THE HAMLYN LECTURES

Rights at Work

Global, European and British Perspectives

By Sir Bob Hepple QC, FBA

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RIGHTS AT WORK
Global, European and British Perspectives

by

SIR BOB HEPPLE
Q.C. FBA
Emeritus Master of Clare College and Emeritus Professor of Law, University of Cambridge; formerly Professor of English Law and Dean and Head of the Department of Laws, University College, London

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To Sarah, Joshua, Peter and Richard

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THE HAMLYN TRUST

The Hamlyn Trust owes its existence today to the will of the late Miss Emma Warburton Hamlyn of Torquay, who died in 1941 at the age of 80. She came of an old and well-known Devon family. Her father, William Bussell Hamlyn, practised in Torquay as a solicitor and J.P. for many years, and it seems likely that Miss Hamlyn founded the trust in his memory. Emma Hamlyn was a woman of strong character, intelligent and cultured, well-versed in literature, music and art, and a lover of her country. She travelled extensively in Europe and Egypt, and apparently took considerable interest in the law and ethnology of the countries and cultures that she visited. An account of Miss Hamlyn by Professor Chantal Stebbings of the University of Exeter may be found, under the title "The Hamlyn Legacy", in volume 42 of the published lectures.

Miss Hamlyn bequeathed the residue of her estate on trust in terms which it seems were her own. The wording was thought to be vague, and the will was taken to the Chancery Division of the High Court, which in November 1948 approved a Scheme for the administration of the trust. Paragraph 3 of the Scheme, which follows Miss Hamlyn's own wording, is as follows:

> "The object of the charity is the furtherance by lectures or otherwise among the Common People of the United Kingdom of Great Britain and Northern Ireland of the knowledge of the Comparative Jurisprudence and Ethnology of the Chief European countries including the United Kingdom, and the circumstances of the growth of such jurisprudence to the Intent that the Common People of the United Kingdom may realises the privileges which in law and custom they enjoy in comparison with other European Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them."

The Trustees are to include the Vice Chancellor of the University of Exeter, representatives of the Universities of London, Leeds, Glasgow, Belfast and Wales and persons co-opted. At present there are eight Trustees:

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From the outset it was decided that the objects of the Trust could be best achieved by means of an annual course of public lectures of outstanding interest and quality by eminent lecturers, and by their subsequent publication and distribution to a wider audience. The first of the Lectures were delivered by the Rt Hon. Lord Justice Denning (as he then was) in 1949. Since then there has been an unbroken series of annual Lectures. A complete list of the Lectures may be found on pages vii to x. The Trustees have also, from time to time, provided financial support for a variety of projects which, in various ways, have disseminated knowledge or have promoted to a wider public understanding of the law.

The 56th series of lectures was delivered by Sir Bob Hepple Q.C., at University College London and Cambridge University, during November 2004. The Board of Trustees would like to record its appreciation to Sir Bob and also the two law faculties, which generously hosted these lectures.

March 2005

KIM ECONOMIDES
Chairman of the Trustees

PREFACE

The language and philosophy of individual legal rights have become increasingly pervasive and important in our society. This is nowhere better illustrated than in the world of work. In these lectures, I discuss three related and controversial issues concerning this growth of rights at work. First, can the expansion of legal rights be reconciled with global competitiveness? Second, what is the nature and significance of the Charter of Fundamental Rights, which forms part of the EU Constitution signed on October 29, 2004? Third, how can judges in the United Kingdom apply the employment rights granted by statute with those developed in the common law in a principled and consistent way?

I argue that the rational expansion of legal rights can be reconciled with globalisation, not by a deregulatory race to the bottom in labour standards but by developing balanced rights-based regulation of the European and British labour markets. I suggest that the EU Charter is capable of filling the gaps in rights-based regulation to a significant extent. Finally, I argue that the structural problems of enforcing employment rights can be met, even in the absence of an employment code, by the courts continuing to develop the principles of fairness, good faith, equality and freedom of association to fill the gaps in statutory rights. Although the lectures focus on the rights and obligations that arise from employment, I believe that the issues have far wider implications. I hope the lectures will be of interest not only to specialists in employment, but also to others who want to find ways to reconcile economic integration in a globalised market economy with the ideal of social justice embedded in the rule of law.

It was a great privilege and pleasure to be invited by the Hamlyn Trustees to deliver these lectures. The first and third took place, on November 16 and 30, 2004, at University College, London, and the second, on November 25, in the Faculty of Laws at Cambridge. I enjoyed the warm hospitality of my friends and former colleagues, in particular Professor Malcolm Grant (Provost and President of UCL), Professor Ian Dennis (Head of the Department of Laws at UCL) and Professor James Crawford

(Chairman of the Faculty Board of Law, Cambridge). I was honoured and grateful to have as Chairman of the first lecture Lord Steyn, of the second Professor Crawford, and of the third Lord Hope of Craighead.

The first and second lectures draw, to some extent, on my book *Labour Laws and Global Trade* (Hart Publishing, Oxford, 2005). These lectures provide an introductory account for the general listener and reader of the issues discussed in greater depth and technical detail in that book. The subject of the third lecture might at first sight appear to be one of "lawyer's law", but it is one for which the objective of Miss Hamlyn's Trust is well-suited. The Trust's aim is "the furtherance . . . among the peoples of the United Kingdom of Great Britain and Northern Ireland of the knowledge of the comparative jurisprudence and ethnology of the chief European countries." So I have tried to present the technical judicial arguments in a way that is intelligible to non-lawyers. The reference to "ethnology" has encouraged me to use a methodology of comparative law that seeks to penetrate the social objectives pursued by legislators and the principles which guide judges in common law and civil law countries.

I am grateful to those whose questions at the end of the lectures helped me to refine the original text. I am especially indebted to a number of colleagues and friends who commented on drafts, in particular Catherine Barnard, Jack Beatson, Sandy Fredman, Stephen Guest, Terence Moore, Gillian Morris, Jo Scott, Erika Szyszczak, and Bill Wedderburn. My wife, Mary Coussey, has, as always, steered me away from mumbo-jumbo and forced me to question my assumptions. None of them is responsible for my opinions and for errors which remain. I had excellent research assistance from Sarah Fraser, James Hawkins, and Nicola Thompson. I am grateful to the Leverhulme Trust for an Emeritus Fellowship and to the Nuffield Foundation for an award as senior partner under a new career development scheme, which contributed towards research expenses. The Master and Fellows of Clare College, and the Faculty of Law at Cambridge provided the facilities and stimulating environment in which to work.

Bob Hepple
January 31, 2005
Clare College
Cambridge

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PROLOGUE

Machines don't need rights, humans do. I recall a visit I made a few years ago to a factory in Japan in which robots were manufacturing robots 24 hours a day, seven days a week. A sign declared: "Working time is for humans". I noticed that all the robots were painted yellow, but there was one that was black. I asked the guide "Why?" She replied: "That's our token diversity policy!"

Human beings need more than token rights at work. This is because the rights of employers and workers are as crucial as property rights to the functioning of the market economy—indeed, some argue that rights at work are themselves property rights, because only slaves have no control over their own labour. The contractual relationship between employer and worker is essential to the success of the modern business enterprise. The contract enables firms and workers to exchange work in return for pay. This exchange gives management the right to decide on detailed work assignments and when they shall be done. It rests on the worker's agreement to be available to undertake certain kinds of work as and when their manager directs. Only in the most exploitative regimes, however, does the employer have unlimited rights. The worker has rights that determine how and when managerial authority is exercised.

But rights are not simply about making the wage–work bargain more efficient. They are an expression of our common humanity. Rights at work—such as the rights to equality, to freedom of association, to job security, to decent working conditions, and to combine family and working life—express the moral judgment that "labour is not a commodity or article of commerce",[1] and that all

[1] This was the founding principle of the International Labour Organisation: Treaty of Versailles 1919, Art.427, reiterated in the Declaration of Philadelphia 1944. Paul O'Higgins, "Labour is not a Commodity: an Irish Contribution to International Labour Law" (1997) 26 *Industrial Law Journal* 226, traces the inspiration for this statement to an address by Dr John Kells Ingram, an Irish economist, to the British TUC in 1880.

human beings are entitled to be treated with equal dignity and respect.

When we assert rights we are claiming that we want work not only to survive, but also to achieve personal and social fulfilment. In Voltaire's words, "work saves us from three great evils: boredom, vice and need."[2] However, for many people work is oppressive and unbearable. In his poem "Toads" (1955),[3] Philip Larkin reflected this feeling:

"Why should I let the toad *work*
Squat on my life?
Can't I use my wit as a pitchfork
And drive the brute off?"

A few years later, in "Toads Revisited" (1964), he revised this bleak view and concluded that he needed work in order to live:

"Give me your arm, old toad,
Help me down Cemetery Road."

A toad, in Shakespeare's lines,[4]

". . . . . ugly and venomous
Wears yet a precious jewel in its head."

The *leitmotif* of these lectures is that our rights at work are "precious jewels" that give us a sense of identity, self-worth and emotional well-being and so enable us to contribute to society.

[2] *Candide and other stories*, trans. and ed. by Roger Pearson (Oxford University Press, Oxford, 1990).
[3] *Collected Poems*, ed. by Anthony Thwaite (Marvell Press and Faber and Faber, London, 1988).
[4] *As You Like It*, II.i.12.

1. Rights in the Global Economy

There has been a transformation of the world of work over the past 33 years since Sir Otto Kahn-Freund delivered his celebrated Hamlyn lectures on *Labour and the Law*.[1] A feature of this transformation has been the growing emphasis on individual rights rather than collective power as the main source of regulation of employment relations. Parliament has been busy. In 1972, the year in which Kahn-Freund delivered his lectures and the right not to be unfairly dismissed was introduced, the industrial tribunals had jurisdiction to decide disputes in respect of 10 statutory rights. In 2004, the employment tribunals (as they are now called) have 77 jurisdictions, and more are on the way. The European Union has been busy too. It has been estimated that 40 per cent of employment regulation emanates from EU legislation.[2] Nor has the common law stood still—new implied contractual duties and tortious liabilities have emerged.

The nationalist critics of this expansion of rights say that it is placing burdens on business, harming Britain's global competitiveness. What is the use of employment rights to the 1,100 employees of the Royal Sun and Alliance whose jobs were outsourced to India in October 2004? This is not an isolated example. We are all familiar with call centres in India and Malaysia that deal with our financial services or book our airline tickets. Medical specialists, architects, even lawyers are facing competition from far cheaper skilled professionals in developing countries. Some 2 to 5 million jobs in Britain are expected to move

[1] O. Kahn-Freund, *Labour and the Law* (Stevens, London, 1972) 3rd ed.(1983) by P. Davies and M. Freedland. In *Johnson v Unisys Ltd* [2003] 1 A.C. 518, HL, at para. 36, Lord Hoffmann referred to the "employment revolution"; see too, D. Brodie, "The Legal Consequences of the Employment Revolution" (2001) 117 L.Q.R. 604. I prefer the word "transformation" because "revolution" suggests the complete overthrow of the previous regime, and this has not happened—there are many continuities.

[2] Better Regulation Task Force, *Employment Regulation: Striking a Balance* (May 2002), para. 2.5.

offshore in the next 5 to 10 years.[3] This follows two decades in which manufacturing jobs have moved to South and East Asia, the Caribbean and Latin America.

Internationalist-minded critics ask, what is the use of rights that are at best for an elite of workers in the rich countries, while alongside there is widespread poverty and powerlessness in the developing countries? A woman working in a supermarket in Britain has rights to a minimum wage, to maximum working hours and four weeks' annual paid leave, she can claim maternity pay and compensation for harassment and unfair dismissal, she has a right to join a trade union and to be accompanied by a union official when she presents a grievance. A woman working in a factory in an export processing zone in Bangladesh, producing goods for the same British supermarket, has none of these rights.[4]

Understandably, workers and their unions in the developed countries whose jobs are threatened by outsourcing and cheap imports complain that competition from countries with low labour standards is unfair. An unemployed US software applications developer reflected the views of many: "when our laws allow US corporations systematically to replace our workers with cheaper-waged [foreign] workers there is something wrong with our laws."[5] On the other hand, the President of Germany's largest employers' organisation has commented: "In the old days, employers asked themselves 'how bad is the wage agreement for me?' Today they say 'I don't care about the agreement any more, because I have four or five excellent exit routes. I may simply relocate 10,000 jobs in the Czech Republic, or I may outsource.'"[6] Small wonder, then, that collective bargaining and collective representation have dramatically declined—in 1979, the main terms and conditions of four-fifths of British workers were determined by collective bargaining. Twenty-five years later that proportion is less than one-third, and is concentrated mainly in the public sector. Even where collective bargaining continues, it impact on management discretion has greatly diminished.[7] For most workers in Britain, statutory and common law rights are now seen as

[3] *Financial Times*, September 23, 2004.
[4] Oxfam, *Rigged Rules and Double Standards* (Oxfam, Oxford, 2002) pp.56, 76.
[5] *Financial Times*, September 24, 2003.
[6] *Financial Times*, August 21, 1996.
[7] W. Brown and S. Oxenbridge, "Trade Unions and Collective Bargaining Law and the Future of Collectivism" in C. Barnard, S. Deakin and G. Morris (eds), *The Future of Labour Law. Liber Amicorum Sir Bob Hepple Q.C.* (Hart Publishing, Oxford, 2004), p.70.

their main protection, but these, too, are under the pressure of global competition.

There is a different perspective from the developing countries. These states are under immense pressure to compete among themselves for access to world markets and investment. Free trade is for them the key to economic growth. In some of these countries basic labour rights are denied and there is brutal repression—the most notorious example being Myanmar (Burma). In others, there are formal labour codes, but these are honoured only in the breach. In theory, Chinese labour law prescribes a maximum 40-hour week and a maximum of four hours' overtime. However, China Labour Watch reports that the 6,000 workers, 90 per cent of them women, in a Sichuan province factory that is a contractor for Reebok on average work 60 hours a week, and are paid less than the prescribed minimum wage.[8] However, most developing countries want to improve living and working conditions, particularly in the vast informal sector that rarely involves a clear-cut employment relationship. These small traders and farmers, service workers, and homeworkers live on the fringe, if not outside, the legal and administrative framework. National governments in many developing countries are trying to create a regulatory framework within which these informal sector workers can form self-help organisations and participate in programmes to create work and relieve poverty.

A threat to national programmes to create "decent work" has come from the policy of international financial institutions. Joseph Stiglitz, former chief economist at the World Bank, says: "[a]s hard as workers have fought for 'decent jobs' the IMF has fought for what is euphemistically called 'labour market flexibility', which sounds like little more than making the labour market work better but as applied has simply been a code name for lower wages and less job protection."[9] The aim of the financial institutions has been to encourage growth, but they have underestimated the effect of their actions in enriching the military and political elites at the top while destroying those kinds of solidarities between states, communities and workers, that might increase these countries' bargaining power with investors. In recent years, the financial institutions have tried to redress the balance to some extent by making their funding conditional on the recipient country recognising basic labour standards. The familiar story is that a developing country, seeking World Bank or IMF support, or trade

[8] China Labour Watch, Hong Kong, 2001, cited in Oxfam, *op.cit.*, p.199.
[9] J. Stiglitz, *Globalization and its Discontents* (Penguin Books, London, 2002), p.84.

preferences from the US or EU, is asked to produce what amounts to paper evidence that the country is observing basic labour standards. This leads to the employment of an "expert" (such as myself) who rapidly drafts a Labour Code for the country in question. Aid or loans then flow, and trade preferences are granted, but the Labour Code remains unenforced.

The orthodox view is that globalisation is undermining the ability of nation states to regulate their own employment relations. In this scenario, transnational corporations are able to put pressure on governments and unions to reduce labour costs by threatening to relocate. Trade unions and civil society are too weak to resist. International solidarity action between workers in different countries is frequently unlawful, and in any event is usually impossible to organise, because one worker's redundancy in country A may be another worker's gain in country B. In theory, the increased demand for labour in low-cost countries will induce workers to migrate to fill these jobs and this, in turn, will lead to higher wages and benefits in those countries. In practice, most workers do not migrate for a number of reasons, such as political opposition to and legal restrictions on immigration. Even when they are able to cross borders (as EU citizens can), they are generally unwilling to do so for reasons of family, language, culture, and cost. The combination of these factors leads those who argue for the orthodox view to say that deregulation or a severe weakening of employment rights is the necessary and inevitable consequence of modern globalisation. A cause-and-effect relationship is assumed between globalisation and the alleged shrinkage of the coverage of employment rights, the growth of more insecure, irregular, non-unionised forms of employment, and the decline of collective representation and collective bargaining. This means that there is a "race to the bottom", the memorable phrase used by Mr Justice Brandeis in 1933 to describe the competition between states to reduce regulatory requirements so as to attract business.[10]

In these lectures I am going to advance a different view.[11] In this first lecture, I shall argue that nations prosper in the global economy, not by becoming more similar in their labour laws, but by building their institutional advantages on a floor of fundamental

[10] *Liggatt v Lee* (1933), 218 U.S. 517, *per* Brandeis J., dissenting, p.599; for doubts about the validity of the race to the bottom see C. Barnard, "Social Dumping and the Race to the Bottom: Some lessons for the European Union from Delaware?" (2000) 25 *European Law Review* 57.

