Introduction

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I. Why rethink social and labour rights?

Social rights, such as the rights to work, to education, to adequate food and housing, to healthcare and to social security, are claims on society which are recognised as having special importance and universality. They are usually asserted by those without power against governments. Labour or employment rights, such as the rights to decent conditions of work, fair pay and job security, and the right to participate in trade unions and to engage in collective bargaining, are usually asserted against private holders of power, in particular employers. Both social and labour rights are referred to as 'fundamental' when they are 'put beyond the reach and revision of ordinary legislation and shifting democratic majorities'.[1]

The essays collected in this book rethink the nature of and justifications for social and labour rights, their constitutionalisation and legal enforcement. The perspectives are those of international, European and national human rights and labour laws. The authors have based their contributions on the varied experiences of several countries, in particular the United Kingdom, France, Germany, Italy, the United States, Japan and post-apartheid South Africa. Drafts of the papers were presented and discussed at a conference held in Cambridge on 21 July 2001 to mark the fortieth anniversary of the foundation of a course on Labour Law (at first called 'Industrial Law') in the Cambridge Law Tripos.

The rethinking of social and labour rights is necessary because the social, economic and political environments in which they were first conceived (e.g. in the Mexican Constitution of 1917, the Russian Constitution of 1918 and the German Weimar Constitution of 1919) have

[1] See Estlund, below, Ch. 8.

been fundamentally affected by modern globalisation and the expansion of the network society. These developments have diminished the power of nation states and national laws to control the flow of capital, finance, technology, information and migrants across their borders. The political legitimacy of modern globalisation is supported by the rhetoric of neoliberalism, a belief that market forces should rule and that the state should have a minimal role. Social rights at international, regional and national levels are increasingly seen as beacons of resistance against the disempowerment of local communities, trade unions and other social organisations which globalisation and neoliberalism entail. In their own different ways each of the contributors deals with this question: does the new rhetoric of social rights – as embodied in instruments such as the ILO Declaration of Fundamental Rights and Principles at Work (1998) and the EU Charter of Fundamental Rights (2000) – match the reality of the new world of market regulation and growing global inequality?

II. The weakness of current responses to globalisation

The scene is set by Professor Lord Wedderburn in the opening chapter. In 1961, when he initiated the Cambridge Industrial Law course, it was a distinctive feature of the law of the United Kingdom – unlike several other countries[2] – that there were no legally entrenched social rights. There was no right not to be unfairly dismissed, no rights against unfair discrimination, and (with limited exceptions) no universal rights to minimum pay or maximum working time. These matters were subject only to the contract of employment which masks the inequality of power and bargaining position in the relationship of employer and employee. Collective bargaining was seen as the principal means of offsetting this inequality. So confident were the unions of their industrial power that before 1970 they 'wanted nothing more of the law than it should leave them alone'.[3] Fundamental social 'rights' were seen as political values and not legal rights. The 'rights' to associate, to engage in collective

[2] In 1944, a committee appointed by the American Law Institute to draft an international bill of rights noted that the 'current constitutions' of many countries recognised social rights, e.g. forty in the case of the right to education; nine the right to work; eleven the right to adequate housing; and twenty-seven the right to social security.

[3] K. W. Wedderburn, *The Worker and the Law* (Harmondsworth, 1965), p. 9; 2nd edn (1971), p. 3; 3rd edn (1986), p. 1.

bargaining and to take industrial action depended on fragile negative immunities granted by Parliament against common law liabilities. Reflecting this reality, the syllabus devised by Wedderburn took students through the analysis of the complex common law, but it also went behind this to probe the social policies and ideology of the law.

In Chapter 1, Wedderburn examines where we have travelled in the United Kingdom since the days when labour rights were dependent upon what Kahn-Freund characterised as collective laissez-faire. Wedderburn argues that it was wrong to vulgarise the idea of 'abstention of the law' into some kind of shorthand for an 'absence' of law or an impotence of the law to change the relations between labour and capital. But the very structure of British collective labour law, built on a 'fabric of liberties and "immunities" from common law illegalities and an incomplete excape from master and servant law, was at the end of the twentieth century unlikely to provide an easy modern basis for such fundamental labour rights as could be found in France, Italy or Germany or in the ILO Conventions'.

