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Rights at work

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Rights at work

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Preface

This Discussion Paper is part of a set of special studies on Decent Work commissioned under the Education and Outreach Programme of the International Institute of Labour Studies. The Programme seeks to develop pedagogical materials on social and labour policies for the promotion of Decent Work. The project output is addressed to officials in government, trade unions and employers' organizations as well as to the academic and policy community interested in the well-being of all in the world of work.

The special studies focus on each of the four dimensions of Decent Work: Rights at Work, Employment, Social Protection and Social Dialogue. Together they explore in depth the concepts, typologies and indicators pertaining to the different dimensions of Decent Work. For the purpose of preparing the studies, the Institute has secured the services of scholars with specialization and teaching experience in the core disciplines of the ILO.

The Institute wishes to thank Professor Bob Hepple, Master of Clare College, Cambridge University for having prepared the present paper dealing with Rights at Work. Other Discussion Papers being brought out under the series are by Martin Godfrey: *The Employment Dimensions of Decent Work*, Sarosh Kuruvilla: *Social Dialogue for Decent Work* and Ashwani Saith: *Social Protection: A Development Perspective*.

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Executive summary

1. Introduction

This paper aims to develop a framework for thinking about rights at work, particularly in response to the argument that rights, such as those articulated in ILO Conventions, are of little relevance to the needs and conditions of most developing countries.

2. Concepts

a) Rights and goals

The rights of working people are based on ideas of social justice. Even if not legally enforceable, moral rights are claims to be treated with the dignity that befits a human being. Personal rights (*droits subjectifs*) – such as the right of association and freedom of speech – are negative rights in the sense of protecting the autonomy of the individual from coercive interference. On the other hand most social rights – such as the right to work, the right to social security and health care – require positive action by the state, and have to be progressively realized.

b) Rights and obligations

Another approach is to consider the agencies which are obliged to provide workers' rights (e.g. the state, employers). This makes rights specific, and allows us to determine who is to grant and who is to benefit from the right in question. So the rights and obligations of employers and workers (the “wage-work” bargain) are mutual. When discussing social rights we should carefully distinguish between those which are simply goals or aspirations and those which are effective because a correlative obligation exists.

c) Substantive and procedural rights

Substantive rights determine the conditions of labour (e.g. wages, hours). Procedural rights shape the processes by which substantive rights are created and enforced. In contemporary labour law, the emphasis is on procedural rights because it is widely believed that desired outcomes are best achieved by enabling employers and workers to make and enforce substantive rules, and that the role of the state is to ensure that certain minimum safeguards exist.

d) Principles and standards

Rights are derived from principles, such those set out in ILO instruments. The latter are usually referred to as international labour standards. These are considered to be universal but their application has to be flexible, so as to take account of different levels of development. A variety of flexibility clauses can be found in ILO Conventions.

3. *Historical and comparative models of rights at work*

The achievement of rights at work in each country is the outcome of complex, protracted struggles between different social groups. It is in changing power relationships that we can find the key to understanding the nature and extent of rights at work. The four models or ideal types described below will help clarify the different approaches to rights in various historical contexts.

a) *The liberal state: Toleration and protection*

Liberal constitutional states that emerged in Europe in the nineteenth century promoted ideas such as the freedom of contract and formal equality of employer and employee. Trade unions and collective bargaining came to be tolerated or even recognized. Protective legislation was enacted for vulnerable groups such as children and women, but this was generally not couched in the language of rights.

b) *The social democratic welfare state: Equality, security and other workers' rights*

This model emerged, for example in the German Weimar Republic (1919-33), and in the Mexican Constitution (1917). This gave constitutional protection to workers' rights and recognized collective solidarity as a means of protecting the individual. The aim was to achieve a fair balance between employers and workers. The idea of rights changed the character of protective legislation: it was no longer seen as the gift of an enlightened ruling class but as the right of the working people. However, some democratic states, especially the United Kingdom until the 1960s and other countries following the common law model, placed the emphasis on freedom of contract and voluntary collective bargaining rather than on individual rights. After the Second World War, ideas of social citizenship and social justice influenced the ILO and regional organizations such as the Council of Europe. A recent comprehensive statement of rights is found in the EU Charter of Fundamental Rights (2000). Another important feature of welfare states was the notion that in return for worker subordination to the commands of management, there would be a guarantee of security and participation.

c) *The neo-liberal state: Deregulation*

The post-war consensus has broken down since the 1970s. It is now generally necessary to justify regulatory interventions in the labour market, and there is a heavy burden of proof on those wishing to maintain workers' rights. Freedom of contract and of property are seen as the best way of raising standards of living and levels of employment.

d) *The development model: Rights-based regulation*

Critics of deregulation have put forward alternative versions of regulatory theory with a view to improving economic performance. This new model accepts that special regulation of employment, including a core of basic workers' rights, may be necessary to correct market failures and to forestall unacceptable market outcomes. Labour market institutions which encourage high trust and partnership are seen as leading to superior economic performance.

4. Key questions

a) *Can rights at work be reconciled with competitiveness?*

It is frequently argued that liberalization of trade and investment throws labour and welfare systems into competition with each other. This is put forward as a justification for limiting employment rights and their enforcement. There are several objections to this line of argument: (1) firms are not likely to relocate to countries with lower nominal labour costs if those lower costs simply reflect lower labour productivity; (2) if labour costs do not reflect relative productivity in a particular country, relocation would increase demand for labour and wage levels would rise; (3) low labour cost strategies trap countries into a downward spiral of repeated cost-cutting rather than giving them an incentive to increase investment in technology and skill creation.

b) *What is the relationship between workers' rights and human rights?*

Some workers' rights, such as freedom of association, freedom from forced and child labour and non-discrimination, are regarded as basic human rights. But, for a number of reasons, movements for workers' rights and human rights have followed parallel tracks. In particular, there is disagreement as to whether social and labour rights are human rights at all; NGOs have tended to focus on human rights while trade unions have concentrated on economic issues; and there is scepticism about the value of human rights which individualize interests that ultimately depend on collective solidarity. Since human rights cannot exist without social justice, it is argued that they should be formulated in a way that fits into a general framework of social justice.

c) *How can workers' rights contribute to the alleviation of unemployment, poverty and inequality?*

A conception of workers' rights limited to the classical model of subordinated workers and their employers does not embrace the wider interests of the unemployed, the working poor and independent producers in the formal and informal economies of developing countries. Poverty should be seen, as Sen argues, as the deprivation of basic capabilities. In pursuing the goal of equal capabilities we need to consider not only income but also opportunities to pursue a career of one's own, freedom of association, and the right to participate in economic, social and political life.

d) *How should rights at work be progressively realized?*

The starting point for countries that wish to realize certain social and labour rights is to distinguish three levels of obligation: (1) the obligation to *respect* a right; (2) the obligation to *protect* a right; and (3) the obligation to *fulfil* a right. The first is negative and is relatively cost-free, so it can be implemented immediately. The second means that the state must prevent violations by third parties (e.g. employers) either by establishing obligations of conduct or obligations of result. This may require some allocation of resources. The third obligation is a positive one and requires real resources, but these may come from sources other than the state – for example technical cooperation, partnerships with international organizations and so on. Action plans to realize the rights, within available resources, need to be conceptualized, implemented and monitored. (See the exercise after section 5.)

5. Policy options for implementing rights at work

a) The pillars of a new institutional structure for rights at work

The classical models of employment rights are plainly untenable in the developed countries and even more so in the developing countries. New directions may be found in a synthesis of traditional models with the modern approach of rights-based regulation as well as human rights theory. Such a synthesis needs to be based on at least four pillars: (1) dialogue between the many different orders that shape power relations (international, regional, national, corporate and local); (2) a new conception of the law of work embracing both employed and independent labour and not privileging certain forms of paid work; (3) the unification of public and private law so as to recognize emerging forms of collective representation as the custodian of individual rights; and (4) ending the traditional divergence between labour rights and human rights, utilizing ILO Conventions as the basis for a new culture of social rights.

b) Soft law or hard law?

Rights at work increasingly take the form of non-binding recommendations, corporate codes of conduct and guidelines (soft law). These instruments may help effective enforcement by amplifying legally binding standards and by recommending voluntary action that goes beyond minimum requirements. However, they have a negative effect when they are used as an alternative to binding instruments. Experience shows that codes do not succeed unless backed by sanctions. Regulation needs to be responsive to the different behaviour of various organizations, and must allow for a progressive escalation of sanctions to deter even the most persistent violator.

c) Public or private enforcement?

The growth of individual legal rights has led to an explosion of litigation in many countries. Alternative dispute resolution procedures, such as mediation and arbitration, are generally cheaper, speedier and more informal than court-based litigation. It is necessary to ensure that such alternative procedures are not simply used by corporate management to increase control and to deny rights, rather than to promote the public policy objectives of legal rights. The best way of doing this is to build low cost, speed, informality and conciliation into public law systems of rights enforcement.

d) How should restrictions on collective solidarity be redefined?

Transnational industrial action is subject to severe legal restrictions, even outright prohibition, in most countries. It is argued that where the decision-making power of enterprises crosses national boundaries, workers should be able to express solidarity beyond those borders. In particular, national laws should allow sympathy action, as a last resort, where there is a common interest between the workers involved in the primary and secondary actions.

1. Introduction

The purpose of this paper is to develop a framework for thinking about rights at work.

The ILO's model of *decent work* is to "promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity" (ILO, 1999). This has four elements: employment, social security, social dialogue and rights at work.

The attainment of rights at work, like the other objectives, is influenced by many aspects of economic, social and institutional structure (Ghai, 2002). Indeed, it is often argued that the concept of rights at work, as derived from ILO standards, is based on the classical employer-employee model in industrialized market economies, and that this has little relevance to the needs and conditions of most developing countries. The great majority of those countries share characteristics in which the language and culture of rights seem out of place. These characteristics are "widespread absolute poverty, extensive under- or unemployment, limited industrialization and dualistic economic structures" (Ghai, 2002, p. 6). There is a fear that the implementation of rights at work will put developing countries at a competitive disadvantage in international trade and in attracting foreign direct investment. This fear is reinforced by the ideology of neo-liberalism and deregulation: the belief that the state should have a minimal role and that "free" and flexible labour markets, supported only by private law rather than public intervention, are the best or only way to ensure economic development and, in the long run, improved conditions of work.