[11] The argument is developed in more detail in B. Hepple, *Labour Laws and Global Trade* (Hart Publishing, Oxford, 2005), esp. Chs 1 and 10, on which this chapter draws extensively [hereafter *LLGT*].

human rights. I hope to show that rights-based regulation is worth developing in order to give Britain a comparative advantage in global trade and investment. In the second and third lectures, I shall consider two major gaps in contemporary rights-based regulation. The first is the absence of a bedrock of fundamental principles or background rights. These are needed by judges as a basis for deciding hard cases. In particular, they can help to resolve what Lord Steyn recently described as the "great structural problem" confronting employment law in the United Kingdom.[12] This is the relationship between the rights created by Parliament and the judge-made common law. The second gap in rights-based regulation is the absence of positive obligations on public authorities to recognise, to respect and to ensure fundamental social rights when pursuing policies of economic growth and full employment.

Before developing my main argument, I must briefly consider two of the mistaken responses in the developed countries to the fears of a race to the bottom or social dumping. These are first, protectionist measures, and secondly, attempts to enforce domestic legislation extra-territorially.

The United States has been the main protagonist of trade measures which seek to protect its own labour against foreign competition. Take one unsuccessful measure. President George W. Bush imposed tariff increases to protect the US steel industry from South Korean, Japanese and European competition. This was declared unlawful by the WTO in 2003. The protection given to US jobs was short-lived and illusory. The revenues from the tariffs were not being transferred to protect the pensions and healthcare of the most vulnerable US workers. Indeed, attempts in the US Congress to expand protection for displaced workers have met with resistance from the Bush Administration.[13]

A more disguised form of protectionism has been the unilateral imposition of "labour [or social] clauses" on developing countries that want to sell their goods in US markets. These clauses prohibit access to US markets to any country "that is not taking steps to afford internationally recognised worker rights to its workers". On their face, these sanctions for ignoring international human rights are appealing. But they have been characterised by some critics as "aggressive unilateralism" or "global bullying". Many in the developing countries describe this as a cynical form of

[12] *Eastwood v Magnox Electric plc* [2004] I.R.L.R. 733, para.51. Both Lord Steyn (para.36) and Lord Nicholls (para.33) said that the present state of this relationship in employment law is unsatisfactory.

[13] W.B. Gould, "Labor Law for a Global Economy: The Uneasy Case for International Labor Standards" (2001) 80 *Nebraska Law Review* 715.

"social imperialism" through which the US seeks to exclude competition by imposing standards that they themselves ignored in the process of industrialisation. Leaving aside the rhetoric, there are, in my view, three main objections to unilateral social clauses. First, they undermine the rule of international law by the use of sanctions against a country for failing to adopt a US-devised list of standards which the targeted country has not accepted and do not form part of customary international law. Second, the processes for their enforcement are ineffective to bring about real changes in labour abuses, and instead may simply increase poverty and unemployment in the targeted country—a vivid example of this is a ban on the products of child labour which does not also involve positive steps to replace family income and provide education for the displaced children. Third, the measures are often motivated by geopolitical and protectionist reasons. For example, most observers believe that the lifting of the suspension of trade preferences for Pakistan in 2002 had little to do with the elimination of child and bonded labour, which is still rife, but was a direct consequence of Pakistan's support for the US in the Afghanistan war.[14]

The principal argument against protectionism is the advantages to all nations of free trade and investment. Two centuries ago, Adam Smith justified free trade: "if a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it off them with some part of the produce of our own industry, employed in a way in which we have some advantage."[15] David Ricardo refined this into the idea—"perhaps the cleverest in economics"[16]—of *comparative* advantage. Free trade, he argued, will not impoverish nations by driving their production abroad, but make them wealthy by allowing each to specialise in the products it makes most efficiently, and exchange them for even more goods from other nations. Specialisation is sensible even if one country is more efficient than other countries at everything.[17] Free trade provides incentives to countries to use

[14] See generally, B. Hepple, *LLGT*, Ch.4.

[15] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Clarendon Press, Oxford, 1976), p.457.

[16] Martin Wolf, *Why Globalization Works: The Case for the Global Market Economy* (Yale University Press, New Haven and London, 2004), p.80.

[17] David Ricardo, *On the Principles of Political Economy and Taxation* (1817, republished Penguin, Harmondsworth, 1971). It has to be noted, however, that some economists have expressed serious doubts whether comparative advantage exists at all. Ricardo's model is a static one, based on trading partners with a fixed mix of endowments, and the assumption that capital is not mobile. Today, a growing share of trade takes place within transnational corporations.

the resources which they have in abundance (land or labour or capital), to the advantage of all. One of the ironies of the use of protectionist measures by the US is that it is also one of the strongest advocates of free trade by other countries.

The second response to fears about globalisation has been the demand that domestic labour legislation should apply extra-territorially.[18] In Europe, new *domestic* rights have been created to mitigate the consequences of redundancies, mergers and takeovers that are a feature of the global economy. Examples of such rights are those to information and consultation with workers' representatives before collective redundancies take place,[19] and the protection of the acquired rights of workers in the event of transfers of undertakings.[20]

The problem with these, and all other labour laws, is that they are nearly always territorial in scope. The Acquired Rights Directive is restricted to cases where the undertaking *to be* transferred is situated in a Member State of the EU. In principle, the Directive and the implementing UK Regulations apply if an economic entity that retains its identity has been transferred. There are several difficulties in applying this concept to offshore outsourcing. In the case of a labour-intensive activity, such as a call centre, the fact that there is no significant transfer of assets and a new workforce is employed in another country is likely to preclude their application. If there is a relevant transfer, this would trigger the information and consultation requirements. However, so far as the individual employees in Britain are concerned—even if they have mobile contracts—the employer is likely to be able to justify their dismissal as being for an "economic, technical or organisational reason entailing changes in the workforce." The workers in India would have no protection under EU or UK legislation, if it were decided to bring the work back to Europe. Neither the Directive nor the UK Regulations appear to provide any meaningful protection to individuals affected by offshore outsourcing.

[18] See for detailed analysis Hepple, *LLGT*, Ch.7.

[19] Council Directive 75/129/EEC, replaced by Council Directive 98/80/EC, [1998] OJ L281/31, implemented in the UK by Trade Union and Labour Relations (Consolidation) Act 1992, Ch.II, as amended. This requires workers' representatives to be informed and consulted before collective dismissals.

[20] Council Directive 76/187/EEC, replaced by Council Directive 2001/23/EC, [2001] OJ L82/16. At the time of writing, the 2001 Directive has not yet resulted in changes in the Transfer of Undertakings (Protection of Employment) Regulations 1981.

In the absence of substantive legal rights for individuals, the question arises whether there are any legal supports for the workers' organisations to influence decision-making.

Rights to transnational collective bargaining and transnational industrial action are virtually non-existent. Rights to union membership are usually territorial in scope, and the representativity of unions is limited by excluding from bargaining units those working outside the national territory. Transnational corporations can play off establishments in one country against those in another in order to negotiate the lowest labour costs. International collective agreements are undeveloped as legal instruments and there is an absence of effective mechanisms for conciliation and arbitration of transnational labour disputes.[21]

At first sight the extra-territorial application of laws so as to protect British workers may seem attractive. But there is a basic objection. This is that, in the absence of multilateral agreement, a country that seeks to apply its laws to those working in another country infringes the principle of national sovereignty. As Morgenstern points out, "no country has a monopoly of excellence in labour law: all that can be said is that in some countries certain aspects of such law are more favourable to the worker than they are in others."[22] There are swings and roundabouts. Take a worker who is offered a contract of employment in the United States. She may be attracted by the high salary and fringe benefits, but under the law in most US states her contract can be terminated at will. If she stays in Britain, her salary may be lower, but she will enjoy the right not to be unfairly dismissed and many other rights not enjoyed by US workers. Any ideas of unification or even the full harmonisation of labour laws on a global or even European scale to avoid extra-territoriality or to minimise conflicts of laws are pure fantasy.

These weaknesses in transnational regulation have led some to put their faith in "institutional redesign"; that is, altering the institutional structure of enterprises so as to take account of their transnational dimension. The European Works Councils Directive[23] is undoubtedly a significant development in this

[21] See Hepple, *LLGT*, pp.76–8. Under the EU social dialogue, however, there are several agreements which have been given legal effect: Hepple, *LLGT*, pp.230–8.

[22] F. Morgenstern, *International Conflicts of Labour Laws* (ILO, Geneva, 1984) p.2.

[23] Council Directive 94/45/EC, [1994] OJ L254/64 extended to the UK by Council Directive 97/74/EC, implemented by the Transnational Information and Consultation of Employees Regulations 1999 (SI 1999/3323).

regard. Although at present limited to large "Community-scale" undertakings or groups of undertakings, it provides the first steps towards a genuinely transnational level of employment relations. But the point I want to emphasise is that, beyond certain very basic requirements, the law which governs the EWCs is the law of the Member State in which the undertaking or group of undertakings is situated. In particular, the method of electing or appointing national representatives to a special negotiating body or an EWC is determined by national provisions in each country. The question as to who is an "employee" is also determined by national laws. As is usual with EU measures, the enforcement mechanisms are a matter for the national laws of the country in which the workers are employed. It can be seen that the "Europeanisation" of workers' participation has left considerable scope for national diversity.

In summary, protectionism deprives both developed and developing countries of the advantages of free trade and investment, and extra-territoriality violates the basic principles of the international legal order. So we must consider how national diversity can be used to the advantage of rights at work, in the face of globalisation.

The orthodox view of the effects of globalisation on labour laws, which I outlined earlier, is defective for three main reasons. First, it overemphasises the role of labour costs in decisions about relocating or outsourcing. Firms are not likely to move to another state with lower nominal labour costs if those costs simply reflect lower productivity of the workers in that state. Let us suppose that a worker in a British call centre is paid £10 per hour and, on average, answers 10 calls in that time. If the worker in a call centre in India is paid £5 per hour, but answers only five calls in that time, there would be no net difference in labour costs. If labour costs do not reflect the relative productivity in a particular state, and a firm relocates to that state, the result would be to increase demand for labour, with the likelihood of rising wage levels. This would, in due course, cancel out the advantages of relocation which was based purely on low labour costs. Moreover, in calculating costs one has to take account not only of relative wages, but also the costs of training the new labour force to ensure that they have the language and other skills and local knowledge required. The preferences of customers for a particular kind of service will influence relocation decisions. Not surprisingly, a UN Conference on Trade and Development Report concluded that "despite a few notable cases, transnational corporations do not often close down on account of low labour cost considerations

alone, production facilities in one country to re-establish them in another country."[24]

The second objection to the orthodox theory is that it neglects the positive gains from free trade which can offset job losses. A good example is the one provided by the research of the Advanced Institute of Management Research published in November 2004.[25] This shows that the potential job losses from outsourcing business services (including call centres) abroad are pretty small compared with total job creation in business services in the UK. Employment in UK business services grew by 92 per cent or 1.9 million jobs between 1984 and 2003. The UK has a healthy, and growing, trade surplus in business services—particularly in research and development, technical consultancies, computer services and legal services. What this means is that while some service jobs have been lost to the UK, this country has gained other jobs that are relatively more productive than in other countries. Workers who lose their jobs in Britain may take some time to retrain or to relocate. They need to be informed, to be consulted about the best ways to mitigate these short-term disturbances, and to receive financial assistance. This is precisely why displaced workers need rights to information, consultation, redundancy payments and the protection of acquired rights, as well as mechanisms to help them shift to new jobs. In this, Britain has a real comparative advantage, doing somewhat better than the less regulated US business services sector, and substantially better than the more regulated French, German and Japanese business services sectors.[26]

The third objection to the orthodox view is that it assumes that the strategies and structures of all firms are similar across states. In their influential work on *Varieties of Capitalism*, Hall and Soskice argue that firms react differently to similar challenges.[27]

Their analysis indicates that firms do not automatically move their activities offshore when offered low labour costs abroad. These scholars put forward the notion that firms may concentrate their activities in countries that provide the advantages of the

[24] UN Conference on Trade and Development, *World Investment Report 1994: Transnational Corporations, Employment and the Workplace* (United Nations, New York, 1994).

[25] Advanced Institute of Management Research, *Offshoring of Business Services and its Impact on the UK Economy* (AIM, London, November 2004).

[26] AIM Report, para.3.2

[27] P.A. Hall and D. Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, Oxford, 2001).

institutional or regulatory frameworks that those countries offer. Firms that need to develop a new product quickly so as to get a market advantage—for example in biotechnology or telecommunications—want to be able to hire and fire workers rapidly, use temporary and agency labour, and not have to inform and consult, or bargain with, workers' representatives. On the other hand, firms that place a premium on continuity of production and long-range development need consensus rather than adversarial decision-making. They have a greater incentive to provide job security and in-house training as well as forms of worker involvement. Accordingly, they will tend to concentrate in countries where there is institutional support for these rights. This has been the case in sectors such as mechanical engineering, product handling, consumer durables and machine tools. Let me take a small example. It is quicker and cheaper to dismiss a worker in Britain than in Germany. In Britain there is no need to consult workers' representatives except (as a result of EU law) in the case of collective redundancies or transfers of undertakings, the employment tribunals allow employers freedom to dismiss so long as they act within a range of reasonable responses and observe fair procedures, average amounts of compensation are low, and reinstatement is a rarity. In Germany, on the other hand, the works council must be consulted before every dismissal and failure to do so renders the dismissal null and void. The works council is in a better position than the employee to control the social aspects of the dismissal. From the employer's point of view, the collaboration with the works council ensures a long-term relationship of trust and confidence.[28] Firms that want high labour turnover may prefer UK dismissal law; those that place a premium on collaboration and stability may favour Germany—in reality, of course, dismissal laws are only one of the factors taken into account in relocation decisions.

This theory of comparative institutional advantage helps to explain why—contrary to many predictions—globalisation has not in fact led to across-the-board deregulation of labour laws, or the disappearance of standard forms of contract. A universal cause-and-effect relationship between globalisation and deregulation has not been established. One of the paradoxes of globalisation is that "nations often prosper not by becoming more similar, but by building on their institutional differences."[29]

[28] B. Hepple, "European Rules on Dismissal Law" (1997) 18 *Comparative Labor Law Journal* 204, p.211.
[29] Hall and Soskice, *op.cit.*,p.60.

This leads me to ask: can the model of rights-based employment regulation which has developed in Britain under New Labour since 1997 be justified on grounds of comparative advantage?

Those—particularly public choice theorists—who give priority to the economic functions of labour laws tend to argue that that economic globalisation is leading to "law without the state" because the state is a fetter on the free play of global market forces.[30] If that is correct, rights granted by the state are the natural enemy of competitiveness. However, all but the most extreme free market economists would agree that rights may sometimes be necessary to correct market failures. Markets may generate differences in wages and working conditions that have no relationship to the value added by individual workers. The labour of some is over-valued while that of others is under-valued. Under-valued labour is inefficient, hampers innovation and leads to destructive competition. It was this argument that was used by the French to claim during the negotiations for the 1957 Treaty of Rome that they would be at a competitive disadvantage if they were the only country among the six with a law requiring equal pay for women and men. This was endorsed by an ILO Committee of Experts (the Ohlin Committee) which said that "countries in which there are large differentials of sex will pay relatively low wages to industries employing a large proportion of female labour and those countries will enjoy what might be considered as a special advantage over their competitors abroad where differentials according to sex are smaller or non-existent."[31] The result was Art.119 (now 141) of the EC Treaty laying down the principle of equal pay—not, at the time, as a fundamental human right, but as an economic necessity to ensure fair competition.

Another economic justification for employment rights is that they can improve efficiency. One example is the right to a minimum wage. Provided this is set at a sensible level, it encourages employers to invest in technology and in the skilled workforce that technology requires. Another pair of examples are equality rights, and rights to parental leave and childcare. The former enable disadvantaged groups to enter and remain in the labour market and improve their skills. The latter make it easier for

[30] S. Piciotto, "The Regulatory Criss-Cross: Interaction between Jurisdictions and the Construction of Global Regulatory Networks" in W. Bratton (ed.), *International Regulatory Competition: Competition and Co-Ordination* (Clarendon Press, Oxford, 1996), pp.93, 95.

[31] B. Ohlin, *Social Aspects of European Collaboration*, (ILO Reports and Studies (New Series) No.46, ILO, Geneva, 1956) [also, 74 *International Labour Review* 99 at p.107].

women and men to reconcile family and working life, and so remain in the labour market.