In seeking an 'alternative labour law', Wedderburn is critical of the contemporary focus on 'regulation', which – even when it leads to the conclusion that some fundamental labour rights are necessary – 'cannot in itself determine the value judgements in assessing any "proper" balance between freedom and subordination'. The school of thought which concentrates on regulation for the purposes of competitiveness puts at centre stage the individual employment relation and seeks a rationale for labour market regulation in 'market failures' and the limited correction of 'unacceptable' distributive outcomes. This frame of reference, Wedderburn argues, 'ignores the reality of modern power, especially in an age of global capital'. He examines the post-1997 labour law measures introduced by New Labour in the United Kingdom and finds in them a continuation of the 'fundamental defect of our labour law', namely 'extravagant individualism'. Paradoxically, 'the English common law notion of individualism, based more on ideas of property than of citizens' formal equality, has not given us any parallel protection for the dignity or privacy of the individual worker'. In this the United Kingdom compares unfavourably with countries such as Italy and Germany, where a combination of fundamental rights and collective bargaining or (in Germany) the works council's powers of codetermination have provided individuals with greater protection.

Globalisation, according to Wedderburn, is the reason why 'the active pursuit of human rights and labour standards is so crucial'. 'Given the conflicting aims of multinationals and weakened states, all means must be considered whereby fundamental labour standards and principles can be created, upheld and – somehow – enforced in the global market.' In this, 'few things are as important as discovering new ways of fostering "countervailing workers' power" '. He finds little comfort in EU law, which is dominated by competition law, despite well-intentioned attempts to generate new social and labour rights. However, he urges a continuation of the search 'for new mechanisms for the enforcement and improvement of international and national labour standards'.

At the centre of any such consideration stands the International Labour Organisation (ILO). During the interwar years and in the first decades after the Second World War, the ILO adopted international minimum standards on a wide range of matters which might be described as social rights, including freedom of association and the right to organise trade unions, the elimination of child labour and forced labour, and freedom from discrimination. Professor Paul O'Higgins, who led the Cambridge Labour Law course from 1964 to 1984, ensured that students were made aware of the activities of the ILO, the OECD and the Council of Europe. He also broadened the students' approach by arranging lectures on industrial relations, as well as the traditional law lectures.

In Chapter 2, O'Higgins explains the motivations for ILO standards, in particular the fears of social revolution and of 'social dumping'. He examines critically the relationship of ILO standards with social rights established under later regional institutions, in particular the Council of Europe's European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), its 'large footnote' the European Social Charter of 1961 (ESC) (revised 1996), the Treaty on European Union (TEU) and the Treaty establishing the European Community (EC Treaty). There is a disturbing lack of ratification of ILO conventions, and even states which have ratified them, including the United Kingdom, fall a long way short of meeting their obligations. The relevance of many of the standards may be queried because of the failure to adopt instruments directly addressed to the multinational corporations. O'Higgins's conclusion is that there is considerable confusion between the different standards-setting bodies. In his view the primacy of

standards set by the ILO should be ensured by some overall supervisory authority, preferably a court, where authoritative interpretations could be given.

III. The potential of fundamental social rights in the EU

The most recent attempt at a regional level to develop fundamental social rights has occurred in the EU, with the adoption at Nice in December 2000 of a Charter of Fundamental Rights, including many social rights in addition to civil and political rights. In Chapter 3, Professor Manfred Weiss examines the political and legal background and possible implications of this Charter. Fundamental Community rights have been an issue since the early days of the EC. The EC Treaty accorded primacy to the four freedoms of movement: of capital, goods, services and labour. Accordingly, there was a danger of deconstruction of fundamental rights at national level. This led to a celebrated controversy between the European Court of Justice (ECJ) and the German Federal Constitutional Court. Only when it was established that the ECJ's interpretations in Luxembourg would not conflict with those of the European Court of Human Rights in Strasbourg did the German court accept the supremacy of EC law. This respect for the Council of Europe's instruments is now confirmed in the TEU. In view of this, why was a new Charter considered to be necessary?

Weiss suggests a number of reasons. One is the need for greater transparency, given the lack of clarity in the TEU and the EC Treaty as to the extent to which the European Social Charter (ESC) and Community Charter of Fundamental Social Rights of Workers (adopted in 1989) are to be observed. Another reason is that the integration of fundamental social rights into the TEU and EC Treaty 'was understood to be a tool to guarantee the social profile of the Community' – which has so far had a pragmatic and weak approach to social policy – 'and to make sure that the possibility of opting out in this area was no longer available'. Weiss defends the case for putting social rights on the same footing as the classical civil rights. However, he is critical of the chapter of the EU Charter on 'Solidarity', which contains some of the social rights, because it puts in one and the same chapter political goals and subjective (legally enforceable) rights. There is also a 'dramatic inconsistency' between the misleading Article 28 of the Charter, which obliges the Community to

promote the right to negotiate and conclude collective agreements and to take collective action 'at appropriate levels', and Article 137(6) of the EC Treaty which denies the Community any legislative competence to do this. In some ways the Charter does not go as far as existing Community law (e.g. in respect of rights to information and consultation), and it includes some rights (e.g. on working time), which cannot be regarded as 'fundamental', while excluding or being ambiguous about others (e.g. the rights as workers of third-country nationals).