In order to clarify thinking on these matters, the paper starts with a discussion of the basic concepts of rights, goals, obligations, principles and standards. Secondly, four historical and comparative models of rights at work are critically assessed. These models are: (a) protection and toleration in the liberal state; (b) equality, security and other rights in the social democratic welfare state; (c) market regulation in the neo-liberal state; and (d) rights-based regulation in the emerging development model. Thirdly, the paper considers a number of controversial questions: (a) can rights at work be reconciled with competitiveness? (b) what is the relationship between workers' rights and human rights? (c) how can these rights contribute to the alleviation of poverty and inequality? and (d) how can these rights be progressively realized? In the final section, there is a discussion of policy options for realizing rights at work. This starts with a general review of the pillars of a new institutional structure for rights at work, and then considers some specific issues: soft or hard law? public or private enforcement? and how should restrictions on collective solidarity be defined?

2. Concepts

a) Rights and goals

What do we mean when we say that all working people have *rights*? The word "right" is ambiguous. First, there is a sense in which to have a right is to have a claim which can be enforced in a court of law, that is a *legal right*. To say that I have a right not to be dismissed without good cause, or a right to be paid in full the wages agreed with my employer is to assert a claim that forms part of positive law. If it cannot be enforced it is not a legal right.

A second sense of the word "right", which is different from a legal right, is that of a *moral right*. If I say that I have a right to decent work, or to fair pay, this does not mean that I am able to enforce that right. On the contrary, if I assert a moral right to decent work or fair pay

it is likely that I do not think I enjoy these rights. We are most acutely aware of a moral right when it is not being conceded. *Moral rights* generally precede their recognition as *legal rights*. This does not mean that they cannot be realized without legislation. Voluntary arrangements and a general social consensus may support such moral rights without legal intervention. Legal rights become necessary when moral rights are not being observed. (In section 3 below there is a discussion of the processes by which rights have become recognized).

The rights of working people are based in ideas of social ethics, of what is considered to be good or just. We can find examples of what the international community believes to be good in documents such as the UN Declaration of Human Rights, the International Covenants on Civil and Political Rights (ICCPR), and on Economic, Social and Cultural Rights (ICESCR), and in the Conventions and Recommendations of the ILO. The Constitutions of many countries set out the basic rights of citizens. Although these are not infrequently a mere façade (as they were in the USSR Constitution), the iteration and formulation of moral rights in these documents gives them considerable political legitimacy. But the mere fact that rights are asserted in this way does not in itself amount to an ethical justification for them.

In ancient Greek philosophy, rights were justified on two main grounds. First, some rights, such as to equal freedom of speech, derived from an individual's status as citizen of a city-state. Secondly, rights were justified as deriving from the order of nature or from the nature of man, rather than from society or from history. These "natural rights" belonged to all free men at all times – slaves and women, however, were not included. Every free man everywhere was entitled to his "natural rights" by virtue of being a rational human being. In the European Age of Enlightenment the idea of natural rights was revived as a powerful argument against the divine right of kings and political authoritarianism. A political regime was regarded as legitimate only if it was based on these natural rights. Natural rights were said to derive from natural law, that is what is universally and immutably regarded as "good". What is "good" could be discovered by human reason. Natural law was regarded as a "higher" law than any law made by political authorities. Since natural rights, derived from this higher law, were inherent in the human condition, there was a smooth transition in the second half of the twentieth century from this to the phraseology of *human rights*.

The continuity from natural rights to human rights has had some important consequences. First, lists of rights have expanded as economic, social and political circumstances have changed. Starting in the eighteenth century with "life, liberty and property", by the mid-twentieth century the UN Declaration of Human Rights itemized 30 human rights, and there has been an explosion of rights in the second half of the twentieth century as economic, social, cultural, labour and environmental rights have been added. Secondly, natural rights are seen as assertions of *individual autonomy*. Their function is to protect the individual from arbitrary interference by the state or other coercive bodies. For this reason traditional rights are expressed as *negative rights*. For example, the right to life did not involve commitment to a universal public health service or a safe environment. The inclusion of social, economic and labour rights among the list of human rights has been one of the most controversial areas of debate. This is largely because they require positive action by the state and other bodies to provide resources for their realization, on a far greater scale than is needed to secure observance of negative rights. For example, the right to work might require the state to provide work and training or at least to take measures to ensure full employment.

A third consequence of the thinking based on natural rights is that a right is recognized only if it is demanded by *justice*. Unlike a legal right, which is a right because it can be enforced, a natural right is justified by natural law (see above). It is precisely this reliance on natural law which has led to attacks on the idea of moral rights from both right and left. Conservative thinkers like Edmund Burke and David Hume denied that natural rights could be derived from natural law and disliked the "rights of man" because this idea led those "destined to travel in the obscure walk of laborious life" [i.e. the common people] to believe that they

were entitled to things which they could not possibly have. Liberal thinkers like the Utilitarian Jeremy Bentham, too, were scornful: “from real law comes real rights; but from imaginary law, from ‘law of nature’, comes imaginary rights...Natural rights is simple nonsense, rhetorical nonsense, nonsense upon stilts” (Bentham, 1843). Bentham was a radical. He objected to natural rights because they took the place of positive legislation from which legally enforceable rights are derived. By the end of the nineteenth century, philosophers and jurists generally came to agree that rights are based on utility, and that they are historically shaped by cultural and environmental factors unique to particular communities.

Although the idea of natural rights is no longer popular, the idea of human rights took root with the rise and fall of Nazi Germany and was renewed by dissidents in the communist states and by those struggling against colonialism and apartheid. The UN Declaration of Human Rights recognized two sets of rights: civil and political rights; and economic, social, and cultural rights. There are abiding disagreements about whether economic, social and cultural rights are “rights” at all (see section 4.b below).

To sum up, we can say that there are two conceptions of “rights”. First is the Western conception of *personal rights* (*droits subjectifs*). This focuses on the individual’s autonomy and protection from coercive interference. It is concerned with rights such as freedom of association and freedom of speech. The second twentieth century conception is concerned with *fundamental social objectives* and leads to the enumeration of rights such as the right to work, the right to social security, the right to adequate food, the right to health care, and the right to education. Although the lists of both personal rights and social rights are fairly systematic, they are not a complete statement of what is universally good or just, and they do not in themselves tell us which rights are to be given priority over others. For example, is the right of the unemployed to work greater than the right of those in employment? Labelling a particular right as “fundamental” simply begs the question as to why one right is more important than another. The only feasible way to uphold social rights therefore, is to recognize that they are not absolute, but have to be progressively realized.

b) Rights and obligations

There is another approach to rights, and that is to link them with co-related obligations. Any human right must have its counterpart in some obligation. The right to work is meaningless unless it is linked to an obligation on the part of the state to provide work. The right to equal opportunities is just loose talk if there is no obligation on anyone to ensure that it is fulfilled. Effective rights depend not on the claims of individuals, but on the existence of others who consider themselves in some way obliged to provide those rights. Several advantages are claimed for this approach (O’Neill, 1996, 2002). The first is that it overcomes one of the main objections to rights, that is their indeterminacy and high level of abstraction. By linking rights with obligations we can determine who is to give and who is to receive. The obligation must be described with reasonable certainty if it is to be acted upon. It may be a negative obligation, to desist from doing something, or it may be positive, to actively do something. But it has to be specific if it is to be secured; it must be what Immanuel Kant called a “perfect obligation”. Secondly, a right without an obligation cannot be enforced. Only a right which springs from an obligation is capable of being effective. Thirdly, the obligations approach focuses on the *relationships* between right-holders and bearers of obligations, rather than simply on those who claim rights. So it is less individualistic than simply talking about rights. Obligations are usually mutual: for example, an employer owes a duty to pay wages in return for the worker’s duty to perform the agreed work. We speak of a “wage-work bargain”. Employers and workers have rights *and* obligations. We may owe an obligation to the whole world, for example, not to make anyone perform forced labour; or obligations may be owed to individuals to carry out our

promises to them; or they may be owed to a specific class of people, such as our obligation to take reasonable care towards our neighbours or our work colleagues.

This insistence on a linkage between rights and obligations is not universally accepted. Amartya Sen (2000, p. 124) writes:

Why demand the absolute necessity of a co-specified perfect obligation for a potential right to qualify as a real right? Certainly a perfect obligation would help a great deal towards the realisation of rights, but why cannot there be *unrealised* rights?

According to this view a right may exist even though it cannot be realized because there is no specified person or agency to provide it. The fact that a right cannot be realized does not mean that it does not exist. This may appear to be simply a matter of language. But most lawyers and some distinguished philosophers believe that the close analogy between moral rights and legal rights is necessary if the ethical concerns of the human rights movement are not to be brought into contempt (O'Neill, 2002). The practical conclusion seems to be that when talking about social rights we should be careful to distinguish between those for which a correlative obligation exists, and those which are simply aspirations. We can measure the *extent* to which those aspirations or goals have been realized, even though they cannot be enforced.

c) Substantive and procedural rights

In broad terms *substantive rights at work* are those which determine the actual conditions of labour, such as minimum wages and maximum working time, and the right to equal treatment. *Procedural rights* are those which shape the procedures by which substantive rights are determined, such as the right to collective bargaining, the rights of workers' representatives, and the right to equal opportunities. One of the features of contemporary labour law is the emphasis on procedural rights which aim to encourage autonomous processes, in particular by supporting mechanisms for workers' representation and participation in corporate governance, rather than imposing particular substantive outcomes (Barnard and Deakin, 2002). This emphasis on procedural rights stems from the view that regulatory interventions are most likely to be successful when they seek to achieve their aims not by direct prescription but by enabling social actors (such as employers and workers) to make and enforce their own substantive rules. The objective is to encourage autonomous processes, in particular by supporting mechanisms for workers' participation.

d) Principles and standards

Rights are derived from principles. So the Constitution of the ILO sets out a number of principles of social justice, such as the principle of freedom of association, and the principle of equal remuneration for work of equal value. These principles are elaborated in Conventions and Recommendations, which also enunciate specific rights to give effect to the principles.

There is some lack of clarity in this respect between principles and *standards* (Murray, 2001, p. 11). The latter term is generally applied to the principles to be found in ILO Conventions and Recommendations, which are called *international labour standards*. The phrase *minimum standards* is applied to ILO standards which permit of higher standards, without any connotation that the standard is set at a low level. ILO standards are characterized by two features. First, they are universal and are intended to be applied in all member States that ratify the Convention. In the case of the Conventions set out in the ILO Declaration of Fundamental Principles and Rights at Work, the standards must be applied by all member States even if the Convention itself has not been ratified.