There are also social justifications for a rights-based approach. One of these is to counteract the inequality of the employment relationship. The social-democratic model of rights first developed in Weimar Germany (1919–1933), and widely followed in most Continental countries after the Second World War, was based on the notion that rights are needed by subordinate or dependent labour so as to maintain a balanced system of industrial pluralism. This was done in Germany by giving constitutional protection to workers' rights and enabling the works councils to act as custodians of individual protection. However, not all democratic societies answered the problem of inequality in the employment relationship by the creation of rights. In Britain until the 1970s, "Labourism" rather than any ideology of legal rights was the dominant influence. The British approach was to defend social and organisational rights won through industrial struggle, using the law on a pragmatic basis only when voluntary means were inadequate. The decline of trade union strength and collective bargaining since the 1980s have greatly enhanced the importance of both statutory and common law rights as a means of redressing inequality. Even from a liberal, as distinct from a social democratic, perspective it is possible to argue—as Ronald Dworkin has—that the right of everyone to equal treatment and respect is not antithetical to liberty of contract, which is still the cornerstone of employment law.[32]

Perhaps the most persuasive argument for rights is that they can be used to support democratic control over the process and effects of globalisation. Democratic states generally recognise or tolerate the autonomy of a plurality of legal orders. This is particularly relevant in the labour field, where "law" is not necessarily coterminous with the state. A variety of actors make rules, enforced through non-state mechanisms or customs, within the workshop or office, enterprise or industry, and these rules may be even more important in practice than state-made laws. There are transnational rules such as international treaties, codes of conduct made by transnational corporations, and a small but growing number of collective agreements with international trade unions and non-governmental organisations. There are also the rules of regional institutions, such as the EU.

[32] Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, Cambridge, Massachusetts, 2000) at pp.179–80, 181–3.

The pluralist perspective sees regulatory diversity not so much as a competition between state systems of labour law, but as a strategic or political process between different legal orders both within and beyond the state. Katherine Stone argues that globalisation "not only breeds a desire for localisation, it also breeds the means to achieve it."[33] She points to the agglomeration of transnational corporations in particular places, such as the computer industry in Silicon Valley (one might add, the Cambridgeshire Fens), partly because of the skills and knowledge of the locality's workforce and the networks they can establish. The attractions of such regions dissuade corporations from moving offshore to avoid high labour costs, increases the leverage of local work and community groups, and the opportunities for local investment in human capital. If the centralised state is not able to provide the redistributive functions of labour laws, then struggles for social protection will become increasingly localised. But local unions and community groups will be powerless to act together to put pressure on transnational corporations to adopt best practices—the "race to the top"—unless they have rights. Rights which reduce divisions between different employment statuses at local level (employees, contingent or atypical, and self-employed), and between working life and family life can strengthen these local solidarities. Rights—such as those to establish European Works Councils, or to complain that another country party to the North American Free Trade Agreement (NAFTA) is not observing domestic labour rights—can help to develop solidarities with those employed by the same transnational corporation in other countries.

There is, of course, an ever-present danger that the rhetoric of rights-talk can become far removed from reality. Even universal social and labour rights are not unqualified. Rights to decent working conditions and to fair pay depend upon the level of socio-economic development in a particular country and they generally presuppose economic growth and expanding social welfare. A minimum wage of £4.85 per hour may be considered equitable in Britain; if fixed at that level in El Salvador it would be equivalent of pay for 12 hours' work.[34] Rights in the market place are balanced against economic considerations. For example, the right against indirect discrimination on grounds of sex or race is subject to justification on grounds of business necessity or cost.

[33] K. Stone, "From Globalism to Regionalism: Protecting Labor Rights in a Post-National Era" (unpublished paper, 2004). I am grateful for the author's permission to cite this paper.
[34] Oxfam, *op.cit.*, p.192.

So a German law that excluded from unfair dismissal protection employees in undertakings with five or fewer employees had a significant adverse impact on women who are disproportionately employed in small enterprises. But the law was held to be justified by the European Court of Justice (ECJ). This was because it pursued the legitimate aim of creating jobs in small undertakings, and the measure was proportional to that aim.[35] There is also the problem of effective enforcement. The argument that only civil rights can be justiciable is now widely discredited, but the courts—led by the South African Constitutional Court and the Indian Supreme Court—are only gradually developing effective procedures and mechanisms for enforcing so-called social rights. More generally, increasing reliance on "soft law" (such as voluntary corporate codes and guidelines laid down by regional and international bodies), the tendency towards privatisation of enforcement through management-controlled disputes resolution procedures rather than public tribunals, and restrictions on collective solidarity, reduce much rights talk to mere rhetoric—in Jeremy Bentham's famous phrase "so much bawling on paper".[36]

I come then to the question I posed at the beginning of this lecture. Can rights at work be reconciled with global competitiveness? My answer is a qualified yes. The alternative would simply be to leave things to global market forces in the belief that the "invisible hand" will in the long run result in equilibrium. This is an argument for widespread deregulation which I believe would be unacceptable in the post-Thatcher world. The theory of comparative institutional advantage encourages us to use rights in a rational way. Rights can *help* markets work more effectively by correcting market failures and promoting economic efficiency; they can reduce the inequality of the employment relationship; and they can be used to exert democratic control over the processes and outcomes of globalisation.

Comparative advantage should never involve the violation of core human rights. This is why the ILO's campaign for "decent work", including the observance of fundamental rights, is of critical importance not only to the developing countries but also to workers in the rich nations. The ILO's Declaration on Fundamental Principles and Rights at Work, adopted in 1998, places obligations on all 175 Member States of the ILO to "respect,

[35] Case C-189/91, *Kirshammer-Hack v Sidal* [1993] E.C.R. I-6185.

[36] J. Bentham, "Anarchical Fallacies" in J. Bowring (ed.) *Collected Works of Jeremy Bentham* (Simpkin Marshall, London, 1843), p.23; see generally on the law and politics of enforcement, B. Hepple in *Social and Labour Rights in a Global Context* (Cambridge University Press, Cambridge, 2002), Ch.10.

to promote and to realise" four fundamental principles: the freedom of association and right to collective bargaining; the elimination of forced labour; the elimination of child labour; and the elimination of all forms of discrimination. These principles are embodied in eight "core" ILO conventions. The unique feature of the Declaration is that it imposes obligations on the Member States, not by reason of the ratification of these conventions, but "from the very fact of membership". This is, therefore, a constitutional obligation. An interesting question is whether any of the fundamental principles and rights embodied in the Declaration have become part of customary international law. The ICJ has said that the practice of states, followed from a sense of legal obligation, must be "broadly consistent".[37] While the prohibition of forced labour is a matter on which state practice is broadly consistent, it is much more difficult to show this in respect of the prohibition on child labour. The UK House of Lords has recently recognised that racial discrimination is a breach of customary international law,[38] but the situation is less clear with other forms of arbitrary discrimination. Widespread abuses of freedom of association in many countries make it virtually impossible to regard these human rights as part of consistent state practice, but the growing observance of the relevant conventions may in time change this.

Although the Declaration may not have elevated all these fundamental principles to the level of customary international law, and it can be criticised for its weak follow-up mechanism and its dilution of the "rights" in the eight conventions into four general principles, it has led to a significant increase in the number of ratifications of the eight core conventions. By 2004, a total of 100 Member States had ratified all eight core conventions and 144 countries had ratified at least one convention in each group. "There is a long hard road to travel" before international labour standards can take human labour out of global competition.[39] But the idea of fundamental rights is a dynamic one that will be progressively developed and updated, for example to include occupational health and safety. A more effective complaints-based

[37] *Nicaragua v United States* [1986] I.C.J. 14 at 98; 76 I.L.R. 349 at 432.

[38] *R. v Immigration Officer at Prague Airport, ex parte European Roma Rights Centre* [2005] I.R.L.R. 115, paras. 46 (Lord Steyn), 102, 103 (Baroness Hale); see, generally, M. Shaw, *International Law*, 5th ed (Cambridge University Press, Cambridge, 2003), pp.28–29.

[39] W.B. Creighton, "The Future of Labour Law: Is There a Role for International Labour Standards?" in C. Barnard, S. Deakin, G. Morris (eds), *The Future of Labour Law. Liber Amicorum Sir Bob Hepple Q.C.*, (Hart Publishing, Oxford, 2004), p.273.

mechanism for supervising compliance with these rights is needed. Membership of the WTO could be made conditional upon the observance of core labour rights, but the supervision and enforcement of these standards should be left to the ILO and not the WTO.[40]

Another fruitful approach is to provide positive, as distinct from negative, conditionality by granting trade preferences only to states which observe these core rights, as is already the case with the EU's Generalised System of Preferences.[41] In the longer term fundamental human rights need to be embodied in the international economic order. In this respect the EU is leading the way, as I shall show in the next lecture.

[40] See for detailed analysis Hepple, *LLGT*, Chs 2 and 6.

[41] This adopts a "carrot and stick" approach (positive and negative trade conditionality). The carrot is the special incentive arrangements for the protection of labour rights. In order to get these substantial special trade benefits, a developing country has to show that its national legislation incorporates the substance of core ILO conventions. It must also show that it effectively applies that legislation. The stick is the temporary withdrawal of preferential arrangements in respect of all or some products where there is "serious and systematic violation" of the core standards. To date this sanction has been used only once—against Myanmar for routine and widespread use of forced labour—but the threat of investigation has been enough to force others to change their practices: see Hepple, *LLGT*, Ch.4.

2. Fundamental Rights in the European Union

In the first lecture, I argued that nations prosper in the global economy not by engaging in a deregulatory race to the bottom in labour standards, but by building their institutional advantages on a floor of fundamental human rights. I tried to show that rights-based regulation is worth developing in order to give the EU, and Britain in particular, a comparative advantage in global trade and investment.

There are, however, two major gaps in contemporary rights-based regulation. The first is the absence of a bedrock of fundamental principles or background rights. These are needed by judges as a basis for deciding hard cases. The second gap in rights-based regulation is the absence of positive obligations on organs of the state to recognise, to respect and to ensure fundamental social rights when pursuing policies of economic growth and full employment.

In this lecture, I am going to consider whether the EU Charter of Rights, which forms Part II of the Treaty establishing an EU Constitution, signed on October 29, 2004, is capable of filling these gaps. The Charter contains a list of 50 so-called "fundamental rights" under the headings of Dignity, Freedom, Equality, Solidarity, Citizens' Rights and Justice.

The likely impact of the Charter has been the subject of divergent opinions. The UK Government's view, as expressed by the Attorney-General, Lord Goldsmith, is that the sole purpose of the Charter is to provide a "showcase" of existing fundamental rights, aimed at ensuring that those implementing EU law respect the rights of EU citizens.[1] According to this view, the Charter takes nothing away from the sovereignty of each of the Member States to maintain and develop their national systems of labour law and social protection. On the other hand, the Leader of the

[1] Lord Goldsmith, "A Charter of Rights, Freedoms and Principles" (2001) 38 *Common Market Law Review* 1201.

Opposition, Mr Michael Howard M.P., says that the Charter "gives European judges a blank cheque on which to start rewriting UK employment and trade union legislation."[2] Who is right?

I am going to suggest a third perspective. This is that the Charter (1) respects national autonomy in social and labour matters, and (2) creates no new individual rights, but (3) for the first time sets out a comprehensive framework of rights and principles within which the EU institutions and the Member States must act when implementing EU law. I shall argue that the great importance of this framework is twofold. First, it provides European judges with a bedrock of fundamental principles on which the base their judgments in hard cases. Second, some parts of the Charter inject the idea of positive duties on the Member States to respect, to recognise and to ensure certain rights into the soft law methods of economic and social integration—in particular the open method of co-ordination and the social dialogue.[3]

Before developing this argument, I must first declare an interest in the Charter. My experiences from 1974, as an independent expert for the European Commission, convinced me that the methods of negative and positive harmonisation of labour laws being pursued by the Commission were inadequate, sometimes counter-productive as a means of reconciling economic integration and social policy. In meetings of experts under various presidencies, I was one of those who, over a long period, advocated a framework of fundamental rights in place of partial harmonisation. In 1996, I got together in Cambridge with Professors Blanpain, Sciarra and Weiss to draft a proposal for incorporating fundamental rights into the next Inter-Governmental Treaty. We obtained the support of 109 European labour law specialists.[4] The Commission subsequently appointed a distinguished *Comité des Sages*, which advocated the integration of civic and social rights as a basis for social policy.[5] After yet another Committee (chaired by Professor Simitis) had recommended that fundamental rights should be incorporated in the treaties,[6] a Charter of Fundamental Rights was drafted by a convention consisting of representatives

[2] *Financial Times*, October 29, 2004.

[3] Some of these arguments are more fully developed in B. Hepple, *Labour Laws and Global Trade* (Hart Publishing, Oxford, 2005), Chs. 8 and 9 [hereafter *LLGT*].

[4] R. Blanpain, B. Hepple, S. Sciarra, M. Weiss, *Fundamental Social Rights: Proposals for the European Union* (Peeters, Leuven, 1996).

[5] *For a Europe of Civic and Social Rights. Report of the Comité des Sages* [Chair: M de Lourdes Pintasilgo] (European Commission, Brussels and Luxembourg, 1996).

[6] *Applying Fundamental Rights in the European Union. Report of the Expert Group on Fundamental Rights* [Chair: S. Simitis] (European Commission, Brussels and Luxembourg, 1999).

of the Member States. The Charter was signed at the Nice Council in December 2000 as a political declaration. It has now been incorporated, with some modifications, into the EU Constitution. Although the Charter is far from perfect, there is some satisfaction in knowing that academics who enter the policy arena can sometimes have an impact.

Why did we believe that there is a "rights-gap" in the social policy of the EU? The founding Six States in 1957 saw no need for supranational social and labour standards. The "accelerated raising of the standard of living"—promised in Art.2 of the 1957 Treaty—would come about simply by establishing a common market and approximating the economic policies of the Member States. Differences in social costs were regarded as fair comparative advantages, so long as these differences reflected improvements in productivity. The only important exception was unequal pay between women and men, where it was said that intervention was justified so as to avoid comparative advantage for countries whose industries employed a large proportion of low-paid female labour. The result was Art.119 (now 141) of the EC Treaty laying down the principle of equal pay—not at the time as a fundamental right but as an economic necessity to ensure fair competition.

Social policy in general, and Community labour law in particular, developed in fits and starts after 1973, when the boom began to fall apart and economic integration was visibly failing to protect working and living standards. An important strand was the ECJ's power struggle with national courts to assert the supremacy of European law. An illustration of this is the ECJ's development of the narrowly-worded Art.119 on equal pay in the light of various international human rights instruments. This led the Court to declare the "fundamental principle" of equality. Another strand was the need felt by the Member States to achieve a level playing-field in respect of collective redundancies, transfers of undertakings, and insolvency, by adopting a series of employment protection Directives. They attempted to do this by partial harmonisation measures, without any overriding principle. The missing dimension was Community legislation guaranteeing basic social rights immune to competitive pressures. The Community Charter of Fundamental Rights of Workers, adopted in 1989 by 11 of the then 12 Member States (excluding the UK), was an attempt to fill this gap. But it was simply a political declaration, the inspiration for a new burst of Community activity in the social field, not a principled framework of fundamental rights.

After the unhappy period of UK opt-out from the Social Chapter of the Maastricht Treaty, a major change occurred in thinking and

action on labour market issues, with a growing consensus, from the time of the Treaty of Amsterdam in 1997, for a European "third way" which would combine social and economic integration. This consensus has now led to the Constitutional Treaty of 2004. One of the features of the so-called European Social Model embodied in this Constitution, is that it emphatically rejects positive harmonisation of the labour laws of the Member States.

There are several reasons for this.[7] One, which I want to stress here, is that the diversity of labour laws and social protection in an enlarging EU renders illusory any idea of a common code of labour and social regulation. An analogy may be drawn with the free movement of goods. In the celebrated *Cassis de Dijon* case,[8] the ECJ enunciated the presumption of equivalence or mutual recognition: goods lawfully produced and marketed in one Member State can 'in principle' be sold in another Member State without further restriction. Each state must accept the other's standards as equivalent to its own, unless it can justify its more stringent requirements as proportionate. The Commission recognised that this obviated the need for much harmonisation legislation. In the field of labour and social protection, mutual recognition is also a plausible response to diversity. However, mutual recognition can be used in a deregulatory way. Since there is freedom of movement of capital, there is a risk that businesses will move to countries with unacceptably low labour and social standards. In the case of free movement of goods this problem has been met by the notion of "minimum requirements".

Dr Barnard has pointed out that the field of labour law is different from free movement of goods.[9] French *Cassis*, produced according to French standards, is placed in direct competition with fine German liqueurs, produced according to German standards, on the German market. Labour law, by contrast, is territorial, and those affected do not move in the same way as goods. Mutual recognition—as an alternative to harmonising legislation—is workable in respect of labour laws only if accompanied by a core of fundamental human rights which all states must accept.

[7] Others include the difficulty of reconciling flexibility and effective implementation, and the political opposition of employers and several governments: see Hepple, *LLGT*, Ch.8.

[8] Case 120/78, *Rewe Zentrale v Bundesmonpolverwaltung für Brantwein (Cassis de Dijon)* [1979] E.C.R. 649.

[9] C. Barnard, *Substantive Law of the European Union: the Four Freedoms* (Oxford University Press, Oxford, 2004) pp.507–8.

Let me turn, then, to my first point about the likely impact of the Charter. The Charter respects national autonomy in matters of employment law and social protection. This is, of course, an issue of supreme political and constitutional significance, particularly to the UK. Art.II-51 of the Constitution therefore makes it clear that the Charter is addressed "to the institutions, bodies and agencies of the Union". It is addressed to the Member States "only when they are implementing Union law." Further, it is expressly stated that "the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution." Nothing could be clearer. The Charter is a means for ensuring that individuals are protected against infringement of their fundamental rights by the EU institutions and bodies.

