1. The rich panoply of sources of labor law: National, regional and international

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INTRODUCTION

To say that labor rights, obligations and entitlements as between employer and employee are many and varied is an understatement. The content and nature of these rights and duties may differ dramatically between countries and regions, public and private sectors, industry and firm, contemporary times and bygone centuries, to name just a few. The sources of labor law, though, can be corralled more readily into categories – collective and individual agreements, statutes, constitutions, international laws, custom and policy, codes and guidelines. These sources are addressed in this chapter, which focuses on the interventions of legislative and other kinds; into the unconstrained operation of the relationship of employee and employer in the market.

Very few countries today have a totally unregulated employment relationship. Indeed the spectrum of the regulation ranges from minimal – perhaps enough to satisfy health and safety and other essentials – to very prescriptive. Within countries the place on the spectrum may have fluctuated, sometimes considerably, over the years with changes in thinking, such as free market or neo-liberal ideologies or modern socialist approaches.

As with any market, and in a simplified model of the complexities of reality, if labor markets were to be entirely free of regulation, the outcomes would clearly vary considerably according to a range of factors. An individual worker might have a substantial degree of bargaining power if her or his skills were relatively rare, if she or he had knowledge of market opportunities, if the costs of obtaining that information were low, if travel to the source of work was financially viable and so on. But likewise the individual worker may have very little power to negotiate terms and conditions (including as to safe systems of work), and would have to accept what an employer in the market offered, if he or she were just one of a large number of workers with similar skills, job mobility, location mobility and so on.

By way of contrast, on the other hand, it could be postulated that a system may provide high degrees of regulation of the actual terms and conditions of employment, directing where workers could work, what occupations particular people could pursue, conditions in which people worked, and so on. This system would produce a very different outcome for a particular worker than the other extreme, however that outcome is measured.

These shorthand descriptions of aspects of systems embody, in a somewhat caricatured way, very different conceptions of the role of the individual in their capacity as a worker in an economic activity and the role of an employer requiring labor services in its business.

It is a reasonable generalisation that in economic systems, within which persons supply labor services in a market framework, the state provides a legal framework for the dealings, as between employer and worker, which is somewhere on a spectrum between these two rigidly-sketched extremes. Moreover, when considering comparisons between countries as to sources of law in labor matters, the position of a particular country is more readily characterised as being at a point on a multi-dimensional matrix, rather than being at a point along the simple linear scale, which is implied by the use of the spectrum concept.

The enormous variability in sources of labor law, and in their combination in particular countries, is illustrated by the dimensions under consideration in this chapter. All countries have much the same implements in their legal toolkits: the law of obligations as it operates on private market behavior vindicated by private action for injunctive or monetary relief; statutory actions; administrative interventions by the state including systems of licensure, or permits beforehand or prohibitive action subsequent; and more. The choice of one or another, to act, to react, or not to act at all is governed by numerous forces, some historical or intrinsic to the country's system. On that, observers have long discerned distinctions rooted in the legal family from which the state draws,[1] but, as the chapter 'Fostering market efficiencies or repairing market failure' by Silvia Bonfanti, Cynthia Estlund, and Nuno Garoupa in this volume attests, that traditional view has become subject to probing reassessment.

This chapter will examine first a primary and significant source of enshrining labor rights, the nation's constitution. It will examine statutory laws, collective and individual agreements, and codes of practice and soft laws. The role of other laws and policies that are not specifically labor laws but influence the labor and anti-discrimination legislation will be examined. The influence of international laws and conventions will be addressed. Finally the European region as an example of another layer of regulation over member states will be examined.

1. CONSTITUTIONS AS A DIRECT SOURCE OF LABOR LAW

The national constitutions of many countries enshrine labor rights and are direct sources of labor law. (Constitutions may also contain broad statements of rights, which apply in the employment context.) Other jurisdictions do not provide for labor rights at

[1] Sean Cooney, Peter Gahan and Richard Mitchell, 'Legal origins, labor law and the regulation of employment relations' in Michael Barry and Adrian Atkinson (eds), *Research Handbook on Comparative Employment Relations*, Edward Elgar 2011, Ch 4:

> [C]ommon law countries have a weaker level of protection than other legal families. This is particularly evident in relation to the level of protection afforded to most worker entitlements. Moreover, common law countries are typically less likely than each of the civil law groups of countries to provide universal coverage of entitlements, notably through the extension of collective agreements to non-union workers. Compared with countries from other legal families, common-law countries are, on average, significantly less likely to place limits on managerial prerogatives through, for example, restrictions on the use of fixed term contracts or requirements to notify a third party (such as a government agency or union) of intentions to make workers redundant.

all – either as applications of general rights or as specific labor rights. Examples of these approaches are considered below.