Secondly, the price of this universality is *flexibility*. If standards have to be universal, and therefore applicable to states whose level of development and legal approaches differ considerably from one another, the only realistic approach is to develop standards with sufficient flexibility so that they can be adapted to the most diverse of countries (Valticos and von Potobsky, 1994, paras. 96-105). A variety of flexibility clauses can be found in ILO Conventions, for example:

- An option as to which obligations are accepted.
- An option to specify at the time of ratification the level at which standards will be applied (e.g. as to minimum age, holidays with pay, etc.).
- An option to describe the scope of the persons or undertakings or industries to be covered (e.g. in relation to hours of work, wages and maternity pay).
- Allowing specific exceptions (e.g. allowing countries whose economy and medical facilities are insufficiently developed to have recourse to temporary exceptions in relation to health and social security).
- Using promotional language stating the policy to be pursued without specifying any particular rights, and providing guidelines in a Recommendation as to how the objective might be progressively realized (e.g. equal remuneration for women and men).
- Allowing flexibility as to the method of application, for example through collective bargaining or national legislation, or a combination of these methods.

3. *Historical and comparative models of rights at work*

One of the best ways to understand the relevance and application of rights at work in different countries and at different times is by the comparison of deductive “models” or “ideal types”. Models of this kind, freed from specific national features, help to illuminate the common tendencies and divergences in different countries, but they are not a substitute for close analysis of the actual circumstances in each country or locality at a particular time. Rights at work have not developed as a series of evolutionary stages, or as a “necessary” or “natural” response to capitalist industrialization. The achievement of these rights in each country was the outcome of complex, protracted and bitterly contested struggles (Hepple, 1986, p. 4). The comparativist has to examine the specific features of historical change in each country in order to explain differences in the extent to which rights were recognized. For example, why was the workweek or “pass” system a feature of labour markets in some countries but not others? Why was the 8-hour day achieved in some places by collective bargaining and in others by national legislation? Why is “protection” treated as a gift from the state in some periods and as a “right” in others?

In seeking answers to questions such as these one has to examine how particular rights came to be introduced into each country. Rights at work are the outcome of struggle between different social groups – monarchy, bureaucracy and middle class; bourgeoisie and aristocracy; bourgeoisie and working class; townspeople and country folk – and of the competing ideologies of conservatives, liberals and socialists, and of religious and secular groups. The rights which any particular group obtains are “not just a matter of what they choose or want but what they can force or persuade other groups to let them have” (Abrams, 1982, p. 15). The crucial element in the making of rights at work is *power*. Many of the demands by labour movements and reformers were unsuccessful because they were unacceptable to those with greater

economic and political power. It is in power relationships, which are rooted in social structure, that we may find a key to the achievement and denial of rights at work.

a) *The liberal state: Toleration and protection*

In pre-industrial societies the worker is a member of a closed society and a closed economy with little freedom of movement. In Western Europe this covered broadly the period before the French Revolution of 1789. The employment relationship was within the family or guild controlled by the head of the household or the master. Master and servant or apprentice, employer and labourer, had mutual obligations. So a master had to provide professional training to an apprentice and to protect him, while the apprentice had to swear obedience and loyalty to the master. Public authorities regulated the rules of the guilds.

Under the early factory system, the factory owners enjoyed almost absolute rights or prerogatives within their own domain. They could also rely on penal master and servant laws to enforce their rights or prerogatives, for example by imprisoning workers who breached their contracts, or who combined into trade unions or went on strike. The workbook (*livret* or “pass”) system restricted the worker’s freedom, especially on termination of employment.

The liberal constitutional states which emerged in Europe in the nineteenth century actively promoted liberal doctrines, purporting to leave the economy alone (*laissez-faire*). This was, of course, a form of intervention in the sense that it gave uncontrolled support to the power of property in the form of capital. Under the influence of liberal contractual ideas, the formal equality of employer and employee was proclaimed. The pre-industrial remnants of penal master and servant laws and laws against combinations were removed. Trade unions and collective bargaining were tolerated and sometimes gained legal recognition. The social problems resulting from industrialization, including the degradation of children and women, urban poverty, unemployment and strikes, became political questions. The enfranchisement of (male) workers increased the pressure for state action to ameliorate these problems. Protective legislation was enacted for workers who were regarded as particularly vulnerable, starting with children and women, and later for other groups of workers. This was generally described in terms of “protection” rather than in the language of rights. The subjects included the length of the working day, the fencing of dangerous machinery, minimum wages and other basic working conditions.

b) *The social democratic welfare state: Equality, security, and other workers’ rights*

The challenges to the liberal model of toleration and protection came from two directions. One was from the Marxian socialists and communists whose primary aim was not to establish “rights” under a capitalist order. Their real objective was the assumption of political power by the working class so as to end the system of wage labour itself. In the Soviet Union this took on the distinctive Leninist form of the “dictatorship of the proletariat” (in reality the dictatorship of the Party). The centralized state took control of the economy and trade unions degenerated into “conveyor belts” between the “vanguard” Party and the workers. The protection, welfare and job security of individual workers was seen as the reward for loyalty and strict observance of labour discipline. “Evasion of socially useful work”, declared Article 60 of the Soviet Constitution, “is incompatible with the principles of socialist society.”

The other challenge was from the social democrats whose aim was to redress the inequality between the suppliers and the purchasers of labour power. Labour “rights” were demanded for subordinate or dependent labour. This idea comes from Gierke, Weber and Durkheim and it stands in contrast to liberal and neo-liberal theories which ignore the inequitable distribution of wealth and power in society. The social democratic model of rights

was tried in the German Weimar Republic (1919-33). It also appeared in some other countries such as the Mexican Constitution of 1917. The aim of the social democrats was – in Kahn-Freund's words (1981, pp. 190-191) – “to legalise the class system in a class-divided society and to make it a component of the legal system.” They did this by giving constitutional protection to workers' rights and enabling the works councils to act as custodians of individual protection. It was in the quest for some kind of substantive and not merely formal equality between employer and worker in a pluralist society that they put their faith. The fragile collectivist system of the Weimar Republic came crashing down in the economic crisis of 1929-33. The huge rise in unemployment which virtually destroyed the new state system of unemployment insurance, and the effective abolition of collective bargaining by presidential decrees, was followed by the victory of the National Socialists over a divided labour movement.

The theory of balanced industrial pluralism was still the dominant theory of labour law in the 1970s when Kahn-Freund (1976, p. 8; 1981, p. 18) wrote: “the main object of labour law has always been, and we venture to say, will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.” Labour law was seen as providing institutions and processes, mainly collective, which created a fair balance between employers and workers. The focus was on subordinated workers within the employment relationship and not on wider aspects of the labour market. Labour law was regarded as serving primarily a social, and not an economic function. “Rights” were a useful tool to end the distinction drawn in liberal societies between the “private” sphere of economic life – what Adam Smith called civil society – and the “public” sphere of what was directly controlled by the state. This was conceptualized in Continental European countries in the distinction between private law and public law. In the liberal state protective legislation for groups such as women and children could be justified on the ground that these groups lacked capacity to contract as equals. The idea of “rights” changed the character of the legislation from a gift granted by an enlightened ruling class into a right of the workers. These new rights – such as the right to work – were different from the rights of the individual proclaimed in the French Revolution and in most liberal constitutions. They were claims on the state to provide work and economic security and to recognize the collective interests of workers through the rights to organize, to bargain collectively and to strike.

However, not all democratic states answered the problem of inequality in the employment relationship by the creation of “rights”. For example, in the United Kingdom “Labourism” rather than any ideology of social rights was the dominant influence. The British approach was to defend social and organizational “rights” won through industrial struggle, using the law on a pragmatic basis only when voluntary means were inadequate. Instead of social revolution or social democratic constitutionalism, the ideology shared by the majority of employers and trade unions was a “very special, very British” variant of pluralism (Clegg, 1975). This, in its classic formulation by the “Oxford School”, is in essence an ideology of “enlightened management”. The focus was on equalizing the position of employers and collective organizations of workers “while leaving room for the continuing effects of market forces”. By the 1970s voluntary collective bargaining between employers and trade unions had come to cover about 85 per cent of the workforce. Individual employment rights granted by legislation were mainly relevant in the absence of collective bargaining. However, from the 1960s onwards there was an increasing volume of legislation conferring rights on individual employees. Some of this fulfilled the function of what Wedderburn (1965) called a “floor of rights”, that is a basis upon which collective bargaining could improve (e.g. unfair dismissal and redundancy compensation). Other legislation dealing with subjects outside the limited sphere of collective bargaining (e.g. race and sex discrimination) introduced the notion of fundamental human rights in the employment relationship. The decline of collective bargaining

and trade union density since the 1980s in the United Kingdom have greatly enhanced the importance of individual rights.

In the United States, too, the approach was market-centred rather than rights-centred (Estlund, 2002). The ideal of free labour after the abolition of slavery became enmeshed with the idea of freedom of contract. Following the Supreme Court's decision in the *Lochner* case (1905),¹ almost every kind of legislation establishing employment rights was struck down as an unconstitutional interference with the right of employers and of workers to buy and sell their labour on such terms as they saw fit. The only guaranteed right was the liberty to contract without state protective legislation. However, in 1937 a new majority of the Supreme Court largely repudiated the constitutional liberty to contract. The Court upheld the National Labor Relations Act (NLRA) which prohibited discrimination against union activists and established a legal framework for union representation and collective bargaining. The Court also upheld the Fair Labor Standards Act which prescribed minimum wages and maximum working hours. What is striking is that these decisions were grounded in the federal government's power to regulate inter-state commerce, rather than on fundamental rights at work. Two major shifts occurred after 1960. The first was civil rights legislation against discrimination on grounds of race, gender, age and disability. The second was the development, largely by courts on a state-by-state basis, of individual legal rights, derived from the common law, on matters such as discharge from employment and the right to privacy.

With the coming of welfare regimes after 1945 protective legislation changed its character. New social rights were supported by theories of "social citizenship". Citizenship was seen as a source of social cohesion. Citizens enjoyed political rights (to participate in the exercise of political power), and civil rights (to make contracts, to speak and to associate). These political and civil rights provided the means to secure social rights (to welfare and security on the basis of equality with others). Social rights were regarded as a component of the concept of citizenship. At the end of the Second World War, the ILO's Declaration of Philadelphia (1944) espoused the language of rights. It proclaimed the principle that "all human beings, irrespective of race, creed or sex, have the right to pursue their material well-being and their spiritual development in conditions of freedom and dignity, of economic security, and of equal opportunity." Social rights were also set out in regional treaties such as the European Social Charter (1961, revised 1996), and in the International Covenant on Economic, Social and Cultural Rights [ICESCR] of 16 December 1966. This includes the right to work, the right of freedom of association for trade union purposes, the right to social security, the rights of the family, the right to adequate food, the right to health, and the right to education.