Moreover, the Charter cannot affect legal relations between citizens and their governments in areas of national competence. In the UK, it does not interfere with the operation of the Human Rights Act 1998, which has incorporated the European Convention on Human Rights and Fundamental Freedoms (ECHR) into domestic law. Let me give an example. Sandra Nerva, an Italian, and three Spanish waiters employed in the Paradiso e Inferno restaurant in London were entitled to receive a statutory minimum wage (then the sum of £72.50 per week). They found out that their employer was making up this amount by including in the minimum wage each waiter's share of tips added by customers to cheques and credit cards. They said they were entitled to the statutory minimum plus the tips (as they would have done if the tips were paid in cash). The UK courts held that these tips and credit card payments made out in the employer's name became the property of the employers and could, therefore, be used to discharge the statutory obligation. The waiters, represented by the Central London Law Centre, claimed a breach of their property rights under Art.I, Protocol I of the ECHR. The European Court of Human Rights (the Strasbourg Court) rejected the claim.[10] In my view, the EU Charter would not have made any difference to the outcome of this case. Art.II-17 of the EU Charter protects the right to property. The Charter says that this, like all other rights in the Charter, have the same meaning and scope as the corresponding rights laid down in the ECHR, although Union law can provide more extensive protection.[11] The ECJ (the Luxembourg Court)

[10] *Nerva v United Kingdom* [2002] I.R.L.R. 816; (2003) 36 E.H.R.R. 4.
[11] Art.II-52.3.

would, therefore, be expected to adopt a similar interpretation to that of the Strasbourg Court. But even if the ECJ did not, the obligation of the UK courts under the Human Rights Act is to interpret national law consistently with the ECHR, not with the EU Charter unless national law is implementing Union law.[12]

My second point is that the Charter does not create any new individual rights of action. It has been claimed, for instance, that the "right to strike" recognised in Art.II-28, "could return Britain to the dark days of mass strikes and industrial conflict", and "this Charter would lock Britain into the steel handcuffs of an old-fashioned social model."[13] This is nonsense. The right of workers and employers, set out in Art.II.28, to collective bargaining and, "in cases of conflicts of interests, to take collective action to defend their interests, including strike action" is derived from Art.6 of the European Social Charter 1961 of the Council of Europe, which has been ratified by the UK. The UK has repeatedly been found to be in breach of Art.6 by the Council of Europe's Committee of Independent Experts. Yet this cannot give rise to any cause of action in UK or European courts, nor will it do so under the EU Charter. Nor could the EU legislature use the Charter as a justification for an EU law on strikes. Charter rights, for which provision is made in other parts of the Constitution, have to be exercised "under the conditions and within the limits defined by those relevant parts."[14] In the case of the right to strike or the right to impose lock-outs, these are expressly excluded from the EU's competence to legislate under the Social Policy "chapter".[15]

Another example is the right to protection against unjustified dismissal.[16] This is taken from the revised 1996 version of the European Social Charter, which the UK has signed but not yet ratified. The right not to be unfairly dismissed has been recognised

[12] The EU could not, in any event, enact its own minimum pay law. "Pay" is expressly excluded from the EU's competence to legislate on social policy matters under Art. III-104 of Part III, Ch.III, s.2 (social policy): see Art.104.6.

[13] F. Maude M.P., Opposition spokesman, as quoted in the *Daily Mail*, October 11, 2000.

[14] Art.II-52.2

[15] Art.III.104.6. *cf.* B. Bercusson, "Episodes on the Path Towards the European Social Model" in C. Barnard *et al* (eds), *The Future of Labour Law. Liber Amicorum Sir Bob Hepple Q.C.* (Hart Publishing, Oxford, 2004), p.191, who argues that the EU may have competences, not restricted by Art.104.6, under other articles to legislate in respect of strikes, but he does not specify those articles. The more likely role of the Charter's recognition of the right to strike may be in support of a defence of objective justification for interference with free movement of goods, persons and services.

[16] Art.II-30

in UK law since 1972, subject to certain limitations such as a one-year qualifying period. The Engineering Employers' Federation claims that the Charter will allow workers in the UK to claim that they are entitled to be covered from the first day of employment. This is wrong. The EU Charter says that "every worker has the right to protection against unjustified dismissal, *in accordance with Union law, and national laws and practices*" (emphasis added). In other words, the Charter recognises national autonomy in laying down the conditions under which the right must be exercised. Both the EU Charter[17] and the European Social Charter permit limitations if they are necessary and genuinely meet objectives of general interest recognised by the Union. This suggests that the one-year qualifying period could be justified under the EU Charter as being proportional to a legitimate aim, namely the promotion of employment.[18]

A final example is genetic discrimination. The Charter declares that discrimination on grounds of "genetic features" shall be prohibited. All of us carry dozens of glitches in our DNA sequence, yet no one should be denied a job for which they are otherwise qualified because of the genes they inherited. In the USA there is some (ineffective) legislation on this. Despite strong advice from an expert group,[19] the EU and the Member States have not yet adopted legislation to ban employers from making jobseekers and workers undergo genetic screening. The Charter does not change this. It will be for each Member State to decide whether or not it wishes to legislate. Nor is an EU framework law likely—Art.13 EC, which provides a basis for EU intervention in respect of discrimination, makes no reference to genetics.

To summarise: the Charter is relevant only to those implementing EU law, it does not affect national labour law and social protection, and it does not create new individual rights. The Treaty expressly states that the Charter is judicially cognisable "only in the interpretation of legislative and executive acts taken by

[17] Art.II.52.1

[18] Issues of indirect sex discrimination also have to be considered: C-1676/97, *R. v Secretary of State for Employment, ex p. Seymour-Smith* [1999] E.C.R. I-625. So does the question of whether excluding certain employers amounts to a form of illegitimate state aid: Case C-189/91, *Kirshammer-Hack v Sidal* [1993] E.C.R. I-6185 (exclusion of small employers from provisions of German labour law did not amount to illegitimate state aid contrary to Art.87(2) EC, even though the effect of the exclusion was to subsidise small employers in Germany): Case C-241/94, *France v Commission* [1996] E.C.R. I-4551; Case C-251/97, *France v Commission* [1999] E.C.R. I-6639; *cf.* Case C-75/97, *Belgium v Commission* [1999] E.C.R. I-3671.

[19] European Group on Ethics in Science and New Technologies, *Ethical Aspects of Genetic Testing in the Workplace* (European Commission, Brussels, July 28, 2003).

institutions and bodies of the Union, and by acts of Member States when they are implementing Union law."[20] In this respect, the EU Charter is quite unlike bills of rights found in the constitutions of sovereign states, such as the United States. The Charter will not turn the EU into a super state. Outside the area of EU competence, Member States remain free to develop their own labour laws and policies—or to put it another way, to maintain their comparative institutional advantages of the kind I discussed in the first lecture.

Having put aside the false fears about the Charter, I come to my main arguments. The first of these is that the Charter provides a foundation of fundamental rights and principles on the basis of which European judges can decide hard cases. The second is that parts of the Charter impose positive duties on the Member States to achieve certain social rights. To explain these arguments, I must explore the way in which the Charter may affect the interpretation of (1) fundamental economic rights; (2) negative rights; and (3) positive duties.

As I have said, the first Treaty of Rome (1957) contained no express recognition of fundamental human rights. This is not surprising in view of the origins of the Community as a common market and not a political union. The four fundamental economic freedoms of movement—of goods, services, capital and persons—were soon recognised as "fundamental rights". One of the most contentious issues in EU law has been how far these economic rights prevent Member States from enacting their own labour laws or invalidate local and national collective agreements. Let us say that Member State A were to seek to attract investment by repealing its minimum wage laws or trade union recognition laws. Could Member State B, which has a minimum wage and strong unions, place restrictions on goods or services produced by cheap, non-union labour in State B? Must a Member State prevent demonstrations by workers in its state which have the effect of blocking a highway which is vital to inter-state commerce? Can a Member State apply laws designed in part to protect workers (*e.g.* prohibiting Sunday trading) which have the effect of restricting the sale of both domestic and imported goods or services?[21] In the early days the Luxembourg Court tended to refuse to recognise that a conflict existed, and resolved the issue either by deciding that the national rule did not fall within the scope of the Community provision, or by declining to deal in any serious way with the possible justification of the national rule.

[20] Art.II-52.5.

[21] See the cases discussed in Barnard, *op.cit.*, Chs 6 and 7.

The situation has changed since the Treaty of Amsterdam. The objectives of a "high level of employment and social protection" were moved up to second place in the list of objectives in Art.2 EC just behind "a harmonious, balanced and sustainable development of economic activities." The new EU Constitution goes even further by listing among the Union's objectives "a social market economy, highly competitive and aiming at full employment and social progress, and with a high level of protection." The objectives now also include the combating of social exclusion and discrimination, the promotion of social justice and protection, equality between women and men, and solidarity between generations.[22]

The changes made by the Treaty of Amsterdam (1997) enabled the ECJ, in the *Albany* case,[23] to find that a policy in the social field is as much a part of the activities of the Community as a system ensuring that competition in the internal market is not distorted. In that case, the Court decided that a Dutch collective agreement which made affiliation to a pension fund compulsory, was compatible with Community competition law. Similarly, the Court has been willing to recognise the observance of fundamental human rights as a free-standing justification for restrictions on the freedom of movement of goods. So, in the *Eugen Schmidberger* case,[24] the Austrian Government was able to justify its failure to ban a demonstration blocking the Brenner motorway (a major route for trade between Northern Europe and Italy) on the grounds that it was respecting the fundamental rights to free expression and assembly under Art.10 of the ECHR. Whether this type of justification could in future be extended to the protection of the social and labour rights recognised by the EU Charter of Fundamental Rights remains uncertain. But what is important, as Dr Barnard points out, is that fundamental rights are now being treated not simply as constituting an express public policy derogation, but as a free-standing objective justification.[25] The judicial review of social and labour legislation to test its compatibility with the fundamental economic rights remains possible. The courts are bound to undertake a balancing exercise in order to determine whether the interference with the freedom of movement or competition rules is proportionate to the legitimate social

[22] Art.1–3.3

[23] Case C-67/96, *Albany International BV v Stichtung Bedrijfspensioensfonds Textielindustrie* [1999] E.C.R. I-5751.

[24] Case C-112/00, *Eugen Schmidberger Internationale Transporte und Planz_v Republic of Austria* [2003] E.C.R. I-5659.

[25] Barnard, *op.cit.*, p.117

aims being pursued. The changed objectives of the Union mean that in future cases there is likely to be greater emphasis on social objectives; and the Charter means that fundamental rights will be relevant to interpretation.

This brings me to negative rights, of which a large number are to be found in the Charter. By this I mean protections of the liberty of individuals, such as the rights not to be subjected to forced or compulsory labour, not to be subject to interference with one's private and family life, or personal data, one's freedom of thought, conscience, religion and expression, freedom of assembly and association, or right to engage in work and to pursue a freely chosen occupation, and the right not to be discriminated against on arbitrary grounds. I have already said that this catalogue in the Charter cannot create any new rights. But these may be highly relevant to the interpretation of existing rights. For example, would the ECJ have decided the *Grant* case[26]—in which the Court declined extend the prohibition on sex discrimination to sexual orientation—any differently, had the Charter been in force? The Charter expressly refers to sexual orientation as one of the impermissible grounds of discrimination. This might have persuaded the Court to interpret "sex" as including sexual orientation.

Does this mean, as Mr Howard suggests, that European judges have been given a "blank cheque"? To answer this, let us ask Ronald Dworkin's ideal judge Hercules.[27] I do not think he would be swayed by the fact that the Charter has chosen to call all the rights it sets out as "fundamental." Take the right in Art.II-31 to "fair and just working conditions". Sub-Art.II-31.2 spells out one aspect of this: "every worker has the right to limitations of maximum working hours, to daily and weekly rest periods, and to annual period of paid leave." The EU Working Time Directive already prescribes a four-week period of paid annual leave. When transposing the Directive, the UK Government made this entitlement subject to the condition that the worker must have been continuously employed by the same employer for 13 weeks. When this requirement was challenged,[28] Advocate General

[26] Case C-249/96, *Grant v South-West Trains* [1998] E.C.R. I-2143. The case law on this point has subsequnely been overtaken by Council Directive 2000/78/EC [2000] OJ L303/16, which outlaws discrimination in employment on grounds of sexual orientation.

[27] R. Dworkin, *Taking Rights Seriously* (new impression with a reply to critics, Duckworth, London, 2004) at pp.105–30.

[28] Case C-173/99, *R. v Secretary of State for Trade and Industry, ex parte BECTU* [2001] E.C.R. I-4881; *cf.* Case 133/00, *Bowden v Tuffnells Parcels Express Ltd.* [2001] E.C.R. I-7031, where neither A.G. Tizzano nor the Court referred to the Charter right.

Tizzano argued that the right to four weeks' annual paid leave is "absolute and unconditional" because the Charter declares paid annual leave to be a "fundamental right". Significantly, when the Court ruled against the UK it did so purely on the basis of the wording of the Directive without reference to the Charter. Whilst the right to working conditions which respect the worker's health, safety and dignity, set out in Art.II-31.1 may be classified as "fundamental", the way this is to be achieved, as set out in Art.II-31.2—including an "accrued annual period of leave"—is surely merely instrumental.[29] What Hercules will ask, in a case where existing rules or practice do not give a definitive answer, is what is the underlying theory in requiring a period of paid annual leave? Is it a theory of providing paid leave as a reward for being a permanent rather than casual worker? Or does it implement a fundamental principle that every one is entitled to health, safety and dignity? If it is the former, and it is not clear whether the Directive allows Member States to impose length of service requirements, then Hercules' conclusion will be that the Member State can do so. On the other hand, if it is part of the general principle of health, safety and dignity at work, then integrity would demand the broader interpretation. The Charter clinches the second interpretation by providing a ready-made statement of the moral values on which purposive interpretation of legislation implementing EU obligations should be based. This is not Mr Howard's "blank cheque", because it requires the judges to act within a statement of principles.

This brings me to the most controversial and problematic part of what I have to say, namely the significance of the positive duties imposed by the Charter on the Member States to achieve certain rights. These may be of crucial importance in the development of the open method of co-ordination (OMC). The OMC is "a decentralised but carefully co-ordinated process, involving the exchange of best practices of benchmarking, national and regional target-setting, periodic reporting, and multilateral surveillance."[30] The

[29] M. Weiss, "The Politics of the EU Charter of Fundamental Rights" in B. Hepple (ed.), *Social and Labour Rights in a Global Context: International and Comparative Perspectives* (Cambridge University Press, Cambridge, 2002), p.86.

[30] C. de la Porte, "Is the Open Method of Co-Ordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas" (2002) 8 *European Law Journal* 38; and see C. Kilpatrick and M. Freedland, "How is EU Governance Transformative? Part-Time Work in the UK" in S. Sciarra, P. Davies and M. Freedland (eds), *Employment Policy and Regulation of Part-Time Work in the EU: a Comparative Analysis* (Cambridge University Press, Cambridge, 2004), p.299; and D. Ashiagbor, "The European Employment Strategy and the Regulation of Part-Time Work" in S. Sciarra *et al, ibid.*, p.35.

OMC is the working method under the European Employment Strategy (EES), which has developed over the past decade, and is now enshrined in Pt III, Ch.III, Arts III-97 to 102 of the EU Constitution. The primary role of the EU is to encourage co-operation and co-ordination between Member States, supporting and, if necessary, complementing their actions. The Council adopts Employment Guidelines, revised annually, setting out common priorities for Member States' employment policies. Each Member State has to submit a National Action Plan reporting on steps taken to implement the Guidelines. On the basis of these reports, the Commission may make proposals and the Council may address Recommendations directed at specific Member States as to how they should improve their employment performance.

A distinctive feature of the OMC is that it relies on soft law such as guidelines rather than legal sanctions. The only legal base for Community action against Member States is currently Art.129 EC (Art.III-101 of the EU Constitution). This allows Regulations (European laws) or Directives (European framework laws) to be used to establish "incentive measures designed to encourage co-operation". The Guidelines are phrased in the mumbo-jumbo of modern management speak: "exchanges of information and best practices", "comparative analysis and advice", "promoting innovative approaches" and "evaluating experiences". The OMC will not give rise to new individual rights: the harmonisation of the laws and practices of Member States through Directives (European framework laws) is specifically prohibited.[31] In the case of the EES, there are no formal legal sanctions against a state which fails to take the Employment Guidelines into account. The significance of the OMC is that it does not attempt to impose uniform rules, but instead tries to steer the Member States towards common objectives.

These Guidelines have a deregulatory edge. "Addressing change and promoting adaptability" can mean changing contractual arrangements in a way which could undermine existing rights; "entrepreneurship" entails reducing "administrative burdens" which may in practice mean less protection for workers in small and medium-size enterprises, "making work pay" can mean reducing rights to social benefits. There is, however, a positive side to the Guidelines, such as improving education and training, promoting gender equality through policies to reconcile work and life, such as improved childcare provision; and

[31] Art.129 EC (EU Constitution, Art.III-101).

improving the labour market situation of older workers, people with disabilities, ethnic minorities and migrant workers. There is, however, no mention of rights at work. The balance between flexibility and security is weighted in the Guidelines against legal rights for workers.