Specific Labor Rights

The constitutions of some countries make specific provision for rights which are directed to labor or employment. The Thirteenth Amendment to the United States Constitution, a document otherwise directed exclusively to government, forbids slavery and involuntary servitude. The Japanese Constitution guarantees 'the right of workers to organise and to bargain and act collectively'.[2] This provision guarantees the rights of workers to organise and join an organisation for the purpose of bargaining with an employer, to collective bargaining and to collective action.[3]

The German Constitution grants all Germans the 'right freely to choose their trade or profession, their place of work and their place of training'.[4] In addition, German workers have rights which link to their work and conditions: the Constitution provides that 'the right to form associations to safeguard and improve working and economic conditions is guaranteed to everyone and to all trades and professions'.[5] This right to free association has been interpreted by the courts to guarantee the right to collective bargaining and the right to strike.[6] Both trade unions and individuals may enforce the right. Other values set out in the Constitution have been assimilated into private law via provisions in the Civil Code. The Swedish Constitution, as an interesting contrast, guarantees the right of association and right to strike but not the right to bargain collectively. Thus examining these three countries (Japan, Germany and Sweden) as examples reveals different approaches to what are and what are not included as labor rights. As the Bill of Rights in the United States Constitution applies only to government it has been held to reach public, but not private, employment.

In addition to more general rights in the Bill of Rights in the Constitution of South Africa (including the right to life,[7] the right to privacy,[8] and the right to human dignity),[9] rights which address or encompass broad labor rights include: the right to be free from slavery servitude or forced labor;[10] the right of freedom of association;[11] and the right to carry on a trade or profession.[12] More specifically too, particular labor rights are identified in section 23 as the right to 'fair labor practices' – the right to form

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[2] Japanese Constitution, Article 28. This provision is in fact based on the Constitution of the Weimar Republic, the former legal structure for government of Germany.

[3] Roger Blanpain (ed.), *Comparative Labor Law and Industrial Relations in Industrialized Market Economies*, Wolters Kluwer, The Netherlands, 2007, p 140.

[4] German Constitution, Article 12.

[5] Ibid., Article 9.

[6] Blanpain (n 3 above).

[7] South African Constitution, Section 11 provides 'Everyone has the right to life'.

[8] Ibid., Section 14.

[9] Ibid., Section 10 provides 'everyone has inherent dignity and the right to have their dignity respected and protected'.

[10] Ibid., Section 13.

[11] Ibid., Section 18.

[12] Ibid., Section 22.

and join a trade union and to join in union activities; and the right to strike. Significantly, rights are not limited to unions or employees but extend to rights of employers to form and join employers' associations and to participate in the association's activities. The right to collective bargaining is also expressly conferred on every trade union, employers' organisation and employee in section 23(5). Collective bargaining is also addressed in section 23(5) by the provision that national legislation 'be enacted to regulate collective bargaining'.[13]

Whilst the Indian Constitution[14] includes an extensive part on Fundamental Rights, Part III, embracing such rights as freedom of religion for every citizen in India[15] and the right to life,[16] these Fundamental Rights relate less to labor law than in some constitutions (and certainly the South African Constitution). The more limited but express labor law rights are:

- right to equality, a broad right but which includes in Article 16 that the State, in employment matters, cannot discriminate against a citizen of India;
- right to be free of exploitation, which extends to no employment of children who are less than 14 years of age in 'any factory or mine or engaged in any other hazardous employment'[17] and abolishes forced labor and human trafficking;[18]
- right of freedom of association: to form unions or associations.