In the European Union an attempt has been made to set out all fundamental rights in a single integrated document, the Charter of Fundamental Rights of the European Union of 7 December 2000 [summarized in the box below].

CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Summary

Chap. I Dignity

Art. 1: Human dignity

Art. 2: Right to life

Art. 3: Right to integrity of the person

Art. 4: Prohibition of torture and inhuman or degrading treatment

¹ *Lochner v New York* 148 U.S. 45 (1905), which struck down a state law limiting the hours of work of bakers.

Art. 5: Prohibition of slavery and forced labour

Chap. II Freedoms

Art. 6: Right to liberty and security

Art. 7: Respect for private and family life

Art. 8: Protection of personal data

Art. 9: Right to marry and to found a family

Art. 10: Freedom of thought, conscience and religion

Art. 11: Freedom of expression and information

Art. 12: Freedom of assembly and of association

Art. 13: Freedom of the arts and sciences

Art. 14: Right to education

Art. 15: Freedom to choose an occupation and right to engage in work

Art. 16: Freedom to conduct a business

Art. 17: Right to property

Art. 18: Right to asylum

Art. 19: Protection in the event of removal, expulsion or extradition

Chap. III Equality

Art. 20: Equality before the law

Art. 21: Non-discrimination

Art. 22: Cultural, religious and linguistic diversity

Art. 23: Equality between men and women

Art. 24: The rights of the child

Art. 25: The rights of the elderly

Art. 26: Integration of persons with disabilities

Chap. IV Solidarity

Art. 27: Workers' rights to information and consultation within the undertaking

Art. 28: Right of collective bargaining and action

Art. 29: Right of access to placement services

Art. 30: Protection in the event of unjustified dismissal

Art. 31: Fair and just working conditions

Art. 32: Prohibition of child labour and protection of young people at work

Art. 33: Family and professional life

Art. 34: Social security and social assistance

Art. 35: Health care

Art. 36: Access to services of general economic interest

Art. 37: Environmental protection

Art. 38: Consumer protection

Chap. V Citizens' rights

Art. 39: Right to vote and to stand as a candidate in elections to the European Parliament

Art. 40: Right to vote and to stand as a candidate at municipal elections

Art. 41: Right to good administration

Art. 42: Right of access to documents

Art. 43: Ombudsman

Art. 44: Right to petition

Art. 45: Freedom of movement and of residence

Art. 46: Diplomatic and consular protection

Chap. VI Justice

Art. 47: Right to an effective remedy and to a fair trial

Art. 48: Presumption of innocence and right of defence

Art. 49: Principle of legality and proportionality of criminal offences and penalties

Art. 50: Right not to be tried or punished twice in criminal proceedings for the same offence

Chap. VII General provisions

Art. 51: Scope

Art. 52: Scope of guaranteed rights

Art. 53: Level of protection

Art. 54: Prohibition of abuse of rights

Another feature of the welfare states was a change in the nature of the wage-work bargain. In Supiot's words "under the model of the welfare state, the work relationship became the site on which a fundamental trade-off between economic dependence and social protection took place. While it was, of course, the case that the employee was subjected to the power of another, it was understood that in return there was a guarantee of the basic conditions for participation in society" (Supiot et al., 1999b, p. 8). This corresponds to the so-called "Fordist" model in which large industrial enterprises engage in mass production based on narrow specialization of tasks and skills and in a pyramidal organization of work. The worker is subject to the commands and organization of a hierarchy of management. In return the worker is promised a secure livelihood and a measure of job security. Social legislation in the fields of workers' compensation for accidents, social insurance and employment protection is enacted.

c) The neo-liberal state: Deregulation

The post-war consensus based on the notion of equality between employer and worker and support for collective representation has broken down since the 1970s. In place of the traditional ideologies, the focus has been on varieties of regulatory theories. These all take the market system as their foundation. They assume that individuals are rational beings motivated solely by self-interest. Through the mechanism of the market, individuals are able to satisfy their preferences of which they are the best judges, in this way increasing their wealth. Values are measured by what people are willing to give up, their lost opportunities. So for example, a woman who seeks part-time work loses the opportunity to be paid at the same rate as a man doing full-time work because of her "preference" for time to look after her children. The employer's "taste" for discrimination is balanced against the cost to the woman. She is assumed to be a person of indeterminate gender or social background, but a calculating person able freely to choose her economic relations. Her preferences, such as caring for her children, are valued only in the process of exchange. Her right as a human being to equal treatment and respect is not seen as a social value in itself: the only value recognized by this theory of markets is self-interest.

In regulatory theories, law is a means of intervening in the market order. Collins remarks that "the regulatory agenda for the traditional field of labour law commences with a disarmingly naïve question: Why regulate the employment relation?" Or, put another way,

“why should we exclude ordinary market principles such as the general law of contract and property from employment relations in favour of special rules?” (Collins, 2000, p. 4). There is a “heavy burden of proof” on advocates of employment rights “to establish the superiority of regulation over ordinary market rules,” and “the special regulation must be demonstrated to be efficient in the sense that its costs do not outweigh the potential benefits or improvements.” The question, and the burden of proof required to justify labour regulation, ignore the existing inequitable distribution of wealth and power. They treat the market and the private law of contract and property as a state of nature into which legal institutions intrude. They do not recognize that labour markets are themselves social institutions structured by law and that these laws can be made to reflect a different set of social values from those drawn solely from economic self-interest. Moreover, the cost-benefit calculations tend to ignore the costs of protecting the so-called negative rights of property and contract enjoyed by employers. “The assignment, interpretation and protection of property rights of the owners of a business are not cost-free but are delivered as a cost to taxpayers, workers and consumers. Employment rights are part of an ancillary exchange by which government and employers recompense or give recognition to workers for the inequality of outcomes of the employment relationship” (Hepple and Morris, 2002, p. 249).

Not surprisingly, in view of the presumption in favour of private law rules, regulatory theory has been used to justify deregulation of the employment relationship. By “deregulation” in this context is meant leaving employment relations to ordinary market principles as underpinned by the private law of obligations. Hayek argued that trade unions used labour law to cartelize the market, so in the British context they had to be stripped of their “special privileges” which protected them from the operation of the ordinary law of obligations (Hayek, 1980, pp. 89-90). In relation to individual rights – such as against unfair dismissal, and against discrimination – Epstein (1984,1995) claims that such special legislation interferes with efficient incentive structures provided by private law contracts. The arguments for decollectivization helped to shape the policies of many governments in the 1980s, but most of those governments never went as far as supporters of the Chicago School would have liked in deregulating individual employment rights. While legislation such as that on minimum pay and working time was repealed, and welfare rights were dismantled, the individual right not to be unfairly dismissed was generally not removed, and rights to equal pay and equal treatment between women and men were expanded. Even neo-liberal governments, intent on individualizing the labour market, saw the need for laws which regulated termination of the contract, and guaranteed certain fundamental rights such as those against discrimination.

The main critique of deregulatory theory in the context of labour law is that the economic model of freedom of individual choice and action is in practice illusory. Free markets are presumed to achieve allocative efficiency because the parties will trade with each other until they cannot further improve their position. This wrongly equates efficiency or cost-effectiveness with wealth-maximization; and it makes claims about the links between labour regulation and job creation which are not evidence-based. Criticisms such as these led, in the 1990s, to alternative versions of regulatory theory being applied to labour law, with a view to improving economic performance. These are of particular importance to developing countries.

d) *The development model: Rights-based regulation*

The new model accepts that special regulation of the employment relation may be justified on two grounds. First, there may be market failure. This occurs when there is a significant deviation between the ideal outcomes which would result from perfect competition and the actual operation of the labour market. Secondly, regulation may be needed to correct unacceptable distributive outcomes. These justifications may sometimes conflict or they may overlap.

One version of market regulation (here called rights-based) sees employment rights as beneficial and necessary to economic development. According to this version, workers come into the labour market with different levels of education and training, as well as differences in gender, class and race, and markets tend to generate differentials in wages and conditions which bear 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 leads to productive inefficiency, hampers innovation and leads to short-term strategies and destructive competition. Only regulation (e.g. a minimum wage, equal pay for women and men, etc.) can correct this market failure.

Secondly, this version of market regulation rests on the redistributive purposes of labour rights. While the deregulators would say that competitive market outcomes are always the just distribution, because they are dictated by individual choice, rights-based regulation tends to favour a transfer of resources to enable those who wish to enter the labour market to do so, for example by providing better education, training and child care. Unlike the deregulators who see wealth maximization (or allocative efficiency) as the primary goal, the rights-based model regards this as only a partial criterion of distributive justice. Accordingly, in this model certain claims or entitlements, sometimes labelled “fundamental rights”, are treated as priorities among the distributive objectives of labour rights. However, there remains a presumption against regulation unless it can be shown that the regulation will not harm those whom it was designed to help. So, if an increase in rights relating to the termination of employment would lead employers to hire or fire fewer workers, this needs to be balanced against the benefits of being more careful in selecting and training workers and monitoring their standards of performance. The question of redistribution is also linked to that of externalities: the self-interested market decisions of the parties to a contract may affect others adversely. For example, redundancies may cause costs to taxpayers who fund the social security system. The regulatory mechanism may therefore seek to transfer all or part of the social costs to the parties to the employment relation.

Thirdly, some advocates of the rights-based version of market regulation argue that labour market institutions which encourage “high trust” or “cooperative” workplace “partnership” lead to superior economic performance. This is the common argument for legal provision for better information, consultation and other forms of workers’ participation in the enterprise, and for the improvement of corporate governance (Deakin and Wilkinson, 2000, pp. 56-61).

4. Key questions

a) *Can rights at work be reconciled with competitiveness?*

One variant of regulatory theory puts the “competitiveness” of the enterprise and the “flexibility” of work practices at the centre of the stage. This argument is familiar in the context of federal and transnational labour regulation. It is said that the liberalization of trade and investment within a regional economic area or internationally, by removing barriers on the movement of goods, services and capital, throws the labour and welfare systems of the states concerned into competition with each other. This leads to a process of market selection by which states adopt the most efficient form of regulation. Countries with low labour costs will attract investment; this in turn leads to greater demand for labour, higher wages and improved working and living conditions. On the other hand, it is said, regional or international labour regulations hamper this natural operation of the market and so lead to a loss in general welfare.