The importance of the OMC goes well beyond employment policy. The Commission's Social Policy Agenda for the period until the end of 2005, plainly envisages the use of the OMC in respect of other aspects of social policy, and an amendment to the EC Treaty, by the Treaty of Nice in 2000 (now embodied in Art.III-104.2(a)) authorises this over the whole range of matters which had previously been the subject of harmonising measures. The areas of social policy which have traditionally been the subject of Directives, which may give rise to individual rights, will instead be "co-ordinated" under the OMC.

Two areas in which the OMC has been particularly important are social protection and social inclusion. "Modernisation of social protection systems" is one of the areas of EU competence added by the Treaty of Nice, and is regarded as a crucial response to the problem of an ageing population and the need to reduce public expenditure and to raise employment rates. "Modernisation" does not, however, mean extending individual rights to social protection; in practice, it may mean some reduction of individual rights to benefits, such as raising the state pension age or making it harder to claim disability benefits. Similarly, the co-ordination by the EU of policies to combat social exclusion is not based on any positive legal duties to promote equal opportunities. An inclusionary approach is now widely seen as the most effective way to reduce the under-representation of disadvantaged groups. This requires employers, those in charge of education, and those providing goods facilities, services and housing to take positive steps. This is not based on individualised legal enforcement of negative rights against discrimination. However, the EU's anti-discrimination Directives, adopted under Art.13 EC (inserted by the Treaty of Amsterdam) contain only negative rights. At present, the UK is the only Member State that imposes positive duties on public authorities to have due regard to equality in carrying out their functions. This has been the case in Northern Ireland since 1998, and in respect of race equality in the rest of the UK since 2000. The Disability Discrimination Act 2005 extends this to equality for disabled persons, and the Government proposes to do the same in respect of gender equality.

How can the EU Charter change this? One of the great achievements of the Charter is to end the long-standing but artificial distinction between the classic civil and political rights and modern

or second-generation economic and social rights and principles.[32] The latter were the foundation of welfare states, and also inspired international labour conventions. In the post-war period, the division between civil and social rights was maintained by dividing the rights and principles in the Universal Declaration of Human Rights between two separate International Covenants, and in the Council of Europe between the European Convention on Human Rights and the European Social Charter. Civil rights were given priority and have far stronger means of supervision than social rights. Several justifications were advanced for this division. Civil rights were said to be capable of judicial enforcement, but social rights were regarded as being impossible to deliver, such as a "right to work" or a "right to social protection". These social rights require positive actions by states. They are desirable social goals, but it is said that to call them "human rights" is to devalue the importance of civil and social rights.[33]

Against this extreme position, Amaryta Sen has argued that rights-based reasoning and goal-based programming are not necessarily antithetical.[34] He says that it is only if we make the fulfilment of each right a matter of absolute adherence, with no room for give and take and no possibility of acceptable trade-offs, as some libertarians do, that there is a real conflict. He suggests that it is possible to formulate rights in a way that allows them to be integrated in the same overall framework as objectives and goals. For example, the rights of those at work can be considered along with—and not instead of—the interests of the unemployed. There is no "right" to protection from starvation, but Sen points out that legal rights of ownership and contract can go hand-in-hand with some people failing to get enough food to survive. For this reason it is natural to promote the right to work and the right to social protection in order to provide a minimum guarantee of survival. The legal right to property has to be balanced against rights such as these.

However, one of the criticisms of rights-talk of this kind is that it does not make clear who is under an obligation to provide the rights. A virtue of the EU Charter is that it does specify positive obligations on the Union and the Member States to respect, to

[32] *cf.* J. Kenner, "Economic and Social Rights in the EU Social Order: The Mirage of Indivisibility" in T. Hervey and J. Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights—a Legal Perspective*, (Hart Publishing, Oxford, 2003) p.1.

[33] M. Cranston, *What Are Human Rights?* (Bodley Head, London, 1973).

[34] A. Sen, "Work and Rights" (2000) 139 *International Labour Review* 119 at pp.123–4.

recognise and to ensure certain rights. The Preamble declares the indivisibility of the "universal values of human dignity, freedom, equality and solidarity". The wording of the Charter draws a distinction between "rights" and "principles". In the first category is the catalogue of individual negative rights. "Everyone has the right" to vote, to a fair trial, to liberty and security of the person, to non-discrimination and so on. In the category of principles we find two levels of obligation placed upon the Union and Member States. The first is an obligation to "respect" and to "recognise" certain rights. This includes the rights to cultural, religious and linguistic diversity, the rights of the elderly, the rights of persons with disabilities, entitlement to social security benefits and social services and access to services of general economic interest.

The second is an obligation to "ensure" certain rights. The Union and Member States "must ensure" equality between women and men, workers' right to information and consultation, that young persons have working conditions appropriate to their age and are protected against economic exploitation and any work likely to harm their health, a high level of protection of human health, a high level of environmental protection, and a high level of consumer protection.

The duty to "recognise and respect" in effect sets a minimum obligation on the EU and the States. The wording suggests a lower level of obligation than the duty to "ensure". "Respecting" a right seems to mean that the Union and the States must refrain from any action which would undermine the rights in question. This is relatively cost-free. It requires monitoring but no other major state expenditure, and so is capable of immediate application. "Recognising" a right seems to me the equivalent of protecting a right. This means that the EU and the Member States must prevent action by third parties. For example, actions by those who incite racial hatred (*i.e.* threaten rights to cultural etc. diversity) or harm the elderly or people with disabilities must be prevented. This is not cost-free because it entails administrative measures, and judicial and other means to ensure that third parties do not violate the rights of these groups. Since this is a traditional function of the State, it can be said that, despite any costs, the obligation to "recognise" or protect is part of minimum state obligations.

The duty to "ensure" or fulfil a right raises the most difficult questions about available resources. Unlike the obligation to "respect" which is a negative obligation, the obligation to ensure is a positive one, and does require real resources. However, these resources need not come from the EU or the Member States themselves. For example, the costs of achieving equality between

women and men, or providing information and consultation to workers, protecting young workers, human health and so on, can be shared with employers and others in a position to deliver these rights. The essence of all these principles is that they allow for the progressive realisation of rights.

It is this which gives them particular significance in the context of the OMC. For example, it would not be compatible with the Charter duty to "respect" and "recognise" the rights of disabled persons, to reduce disability benefits. (This does not, of course, prevent the state from ensuring that only those who are genuinely disabled receive those benefits.) When implementing the Employment Guidelines, states would not be "ensuring" workers' rights to information and consultation, if they used the excuse of promoting employment as a justification for denying this right to workers in small and medium enterprises. Nor would deregulation of protective rules for young workers be compatible with the duty to ensure their rights.

The best illustration of the potential impact of the positive duties in the Charter is, perhaps, the obligation of the Union and the states to ensure equality between women and men in all areas, including employment, work and pay. I have already pointed out that existing EU anti-discrimination law concentrates on negative duties; it permits but does not require positive action giving specific advantages to the under-represented sex. In the field of discrimination on grounds of nationality, the ECJ has already combined this negative right with the fundamental status of citizenship of all Member State nationals in order to ensure equality between migrants and nationals. In a series of cases it has been established that migrant EU citizens who are not economically active have the right to claim all the benefits available to nationals of the host state, unless they are expressly excluded by Community law. Catherine Barnard has pointed out that the ECJ has taken an incremental approach: the longer migrants reside in the Member State, the greater the number of benefits they receive on equal terms with nationals. The basis of these decisions, says Barnard, are the principles of integration and solidarity.[35] A Spanish national who had lived in Germany for 25 years, since the age of 12, was entitled to child benefits on the same terms as

[35] C. Barnard, "The Future of Equality Law; Equality and Beyond" in C. Barnard, S. Deakin and G. Morris, *The Future of Labour Law. Liber Amicorum Sir Bob Hepple Q.C.* (Hart Publishing, Oxford, 2004) pp.219–24; see too, E. Szyszczak, "Citizenship and Human Rights" (2004) 53 *International and Comparative Law Quarterly* at p.493.

German nationals on the basis of national solidarity.[36] By contrast, a French national on a four-year course in a Belgian University, who was expected to return home at the end of his course, was not considered fully integrated into the Belgian community and so could receive the minimex (a non-contributory social benefit for those in need) only for a temporary period.[37] Although these decisions were not based on the Charter, they are in my view reinforced by the positive obligations in the Charter.

By analogy, the Charter provides a solid basis for developing an incremental approach to equality between men and women, and one that imposes positive obligations on the EU and Member States to ensure such equality. The principles of equality and solidarity in the Charter would justify soft law measures, as part of the OMC, to remove obstacles to the full participation of women in the economy. This can already be found in the European Commission's framework strategy on gender equality, or gender mainstreaming. This focuses on positive action to promote change. EU institutions are obliged to incorporate equality between men and women into all their policies and activities. This aims to overcome the limitations of the individual legal rights approach to equality, and operates in tandem with those rights. Gender mainstreaming is at present supranational, being driven by the European Commission.[38] The Charter provides the opportunity to extend this to the intergovernmental level of the OMC, in particular under the EES. This approach can also be extended beyond gender equality. For example, the positive obligation "to ensure" the "independence, social and occupational integration and participation in the community" of disabled persons is capable of achieving superior outcomes for a larger number of people than the litigation-based approach of individual rights. This does not imply that the courts have no role. Their extremely important function is to ensure that Charter rights are considered by EU institutions and the Member States, and that derogations from these rights are fully and transparently justified.[39]

[36] Case C-85/96, *Martinez Sala v Freistaat Bayern* [1998] E.C.R. I-2691.

[37] Case C-184/99, *Rudy Grzelczyk v Centré public d'aide d'Ottignies-Louvain-la-Neuve* [2001] E.C.R. I-6193.

[38] European Commission, *Towards a Community Framework Strategy on Gender Equality 2001–2005* COM (2000) 335 final.

[39] G.de Bŭrca, "The Constitutional Challenge of New Governance in the European Union" (2003) 28 *European Law Review* 814; see too, N. Bernard, "A 'New Governance' Approach to Economic and Social Rights in the EU", in T. Hervey and J. Kenner (eds), *op.cit.*, p.247.

To conclude, and to link what I have been saying with the theme of my first lecture, I have shown that the impact of the Charter will not be to increase individual rights at wok, except at the margins of interpretation of established rights. States remain free to exploit their comparative institutional advantages, but they must do so within a framework of common values, rights and principles. The Charter does this in three distinct ways. First, the Charter can provide a free-standing objective justification for departures from the fundamental economic rights in the Treaty. Second, the Charter contains background rights to assist in the judicial interpretation of EU laws and implementing national legislation. Third, perhaps most significantly, the Charter could change the focus of social policy towards positive action to promote the Charter rights of EU citizens. This approach is capable of achieving superior outcomes for a larger number of people than adversarial litigation-based individual rights. The future of the European Union may well depend upon whether or not this bold new direction succeeds.

3. The Common Law and Statutory Rights

In this final lecture, I am going to consider a major obstacle that impedes the development of fundamental principles or background rights in the domestic employment law of the United Kingdom. This is the "great structural problem"[1] of the unsatisfactory relationship between common law and statutory rights. By the common law, I mean that rich stream of English law that is created by the judges case by case on the basis of judicial precedent. By statute, I mean all the legislation enacted by or under the authority of Parliament.

The first, and most obvious structural weakness is the absence of an employment code. The second is what Professor (now Mr Justice) Beatson, in a more general context, has described as the "oil and water" or "legal apartheid" judicial attitude to common law and statute—"the view dominant since the time of Coke and Blackstone that common law and statutes flow next to but separately from each other in their separate streams."[2] The third structural problem is the failure to develop a general principle that one may not derogate from certain core rights. In some cases this may be a prohibition on derogation downwards. In others it may prevent derogation upwards. Professor Lord Wedderburn has suggested, in the context of collective agreements, that we might use the concept of "inderogability".[3] This he derives from concepts used in Italian labour law of *inderogabilità in pejus* (unalterable downwards) and *inderogabilità in melius* (unalterable upwards).

I have no reason to believe any of these is less of an obstacle in Scots law than in English law, but I suspect that the civilian tradition of Scots law (which bears some resemblance to the Roman-Dutch law in which I was first trained) may make Scottish

[1] *per* Lord Steyn in *Eastwood v Magnox Electric plc* [2004] I.R.L.R. 733, para.51.

[2] J.Beatson, "The Role of Statute in the Development of Common Law Doctrine" (2001) 117 L.Q.R. 247 at p.251 *et seq.*; "Has the Common Law a Future?" [1997] C.L.J. 291.

[3] Lord Wedderburn, "Inderogability, Collective Agreements, and Community Law" (1992) 21 I.L.J. 245 at p.250.

lawyers more receptive than English ones to the development of principles of the kind I am going to suggest for overcoming these problems.

The problems are vividly illustrated by recent cases. Mr Johnson, who worked for 20 years for Unisys Ltd, a multinational software service company, was summarily dismissed in 1994 for an alleged irregularity. He was given no opportunity to defend himself and the company was in breach of its own disciplinary procedure. He had a statutory right not to be unfairly dismissed—introduced in 1971 and now contained in Part X of the Employment Rights Act 1996. His complaint of unfair dismissal was upheld by an employment tribunal. Parliament has set a cap on the amount that can be awarded as compensation. At the time this was £11,700,[4] and he received close to that sum. The award covered only his financial losses. In the very first year of operation of the new statutory right, the National Industrial Relations Court, presided over by Sir John Donaldson (as he then was), had ruled that "loss" means financial loss only and does not include injury to pride or feelings—an interpretation that the House of Lords has recently affirmed.[5]

Two years later, Mr Johnson had still not found a new job. He claimed that as a result of the manner of his dismissal he had suffered a mental breakdown, had attempted suicide, and started to drink heavily. He commenced an action in the county court against his former employer for common law damages in excess of £400,000. His action was based on breach of a number of implied terms of contract, in particular breach of trust and confidence, an over-arching obligation implied by law into every contract of employment.[6] There was an alternative claim in tort, based on Mr Johnson being owed a duty of care because it was reasonably foreseeable that, being psychologically vulnerable, he would suffer psychiatric injury from being dismissed in the way he was. The county court judge decided that there was no cause of action at common law because Mr Johnson was in substance seeking to circumvent the unfair dismissal legislation and in particular the upper limit on compensation under the statutory framework.

The Court of Appeal dismissed an appeal, and so did the House of Lords. Mr Johnson was told by a 4:1 majority (Lord

[4] This limit from February 1, 2005 is £56,800.

[5] *Norton Tool C. v Tewson* [1972] I.C.R. 501, NIRC. In *Johnson v Unisys Ltd* [2003] 1 A.C. 518, HL, at para.54, Lord Hoffmann threw doubt on this decision, but in *Dunnachie v Kingston-upon-Hull City Council* [2004] I.R.L.R. 727, HL (opinions delivered on the same day as *Eastwood*, n.1 above) *Norton* was affirmed.

[6] *Mahmud v Bank of Credit and Commerce International SA* [1998] A.C. 20, HL.

Steyn dissenting) that he had no right to common law damages because the statutory regime of *unfair* dismissal implicitly precludes a common law development in respect of *wrongful* dismissal.[7] For the benefit of those unfamiliar with this branch of law, let me explain that at common law an employer can dismiss for any reason or for no reason. Since the early nineteenth century, the courts have implied a term into contracts of employment that both parties should give reasonable notice prior to termination—a feature of the English common law that distinguishes it from that in the United States where (subject to some important exceptions) termination-at-will is the rule. In the UK, statutory minimum periods of notice were introduced in 1963, but these can still be as little as one week.[8] There is a *wrongful* dismissal if notice is not given, and this may result in a common law action for damages. This is subject to several limitations. The contract may be summarily terminated (without notice) if the employee has been guilty of gross misconduct. The damages are limited to the amount of wages the employee would have earned for the period of notice, and from this will be deducted any amount which the employee earned (or through his or her fault failed to earn) during the period of notice. In 1905, Mr Addis was abruptly and ignominiously dismissed as manager of the business of the Gramphone Co. in Calcutta. The House of Lords held that his damages for wrongful dismissal were confined to loss of salary and commission for six months. He had no cause of action for the loss of employment prospects arising from the harsh and humiliating manner of his dismissal.[9]

The Court of Appeal thought that *Addis* stood in the way of any recovery of common law damages by Mr Johnson. Lord Steyn delivered a powerful critique showing that the rule attributed to this case never was the law, being derived from a faulty headnote which misrepresented the reasons for the decision. Lord Steyn also made extensive reference to academic research to demonstrate that the purported rule is no longer appropriate in view of the "fundamental alteration in the relationship between employer and employee that has come about" since 1909. One might comment that there is no reason to believe that being dismissed in an arbitrary way is any more stressful today than it was in 1905; what has changed, as Professor Barrett has pointed out,[10] is that awareness of work-related stress has increased and we are

[7] *Johnson v Unisys Ltd.* [2003] 1 A.C. 518, HL.
[8] Employment Rights Act 1996 [ERA], s.86
[9] *Addis v Gramophone Co. Ltd* [1909] A.C. 488, HL.
[10] B. Barrett, (2004) 33 I.L.J. 343.

less willing to tolerate it. The real difficulty in these cases is to prove that it was the job, rather than other factors, which was the cause of the stress.