The Constitution of the People's Republic of Bangladesh takes a similar approach to that of India. It also incorporates in Part III, fundamental rights to embrace rights to equality of opportunity in public employment,[19] prohibition of forced labor,[20] freedom of association to grant the right to form associations or unions[21] and the right to carry on a trade or profession.[22] Further prohibitions against discrimination in Article 28 extend not only to the grounds of sex, religion and race, but also of caste and place of birth.[23]

No Constitutional Provision for Labor Rights

The constitutions of some countries are notable for the absence of any express labor rights, hence these constitutions cannot be looked to as a source of labor rights. This is the case in Australia, where the Constitution neither provides for a Bill of Rights nor

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[13] Ibid., Section 23(5).
[14] This is a federal Constitution.
[15] See Indian Constitution, Articles 25, 26, 27 and 28.
[16] Ibid., see Articles 20 and 21.
[17] Ibid., Article 24.
[18] Ibid., Article 2.
[19] People's Republic of Bangladesh Constitution, Article 29.
[20] Ibid., Article 34.
[21] Ibid., Article 38.
[22] Ibid., Article 40.
[23] See generally paper presented to Labor Law Research Network Inaugural Conference, Barcelona, June 2013, Jakir Houssain, 'Standards-Rights Nexus in Action in Bangladesh: Transforming Labor Standards into Workers' Rights'.

does it attempt to enshrine either general rights that might apply to employment or specific labor rights. Amongst the few express rights provided, none translate or apply to labor rights. Some rights have been implied into the Constitution by the High Court of Australia but freedom of association, for example, whilst receiving some judicial support, is not implied. In some countries, notably Israel, New Zealand and the United Kingdom, there are no written constitutions and hence no constitution as a source of written labor rights.

Absolute Rights?

Even where countries' constitutions provide for labor rights, the rights may not be absolute or they may be subject to limits which could be placed on them by the parliament. In South Africa, for example, there is built-in provision for the possibility of clauses to restrict or limit those rights. Section 36 contains a general limitation clause enabling limits to be imposed in general law application where they are 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. In India, whilst freedom of association with the right to form union or associations is conferred, restrictions can be imposed. Hence when considering the constitution as a source of rights, some caution must be expressed about the strength ultimately of some of the constitutional 'guarantees'.

Constitutional Approaches: Making Sense of Various Approaches

As the brief survey set out above demonstrates, there is an array of approaches to enshrining labor rights in the Constitution. Some of the core rights addressed in Constitutions are the right not to be discriminated against; freedom from slavery; freedom of association; the right to strike; and the right to bargain collectively.

(a) Right not to be discriminated against

A right which seems to be enshrined in many Constitutions which have incorporated rights is the right not to be the subject of discrimination. This embraces the labor right not to be discriminated against in the field of employment but of course it is a much broader right, including the right to equal treatment in a wide range of contexts – education, housing, and the provision of services. Thus the right of equal treatment in the employment context is but one aspect of the right of equal treatment more generally.

(b) Freedom from slavery

The right not to be held in slavery or servitude, however, is a more basic but important labor right. It is provided in the Constitutions of many countries – see, for example, the Constitutions of Ghana, South Africa, India, Bangladesh, and the United States. The expression of this right – and therefore its content – also varies, with some countries using a simple statement, as in Ghana whose Constitution provides that no person shall be held in forced labor or servitude or required to perform forced labor; whilst other Constitutions are more expansive and include a right to be free of exploitation and prohibit engagement of child labor, as in the Indian Constitution.

(c) Freedom of association

The freedom to form and join trade unions is seen by many countries as so fundamental that it should be enshrined in the Constitution. While it may be expressed in general terms as freedom of association,[24] it is often detailed more fully as the right to form and join trade unions and the right to join in union activities, as in the South African Constitution, or the right to join associations to improve working conditions, as in the case of Germany. The Constitution may also enshrine the ability to limit the freedom. The Indian Constitution, for example, enables the state to limit this freedom to impose 'reasonable restrictions on the examination of the right … in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality … .'[25]

Whilst the freedom may be granted in the Constitution, court decisions may flesh out its content – the extent of true conferral of freedom to form and join associations may depend on the combination of constitutional expression and its interpretation by the courts which in turn may be influenced by other sources of law, such as ILO Conventions or European Directives.

(d) Right to bargain collectively

The right to bargain collectively is expressed in some countries' constitutions, as in the case of some European Union member countries, for example Belgium,[26] and in South Africa. In other cases it may be read from the right to form trade unions and engage in union activities, as in the case of France, Germany and Italy. Canadian courts have recently read freedom of association as embracing the right to collectively bargain (see later section).