In the European Union this kind of argument has been used against the harmonization of employment laws or the setting of universal minimum standards. At national level, regulatory competition theory is increasingly used as a justification for limiting employment rights and

their enforcement. A recent example is the British Employment Act 2002 which limits access to employment tribunals. A justification put forward by the government was that this would “strengthen U.K. competitiveness” by creating the “right regulatory framework” with minimum standards “to protect the most vulnerable workers” (Hepple and Morris, 2002, p. 246). Similar arguments have been used in France, Germany, Italy and Spain to justify recent reforms of employment rights. A theory of the employment relationship which concentrates on the competitiveness of the employer and not on the welfare of the human being at work is readily used by the state “to limit even access to enforcement procedures both to avoid costs for the employer and to protect its public funds” (Wedderburn, 2002, p. 27).

There are several objections to the competitiveness arguments. First, firms are not likely to relocate to another state with lower nominal labour costs if those lower costs simply reflect lower productivity of workers in that state. Empirical evidence shows just the reverse (OECD, 1996, 2000). Transnational companies tend to favour investing in countries where the skills of the labour force are high. Secondly, if labour costs do not reflect relative productivity in particular states and if firms do relocate to those states, the result would be to create increased demand for labour with the likelihood of raising wage levels. This would soon cancel out the advantages of relocation which is simply based on low labour costs. Thirdly, firms which adopt low labour-cost strategies are likely to be trapped in a downward spiral of repeated cost-cutting rather than investment in technology and skill creation. This is a recipe for commercial failure.

b) What is the relationship between workers' rights* and human rights?

Labour movements in the nineteenth and twentieth centuries sought civil and political rights to enable them to use political power against the abuse of economic power in the labour market. They also pressed for government recognition of social rights such as the right to work, to education, to adequate food and housing, to health care and social security. Claims against employers have often been asserted as “rights” to decent conditions of work, to fair pay and job security, and the right to participate in trade unions and to engage in collective bargaining. Rights have been seen as a means of redressing the unequal bargaining power between employer and worker. There was traditionally a strong emphasis on freedom of association as a core human right.

Yet it is true to say that the international human rights movement has paid relatively little attention to workers' rights. “The human rights movement and the labour movement run on tracks that are sometimes parallel and rarely meet” (Leary, 1996, p. 22). This is surprising because lists of human rights include many rights relevant to work, such as the right to form and join trade unions, the right to free choice of employment, rights which prohibit forced labour and child labour, and which forbid arbitrary discrimination. The extent of workers' rights in a country is a sign of the status of human rights in general: repressive regimes outlaw independent trade unions, arrest and torture trade unionists.

There are many reasons for the parallel tracks of workers' rights and human rights. The first is the abiding disagreement as to whether social and labour rights are human rights at all. At one extreme, there are those who contrast legal rights with socially accepted principles of justice. They argue that treating the latter as “rights” does not make sense (e.g. Cranston, 1973). One cannot have a right to something which is impossible to deliver, such as holidays with pay for everyone. Social rights generally require positive actions by the state and others. To provide a meaningful “right to work” or a “right to social security” requires resources which a poor state does not have. Nor are all these rights, (for example to paid leave) universal moral rights.

* In this section the phrase “workers' rights” is used rather than “rights at work” because the latter may include the rights of corporate employers (e.g. the right to associate), trade unions, etc. The term “human rights” is used here in the sense of rights attaching to natural persons.

Although they are desirable social goals, it is said that to call them “human rights” is to devalue the importance of civil and political rights.

Against this extreme position, Amartya Sen (2000, pp. 123-124) has argued that rights-based reasoning and goal-based programming are not necessarily antithetical. He suggests 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 which allows them to be integrated within the same overall framework as objectives and goals, such as those encapsulated in the ILO’s notion of decent work. 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 security in order to provide a minimum guarantee of survival. The legal right to own property has to be balanced against rights such as these.

A second reason for the different trajectories of workers’ rights and human rights has been the tendency, until fairly recently, of human rights organizations to give priority to civil and political rights, while trade unions have focused on local and economic issues. At international level, the Conventions of the ILO were not originally conceived as statements of human rights. The ILO’s official compilation of Conventions and Recommendations includes only three sets of instruments under the heading of “basic human rights”. These relate to freedom of association, forced labour and equality of opportunity and treatment. The ILO’s 1998 Declaration of Fundamental Principles and Rights at Work added the elimination of child labour to these categories. The vast bulk of ILO instruments are not classified as human rights (see box).

INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS

Subject matter

- I. Basic human rights
- II. Employment
- III. Social policy
- IV. Labour administration
- V. Labour relations
- VI. Conditions of work
- VII. Social security
- VIII. Employment of women
- IX. Employment of children and young persons
- X. Older workers

- XI. Migrant workers
- XII. Indigenous workers and tribal populations
- XIII. Workers in non-metropolitan countries
- XIV. Particular occupation sectors

There is a third reason why the categorization of workers' rights as human rights has met with scepticism. A distinctive feature of rights discourse in the employment context in recent decades has been the *individualization* of these claims. Whether one follows Rawls' "first principle" that "each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system for all" (Rawls, 1973, pp. 11-15) or Dworkin's right of all to equal treatment and respect, (Dworkin, 1977, chap. 6), it is the *individual* and not the collective that is to be protected. So Article 11 of the European Convention on Human Rights and Fundamental Freedoms protects the freedom of association and the right to join trade unions as an *individual* right, and is not directed at the inequality of the employment relationship (Hepple, 1998, pp. 72-76). Although rights such as the right to work are nowadays not infrequently included in the constitutions of democratic societies, it is rare for such rights to be justifiable or legally enforceable.

It has to be recognized that there are serious limitations on the use of such *individual* rights as a basis for the modernization of labour law. First, most social and labour rights – other than a few core values such as the freedom from slavery, forced and child labour, freedom of association and freedom from discrimination (enshrined in the ILO Declaration, 1998) – are not universal or unqualified. Rights to decent working conditions and fair pay depend upon the level of socio-economic development in a particular country and they generally presuppose economic growth and expanding social welfare. Secondly, there is a contradiction between the inequality of class in the marketplace and the democratic element of citizenship and equal rights in the political sphere. Experience in many countries shows that social rights can be devalued by political action because industrial citizenship does not match political citizenship. Thirdly, there is a conflict between civil rights (such as the freedom to contract) which generally favour the operation of markets, and some social rights which may come into conflict with those markets. For example, the freedom to contract implies the freedom to refuse to contract with another person on grounds of race or gender. This conflicts with the freedom against discrimination on these grounds. Fourthly, social rights lack effective procedures and mechanisms for their enforcement. Indeed, increasing reliance on "soft law" (such as voluntary corporate codes), the tendency to privatize enforcement through management-controlled dispute resolution procedures rather than public tribunals, and restrictions on collective solidarity, all reduce much talk of rights to a rhetorical device – in Jeremy Bentham's famous phrase "so much bawling on paper" (Bentham, 1843, p. 23).

To sum up: the language of human rights is widely used today rather than "social justice". But human rights cannot exist without social justice. For this reason rights should be formulated in a way which allows them to be integrated within the same overall framework as the goals of social justice. This can be done by defining rights not simply as negative means of defence against the state, but also as positive means to achieve meaningful participation in society. For example, a constitutional right to equal treatment must be understood not merely as a formalistic defence right, but as a right to equal opportunities. A right to education and to vocational training has to be understood as requiring the provision of educational and training services.

c) How can workers' rights contribute to the alleviation of unemployment, poverty and inequality?

A conception of workers' rights that is essentially limited to the classic model of subordinated workers and their employers does not embrace the wider universe of the unemployed, the semi-employed, the working poor and the small independent producers in both the formal and informal economies. A central task of labour law in developing countries in the era of globalization must be to facilitate equality of capabilities.

In the developing countries, it is not possible to obtain a meaningful picture of unemployment because of the large proportion of the working population who are not in paid employment. So in addition to unemployment, we must look at poverty and inequality. These concepts are often used together but they are distinct. Poverty refers to those who fall below a certain minimum standard. It can be measured first on an absolute basis, referring to people whose income is insufficient to cover basic needs; or it may be defined on a relative basis by referring to those people whose income does not allow them to function properly in their particular social environment. Amartya Sen (1999) argues persuasively that poverty should be seen as a deprivation of basic capabilities, rather than merely as low income. Even where there is some form of social security for those who are unemployed, loss of work can have "far-reaching debilitating effects on individual freedom, initiative, and skills". It contributes to "social exclusion" by reducing self-reliance and self-confidence, as well as harming psychological and physical health.

Relative poverty within the world's richer countries is put into the shade by the gap between rich and poor countries. The average income in the richest twenty countries is 37 times the average in the poorest twenty, a gap that has doubled in the past forty years. The increasing prosperity of an élite in the developed countries has "gone hand-in-hand with mass poverty and the widening of already obscene inequalities between rich and poor" (Oxfam, 2002, p. 5). According to the World Bank, in 1998 almost half the world's population were living on less than \$2 a day and a fifth on less than \$1 a day, the same figure as in the mid-1980s (World Bank, 2001, p. 3). Human development indicators, such as infant mortality, undernourishment, adult illiteracy and access to clean water, reveal extremely high levels of deprivation in South Asia and sub-Saharan Africa. "The wealth that flows from liberalised trade is not pouring down to the poorest, contrary to the claims of the enthusiasts for globalisation" (World Bank, 2001, p. 65).

The concept of equality is elusive. "Equality of what?" This may refer to equality of income or resources, or it may be what Sen calls the "equality of capabilities", such as education and training, human rights and democratic freedoms. There is, of course, an overlap because lack of income may make it impossible to acquire capabilities and lack of capabilities affects the capacity to earn a living. "Equality for whom?" Some groups, such as women, disabled people and ethnic minorities are at a particular disadvantage and are victims of discrimination in respect of both income and capabilities. There is also general inequality of incomes. If our concern is with equality of capabilities, then our measures of inequality will relate not simply to income, but more broadly to opportunities to pursue an occupation or career of one's own choosing, to freedom of association including the right to form and join trade unions, and to participate in economic and political decision-making that affects one's life, as well as other rights.