The majority in the House of Lords were sympathetic to the critique of *Addis*, and it seems would have been willing to overrule it, or to avoid its application,[11] had it not been for what Lord Nicholls described as the "insuperable obstacle" of the intervention of Parliament in the unfair dismissal legislation. The decision in *Johnson* has now been confirmed in the *Eastwood* and *McCabe* cases[12] (again with a powerful dissent from Lord Steyn). The result is that employees may be better protected in areas where Parliament has chosen not to legislate than in those in which it has. Parliament has provided a remedy for unfair dismissal, but not for unfair suspension from employment. Mr Johnson had no remedy because his complaint related to the manner of his dismissal. On the other hand, Mrs Gogay, a residential care worker, could claim damages for breach of trust and confidence when she was unjustifiably suspended by her employer in a "knee-jerk" reaction to a report that a disturbed child in her care had talked about her in a sexual way.[13] The *Johnson* "exclusion zone", as it has come to be called, did not apply because this was a suspension, not a dismissal. Lady Justice Hale (as she then was) pointed out that this has the "strange result that, according to *Johnson*, the defendant authority would have done better had they dismissed rather than suspended" Mrs Gogay.[14] It may now be cheaper for an employer to dismiss rather than to suspend an employee.

Drawing the boundary line between cases that fall within and outside the *Johnson* exclusion zone was said by Lord Nicholls to be straightforward in principle but difficult to apply in practice.[15] The courts will have to decide whether the cause of action at common law—for breach of the implied obligation of trust and confidence or breach of the duty of care in tort—had accrued before the subsequent actual or constructive unfair dismissal. Mr Eastwood (and his co-claimant Mr Williams) alleged that they had been subjected to a campaign by management to demoralise and undermine them over several months, culminating in their

[11] *Johnson v Unisys Ltd*, at para.44 (Lord Hoffmann) and para.77 (Lord Millett).

[12] *Eastwood v Magnox Electric plc; McCabe v Cornwall County Council* [2004] I.R.L.R. 733, HL.

[13] *Gogay v Hertfordshire County Council* [2000] I.R.L.R. 703, CA.

[14] *Gogay v Hertfordshire County Council* [2000] I.R.L.R. 703, *per* Hale L.J. at paras 68–69, adding "the sooner these matters are comprehensively resolved by higher authority or by Parliament the better".

[15] *per* Lord Nicholls in *Eastwood* and *McCabe*, at para.27.

unfair dismissals. In response to the decision in *Johnson*, their claims were limited to the period before dismissal, and they alleged that by the time of their disciplinary hearings they were already suffering from depressive illnesses.[16] These claims were said by the House of Lords to fall outside the exclusion zone. Similarly, Mr McCabe, a teacher who was suspended and later dismissed after allegations that he had behaved inappropriately towards certain female pupils, limited his claim to loss suffered as a result of his suspension and the alleged failure to carry out a proper investigation.[17] The House of Lords decided that his case should proceed to trial. The result, Lord Nicholls acknowledged, is that "judges and tribunals, faced perhaps with conflicting medical evidence, may have to decide whether the fact of dismissal was really the last straw which proved too much for the employee, or whether the onset of the illness occurred even before he was dismissed."[18]

Lord Nicholls remarked: "It goes without saying that an interrelation between the common law and statute having these awkward and unfortunate consequences is not satisfactory."[19] Looked at from a structural viewpoint, the statutory right is not a floor but a glass ceiling—glass because, like Norman Foster's beautiful Law Faculty building in Cambridge, you can see the sky above but not reach it.

How could such an anomalous situation have come about, and what can be done about it? In answering these questions, one has to recognise that the recent cases are not isolated instances. They are increasingly being relied on (although not always successfully) as arguments for blocking common law claims in respect of employment, such as one based in contract and tort for giving misleading information before a transfer of undertaking governed by the Transfer of Undertakings (Protection of Employment) Regulations,[20] and a breach of contract claim for loss of a chance to

[16] At paras 17–23.

[17] At paras 24–26.

[18] At para.31.

[19] *Johnson v Unisys Ltd*, at para.33. For examples of cases where statutes are not seen as occupying the field, see S. Deakin and G. Morris, *Labour Law* (3rd ed., Butterworths, London, 2001) at p.419 n.2, and B. Hepple and G. Morris, "The Employment Act 2002 and the Crisis of Employment Rights" (2002) 31 I.L.J. 245 at p.255 n.58.

[20] *Hagen v ICI* [2002] I.R.L.R. 31, QBD (Elias J. rejected the argument, based on *Johnson*, because the TUPE obligations kick in where there is a failure to provide information; here the allegation was that loss had been suffered as a result of failure to take care in giving the information, and the claim was by an individual not the workers' representatives who are entitled to information under TUPE.)

bring a statutory unfair dismissal claim.[21] *Johnson* has also been cited outside the employment sphere as authority for a general principle that a common law claim may not lie where there are statutory remedies.[22] I am not going to repeat the powerful arguments which Lord Steyn spelt out in *Eastwood* as to why the majority in *Johnson* were wrong.[23] Instead, I want to concentrate on the structural problems which "prevent, and will continue to prevent, the natural and sensible development of our employment law in a critical area."[24]

The first structural problem is the absence of an employment code. The 77 statutory provisions currently dealt with by employment tribunals are not a comprehensive or systematic code of employment law. At their best, they represent an English-type "code" of interlinked provisions on particular aspects of the employment relationship.[25] In France, where work on the Labour Code started in 1910 and was completed in 1973, there is an integrated structure of rationally ordered legal concepts. The task of the judge, under such a code, is primarily to interpret the statutory text and to analyse problems so as to fit them conceptually

[21] *Harper v Virgin Net* [2004] I.R.L.R. 390 (CA held no common law claim could lie where it was alleged the employer had failed to give contractual notice so denying the employee the opportunity to be eligible to bring a statutory claim; only the statutory notice period may be taken into account, otherwise the statutory scheme would be subverted).

[22] e.g. *Marcic v Thames Water Utilities Ltd* [2004] 2 A.C. 42, HL (establishment of statutory scheme for enforcement of obligations against water undertakers precluded common law claim; counsel cited *Johnson* as authority for this in the CA, [2002] Q.B. 929 at 973, but this was not mentioned in the judgement nor in the HL.)

[23] *Eastwood* at paras 36–49. In summary these are: (1) the decision in *Dunnachie* (above) removes an essential step in Lord Hoffmann's reasoning in *Johnson;* (2) the "curious distinctions and artificial results" of distinguishing dismissal cases from other situations where there is a breach of trust and confidence or breach of a duty of care; (3) the "disharmony" between suspension and dismissal cases; (4) the absence of jurisdiction for tribunals to deal with cases of personal injury, including psychiatric illness; (5) the strong academic criticism of *Johnson;* (6) the co-existence of the statutory scheme and common claims would not be unworkable because double recovery would not be allowed; (7) *Addis* does not reflect settled law and was not followed in *Mahmud;* (8) the implied term of trust and confidence and express terms as to notice can co-exist; (9) the denial of common law damages because of the statutory ceiling comes "at too high a price in the failure of corrective justice"; (10) the "inhibitory effect of *Johnson* on the development of the common law poses a great structural problem."

[24] Per Lord Steyn in *Eastwood* at para.51.

[25] *cf.* P.M.North, "Problems of Codification in a Common Law System" (1982) *Rabels Zeitschrift für Ausländisches Privatrecht* 490, describing this English-type codification in the fields of family law, private international law and criminal law.

into the system of the code. The design and purpose of the legal rules in the code—which lays down the fundamental principles of labour law—is the focus of the judge's attention.[26]

British employment statutes also differ from statutes which codify the law relating to certain kinds of commercial contracts. Those statutes, like the Sale of Goods Act, the Bills of Exchange Act and the Marine Insurance Act, are largely a restatement of the extensive case law relating to those contracts. By way of contrast, the courts played a relatively small part in filling in the blanks which the parties had left unsaid in the contract of employment. At the time of Kahn-Freund's 1972 Hamlyn lectures, the primary factor in filling the blanks of the empty contract of employment was the collective agreement. In his words, the collective agreement's "pivotal influence on the mutual obligations of employers and workers ... greatly reduced the influence of the courts."[27] The courts filled in the blanks not by making up their own rules (terms "implied in law"), but by incorporating appropriate terms of collective agreements on a case-by-case basis into individual employment contracts. An example given by Kahn-Freund was the problem of whether the employer must pay the worker if he cannot do the work owing to causes for which neither the worker nor the employer is responsible, such as a power cut, a transport strike, or a stoppage in the supply of materials. There were hardly any common law cases at all—the problem was resolved by "guaranteed week" provisions in numerous collective agreements. Twenty-five years later collective agreements cover less than a third of the workforce, mainly in the public sector, and the guaranteed week is rare. It is not to collective agreements, but to the statutory right to guaranteed pay that one must now usually look.[28] But this does not rule out common law rights. The statute expressly states that "the right to a [statutory] guarantee payment does not affect any right of an employee in relation to remuneration under his contract of employment."[29] This contractual remuneration goes towards discharging the employer's statutory obligation.[30]

It is obvious that there are many gaps in statutory regulation. In the absence of collective agreements, only the common law can

[26] R. Zimmerman [1997] C.L.J. 215 at p.320; K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (3rd ed., Clarendon Press, Oxford, 1998) p.181.
[27] O. Kahn-Freund, *Labour and the Law* (3rd ed. by P. Davies and M.Freedland, Stevens, London, 1983), pp.23–4.
[28] ERA, Part III.
[29] ERA, s.32(1).
[30] ERA, s.32(2).

fill these. The gap in *Johnson* was that the statute did not, according to the House of Lords' interpretation, cover compensation for the manner of dismissal or injury to feelings; nor could the tribunals award damages for psychiatric injury,[31] a well-established head of damages in the common law of tort. The House of Lords could have filled the gap. It did not do so, because, according to Lord Nicholls, "the common law along these lines cannot co-exist satisfactorily with the statutory *code* regarding *unfair* dismissal."[32] That so-called "code" provides a statutory cap on the amount of compensation, and excludes certain classes of employee, such as those with less than a year's qualifying service. It will be noted that in this reasoning the word "unfair" is elided with "wrongful", although in law these are separate concepts; and the specific law on unfair dismissal is a treated as a "code" on termination of employment, implying that it covers the whole ground. Had "unfair" and "wrongful" been kept distinct, and the limited nature of the statutory intervention on unfair dismissal been recognised, a different conclusion could have been reached by the majority.

Why don't we have an employment code? Let me offer two anecdotes. In 1974, soon after ACAS was established, my Cambridge colleague, Dr. (later Professor) Paul O'Higgins, and I suggested to Jim Mortimer, the first chairman of the newly established Advisory, Conciliation and Advisory Service (ACAS), that there should be a statutory code of employment law. He told us quite firmly that the trade union members on his Council would undoubtedly reject the idea because they preferred simply to react to adverse legal decisions on a case-by-case basis, as unions had done since the nineteenth century. These trade unionists believed that what Parliament gave in a code, Parliament could take away. The unions would prefer to rely on their own strength rather than a code, and employers would be fearful that a code would escalate the costs of employment. So we did not get a code. The subject of employment law was also too hot for the Law Commission to handle, because of the political and industrial strife over the Industrial Relations Act, which was repealed in 1974.

[31] The Employment Tribunals (Extension of Jurisdiction) (England and Wales) Order 1994, reg 3, as amended. Such damages are possible for the statutory tort of racial discrimination: *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] I.R.L.R. 482, CA.

[32] *Eastwood* at para.12. *cf.* Lord Steyn at para.45 who makes it clear that double recovery would not be allowed. As a matter of practice, the general view is that the elements of the compensatory award for unfair dismissal which are capable of being allocated to any of the heads of damages for wrongful dismissal should be deducted from the award of damages: *Sweet & Maxwell's Encyclopedia of Employment Law*, vol.1, para. 5G-1.33.

The second anecdote was recounted to me by Sir Otto Kahn-Freund. During the deliberations of the Royal Commission on Trade Unions and Employers' Associations (1966–68) of which he was a member, he suggested that the new statutory "safeguards against unfair dismissal" should replace the common law, and that the proposed labour tribunals should have exclusive jurisdiction over all claims arising from the contract of employment. George Woodcock, then General Secretary of the TUC and also a member of the Commission, strongly objected: "You can't take away workers' common law rights."

Kahn-Freund—always fascinated by the contrast between his own German background and what he saw in Britain[33]—was struck by this attachment of a trade union leader to the judge-made common law. There was a widespread belief that a trade unionist could not get impartial justice from the common law courts—one of the reasons for the establishment of the Donovan Commission was the decision in *Rookes v Barnard*[34] in which the House of Lords invented a new tort (economic intimidation) in order to circumvent the statutory immunities in respect of industrial action granted by Parliament in 1906.[35] Individual workers still faced attitudes grounded in the old master and servants law. In 1957, in *Lister v Romford Ice and Cold Storage Co. Ltd.*,[36] Viscount Simonds justified the refusal to imply a term in a lorry driver's contract that his employer would insure him against the risk of liability for careless driving by saying that to do so "would tend to create a feeling of irresponsibility in a class of persons from whom, perhaps more than any other, constant vigilance is owed to the community."[37] The employee is portrayed as a "servant", a member of an "irresponsible" class, whom the employer must control with "constant vigilance."[38]

[33] See M. Freedland, "Otto Kahn-Freund (1900–1979)" in J. Beatson and R. Zimmermann (eds), *Jurists Uprooted* (Oxford University Press, Oxford, 2004), p.314.

[34] [1964] A.C. 1129; see below.

[35] See generally, Lord Wedderburn, *The Worker and the Law*, (3rd ed., Penguin, Harmondsworth, 1986), Ch.1; and generally on the common law and labour law Lord Wedderburn, "Laski's Law Behind the Law: 1906 to European Labour Law" in R. Rawlings (ed.), *Law, Society and Economy* (Clarendon Press, Oxford, 1997) p.25.

[36] [1957] A.C. 555, HL.

[37] *ibid.*, p. 578.

[38] Glanville Williams pointed out how this decision failed to reflect changed social circumstances. It meant that "the friendliest relations between the employer and his staff can now be disrupted, and the employee impoverished, by the action of an insurance company, which finds itself in the happy position of having received premiums for a risk that it does not have to bear": (1957) 20 M.L.R. 220 at p.221.

In view of the background of judicial hostility to trade unions and outdated attitudes to individual workers, how could George Woodcock insist that judges like Viscount Simonds should continue to wield common law power over the employment relationship? Woodcock (1904–79) had gone to work in a cotton mill at the age of 12 and, in the words of his biographer, was "ever conscious of his working-class background." He was the "philosopher king of trade unions" and "the outstanding intellect of the TUC in the post-war years."[39] By way of contrast, Simonds (1881–1971), the scion of a wealthy family of brewers, a product of Winchester and New College, Oxford, is described by Robert Stevens as the "high priest" of substantive legal formalism,[40] and by Gerry Rubin as "the most significant exponent of English judicial conservatism in the twentieth century."[41] The new tripartite tribunals, adjudicating on disputes about rights granted by Parliament, offered a fresh start, particularly because para.583 of the Donovan Report (drafted by Kahn-Freund) insisted that a new breed of lawyers, trained by the law schools in labour law and industrial relations, would staff these tribunals.

No doubt part of Woodcock's reason for wanting to keep alive the common law, and the jurisdiction of the common law courts in individual disputes, was simply pragmatic—along the lines, "let's see how the new system works before we scrap the old one." But I believe there may also have been a deeper instinct embedded in popular British culture since the seventeenth century. This is the belief, perceptively described by the historian E.P. Thompson, that the rule of the common law is not simply an instrument for preserving the property and privileges of the ruling class at any time, but is "a medium within which other social conflicts have been fought out." In Thompson's words: "Productive relations themselves are, in part, only meaningful in terms of their definitions at law: the serf; the free labourer; the cottager with common rights ... the picket conscious of his rights; the landless labourer who may still sue his employer for assault. And, if the actuality of the law's operation in class-divided societies has again and again, fallen short of its rhetoric of equity, yet the notion of the rule of law is itself an unqualified good."[42] Woodcock's instinct may have been that although the

[39] Geoffrey Goodman, *Dictionary of National Biography* [hereafter *DNB*] (Oxford University Press, Oxford, 2004).
[40] Robert Stevens, *Law and Politics* (Weidenfeld & Nicholson, London, 1979), p.342.
[41] G.R. Rubin, Viscount Simonds, *DNB*.
[42] E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Penguin Books, Harmondsworth, 1977), p.267.

uncodified common law was flexible and unprincipled—and therefore pliant to the "common sense" of judges drawn from the middle classes—this very flexibility offered an opportunity for workers to safeguard themselves against abusive working conditions where collective bargaining or statute failed. In other words, the retention of the common law and the jurisdiction of the ordinary courts, and the rejection of a statutory code on termination of employment as proposed by Kahn-Freund, was deliberate. There is no reason to believe that Woodcock and his fellow Commissioners thought that the common law they were preserving would stand still.