(e) Right to strike

This right is expressly conferred in the constitutions of such European countries as France, Italy, Spain, Portugal, Greece and Sweden, but strangely not in the Netherlands. It has been commented that, 'Perhaps curiously, the *right to strike* appears to be more widely recognized in European social democracies than the process of collective bargaining of which it is an essential feature.'[27] It may be, of course, that collective bargaining is no less entrenched in labor law systems because of its constitutional absence, as in the case of Sweden where it is self-regulated and given legislative backing.

Rationale for Enshrining Labor Rights in Constitutions

Enshrining the rights in Constitutions makes for more inviolable rights in the sense that Constitutions are generally more difficult to change than ordinary laws passed by the legislature – so a decision of a country to adopt rights in their Constitutions is an

[24] See, eg. The Irish Constitution

[25] Indian Constitution, Article 19(2).

[26] Constitution of Belgium, Article 23.

[27] Michael Rosenfelt and Andras Sajo (eds) *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012, p 1046.

indication of the seriousness with which those countries hold or regard the rights. They want these rights neither to be at the whim of Parliament, that is, not to be easily changed by the usual processes adopted by parliaments to enact laws (but in some cases the right can be constrained but not eliminated).

The underlying question, though, why some countries decided to enshrine labor rights in their Constitutions and others chose other avenues is not easily explained. The influence of other countries' approaches and the origins of a country's Constitution in colonial history may go some way to providing an adequate explanation. For other countries, the tradition of a Constitution based on convention, rather than the written law, would explain this – as in the United Kingdom. Elsewhere, the battleground of the Constitution was fought on other issues. In Australia, for example, the issues besetting the 'Constitutional forefathers' had, as a fundamental concern, the balance between powers to be held by the proposed new federation of states (the Commonwealth) as against the new states themselves (former individual colonies). In the labor-relations area, the energies in these Constitutional debates focused on the precise nature, if any, of the power to make laws with respect to labor relations to be conferred on the new Federal Parliament.[28] Perhaps no generalisation for present purposes can be made, as each country's own history will provide at least a large part of any answer there may be – although the general adoption of international conventions in the twentieth century may have encouraged some countries to include rights derived from those conventions, if their constitutions were developed in the context of the increasing frequency of conventions dealing with such matters, as occurred in India.

Quasi-Constitutional Rights Instrument: Bills or Charters of Rights

One of the problems in coming to grips with the diversity of constitutional and quasi-constitutional arrangements in various nations is that a term such as a 'bill of rights' and 'charter of rights' can represent concepts with different content and status in different countries. Whilst the constitutions of some countries include a part incorporating fundamental rights, another approach taken in recent years by a number of jurisdictions is to enact 'quasi-constitutional' rights instruments which form part of the content of domestic labor law. Essentially these laws are Acts of Parliament which provide for fundamental human and other rights (and may encompass a range of labor rights) and may be labelled as a Charter of Rights or a Bill of Rights.

This approach was adopted in New Zealand, with the New Zealand Bill of Rights Act 1990 (NZ Bill of Rights) setting out a series of fundamental rights, including the rights to free association and free assembly.[29] These rights may be subject only to such 'reasonable limits prescribed by law as can be demonstrably justified in a free society'.[30] The NZ Bill of Rights requires that any enactment must be interpreted in a way that is consistent with the rights contained in the Bill. In addition, all new

[28] See generally Marilyn Pittard and Richard Naughton, *Australian Labour Law: Text, Cases and Commentary,* 10th ed, LexisNexis, 2010; and Marilyn Pittard and Richard Naughton, *Australian Labour and Employment Law*, LexisNexis, 2015.

[29] New Zealand Bill of Rights Act 1990, Sections 16, 17.

[30] Ibid., Section 5.

legislation must be examined to determine its consistency with the NZ Bill of Rights. If not, the government is required to provide a justification for the inconsistency.[31] The rights contained in the NZ Bill of Rights may be exercised by legal persons, which include unions, as well as natural persons.[32] The few rights relevant to labor law are expressed succinctly – section 17 simply provides: 'Everyone has the right to freedom of association' and it does not flesh out the application to unions; and section 16 provides: 'Everyone has the right to freedom of peaceful assembly.' There is further a right to freedom from discrimination.[33]