Attempts are currently being made to resolve the paradox of a world in which those protected by labour law are "more equal" than those who fall outside its traditional scope. One approach is to extend the coverage of labour law to those dependent workers who have lost, or never had, its protection. This involves treating part-time workers, those on fixed-term contracts and those supplied by employment agencies or labour suppliers in the same way as directly employed workers on indefinite contracts. Other, much bolder proposals seek a new

conception of work, not restricted to dependent labour that embraces both employed and self-employed paid labour. Even the privileging of paid work above “family” work is criticized by feminist scholars as being incompatible with gender equality (Conaghan, 2002). Yet others argue that “labour law will become increasingly stultified and marginalized” within the framework of labour markets unless it engages intensively with the redistributive functions of welfare law (Williams, 2002).

Another currently popular approach is to relocate labour law within the sphere of labour market regulation. In particular, active labour market policies to reduce unemployment and to improve “flexibility” and “competitiveness” are often seen as central aspects of labour law. There is a danger, however, that such strategies for creating more work may be achieved at the cost of such traditional labour law values as employment protection. The European Employment Strategy, for example, has been criticized for failing to ensure that the goal of more jobs goes hand-in-hand with the goal of labour law to provide “decent” work (Ball, 2001). Any such strategy needs to be linked with the promotion of rights at work and social protection, and must guard against simply creating a large number of temporary and casual jobs.

To sum up: while active labour market policies are certainly important to the reduction of unemployment, poverty and inequality it does not follow that they will in themselves produce “decent work”, or more broadly “equality of capabilities”. They must be accompanied by the promotion of rights at work.

d) How should rights at work be progressively realized?

Article 2.1 of the ICESCR permits State parties to

Take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with the view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

This approach to social rights places the emphasis on determining whether there are certain minimum or core obligations which must be observed, on finding ways to balance resource constraints against the achievement of these obligations, and on monitoring progress towards realization. A similar approach may be relevant to the implementation of workers’ rights contained in the ILO Declaration and ILO Conventions. The *minimum or core content* of a right is usually defined as an essential element without which it loses its significance (Chapman and Russell, 2002, p. 9). *Core rights* are characterized as the “floor of rights” below which standards should not fall. There is a danger that a “floor” will be regarded as a “ceiling”. States may seek to do only the minimum that is necessary to fulfil their obligations under the ILO Declaration or in respect of ratified Conventions. The minimum must therefore be seen as a starting point not a final destination.

It has been suggested that at least a partial way out of this dilemma is to talk about *minimum state obligations* (Chapman and Russell, 2002, p. 9). This focuses on what the state must do immediately in order to realize the right. First it has to tackle the fundamental element of the right. This approach recognizes that poorer countries simply do not have the resources to realize a right fully from the start. This consideration does not justify non-ratification and non-implementation, as it aims to facilitate progressive implementation. If this approach is followed, one may distinguish three levels of obligation: (1) the obligation to respect a right; (2) the obligation to protect a right; and (3) the obligation to fulfil a right. The first is negative: the state must not interfere with the right, and it must respect the right itself. For example, ILO Convention No. 87, Art. 3(2) provides that “the public authorities shall refrain from any interference which would restrict this right [freedom of association] or impede the lawful

exercise thereof.” Article 8(2) of the Convention elaborates this: “the law of the land shall not be so applied as to impair the guarantees provided for in this Convention.” These minimum obligations – in respect of administrative and legislative action – are cost-free. They do not demand resources, and so they are capable of immediate application.

The second obligation, to protect rights, means that the state must prevent violations by third parties. For example, Convention No. 87 requires State parties “to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.” This is not cost-free because it entails administrative measures (including an inspection regime), judicial and other means to ensure that third parties do not violate the right. Since these are essential features of any form of state, it can be said that, despite their costs, the obligation to protect is part of minimum state obligations. However, there are degrees of compliance. In this connection it is useful to distinguish *obligations of conduct* from *obligations of result*. The former require action aimed at realizing a goal; the latter sets targets which must be met in order to meet substantive goals. In the context of the right to work, for example, a state’s minimum obligation is to implement strategies and policies aimed at achieving high levels of employment. Particular outcomes, such as high rates of unemployment, should trigger state action.

The third obligation, to fulfil, raises the most difficult questions about available resources. Unlike the obligation to respect, which is a negative obligation, the obligation to fulfil is a positive one, and it requires real resources. However, these resources need not come from the state itself. The state can require employers and workers or others to pay. For example, the obligation under Convention No. 98 on ratifying states to enable workers’ organizations to engage in collective bargaining requires positive legal provisions, including the protection of rights to bargain collectively (ILO, 2000). The costs of implementing this can, however, be shared between employers and trade unions. Another example would be action plans to eliminate child labour which can rely on technical cooperation, partnerships with international organizations and private initiatives coordinated by governments (ILO, 2002).

This approach to progressive realization, based on core minimum obligations, has already been utilized in some countries. For example, in South Africa, the Constitutional Court has interpreted the constitutional right of access to adequate housing to require the state to devise and implement a comprehensive programme to progressively realize this right, including measures to provide relief to those in desperate need of shelter, subject to available resources.² The Court has also interpreted the right of access to health care services and the rights of children to require the state to remove restrictions on the provision of anti-retroviral drugs, and to permit their use, when medically indicated, in order to prevent mother-to-child transmission of HIV/AIDS.³ This has been done by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question. A reasonable housing programme requires making provision for those most in need; a reasonable health programme requires making drugs available to those most at risk from HIV/AIDS. This is an approach that may help other countries to conceptualize and implement core obligations in relation to rights at work (see box).

² Government of South Africa v Grootboom 2001 (1) SA 46 (CC).

³ Minister of Health v Treatment Action Group 2002 (5) SA 721 (CC).

CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

23. *Labour relations*

- (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right: (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union; and (c) to strike.
- (3) Every employer has the right: (a) to form and join an employers' organisation; and (b) to participate in the activities and programmes of an employers' organisation.
- (4) Every trade union and every employers' organisation has the right: (a) to determine its own administration, programmes and activities; (b) to organise; and (c) to form a federation.

26. *Housing*

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within the available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

27. *Health care, food, water and social security*

- (1) Everyone has the right to have access to: (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must also take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

5. ***Policy options for implementing rights at work***

a) The pillars of a new institutional structure for rights at work

The potential of rights at work can be realized only if old modes of thinking about them are abandoned. The traditional theories and the categories of legal thinking – such as “employee” and “contract of employment” – were shaped in industrialized nation states where the typical subjects of the law were Fordist manufacturing companies employing full-time male workers in life-time jobs on standardized contracts often regulated by collective agreements with trade unions. In the twenty-first century that classical model of labour law is plainly untenable even in the post-industrial countries. In those countries union density and collective bargaining coverage have dramatically declined, and the contract of employment has lost much of its

analytical value as paid work is increasingly performed outside conventional employment relationships. The feminization of the workforce is now an irreversible fact, with profound consequences for the division between “work” and “family”, between paid and unpaid work, and between “jobs” and “careers”.

The classical models are even less relevant in the developing countries. The most important changes are those resulting from modern globalization – the liberalization of trade and investment, the domination of transnational companies (TNCs), the growth of a worldwide network society, and increasing global competition. A major consequence of this is the reduced power of nation states to regulate labour within their own borders or migration across frontiers, the growth of complex multivalent legal orders with murky boundaries between supranational, transnational, national and workplace legal norms, and the prevalence of “soft” law such as corporate codes of conduct. The classical models are also inappropriate because of the differences in employment structure. Not only is there a large informal sector in developing countries, but even in the formal sector many workers tend to be independent and self-employed.

Some advocates of rights at work are still hidebound by the classical models. But there are others who are attempting to develop new theoretical frameworks and legal concepts to comprehend the changing world of work. The deregulatory school of thought on the Right would abandon labour law altogether and dissolve its subject matter back into the realm of the general law of obligations and property. Those supporting a social democratic “Third Way”, seek to invoke regulatory theory in the context of individualized labour markets, human resource techniques such as information and consultation, “flexible” work rules and “family-friendly” policies. Within this broad field of regulatory theory there are many different perspectives, some of which focus on rights-based universal minimum standards, and others which emphasize the need for competitiveness and flexibility in the face of global competition.

An alternative response focuses on the welfare and human rights of workers, rather than on market success or failure. The values underlying this approach are avowedly egalitarian and democratic. Karl Klare has correctly observed that the law regulating work cannot be fitted into a single over-arching paradigm (Klare, 2002). Moreover, a transformative project of egalitarian redistribution and democratic participation needs more than negative ideological criticism of regulatory theory. Instead we need to reconstruct rights at work to safeguard the individual in the changing world of work.

New directions may be found in a synthesis of traditional models with the modern approach of rights-based regulation as well as human rights theory. Such a synthesis needs to be based on at least four pillars.

The first is dialogue between the many different legal orders that shape power relations. The dialogue between these orders may lead, in Kilpatrick’s words in relation to gender equality, either to “emancipation through law” when new opportunities are created for groups struggling for equality, or by contrast, “emasculatation by law” when the result undermines more favourable treatment under another legal order (Kilpatrick, 2002). This dialogue is an integral part of the process of social and political change. An example of how this can work is the freedom of association dispute at the BJ&B factory in the Dominican Republic (see box).

FREEDOM OF ASSOCIATION: A CASE STUDY

In the Dominican Republic, the BJ&B factory, owned by a Korean parent company, produces Nike, Reebok and Adidas products. In October 2001, a group of 20 workers employed at the factory filed a petition under Dominican law for the recognition of their union. (The Dominican Republic has ratified 35 ILO Conventions including those on freedom of association and the right to organize). In the course of the next two months all these workers were dismissed or

resigned in circumstances that led to the allegation that they had been victimized for trade union activity. Over a five-year period there had been other allegations of forced overtime, physical and verbal abuse of workers and lack of proper grievance procedures. The Labour Code of the Dominican Republic leaves considerable discretion to management with respect to dismissal without cause, and this coupled with managerial practices at BJ&B led to unfair actions and the restriction of the right to organize. Nike and the other brands filed a complaint against their contractor with the Fair Labor Association based in Washington DC. The FLA investigated the complaint, with the support of the Dominican Department of Labour, put on a training course on freedom of association for all 1600 workers (in small groups) with supervisors, and negotiated the return to work of the dismissed trade unionists. The brands involved put pressure on the head office of BJ&B's Korean parent company to observe the brands' corporate codes which include freedom of association. Despite a threat from that company to relocate the facility in Bangladesh, as at October 2002 it was still operating in the Dominican Republic. The union has now secured support from a majority of workers and is seeking negotiations for a collective bargaining agreement. The company's lawyers are trying to use the letter of Dominican law to avoid this.⁴ This is a case where a combination of ILO standards and a corporate code, coupled with the active involvement of a human rights group collaborating with the government and local workers, is in the process of holding the contractor to a higher standard than could be enforced under national labour law.