A second and more fundamental structural feature of our law is the judicial approach which treats common law and statute as "oil and water". Sir Jack Beatson has advanced arguments of principle and practice for the common law to reconsider and ultimately reject this approach. I will not repeat those arguments here, save to support his conclusion (to which I shall return) that purposive interpretation of statutes can elucidate principles that should help to shape the common law.

The important point I want to make, in the context of employment law, is that common law and statute have never been "oil and water". The common law of employment emerged out of the Statute of Labourers 1351, enacted by Edward III in the wake of the Black Death to protect employers from the excessive wage demands of servants and labourers in a seller's market.[43] There was no remedy at common law for the master against a servant who deserted his work. There were only the varying standards of local courts. The Statute, which penalised deserting servants, was built on by the King's courts to fill this gap at least until the common law developed its own alternatives. In the decisions on master and servant recorded in the Year Books, it is evident that the innovations in the Statute hastened the expansion of the common law—for example, in 1355 a civil action in respect of unwarranted departure from employment under the analogy of (*fonde sur*) the Statute.[44] In turn, the developing common law affected the interpretation given to the Statute—for example, that failure to pay wages would constitute "cause reasonable" justifying the servant's departure.[45]

[43] I am indebted to Brian Napier's unpublished dissertation, *The Contract of Service: the Concept and Its Application* (Cambridge Ph.D, 1975), for much of the information on this period.

[44] (1355) Y.B. 28 Edw. III, M. pl.18, f.21.

[45] Y.B. 13 Ric. II (Ames Series) 31.

The unwillingness of the common law to stand still in deference to Parliament has perhaps never been more evident than in the period of fundamental social change which rendered obsolete the strict controls over the economy and employment contained in the Statute of Artificers 1563. While Parliament merely tinkered with master and servant law in the eighteenth and early nineteenth century, the courts felt free to fashion common law doctrines to satisfy the needs of the new industrial age, such as the vicarious liability of the master to outsiders (but not to fellow-servants of the careless one) for the torts of the servant. At the same time, the courts remained intellectually under the sway of the old legislation. When filling the blanks in the contract, in the way I described earlier, they relied on judicial precedents shaped by the master and servant laws. As late as 1972, a leading text could still cite as good law a case of 1845 in which it was held that a domestic maid could be summarily dismissed for taking an afternoon off to visit her dangerously ill mother.[46]

Professor Deakin has shown that nineteenth-century employment law did not recognise the modern distinction between dependent employment and self-employment, nor did it consistently see the relations as contractual.[47] The old "service model" which applied to most workers was only gradually replaced under the influence of collective bargaining and of early social insurance and workmen's compensation legislation. Collective bargaining undermined practices such as labour-only sub-contracting which were excluded from the notion of "service", and it increased job security for example by reducing casual and short-term contracts. The courts accepted this development by the device of incorporation of collective agreements into individual contracts. The courts were at first hostile to the redistributive and egalitarian aims of welfare legislation, but later expanded the notion of the "contract of service". They gradually moved away

[46] *Turner v Mason* (1845) 11 M & W 112, cited by J.C. Wood (ed.), *Cooper's Outlines of Industrial Law* (6th ed., London, 1972) at pp.81, 99. Also cited was *Beale v Great Western Ry Co.* (1901) 17 T.L.R. 450 (employees could be summarily dismissed for refusing to attend late at night at their own expense to carry out a task after they had already completed a 12-hour shift). By 1974, however, under the influence of unfair dismissal legislation the common law tide was turning: see *Wilson v Racher* [1974] I.C.R. 428 at p.430, in which Edmund Davies L.J. recognised that cases such as these "may be wholly out of accord with current social conditions. We have by now come to realise that a contract of service imposes on the parties a duty of mutual respect."

[47] S. Deakin, "The Evolution of the Contract of Employment, 1900–1950. The influence of the welfare state" in N. Whiteside and R. Salais (eds), *Governance, Industry and Labour Markets in Britain and France—The Modernising State in the Twentieth Century* (Routledge, London, 1998), Ch.11.

from the restrictive "control" test to broader notions of "integration" and "business reality" in order to allow a wider range of dependent workers to enjoy the benefits of the welfare state.

Turning to modern employment rights legislation, there could be no clearer evidence that Parliament intended the symbiotic relationship between common law and statute to continue than in the way in which statutory rights have been placed firmly within the framework of the contract of employment. In some cases, this has been done explicitly. For example, the right of women and men to equal pay for like work or work of equal value is enforced by the device of a mandatory "equality clause" implied by statute into every contract of employment.[48] More often, though, the common law is introduced by Parliament into the statutory regime indirectly.[49] An example is the definition of "dismissal" for purposes of unfair dismissal. This is based on the termination of the contract of employment, with the consequence that the question of whether there has been an actual or constructive dismissal must be decided in the language and according to the rules of the law of contract.

Let me illustrate with another anecdote. In 1977, an 18-year-old woman complained to the Ashford Industrial Tribunal, of which I was Chairman, that she had been constructively unfairly dismissed by her employer.[50] She had been employed as a live-in mother's help by the managing director of a small family company and his wife, the company secretary, to look after their children while they ran the business. It was not disputed that the company secretary had seduced the young woman into a sexual relationship, and the tribunal found that the presumption of undue influence had not been rebutted. After two weeks, the young woman left and did not return because she was unhappy with the situation. The two lay members of the tribunal had no doubt that the employer's conduct was intolerable. They asked me to find legal grounds to justify a decision that there had been

[48] Equal Pay Act 1970, s.1.

[49] Another example is ERA, s.13, which allows a deduction from wages where there is contractual authority to do so. M. Freedland, *The Personal Contract of Employment* (Oxford University Press, Oxford, 2003) at p.4 comments that the scope of what is technically a statutory cause of action "is determined to a quite extraordinary degree by the common law. So much is this the case that the common law itself had to be developed in order to expound the concept of 'deduction from wages'." See *e.g. Delaney v Staples* [1992] I.C.R. 483, HL. The statutory right to a national minimum wage was placed within the framework of the contract of employment in *Paggetti v Cobb* [2002] I.R.L.R. 861, EAT (as a minimum for the basic award in respect of unfair dismissal).

[50] *Wood v Freeloader Ltd.* [1977] I.R.L.R. 455, IT.

a constructive dismissal. The statute provides that there is a constructive dismissal if the employee terminates her contract with or without notice in circumstances which entitle her to do so by reason of the employer's conduct.[51] The problem I faced was that the statute uses the language of contract ("entitled", "without notice") connoting that the employee must show that the employer's repudiatory conduct entitles her to treat herself as discharged from any further performance of the contract.[52] It is not enough to show that the employer's conduct was "unreasonable". So I scratched around for a contractual term. There were a few old cases under the master and servant laws that said a female servant might be justified in leaving her (male) employer if he seduced her. But it seemed to me that attitudes to sexual relations have greatly changed, and the fact that a consensual private relationship has ended would not necessarily amount to grounds for ending the contract of employment. Instead, my judgment relied on the implied contractual duty of co-operation. My judgment said that there was a duty on the employer not do anything which would undermine mutual trust and confidence. On the facts, this obligation had been repudiated by the employer's conduct. The mother's help was entitled to leave and to claim compensation. The decision was reported and entered the textbooks. The implied term of mutual trust and confidence was gradually developed by the higher courts, culminating in the seminal House of Lords' decision in *Mahmud v BCCI* (1998).[53] The common law term was not a separate stream: it was a by-product of the statutory law of constructive dismissal, and it has now developed into an overarching obligation in the employment contract. I have to confess a logical difficulty in understanding how the breach of this contractual term can entitle an employee to terminate the contract without notice (constructive dismissal) but not

[51] ERA, s.95 (1)(c) (formerly TULRA 1974, Sch.1, para.5(2)).

[52] At the time of the decision in *Wood*, Kilner Brown J had said in *Western Excavating (ECC) Ltd v Sharp* [1977] I.R.L.R. 25,EAT, that in deciding whether there was a repudiation of contract, the tribunal was not limited to the common law contractual tests but rather should be guided by the overriding guideline of equity which formed part of the definition of "unfairness". This was subsequently overruled by the Court of Appeal, [1978] I.R.L.R. 27. Lord Denning M.R. said that the employee had to show a significant breach going to the root of the contract.

[53] [1998] A.C. 20, HL, Lord Steyn referred to Hepple & O'Higgins, *Employment Law* (4th ed., Sweet & Maxwell, London, 1981), p.45, in support of the development of this implied duty.

entitle the employee to claim damages in respect of the same breach.[54]

It is difficult to say where *Johnson* and *Eastwood* have left the controversial declaratory theory of the common law—the "fairy tale"[55] that common law judges do not make law—recently reaffirmed by a majority in the House of Lords in *Kleinwort Benson Ltd v Lincoln CC*.[56] If the common law rule in *Addis* never was the law, why was the House of Lords deterred from overruling it simply because Parliament had made the assumption that the rule existed? In *Kleinwort Benson* the majority "declared" that the law of England had never prevented the recovery of payments made under a mistake of law, although there was legislation in force enacted on the assumption that the rule existed. This inconsistency with *Kleinwort Benson* is not explained in the opinions delivered in the employment cases. In a curious way, *Johnson* and *Eastwood* stand another landmark labour law case on its head. In *Rookes v Barnard*,[57] the House of Lords "drove a 'coach and four', as counsel put it, through the 'immunities' of the Trade Disputes Act 1906"[58] by radically expanding the tort of civil intimidation to include a peaceful threat to break a contract, a tort not known to Parliament when the 1906 Act was enacted. In *Johnson* and *Eastwood*, by contrast, the majority used the statute as a justification for not developing the common law. What all these labour relations and employment cases have in common is the "oil and water" approach, or, to change the metaphor, the failure of the judiciary to appreciate that the common law of employment and statutory rights are imbricated, like overhanging roof-tiles, and keep each other in place. Their separation in *Johnson* and other cases means there is a leaky roof in the structure of employment law.

The third feature of the structure of employment law that I want to discuss goes to the heart of the question of why statutory rights were construed as a glass ceiling. This is the absence of a

[54] *cf.* L.Barmes, "The Continuing Conceptual Crisis in the Common Law of the Contract of Employment" (2004) 67 M.L.R. 435, who argues that the logical consequence of the majority reasoning in *Johnson* is that the existence or not of a breach of contract by the employer is made contingent on the employee's reactions.

[55] Lord Reid, "The Judge as Law Maker" (1972–3) 12 J.S.P.T.L. (NS) 22.

[56] [1999] 2 A.C. 349, but see the powerful dissents by Lord Browne-Wilkinson at pp.358–9, and Lord Lloyd of Berwick at p.393, and generally Beatson (2001) 117 L.Q.R. at p.271, to whom I am indebted for drawing my attention to this point..

[57] [1964] A.C. 1129.

[58] Lord Wedderburn, *The Worker and the Law* (3rd ed. Penguin Books, Harmondsworth, 1986), p.39.

general principle that one may not derogate from certain core rights, what Lord Wedderburn calls "inderogability."[59] In the past, this has generally been a problem where the common law is used to derogate downwards from statutory rights. There are notorious examples of this in the early history of factory legislation. In 1850, the Court of Exchequer held that the Ten Hours Act did not exclude "relays" of children and young persons that rested on their fictional agreement to be kept in the factory for 15 hours coming on to work in turns.[60] The legality of contracting out of legislation imposing liability on employers for certain industrial accidents was upheld by the Queen's Bench Division in 1881.[61] To prohibit contracting-out, it was said, "manifestly interfered with the freedom of the individual to dispose of his property as he sees fit." The Race Relations Act of 1968 was the first modern legislation to include a non-derogable human rights standard in employment. This was followed by prohibitions against derogation downwards in the anti-discrimination legislation of the 1970s, the unfair dismissal legislation, and in the case of many other statutory rights since then.

Recently, however derogation downwards has been permittted in the interests of "flexibility". A controversial example is the UK Regulations implementing the EU Working Time Directive which allow individual workers to make agreements with their employer to opt out of the 48-hour limit to weekly working hours. Recent empirical research finds that this opt-out is the principal reason why the Regulations have had little impact on the long-hours culture in the UK.[62] More generally, it remains possible to construct contracts in a way that allows avoidance of the prohibition on contracting out.[63]

[59] (1992) 21 I.L.J. at p.250. Ultimately, the case for "inderogability" in labour law rests on what Paul Durand described as *la particularisme du droit du travail*: "labour law detaches itself from the civil law and is established as an independent juridical system" (1945 *Droit Social* 298). This idea is discussed by Lord Wedderburn, "Labour Law—From Here to Autonomy" (1987) 16 I.L.J. 1, who shows that even in France with its more propitious starting point, the problem of autonomy has not been resolved.

[60] H.L. Hutchins and A. Harrison, *A History of Factory Legislation* (Frank Cass & Co., London, 1966), p.102.

[61] *Griffiths v Earl of Dudley* (1881) 9 Q.B.D. 357; see David G.Hanes, *The First British Workmen's Compensation Act 1897* (New Haven, 1968), pp.1, 23–4, 35.

[62] C. Barnard, S. Deakin and R. Hobbs, "Opting Out of the 48-hour Week: Employer Necessity or Individual Choice? An Empirical Study of the Operation of Article 18(1)(b) of the Working Time Directive in the UK" (2003) 32 I.L.J. 223.

[63] *e.g., Stevedoring and Haulage Services v Fuller* [2001] I.R.L.R. 627, CA, (denial of mutuality of obligation); see too *Wilson v St Helens Borough Council* [1998] I.R.L.R. 706, HL, (valid agreement by transferred workers to accept lower pay because their dismissals were for an economic, technical or organisational reason).

The problem in the *Johnson* case, however, was not one of derogation downwards, but of derogation upwards. Other legal systems have faced this problem. For example, in the United States, the Supreme Court decided that an individual contract of employment containing more favourable terms than a collective agreement reached under the statutory system of collective bargaining between employers and a union elected as exclusive bargaining agent, is not permissible.[64] A similar rule will be found in the South African Labour Relations Act.[65] The reason for this is to protect the integrity of the system against attempts to undermine it by offering better deals to so-called "free-riders".

Another example of no upward derogation is prices and incomes legislation, enacted in "crisis" situations in various countries, which places an upper limit on negotiated wages.[66] In *Johnson* and *Eastwood*, it was the cap on statutory unfair dismissal compensation and the exclusion of certain categories of employees from the right not to be unfairly dismissed, that persuaded the majority that this was a ceiling and not a floor of rights.[67] I have already given reasons why the development of the common law on termination (by overruling *Addis*) would not be inconsistent with the statutory scheme: this is not a code, "unfair" is not the same as "wrongful", and the history of the legislation indicates an intention to retain the living common law.

The underlying structural weakness of the common law is that it does not normally recognise imperative norms in the contract of employment. Employer and employee are generally free to modify or exclude any term in a contract. This is different from the civil law systems which, for two centuries, have applied general imperative norms (*jus cogens*) to all contracts and special norms to the contract of employment. The idea of positive legal norms is alien to the common law approach. As Lord Steyn said in *Mahmud v BCCI*, "implied terms operate as default rules. The parties are free to exclude or to modify them."[68] This appears to apply even to terms which are implied by law such as fidelity, the

[64] *JI Case Co v NLRB*, 321 U.S. 332 (1944); see A. Goldman, "United States of America" in R. Blanpain (ed.), *International Encyclopedia for Labour Law and Industrial Relations* (Kluwer Law International, The Hague, 2002) paras 60, 289.

[65] Labour Relations Act, No.66 of 1995, s.20(3).

[66] Wedderburn, (1992) 21 I.L.J. at 250 n.22.

[67] *Eastwood* at para.13 per Lord Nicholls.

[68] [1997] I.R.L.R. at p.468, HL; *cf.* Lord Nicholls at p.465 who recognised the disparity of power between the parties; see generally D. Brodie (1998) 27 I.L.J. at pp.83–86.

maintenance of mutual trust and confidence and obedience to the employer's lawful instructions.

Let me take as an example of statutory rights where derogation upwards must surely be allowed, the human rights in the European Convention on Human Rights (ECHR) domesticated by the Human Rights Act (HRA). That Act creates no new free-standing rights in the private contract of employment. There is no statutory term of the contract which establishes the right to private life or family life nor to freedom of expression, freedom of thought, conscience and religion as such against a private employer. Those rights exist by virtue of the new statutory tort created by the HRA only against public authority employers. If convention rights are to have indirect effect against private employers, it will only be because the court or tribunal is able to develop some existing common law right incrementally so as to be compatible with convention rights. In private employment relationships, convention rights will be parasitic. I suggested, in an earlier lecture,[69] that one existing common law duty which might be sufficiently flexible and open-ended to serve as host to some (but not all) convention rights is that of maintaining mutual trust and confidence. I argued that the right to private life could be enforced through the existing duty on an employer not to conduct itself in a manner calculated to destroy or seriously damage the relationship of confidence and trust between employer and employee. If that is so, can there be any doubt that there could be a derogation upwards from the implied term so as to allow more stringent protection of a convention right? For example, the second part of Art.9(1) of the ECHR confers the right to manifest one's religion. As interpreted by the courts, this does not oblige an employer to allow time off during working hours for prayers.[70] I suggest that the real issue in such a case is whether conferring greater rights for praying time than the convention requires is compatible with the convention rights—which it surely is.[71]

I have described three features of the structural problems of employment law: the absence of an employment code, the "oil

[69] B. Hepple, *Human Rights and the Contract of Employment*, Employment Lawyers' Association Annual Lecture 2000, at p.5.