Similarly, rights in Canada are guaranteed under the Canadian Bill of Rights. The Canadian Bill of Rights, a federal statute enacted in 1960, establishes 'fundamental freedoms', including the rights to free speech, free assembly and free association.[34] Laws of Canada are to be 'construed and applied so as not to abrogate, abridge or infringe … any of the rights or freedoms' contained in the Bill.[35] There was dissatisfaction with the Canadian Bill of Rights and, ultimately in 1982, the enactment of the Charter of Rights and Freedoms as part of the Canadian Constitution occurred.[36] The Bill of Rights remains in existence but it is not part of the Constitution of Canada and therefore, not being subject to restrictions and requirements for amending the Constitution, could be readily amended by Act of Parliament. Similar to the NZ Bill of Rights, these Canadian rights are not specific to labor relations but they are applicable to labor matters.

The major limitation of these approaches, however, is that whilst the Charters or the Bills of Rights, which are not entrenched constitutionally, endeavor to enshrine various rights, their application is limited. They do not compel the enactment of particular laws. Rather, they provide a mechanism for reviewing Acts of Parliament to ensure that these Acts are consistent with the rights which are the subject of the domestic law in the Charter or Bill and may apply, as in the case of the NZ Bill of Rights, to actions of persons or bodies performing public functions, powers or duties, but do not extend beyond this legislative check or accountability. Generally, if the court determines that the legislation is not consistent with the Charter, the legislation is not void or unenforceable but may be reviewed again by the Parliament. However, despite this limitation, in Canada, the Charter (which is now constitutionally enshrined) has lead to a significant Supreme Court decision which acknowledges the right to collective bargaining, derived from the express right to freedom of association.[37] Following challenges to the validity of British Columbia government action – in introducing legislation which repealed rights to bargain collectively without consulting those trade unions who represented affected employee members and effectively introducing the legislation without public debate – the Supreme Court of Canada, in upholding the

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[31] Ibid.
[32] Ibid., Section 29.
[33] Ibid., Section 19.
[34] Canadian Bill of Rights Part 1, Section 1.
[35] Ibid., Section 2.
[36] Constitution Act 1982.
[37] *Health Services and Support-Facilities Subsector Bargaining Association v. British Colombia* [2007] SCJ No 27; 2 SCR 391.

challenges, effectively overturned previous court decisions by ruling that the right to bargain collectively is part of freedom of association.[38]

2. CONSTITUTIONS SHAPING THE NATURE OF LABOR LEGISLATION

National Constitutions govern both the formation and making of domestic labor law, and the extent to which international or regional labor law is applicable in the jurisdiction. In addition to (perhaps) conferring directly labor rights they govern the ability of Parliament to legislate with respect to those labor rights.

Formation and Operation of Labor Law

Constitutions generally mandate a process by which laws are made in the jurisdiction. In most jurisdictions with developed legal systems this includes the separation of the power to make law between the legislature, the executive and the judiciary. In addition, in federal jurisdictions, the Constitution will divide the power to make law between levels of government (commonly, the national level and another level based on a region of the country).

The power to make labor law is granted to the separate institutions of government – the legislature, judiciary and executive. The legislature, empowered by the national Constitution, passes legislation which forms the content of labor law. The legislature may also delegate some legislative power to the executive, empowering it to create regulations and make administrative decisions on labor law matters. Finally, the judiciary is charged with resolving labor disputes, and in doing so interprets the law formulated by the legislature. The proportion of power that each arm of government has in the process of formulating and implementing labor law differs in each jurisdiction, and will be discussed below.

The power to make labor law will be granted to one or more levels of government. In unitary jurisdictions, such as New Zealand and the United Kingdom, there is a single, national government. Clearly, in these jurisdictions, the power to make labor law is reserved to the national government. However, in federal jurisdictions, the constitution will often divide this responsibility between the federal and state or provincial governments, but not always cleanly, thus adding to the complexity of operation and application of interacting labor laws.

In certain federal states, labor law-making power is reserved to federal governments. For example, in Germany, only the federal legislature ('Bundestag') is competent to legislate on industrial relations. Labor law can only be made by state legislatures upon a specific grant of power by the Bundestag, such as that established by the Federal Act

[38] See Judy Fudge, 'Conceptualizing collective bargaining under the Charter: The enduring problem of substantive equality' (2008) 42 *Supreme Court Law Review* (2d); Judy Fudge, 'The Supreme Court of Canada and the right to bargain collectively: The implications of the *Health Services and Support* Case in Canada and beyond' (2008) 37(1) *Industrial Law Journal* 25.

on Staff Representation. This has contributed to general homogeneity of labor law throughout Germany.