Weiss believes that the EU Charter is important in several ways: as a signal to the candidate EU states; as a guide to interpretation of the Treaties for the ECJ and national courts (between February and July 2001, it had already been relied upon in eight cases by Advocates-General, once by the Court of Justice and once by the Tribunal of First Instance, as well as by courts in Spain and Germany[4]); and as a source of inspiration for new Community measures. The only remaining question, in Weiss's view, is not whether, 'but rather when, how, and by what procedure' the Charter should be integrated into the Treaties.

The EU Charter has the potential, Weiss suggests, to provide a source of 'constitutional patriotism' (in Habermas's language) in the EU and, thereby, a safeguard against excessive nationalism. Above all, in his view, 'social policy can no longer be understood merely a marginal annex to EU policies'. But how then are social rights to reconciled with the economic freedoms which are at the heart of the EC? This is the crucial question to which Chapter 4 on 'Market freedom and fundamental social rights', by Professor Silvana Sciarra, and Chapter 5 on 'Corporate governance, European governance and social rights', by Catherine Barnard and Professor Simon Deakin, are devoted.

Sciarra, like Weiss, argues that labour law is central to European integration. While emphasising the need to re-establish social priorities in a 'market without a state', she also accentuates elements of compatibility of social rights with market principles. Her arguments are grouped under four heads: re-forming, re-balancing, re-establishing and re-thinking. First, the inclusion of labour law reforms in macro-economic policies, far from heralding the disappearance of this discipline, provides an opportunity to find new legal methods to ensure that efficiency is combined with the achievement of social goals. Secondly, labour law contributes

[4] Note from the Commission's Legal Service, July 2001.

to the re-balancing of economic and social forces which becomes necessary when there are drastic changes in government or in the equilibrium between management and labour. In place of a sharp conflict between market freedom and social rights, labour law offers a new dimension to the market. Not only is it possible to make an economic case for social rights, but it is also arguable that the different systems of social and labour rights across the EU enhance the competitiveness of the EU as a whole, provided core labour standards are maintained.

Sciarra pays particular attention to collective bargaining as 'the most consolidated and powerful institution contributing to bringing some equilibrium to unbalanced economic situations'. This leads, under her third head, to a detailed analysis of the European Court of Justice's decision in the *Albany* case, in which competition law and labour law were reconciled.[5] Fundamental social rights and collective bargaining, which are long established in national legal systems, were 're-established' in the European legal order. Finally, she argues that re-thinking is necessary in order to transform the weak processes of European labour law into permanent gains. Two examples are the involvement, under the Employment Title of the revised EC Treaty, of the social partners in national and supranational employment policies, and the consultation of civil society in the drafting of the EU Charter of Fundamental Rights. The underlying issue in both cases is that of strengthening the legitimacy of EU policies and law. This, in turn, rests on the 're-birth' of the discipline of labour law 'which over the years has so notably expanded the breadth of European legal culture'.

Barnard and Deakin continue this theme. They argue that social rights are a means of controlling or channelling regulatory competition. They take a procedural, as distinct from a substantive approach to social rights. According to this approach, 'reflexive harmonisation' is needed in the EU 'to preserve a space for local-level experimentation and adaptation, contrary to the "levelling down" agenda of negative harmonisation, but also in contrast to the idea that harmonisation in the form of a "European labour code" must occupy the field at the expense of local autonomy'. The essence of this approach is that regulatory interventions are most likely to be successful 'when they seek to achieve their ends not

[5] Case C-67/96, *Albany International BV* v. *Stichtung Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

by direct prescription, but by inducing "second-order effects" on the part of the social actors'. 'Reflexive law' aims to encourage autonomous processes, in particular by supporting mechanisms for group representation and participation, rather than by imposing particular distributive outcomes.

Barnard and Deakin apply this approach first to the question of corporate governance in the EU – 'the system by which companies are directed and controlled' – in particular the role assigned to the various stakeholders and to workers' participation in the corporate enterprise. They examine the company law harmonisation programme and the diversity of company laws in the EU member states. A vital issue is whether the shareholder-orientated model which is associated with US and (to a degree) British practice, or the continental model involving some degree of worker participation, will become dominant. They link this issue with that of European governance, in particular the European Commission's strategy of involving new players, such as regional and local authorities, social partners, non-governmental organisations (NGOs) and third-sector associations. They examine the involvement of the social partners in the process of social legislation since the Maastricht Treaty in 1992, and find that more emphasis has been placed on these procedures than on the quality of the end result in terms of substantive social rights. They identify the risks of lack of representativity, and the alienation of individual citizens who are spectators in a discussion 'between elites for elites' which 'does not furnish them with detailed, legally enforceable rights'. For these reasons, they advocate a core of protection based on substantive rights alongside a framework for devolved law-making which recognises the role played by institutions of civil society.