[70] *Ahmad v Inner London Education Authority*, [1978] Q.B. 36, CA.

[71] See generally, the illuminating discussions by G.S. Morris, "Fundamental Rights: Exclusion by Agreement?" (2001) 30 I.L.J. 49; and M.R. Freedland, "*Jus Cogens, Jus Dispositivum*, and the Law of Personal Work Contracts" in P. Birks and A. Pretto (eds), *Themes in Comparative Law* (Oxford University Press, Oxford, 2004), Ch.12.

and water" judicial approach to common law and statutory rights, and the failure to develop a principle of inderogability of certain core rights. How are these problems to be resolved? In the time available, I can do no more than sketch a new approach.

An obvious step would be to codify employment law. As long ago as 1986, I suggested that individual employment rights should be restructured within a comprehensive and intelligible legislative framework "which promotes collective bargaining and is freed from the contract of service." I argued that the employment relationship "had to be freed from the law of contracts and property", as had been done in several other European countries,[72] and that specialist tribunals should have exclusive jurisdiction over this code.[73] In his recent penetrating study of *The Personal Contract of Employment*, Professor Mark Freedland has advocated, "not without a good deal of diffidence a legislative codification of the law of personal work or employment contracts."[74] The significant difference between his proposal and mine is that he would revalidate "the central role of contract law in employment law", while I would leave a role for contract law only to improve on the minimum standards prescribed by the code or by collective bargaining. Whatever the form of a code, I believe that we agree on the need to base it on a wide conception of the employment relation as its foundational or definitional institution. We also agree that there should be integration of statutory and common law duties, as well as the autonomous sources of employment law, in particular collective bargaining.

This is, however, an ambitious project that would take many years to achieve and, indeed, may be unattainable.[75] There are serious doubts as to whether the political will exists to carry this through, although there is a strong case for saying that a single comprehensive code will make the law more accessible and less complex for both employers and workers. The "principle of unripe time" has been used by the Government for the past four years to hold up the Single Equality Bill, which the Cambridge Independent Review of the Enforcement of Anti-Discrimination

[72] B. Hepple, "Restructuring Employment Rights" (1986) 15 I.L.J. 69.

[73] B. Hepple, "Labour Courts: Some Comparative Perspectives" (1988) 41 *Current Legal Problems* 169.

[74] M. Freedland, *The Personal Work Contract*, at 519; *cf.* Lord Wedderburn in Rawlings (ed), *op.cit.* n.35, p.60 who warns against "purely cerebral, millennialist codes of law reform."

[75] See M. Kerr, "Law Reform in Changing Times" (1980) 96 L.Q.R. 515 at p.520, giving reasons why comprehensive codes in other areas of law have proved to be unattainable.

drew up.[76] An employment code is likely to be even more controversial, particularly if it is seen to increase rights at the expense of business. The spectre of global competitiveness that I discussed in the first lecture, however exaggerated, is bound to haunt any major overhaul of employment law.

So, in the medium term at least, we have to look to the judiciary. In his Hamlyn Lectures last year, Mr Justice Kirby of the High Court of Australia said that faced with a novel problem in the common law, or an ambiguity in the written law, the modern judge in our tradition will have regard to three great sources of guidance: legal authority, legal principle and legal policy.[77] I have pointed out that in the field of employment law there is relatively little by way of legal authority on common law rights and duties, and many of the older cases—such as *Addis v Gramophone Co.*—are plainly inappropriate in modern times.

Ronald Dworkin says that "arguments of policy are arguments intended to establish collective goals."[78] In my view, in their purposive interpretation of employment statutes, the courts and tribunals should obviously seek to discover the collective goal being pursued by Parliament, and give effect to it. But in areas where legislation and collective bargaining are silent, sensitive questions of employment and social policy should not be decided on the basis of judges' own views—even if they could agree as to desirable collective goals. Instead, they should, as Dworkin argues, seek out guiding principles on which to develop the common law. "Arguments of principle" are, in Dworkin's words, "intended to establish an individual right . . . Principles are propositions that describe rights." My argument in the first two lectures was that judges need a bedrock of principles or background rights to decide hard cases.

What are those principles? Judges can find guidance in the international labour conventions—at least those ratified by the UK—that I discussed in the first lecture.[79] They can also find them

[76] B. Hepple, M. Coussey and T. Choudhury, *Equality: a New Framework. Report of the Independent Review of the Enforcement of Anti-Discrimination Legislation* (Hart Publishing, Oxford, 2000). An Equality Bill based on the Report was introduced by Lord Lester of Herne Hill Q.C. in the House of Lords and passed all its stages in February 2003. The Government proposes to legislate in respect of one of the Report's proposals, for a single Commission for Equality and Human Rights, in the 2004–5 session, but has not yet accepted that there should be a single code of anti-discrimination law.

[77] The Hon Mr Justice Michael Kirby, *Judicial Activism* (Sweet & Maxwell, London, 2004), p.83.

[78] Ronald Dworkin, *Taking Rights Seriously* (Duckworth, London, 1977), p.90.

[79] The *Prague Airport* case [2005] I.R.L.R. 115, shows a willingness by the House of Lords to do this.

in the "showcase" of the EU Charter of Fundamental Rights that I described in the second lecture. Although the EU Charter is, strictly speaking, relevant only to EU measures, we cannot blindfold judges and pretend that the fundamental principles underlying domestic UK employment law are significantly different from those of the rest of the EU. But even without these international and European declarations, I suggest that there are already common law principles which provide the basis for a sensible development of the common law in an age of statutes. They are based on the moral judgment that I articulated in the Prologue: labour is not a commodity and all human beings are entitled to equal treatment and respect. Case law in some other common law countries has already begun to spell out this principle in respect of four distinct rights: to fairness; to good faith; to equal treatment and respect; and to freedom of association.

The basis of these rights was well-expressed by Dickson C.J. in the Supreme Court of Canada in 1987:

> "work is one of the most fundamental aspects of a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being."[80]

The Chief Justice added that since the employee is normally vulnerable to the dominant bargaining power of the employer, employment protections are necessary to safeguard the employee's fundamental human rights to economic security, dignity and respect. Although this was said in a dissenting judgment on the constitutionality of legislation restricting the right to strike, Dickson C.J.'s remarks have profoundly influenced the way that Canadian courts have applied the common law of the employment contract to provide employees with rights additional to those embodied in statutes or collective agreements.

For example, in 1997 the Supreme Court held that the employer is obliged to act in good faith when dismissing an employee.[81] Failure to do so entitles the court to extend the period of "reasonable" notice of termination, even though the employee may not have suffered any quantifiable financial loss, or proved psychological harm resulting from the breach of duty. This has been

[80] *Reference Re Public Service Employee Relations Act (Alberta)* [1987] 1 S.C.R. 313 at p.368.

[81] *Wallace v United Grain Growers Ltd* [1997] 3 SCR 701, in particular Iacobucci J. citing Dickson CJ at p.146.

developed in subsequent decisions to require procedural fairness in the handling of dismissals, and even to decide that there is no category of employee misconduct that automatically justifies summary dismissal at common law. Only a "proportional" penalty having regard to the "context" of the dismissal is permitted. This common law test was enunciated—in order to protect the economic and psychological security of the employee—notwithstanding the existence of a statutory regime for unjust discharge and a regime for arbitration under collective agreements.[82]

The principle of good faith (as Lord Steyn preferred to call the implied duty of trust and confidence) would have justified the House of Lords importing into the sphere of private employment, precedents such as *Ridge v Baldwin*[83] and *Malloch v Aberdeen Corporation*[84] in which the duty to provide a fair hearing had been applied to public employers. As Lord Justice Sedley pointed out in his memorable fiftieth series of Hamlyn lectures, had Parliament not enacted the unfair dismissals legislation in 1971, it is highly likely that the common law in England would have filled the omission of the legislature.[85]

Let me give an example in respect of the right to equal treatment and respect. In the South African case of *Hoffmann v South African Airways*,[86] the Airways refused to continue the employment as a cabin attendant of someone who was HIV-positive. The Constitutional Court accepted evidence that asymptomatic HIV-positive persons can perform the work of a cabin attendant competently, and any risks to which he may be exposed can be managed by counselling, monitoring and vaccination. The risks to passengers were inconsequential. On the basis of this evidence, the Court held that Mr Hoffmann's right to equality, guaranteed by the South African Constitution, had been violated and it reinstated him to the job of cabin attendant. At the time, discrimination on grounds of HIV status was not prohibited by statute, and the Constitution did not specifically outlaw discrimination on this ground. The most significant feature of the Court's judgment was the reliance placed on human dignity: "at the heart of the prohibition of unfair discrimination is the recognition that under

[82] *McKinley v B.C. Tel.* [2001] 2 S.C.R. 161, see especially Iacobucci J. at 188–9; *cf. Reda v Flag Ltd* [2002] I.R.L.R. 747 (PC), where it was held that an unqualified power to dismiss without cause could not be qualified by the implied obligation of trust and confidence.

[83] [1964] A.C. 40, HL.

[84] [1971] 1 W.L.R. 1578, HL.

[85] Lord Justice Sedley, *Freedom, Law and Justice* (Sweet & Maxwell, London, 1999), p.36–7.

[86] [2000] B.H.R.C. 571.

our constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired where a person is unfairly discriminated against." In Britain, discrimination on grounds of HIV status will be regarded as a "disability" once the Disability Discrimination Act 2005 is brought into operation. My argument is that so long as there is not a statute covering the whole field of arbitrary discrimination, a court would be entitled to have regard to the "fundamental principle" of equality. This would not be particularly novel. Ten years before the Sex Discrimination Act came into force, the Court of Appeal ruled that the then policy of the stewards of the Jockey Club in refusing to give trainers' licences to women was void as against public policy.[87]

A final example relates to the fundamental right to freedom of association. In many ways this is the most crucial right of all. In his 1972 lectures, Kahn-Freund remarked that "as a power countervailing management the trade unions are much more effective than the law ever has been or can ever be."[88] Individual legal rights for workers are usually only written on paper unless the aggrieved worker has the support of others at the workplace. Individual rights are not some kind of substitute for collective power. To be effective, they need trade unions to act as their custodians. The primary source of principle in the United Kingdom in this respect is Art.11 of the ECHR which guarantees freedom of association including the right to protect one's interests through trade union membership. The recent decision of the European Court of Human Rights in the *Wilson and Palmer* cases[89] has shown that this fundamental principle embraces not only the right to have a trade union make representations on one's behalf, but also gives a right to be represented by the union in regulating relations with the employer. Although this does not give a right to collective bargaining (one of the ILO's "core rights"), the

[87] *Nagle v Feilden* [1966] 2 Q.B. 633, CA. Lord Denning MR derived this from "a man's (sic) right to work at his trade or profession [which] is just as important to him as, perhaps more important than, his rights of property." Danckwerts L.J. described the rule as "restrictive and nonsensical". See B. Hepple, *Race, Jobs and the Law in Britain* (2nd ed., Penguin, Harmondsworth, 1970), pp.251–2.

[88] O. Kahn-Freund, *Labour and the Law* (3rd ed., Stevens, London, 1983), ed. by P. Davies and M. Freedland, at p.12.

[89] [2002] I.R.L.R. 128; see generally K.D. Ewing, "The Implications of *Wilson and Palmer*" (2003) 32 I.L.J. 1. There has been an analogous widening of the interpretation of "freedom of association" in the Canadian Charter of Rights in *Dunmore v Ontario (Attorney-General)* [2001] 3 S.C.R. 1016, 207 D.L.R. (4th) 193 (SCC); see J.Fudge, "Labour is not a Commodity: The Supreme Court of Canada and the Freedom of Association" (2004) 67 *Saskatchewan Law Review* 425.

decision is significant in recognising that the individual right also has a collective dimension entitling unions to seek remedies for their violation. The courts—in this case fulfilling their obligations under the Human Rights Act—may well be called upon to decide whether the Employment Relations Act 2004 has properly given effect to the *Wilson and Palmer* decision.

If there are, as I have argued, developing common law principles of fairness, good faith, equality and freedom of association, the consequences for the interpretation of statute and common law are these. First, the statute needs to be purposively construed to see if it embodies these principles. Second, if it does, we have to ask whether the statute has taken over the whole of the area covered by the principle and removed it from further common law development. I have already given my reasons for believing that the unfair dismissals legislation did not take over the area of compensation for psychiatric injury arising from the manner of dismissal. Third, where it is not clear that Parliament has occupied the field, then the judges are entitled to resort to the fundamental principles I have enunciated. The common law could fill the legislative gap.

This leaves the most difficult question of all. Are these fundamental human rights derogable downwards? Could they be excluded by agreement? If dignity, respect and equality are fundamental human rights, then it is difficult to see how they can be. It is not radical to suggest that certain core rights are inderogable. After all, the courts have held that at common law trade unions cannot contract out of the principles of natural justice in their rule books when dealing with individual members[90]; and covenants unreasonably restricting post-employment competition can be ruled unlawful.[91] It might be better to describe these rights as *incidents* of the contract rather than "implied terms". Mr Justice Lindsay has argued persuasively that a contract that purported to exclude the *incident* of mutual trust and confidence would be incompatible with the very notion of a contract of employment.[92] The same could be said of the other fundamental rights I have described.

[90] *Edwards v SOGAT* [1971] Ch.354; *Abbott v Sullivan* [1952] 1 K.B. 189 at p.198; *Lee v Showmen's Guild of GB* [1952] 2 Q.B. 329 at p.342. The legal basis for this remains uncertain: see P. Elias and K. Ewing, *Trade Union Democracy: Members' Rights and the Law* (Mansell, London, 1987) at pp.34–44, and S. Deakin and G.S. Morris, *Labour Law* (3rd ed., Butterworths, London, 2001), p.848.

[91] Deakin and Morris, *op.cit.*, pp. 342–6.

[92] Mr Justice Lindsay, "The Implied Term of Trust and Confidence" (2001) 30 I.L.J. 1 at pp.9–10.

To conclude these lectures, I have argued that the rational expansion of legal rights can be reconciled with global competitiveness, not by engaging in a deregulatory race to the bottom in labour standards, but by developing rights-based regulation of the European and British labour markets. I have suggested that the EU Charter of Fundamental Rights is capable of filling the gaps in rights-based regulation to a significant extent in the implementation of EU social and employment policies by the Member States. Finally, I have proposed that the structural problem of British employment law can be overcome, even in the absence of a comprehensive employment code, by the courts continuing to develop the principles of fairness, good faith, equality, and freedom of association to fill the gaps in statutory rights.

The ILO has proclaimed a universal goal of achieving "decent work" to "promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity."[93] This ambitious goal may be considered by many to be utopian. Yet the revolution in global trade opens enormous opportunities for economic growth and widening prosperity. The urgent task for employment law, at local, national and international levels is to provide the framework of rights within which these benefits can be enjoyed by everyone.

[93] International Labour Organisation, *Decent Work: Report of the Director-General* (ILO, Geneva, 1999).

INDEX

Rights at Work:
Global, European and British Perspectives

By Sir Bob Hepple QC, FBA

The language and philosophy of individual legal rights have become increasingly pervasive and important in our society. This is nowhere better illustrated than in the world of work. In this book, based on the 56th series of Hamlyn lectures, Sir Bob Hepple discusses three related and controversial issues concerning the growth of rights at work. First, can the expansion of legal rights be reconciled with global competitiveness? Secondly, what is the nature and significance of the Charter of Fundamental Rights, which forms part of the EU Constitution signed on 29 October 2004? Thirdly, how can judges in a common law system apply the employment rights granted by statute with those developed in the common law in a principled and consistent way?

He argues that the rational expansion of legal rights can be reconciled with globalisation, not by a deregulatory race to the bottom in labour standards but by developing balanced rights-based regulation of the European and British labour markets. He suggests that the EU Charter is capable of filling the gaps in rights-based regulation to a significant extent. Finally, he argues that the structural problems of enforcing employment rights can be met, even in the absence of an employment code, by the courts continuing to develop the principles of fairness, good faith, equality and freedom of association to fill the gaps in statutory rights. This book will be of interest not only to those interested in employment relations and in the development of legal rights, but also to others who want to find ways to reconcile economic integration in a globalised market economy with the ideal of social justice embedded in the rule of law.

About the Author: Sir Bob Hepple QC, FBA is a Barrister at Blackstone Chambers, Emeritus Master of Clare College, Emeritus Professor of Law in the University of Cambridge, and formerly Professor of English Law and Dean and Head of the Department of Laws, University College London.

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