In Canada, the power to make labor law is 'divided between the two levels of government on the basis of the nature of activity involved'.[39] Under the Canadian Constitution, the federal government has the power to regulate transportation and communications, interprovincial and international trade, defence-related industries and the federal public service'.[40] This power has been interpreted to extend to the making of labor law governing employment relationships in these sectors. However, the labor law-making power in all other sectors is granted to provincial governments. Hence there is a public-private sector divide due to the federal and provincial divisions of power.

The US Constitution limits the legislative power of the Congress to certain matters, and reserves all other law-making to the states. Most of US federal labor law is based on the power to regulate interstate commerce, which since 1937 has been read quite expansively. Most employment law in the US is state law; but when federal law steps in the common question is whether it preempts the field. For the most part, federal law is not preemptive. A major exception is law of unionisation and collective bargaining.

Successive constitutional court decisions have expanded the power of the federal government to make labor law in Australia. The Australian Constitution grants legislative power to the federal Parliament only if a 'head of power' exists in the Constitution to support the legislation. The 'labor power' set out in the Constitution gives the federal Parliament the power to legislate on labor matters in a particularly constrained way, at least on the form of wording used: the federal Parliament has power to make laws with respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State', thereby prescribing the method of dispute settlement and restricting it to *interstate* industrial disputes.[41] It also means the Parliament cannot directly legislate for industrial relations, for example prescribe minimum wages and conditions, unlike Brazil where the Federal Constitution establishes national minimum wages, and the Constitution and the Labor Code lay down the working week (44 hours; eight hours each day).

The Australian Constitution left intrastate labor disputes and other labor matters within the legislative power of each state. As the power to enact labor laws is held concurrently by state and federal governments and each state took the opportunity to establish its own industrial relations system, the very real possibility of clashes in laws at different levels always eventuated. However, despite the apparent limit in the federal power to legislating for interstate disputes, the High Court of Australia's broad interpretation ensured that this component of an 'interstate dispute' was easily created and easily satisfied. In reality, legislation at federal level resulted in coverage of industrial awards of approximately 80 per cent of the Australian workforce until the 1990s.[42]

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[39] Harry Arthurs et. al. *Labor Law and Industrial Relations in Canada*, Kluwers, The Netherlands, 1981.

[40] Ibid.

[41] Australian Constitution, Section 51(xxxv).

[42] Pittard and Naughton, *Australian Labour Law*, (n 28 above), Chs 7 and 10.

However, the Australian federal legislature also has the power to make laws with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth' (frequently referred to as 'constitutional corporations').[43] This power was used cautiously initially to outlaw trade union secondary boycotts against corporations;[44] to enable incorporated employers to enter into collective agreements *without* trade unions;[45] and to allow statutory agreements between incorporated employers and individual employees, a form of individual bargaining.[46] In 2006, Australia's constitutional court again broadened its interpretation of the corporations' power, by holding that the federal legislature's power to make labor law extends to:

> The regulation of the activities, functions, relationships and the business of a [constitutional corporation], the creation of rights, and privileges belonging to such a corporation [and] the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or businesses.[47]

This decision clearly confers on the federal legislature the power to regulate 'the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations'.[48] And has virtually made the express provision relating to making labor laws, section 51(35), redundant. It enabled a national system of industrial regulation to operate, with the states referring some of their law-making powers to cover non-corporate employers and leaving the states operating only in a limited sphere of government level employees.

Sources of labor then can be federal laws and state or provincial laws, with the constitution providing relevant powers and courts ruling on the validity or otherwise of the laws. The very nature of the power granted in the constitutions can shape the labor laws enacted, and the court interpretations over time are another influential source.

3. LEGISLATING THE FRAMEWORK FOR COLLECTIVE BARGAINING

Collective bargaining can generally be described as 'the process by which terms and conditions of employment are determined by negotiations between employers and trade

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[43] Australian Constitution, Section 51(xx).

[44] Trade Practices Act 1974 (Cth) (now Competition and Consumer Act 2010 (Cth)).

[45] Workplace Relations Act 1996 (Cth).

[46] These were known as Australian Workplace Agreements. Pittard and Naughton, *Australian Labour Law* (n 28 above), Ch 12, and Pittard and Naughton, *Australian Labour and Employment Law*, (n 28 above), Ch 13.