The second pillar is a new conception of the law of work, not restricted to dependent or subordinated labour, that embraces both employed and “self-employed” paid labour. Moreover the privileging of paid work above “family” work is also incompatible with gender equality. Rights at work will also become increasingly stultified and marginalized within the framework of labour markets unless they are linked to the redistributive functions of social protection (see Saith, forthcoming 2003).

The third pillar is the unification of “public” and “private” law in this field – a still unfulfilled ambition of the early twentieth century founders of the subject. This goes beyond removing technical distinctions; it involves treating the private law of property and contract as a form of regulation that sustains inequality. The twentieth century belief was that collective bargaining could compensate for this bias in the common law; a modern approach to the subject of “countervailing workers’ power” needs to foster the idea of *institutional* participation, but much remains to be said on the forms of such participation (see Kuruvilla, forthcoming 2003). These emerging collective forms are the ultimate custodians of individual rights.

The fourth pillar is a notion of “social rights” which ends the traditional dichotomy between labour rights and human rights. We must not underestimate the familiar objections to the constitutionalization of social rights (lack of positive right to a particular allocation of resources, vagueness, and undermining of the separation of powers), nor the weakening of the social dimension by judicial protection of the individual. However international human rights law, and ILO Conventions, provide a basis for a new culture of social rights. The creation and enforcement of these rights enables the law “to act relatively autonomously to restrain public and private power for the benefit of at least some of the people for some of the time” (Hepple, 2002, p. 16).

b) Soft law or hard law?

Rights at work are sometimes expressed in binding legal instruments, with enforcement mechanisms, but increasingly they take the form of non-binding recommendations, codes of

⁴ Information supplied by Auret van Heerden, Fair Labor Association, Washington DC.(<http://www/fairlabor.org>).

practice and guidelines. The former are usually referred to as “hard law” and the latter as “soft law”.

In public international labour law, ratified ILO Conventions are the best-known example of hard law. They create legally binding obligations on member States, subject to international supervision. ILO Recommendations cannot create international legal obligations and so are usually described as “soft law”. But the distinction with Conventions is to a large extent more a matter of theory than practice. Recommendations have some significant features in common with Conventions: they are drawn up by the same lengthy and careful tripartite procedures, and are subject to the same follow-up procedures as Conventions, apart from those designed to monitor the application of ratified Conventions. After studying a selection of Recommendations that entail varying degrees of difficulty in implementation, Francis Maupain concluded that ILO Recommendations, like unratified Conventions, “can exercise a real influence on national law and practice, with the degree of influence varying widely depending on the subject matter” (Maupain, 2000, p. 383). What is much more difficult to assess, however, is the extent of “compliance” in the strict sense. Maupain suggests that some other terminology may be more appropriate “to describe what the limited evidence suggests, that in many cases there is a selective impact of some of the normative provisions of the instrument, but not necessarily of the instrument as an integrated whole” (Maupain, 2000, p. 393).

Another example of soft international law is the ILO’s disappointing Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (1977), which bears a close resemblance to the OECD’s Guidelines for Multinational Enterprises (1976). As in the case of the OECD guidelines, compliance is voluntary. Neither is legally enforceable, and they cannot be invoked before national courts or tribunals. The ILO Tripartite Declaration has been ineffective because of the absence of sanctions to secure compliance with its standards, even by countries which adopt them (Murray, 1998).

A final example of soft law at international level is the rapid proliferation of corporate codes of conduct issued by transnational corporations (TNCs). These codes have in common the fact that they are *voluntary* written commitments to observe certain standards in the conduct of business, usually including labour and employment rights. The choice of particular labour issues is highly selective and they are usually made unilaterally without the involvement of trade unions. They are ineffectively implemented, with inadequate (if any) monitoring, a lack of training and incentives for local managers to comply, and an absence of sanctions. Most codes make no reference to the consequences of non-compliance; a few mention “working with suppliers or business partners to make improvements”, but termination of a contract or business relationship for non-compliance is a rarity (Hepple, 1999).

There are many reasons for the popularity of soft law. One, which may actually help effective enforcement, is to amplify broad legally binding standards and sometimes to recommend voluntary action which goes beyond strict requirements. ILO Recommendations are an example, as are some national and local codes of practice, issued under statutory powers and capable of being used as an aid to interpretation and enforcement. A second reason is far less acceptable. This treats codes as exclusive alternatives to binding instruments. This approach is profoundly mistaken. First, national experiences indicate that in practice voluntary codes do not succeed unless backed up by legal sanctions. Secondly, the antithesis between soft law and hard law is a false one. One form of regulation (voluntarism) is not an alternative to another (legal enforcement). The point is that a voluntary approach may work in influencing the behaviour of some organizations (e.g. a leading-edge company selling mainly to ethnic minorities will readily want to project an equality policy), but not others who for economic or social reasons are resistant to change. The theory of “responsive regulation” persuasively suggests that regulation needs to be responsive to the different behaviour of various organizations. Although regulators start with attempts to persuade those subject to them to cooperate, they may need to rely on progressively more deterrent sanctions until there is

compliance. In order to work, there must be a gradual escalation of sanctions and, at the top, sufficiently strong sanctions to deter even the most persistent offender. When a low sanction fails, more severe ones need to be available. The theory is supported by much empirical evidence (Hepple, Cousseay, Choudhury, 2000).

c) Public or private enforcement?

Rights at work developed in part as a response to the distinction between the “private” sphere of economic life – what Adam Smith called “civil society” – and the “public” sphere of all that was controlled and administered by the state. This was conceptualized in Continental Europe in the distinction between private and public law. The challenge came from those who were subjected to the domination of private power in the economic sphere but were gradually securing the rights of political and social citizenship. Protective labour legislation changed its character from the gift of the liberal state into the “rights” of workers. Independent state inspectorates (starting with the British factory inspectors) played an important role. As the idea spread of integrating workers into liberal society, so safety delegates, workers delegates and “mixed” labour courts (starting with the French *conseils d’prudhommes*), emerged in Europe as participants in a system of publicly accountable enforcement of workers’ rights. On the other hand, in the United States, private arbitration of labour disputes under collective agreements has been favoured.

The growth of individual legal rights, under statutes and through developments in the common law, has led to an explosion of litigation in many countries. This has prompted the growing popularity of alternative private dispute resolution procedures, such as mediation and arbitration. The main advantages of these procedures are that they are generally cheaper, speedier and more informal than court-based litigation. The main disadvantage is that they usually require the employer and worker to waive their statutory rights. This may be done by way of a pre-dispute mandatory arbitration clause, in which the parties give up their rights to go to court; or it may be post-dispute, i.e. after a specific dispute has arisen. The rights which may be lost in this way include the right to a public hearing (publicity may be an important element where a union seeks to use individual rights as an organizational tool); the right to compel the attendance of witnesses and to cross-examine them; the right to compel production of relevant documents; and the right to published and full reasons for a decision. In some cases arbitration substitutes the unfettered discretion of the arbitrator for the application of pre-existing legal rules. Instead of a judicial process applying laws enacted through the democratic process, private arbitration may simply be used by management to further corporate objectives and to increase control, rather than to promote the public policy objectives of legal rights (Hepple, 2002, pp. 250-252).

An alternative approach is to build the low cost, speed and informality of conciliation, mediation and arbitration into public law systems of rights enforcement. A public law system is able to address the inequality of resources of the parties in a system of individual rights. This can be done by guaranteeing the right of workers to be assisted by workers’ representatives, and to obtain legal advice. State mechanisms for conciliation and mediation can play a major role in resolving disputes over rights.

d) How should restrictions on collective solidarity be redefined?

“The dilemma which globalisation poses for labour law is that the more comprehensive and effective legislation or collective bargaining is, the more likely it is that [multinational corporations] will wish to relocate” (Hepple, 1997). The threat of “strikes” by capital are greatly facilitated by the new mobility of international capital, and by the legal guarantees of free movement of capital, goods and services. The freedom of movement of individual workers

is no counterpart to these freedoms. Morgan and Blanpain (1977) argued 25 years ago, that “if the decision-making power of the enterprise crosses national boundaries, as can be the case with multinational enterprises, employees should equally be able to express solidarity beyond national boundaries.” Yet, transnational industrial action is subject to severe legal restrictions, sometimes outright prohibition, in almost every country, and these restrictions have increased over the past two decades. A recent survey (Germanotta, 2002) indicates that among OECD member States only Belgium appears to leave national and international solidarity action unregulated. Outright prohibition is a feature of UK law, a legacy of market individualism which has been left undisturbed under the New Labour government. In most other OECD countries solidarity action is permissible only if certain strict conditions are satisfied.

The ILO’s response to this has been equivocal and contested. Although the Director-General has spoken strongly about the need for the ILO to contribute to the empowerment of workers, the ILO’s Governing Body has not moved beyond inconclusive discussions. The 1998 ILO Declaration, with its reassertion of freedom of association and collective bargaining as fundamental rights, does provide a framework for new ILO initiatives. The crucial issue is the extent to which the ILO’s supervisory bodies, in particular the Committee of Experts on the Application of Conventions and Recommendations (CE) and the Committee on Freedom of Association (CFA), are willing to recognize that solidarity action, particularly across national boundaries, is encompassed by the freedom of association. The right to strike, including the right to solidarity action, is not expressly recognized in ILO Convention No. 87 on Freedom of Association, but the CE has derived the right to strike from Articles 3 and 10 of the Convention. In relation to solidarity action, the CE and CFA have generally taken the position that “a general prohibition on sympathy strikes could lead to abuse, and workers should be able to take such action, providing the initial strike they are supporting is itself lawful.” The applications of these standards have been ambiguous. In relation to the United Kingdom, the CE has recently reiterated that “workers should be able to participate in sympathy strikes provided the initial strike they are supporting is itself lawful.” In 1989, the CE said that “where a boycott relates directly to the social and economic interests of the workers involved in either or both the original dispute and the secondary action, and where the original dispute and the secondary action are not unlawful in themselves, then that boycott should be regarded as a legitimate exercise of the right to strike.”