IV. Constitutionalisation and enforcement of social rights: some comparisons

The remaining five chapters focus on the comparative experience of the constitutionalisation and legal enforcement of social rights. In Chapter 6 Ivan Hare considers whether social rights should be protected as constitutional rights, concentrating on four basic rights: to education, housing, health care and minimum income. His basic theme is that although many of the traditional objections to constitutional protection

of social rights are either simplistic or overstated, there are substantial principled and pragmatic obstacles to granting to the judicial branch the ultimate decision-making power over the extent of such rights. Hare argues that there is judicial reluctance to impose positive obligations on the state in the fields of civil and political *and* social rights, because of the difficulty in quantifying and balancing substantial obligations on the state within the confines of the judicial process. A related but distinct point is that judges are thought to be particularly ill-suited to substitute their view for that of elected politicians and professional civil servants on how spending on social programmes and other areas of government expenditure should be balanced.

Hare examines recent decisions of the UK courts, the European Court of Human Rights and the South African Constitutional Court to see how far social rights are already enforced. He finds that the UK judicial review cases where some protection has been given are all explicable on traditional administrative law grounds and do not support the case for constitutional as opposed to statutory protection for social rights. The Strasbourg court has given an expanded meaning to 'civil rights' so as to include some social benefits, but this has purely procedural consequences and does not affect questions of distribution. Moreover, in recognising social rights as legitimate objectives of state policy which can limit the right to property, the Court of Human Rights has not upheld any positive social right. The post-apartheid South African Constitution explicitly recognises social rights. But an examination of two leading decisions of the Constitutional Court leads Hare to conclude that it has applied only the familiar standards of administrative law based on reasonableness, rather than an intense form of judicial scrutiny appropriate to the vindication of an inviolable right. For Hare, the case for the constitutionalisation of social rights is not proven.

Whether or not the new EU Charter of Fundamental Rights is part of a new constitutional framework for Europe, there are rich lessons to be drawn from the experience of European countries in respect of the legal efficacy and significance of fundamental social rights. In Chapter 7, Antoine Lyon-Caen draws some general hypotheses from this experience. His starting point is a critique of the traditional distinction between *droits-libertés* and *droits-créances*. The former are negative defences against the state, while the latter, usually identified with

social rights, require positive intervention by the state. Lyon-Caen points out the necessary complementarity between freedoms and social rights: social rights enable people to make the choices protected by the freedoms. Moreover, social rights take effect in a variety of ways: as a means of orienting the interpretation of other legal rules, as a method of justifying rules, mechanisms and institutions, as a means of challenging the legality of rules laid down by public authorities which conflict with social rights (an impeding effect known in France as the jurisprudence of the *cliquet*), and as a way of securing access for individuals to public facilities and services. The legal significance of social rights in the European context is increasingly as a vehicle of change. One does not 'apply' social rights as if they have automatic effects. They have to be 'implemented', that is translated, interpreted and mobilised. They are principles of action, provoking not a top-down hierarchy of norms, but rather a complex exchange between a plurality of actors. This idea is closely linked to the current movement (referred to earlier by Barnard and Deakin) towards the proceduralisation of social rights. Lyon-Caen's reinterpretation aims to provide a framework for recreating a link between rights of positive status (*droits-créances*) and the rights of citizens to take an active part in defining the conditions of collective life.

In Chapter 8, Professor Cynthia Estlund presents an American perspective on fundamental labour rights. Just how fundamental are American labour rights and how did they get that way in a country where the market is ascendant and there is believed to be a receding role for state regulation? Federal constitutional rights play essentially no role in labour matters. Part of the explanation of this is the state action requirement – the rights secured by the federal constitution (apart from the 13th Amendment's ban on involuntary servitude) operate only against government. In private sector employment constitutional rights arise only when the government intervenes, and this it rarely does. Estlund recounts the pivotal history of 'the right of employers to be left alone' which still shapes American consciousness on the role of the law. She concludes that 'the net result has been a system of collective labour relations that has been almost entirely insulated from ordinary democratic politics, yet equally insulated from the potentially progressive influence of constitutional commitments to liberty and equality'. 'By leaving more to the domain of contract, the American labour market has gained flexibility, and perhaps job growth, while American workers