[47] *New South Wales v. The Commonwealth* [2006] HCA 52 (Work Choices Case).

[48] *New South Wales v. Commonwealth* [2006] HCA 52, para 178.

unions'.[49] Having said that, some systems permit negotiations between employers and groups of employees, without union involvement.[50]

Legal frameworks are usually enacted in which collective bargaining operates. There are a wide range of schemes with differing degrees of complexity and regulation. The issues usually canvassed in these schemes relate to, on the one hand, procedural matters, such as the recognition of bargaining agents and right to use particular bargaining agents, and the requirement to bargain in good faith, and, on the other hand, the substantive matters which are the matters of the subject of bargaining. Jurisdictions differ as to what is emphasised in the regulatory framework. In the United States, for example, procedural matters loom large.[51] Important too in collective bargaining systems are issues of the enforceability of collective agreements; the extent to which the agreements are underpinned by safety nets; the extent to which there is third-party approval of the agreement necessary for its operation and enforcement and the nature of the right to undertake strike action or lockouts in support of bargaining or more generally.

On the procedural matters, frequently the parties themselves determine and agree on process for bargaining, as in the case of the United Kingdom; while in others process is laid down in statutes, sometimes in detail, for example about the appointment of bargaining representatives in Australia. Some jurisdictions leave little room for the parties themselves to decide on matters to be included in the agreement, and prescribe matters which cannot be included (eg, bargaining fees to be charged by unions for representing non-unionists in negotiations); matters which must be included (eg, dispute resolution processes) and matters which may be included (eg, matters pertaining to the relationship of employer and employee only). Thus some systems are highly regulated and shaped by legislation and therefore are at risk of legislative change with successive governments of different political persuasions. Often the rhetoric in policy is that parties freely negotiate their own agreements (deregulation) but in reality the systems can be highly regulated.

Other systems feature self-regulation. Sweden has no government intervention in bargaining, but the 1977 Codetermination Act provides a framework and does regulate some matters relating to recognition of unions, and bargaining process aspects. However, maximum working hours and minimum paid annual leave, for example, are the subject of legislation, and the system underwent changes in the 1980s.[52] Collective agreements would govern terms and conditions of work in most Swedish workplaces. The terms set are minimal which can be improved upon by employers. The content of collective agreements commonly covers wages, hours of work, sick leave, sickness and accident insurance.

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[49] Bob Simpson in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law,* Oxford University Press, 2008, p 153.

[50] For example, Australia had a non-union stream of collective bargaining between an employer and two or more employees under the Workplace Relations Act 1996 (Cth).

[51] Robert Gorman and Matthew Finkin, *Labor Law: Analysis and Advocacy*, Juris Publishing, Inc, 2013.

[52] Kristina Ahlén, 'Swedish collective bargaining under pressure: Inter-union rivalry and incomes policies' (1989) 27(3) *British Journal of Industrial Relations* 330.

Level of Bargaining

Bargaining may occur at industry or sectoral levels or at enterprise or plant levels. In the United States, Canada, Australia, Japan, many Eastern European countries and South American countries, for example, enterprise or more localised bargaining is the norm (and indeed may be prescribed). In Western Europe, as well as such countries as Brazil and Argentina, the bargaining level is industry or sectoral. Thus one collective agreement might apply to, say, the metalworking industry across the whole of Spain. Greater uniformity of employment conditions between businesses occurs where the collective agreement is negotiated at broader levels. In some jurisdictions multi-employer agreements are not permitted.

To further add to the variety of arrangements, multi-level agreements may exist where a plant, for example, is covered by one agreement at that very local level and also by an industry or sectoral level agreement. At peak or umbrella employer organisation and union confederation levels, particularly in some professions, agreements too may be concluded about specific matters, such as training. Framework agreements may be negotiated to provide a basis for the negotiation of agreements at a more local or enterprise level.[53]

Public or Private Enforcement and Administration of Collective Bargaining

Enforcement mechanisms vary considerably. Some jurisdictions have relatively little intervention and the collective agreement is binding and enforceable upon signing, as in the United States, with no third-party supervision.[54] Interpretation and enforcement of agreements in the United States reflects a private enforcement approach. Collective agreements commonly provide for resort to arbitration for disputes arising under them – there are no civil remedies for breach.[55]