The main problem with the CE’s approach is that it makes lawful sympathy or secondary action dependent upon the lawfulness of the primary dispute. If the law applied is that of the country in which the primary dispute occurs, this limitation may make it impossible to take solidarity action with workers in a country where strikes are prohibited or severely restricted. Testing the legality of the primary dispute by the law of the country in which the sympathy action occurs is also beset with difficulties because of the different institutional arrangements and collective bargaining procedures in each country. Application of the law of the country in which the sympathy action occurs would involve artificial modifications of unfamiliar systems. It would, therefore, make sense for national legislation to apply simply a test of “common interest” between the workers involved in the primary and secondary actions.

EXERCISE: INDICATORS OF PROGRESSIVE REALIZATION OF RIGHTS

In his Report to the International Labour Conference in 2001, the Director-General of the ILO drew attention to the “gap between the world we work in, and the hopes that people have for a better life.” This exercise is concerned with the *rights gap*. This gap arises when a country is willing to adhere to certain rights but is unable to do so because of legal or practical difficulties or lack of available resources.

The purpose of the exercise is to enable you: (1) to determine the minimum or core obligations which must be observed; (2) to find ways to balance these against real or imagined constraints; and (3) to monitor progress towards realization.

We shall take three sets of ILO Conventions as examples. These are (1) Convention Nos. 87 (freedom of association and protection of the right to organize) and 98 (right to organize and to bargain collectively); (2) Conventions Nos. 29 and 105 (forced or compulsory labour); (3) Conventions Nos. 138 and 182 (child labour) The texts and ratifications can be found in the readings below, or on the ILO website. These texts should be examined using the criteria discussed in section 4 above.

First Indicator - *willingness to adhere*. Has the state ratified the Convention? Has the Convention been ratified by other states (a) in the same region, and (b) at a similar stage of development?

Second Indicator - *obligations to respect a right*. Identify which rights in the Convention are capable of immediate application without cost or at low cost. Have these been implemented in practice in the country concerned?

Third Indicator - *obligations to protect a right*. Identify those rights in respect of which the state must prevent violation by third parties. Then break down these rights into (a) obligations of conduct and (b) obligations of result. What *net* costs would implementation of these rights involve? To what extent have these rights been implemented in the country concerned?

Fourth Indicator - *obligations to fulfil a right*. Identify those rights in respect of which real resources are required. Who could provide these resources (e.g. state, employers, workers’ organizations, etc.)? What technical and/or financial assistance might be obtained from other sources? To what extent have these rights been implemented in the country concerned?

On the basis of these indicators, you should draw up an action plan for the progressive realization of these rights in the country in question.

Reading: Chapman and Russell, 2002; ILO, 2000, 2001, 2002.

Bibliography

- Abrams, P.: *Historical sociology* (Shepton Mallett, Open Books, 1982).
- Ball, S.: “The European employment strategy: The will but not the way”, in *Industrial Law Journal*, 2001, Vol. 30, pp. 353-374.
- Barnard, C.; Deakin, S.: “Corporate governance, European governance and social rights”, in B. Hepple (ed.): *Social and labour rights in a global context: International and comparative perspectives* (Cambridge, Cambridge University Press, 2002), pp. 122-150.
- Bentham, J.: “Anarchical fallacies”, in J. Bowring (ed.): *Collected works of Jeremy Bentham* (London, 1843).
- Chapman, A.; Russell, S.: “Introduction”, in A. Chapman and S. Russell (eds.): *Core obligations: Building a framework for economic, social and cultural rights* (Antwerp, Intersentia, 2002).
- Clegg, H.A.: “Pluralism in industrial relations”, in *British Journal of Industrial Relations*, 1975, Vol. 13, p. 309.
- Collins, H.: ch. 1 in H. Collins, P. Davies and R. Rideout (eds.): *Legal regulation of the employment relation* (London, Kluwer Law International, 2000).
- Conaghan, J.: “Women, work and family: A British revolution?”, in K. Klare (ed.): *Labour law in an era of globalisation* (Oxford, Oxford University Press, 2002), pp. 53-74.
- Cordova, E.: “Some reflections on the overproduction of international labour standards”, in *Comparative Labor Law Journal*, 1993, Vol. 14, pp. 138-162.
- Cranston, M.: *What are human rights?* (London, Bodley Head, 1973).
- Deakin, S.; Wilkinson, F.W.: “Labour law and economic theory”, in H. Collins, P. Davies and R. Rideout (eds.): *Legal regulation of the employment relation* (London, Kluwer Law International, 2000).
- Dworkin, R.: *Taking rights seriously* (London, Duckworth, 1977).
- Epstein, R.: “In defense of contract at will”, in *University of Chicago Law Review*, 1984, Vol. 51, p. 947.
—: *Forbidden grounds* (Cambridge, Mass., Harvard University Press, 1995).
- Estlund, C.: “An American perspective on fundamental labour rights”, in B. Hepple (ed.): *Social and labour rights in a global context: International and comparative perspectives* (Cambridge, Cambridge University Press, 2002), pp. 192-214.
- Germanotta, P.: *Promoting worker solidarity action: A critique of international labour law* (London, Institute of Employment Rights, 2002).
- Ghai, D.: *Decent work: Concepts, models and indicators*, Discussion Paper 139/2002 (Geneva, International Institute for Labour Studies, 2002).
- Hayek, F.A.: *Law, legislation and liberty* (London, Routledge, 1980), Vol. 3.
- Hepple, B.: “Introduction”, in *The making of labour law in Europe* (London, Mansell, 1986), pp. 1-30.
—: “New approaches to international labour law”, in *Industrial Law Journal*, 1997, Vol. 26, pp. 353-366.
—: ch. 7 in B. Markesinis (ed.): *The impact of the Human Rights Act on English law* (Oxford, Clarendon, 1998).
—: “A race to the top? International investment guidelines and corporate codes of conduct”, in *Comparative Labor Law and Policy Journal*, 1999, Vol. 20, pp. 347-363.
—: *Labour law, inequality and global trade* (Amsterdam, Hugo Sinzheimer Institute, 2002).
—: Coussey, M.; Choudhury, T.: *Equality: A new framework. Report of the independent review of the enforcement of UK anti-discrimination legislation* (Oxford, Hart, 2000).
—: Morris, G.: “The Employment Act 2002 and the crisis of individual employment rights”, in *Industrial Law Journal*, 2002, Vol. 31, pp. 245-269.

- International Labour Organization: *Decent work: Report of the Director-General* (Geneva, ILO, 1999).
- : *Your voice at work* (Geneva, ILO, 2000).
- : *Stopping forced labour* (Geneva, ILO, 2001).
- : *A future without child labour* (Geneva, ILO, 2002).
- Kahn-Freund, O.: *Labour and the law* (London, Stevens, 1976).
- : in J. Clark and R. Lewis (eds.): *Labour law and politics in the Weimar Republic* (Oxford, Blackwell, 1981).
- : in P. Davies and M. Freedland: *Labour and the law* (London, Stevens, 3rd ed., 1983).
- Kilpatrick, C.: “Emancipation through law, or the emasculation of law? The nation-state, the EU and gender equality at work”, in K. Klare (ed.): *Labour law in an era of globalisation* (Oxford, Oxford University Press, 2002).
- Klare, K. (ed.): *Labour law in an era of globalisation* (Oxford, Oxford University Press, 2002).
- Kuruvilla, S.: *Indicators of social dialogue: National social dialogue data sheets*, (Forthcoming Discussion Paper, Geneva, ILS, 2003).
- Landy, E.A.: *The effectiveness of international supervision: Thirty years of ILO experience* (London, Stevens, 1966).
- Leary, V.: “The paradox of workers’ rights as human rights”, in L.A. Compa and S.F. Diamond (eds.): *Human rights, labor rights and international trade* (Philadelphia, University of Pennsylvania Press, 1996), pp. 22-47.
- Maupain, F.: “International Labour Organization Recommendations and similar instruments”, in D. Shelton (ed.): *Commitment and compliance: The role of non-binding norms in the international legal system* (Oxford, Oxford University Press, 2000).
- Morgan, A.; Blanpain, R.: *The industrial relations and employment impacts of multinational enterprises: An enquiry into the issues* (Paris, OECD, 1977).
- Murray, J.: “Corporate codes of conduct and labour standards” in R. Kyloh (ed.) *Mastering the challenge of globalization* (1998).
- : *Transnational labour regulation: The ILO and EC compared* (The Hague, Kluwer Law International, 2001).
- O’Neill, O.: *Towards justice and virtue: A constructive account of practical reasoning* (Cambridge, Cambridge University Press, 1996).
- : *Autonomy and trust in bioethics* (Cambridge, Cambridge University Press, 2002).
- Organisation for Economic Co-operation and Development: *Trade, employment and labour standards* (Paris, OECD, 1996, 2000).
- Oxfam: *Rigged rules and double standards: Trade, globalisation and the fight against poverty* (Oxford, Oxfam, 2002).
- Rawls, J.: *A theory of justice* (Oxford, Clarendon, 1973).
- Saith, A.: *Conceptualising social protection*, (Forthcoming Discussion Paper, Geneva, ILS, 2003).
- Sen, A.: *Development as freedom* (Oxford, Oxford University Press, 1999).
- : “Work and rights”, in *International Labour Review*, 2000, Vol. 139, pp. 119-128.
- Supiot, A.: “The transformation of work and the future of labour law in Europe: A multidisciplinary perspective”, in *International Labour Review*, 1999a, Vol. 138, pp. 31-35.
- et al.: *Au-delà de l’emploi: Transformations du travail et l’avenir du droit du travail en Europe. Rapport pour la CE* (Paris, Flammarion, 1999b).
- Valticos, N.; von Potobsky, G.: “International labour law”, in *International encyclopedia for labour law and industrial relations* (Deventer, Kluwer, 1994).
- Veneziani, B.: “The evolution of the contract of employment”, in B. Hepple (ed.): *The making of labour law in Europe* (London, Mansell, 1986), pp. 31-72.
- Wedderburn, K.W.: *The worker and the law* (Harmondsworth, Penguin, 1965), 2nd ed., 1971; 3rd ed., 1986.
- : “Common law, labour law, global law”, in B. Hepple (ed.): *Social and labour rights in a global context:*

International and comparative perspectives (Cambridge, Cambridge University Press, 2002), pp. 19-54.

Williams, L.: "Beyond labour law's parochialism: A re-envisioning of the discourse of redistribution", in K. Klare (ed.): *Labour law in an era of globalisation* (Oxford, Oxford University Press, 2002), pp. 93-114.

World Bank: *World development report 2000/1: Attacking poverty* (Washington, DC, World Bank, 2001).