Even in systems where third-party approval is not required, enforcement differs. Collective agreements are generally not enforceable in the courts in the United Kingdom, being regarded as 'gentlemen's agreements' or private arrangements at common law, with no intention to enter into legal relations.[56] However there might be ability to incorporate the terms of a collective agreement into a contract of employment to make it part of the contract and thereby enforceable as terms of that individual contract. While the Trade Union and Labor Relations (Consolidation) Act 1992 (UK) now provides for enforcement in section 179, it is limited to circumstances where the parties expressly state that it is their intention that the agreement be enforceable and the collective agreement is in writing. Hence, the matter still remains in the realm of

[53] There might also be differences between private and public sector employees. See, eg, Marilyn Pittard and Philippa Weeks (eds) *Public Sector Employment in the Twenty-First Century*, ANU EPress, 2007.

[54] Gorman and Finkin (n 51 above).

[55] Craig Becker, 'The continuity of collective action and the isolation of collective bargaining: Enforcing Federal Labor Law in the Obama Administration' (2012) 33 *Berkeley Journal of Employment and Labor Law* 401.

[56] *Ford Motor Co v. AUEFW* (1969) 2 QB 302. See generally, Hugh Collins, Keith D Ewing and Aileen McColgan, *Labour Law*, Cambridge University Press 2012, pp 123–30, 535.

the parties to decide on enforceability. In the United Kingdom, there is relatively little publicly funded or third-party intervention in collective bargaining – the legislation sets out processes for recognition of bargaining agents but the agreements themselves are negotiated between the parties with no requirement for third-party approval. Patterns and length of strikes are influenced by the degree of state intervention.

In other jurisdictions, third-party supervision may be considerable – the collective agreement must be approved by a tribunal or body and 'registration' of the agreement is required as a precondition of that agreement being binding and enforceable. Many jurisdictions provide publicly funded schemes to enforce collective bargaining and its requirements. In Australia, for example, there is a government funded authority (currently the Fair Work Ombudsman) which can investigate breaches of enterprise agreements and institute proceedings in the courts for enforcement – through the imposition of financial penalty and award of monies owing or other relevant orders. As an enforcement arm, it has promulgated a 'prosecution policy', inter alia, governing decisions about which cases are eligible for publicly funded prosecution. Unions or the employees themselves can also institute proceedings for breach. The enforcement, however, is in the courts of law, not specialist courts. In terms of administration, the independent, publicly funded tribunal (Fair Work Commission) is the body which approves collective agreements (necessary for enforcement) in accordance with the legislative requirements, makes orders in relation to breaches of good faith bargaining requirements and orders about coverage of agreements or where an employer is refusing to bargain.[57]

The process of bargaining and good faith bargaining are commonly matters of importance in bargaining systems and these are often prescribed, even where the degree of intervention by the state is relatively low. Good faith bargaining requirements apply through legislation in such countries as the Philippines, Korea, New Zealand, Australia, Canada, and the United States.

4. STATUTORY PROVISIONS

Collective Rights

The statutory law might also regulate collective rights, in addition to providing a collective bargaining framework, but could be a force 'for good or ill', conferring rights positively or restricting them. Trade union status, procedures for mass redundancies and the right to strike and lockout would be among these collective rights positively conferred. Freedom of association, trade union recognition and the conferral of legal status on unions are usual and significant legislative interventions in many jurisdictions. Australia, for example, conferred legal status akin to corporate status on unions in the first federal labor law legislation,[58] thereby avoiding the struggle for recognition that historically occurred in many countries. In Sweden, the Employment

[57] Pittard and Naughton, *Australian Labour Law* (n 28 above), Ch 13; and Marilyn Pittard and Richard Naughton, *Australian Labour and Employment Law* (n 28 above), Ch 14.

[58] Conciliation and Arbitration Act 1904 (Cth).

(Co-Determination in the Workplace) Act regulates employer and trade union relations and establishes rules. Notably, the employer must keep unions informed about matters such as the employer's financial position, any policies at work, and proposals for restructuring or downsizing.

In some countries unions are, or have been, institutionalised, akin to an arm of the state and carrying out policies of the state, as was the case in Mexico. Further the legislation might be a source of anti-union rights, as historically in the United Kingdom and Japan, for example, or might water down freedom of association to include a notion of freedom *from* association (Australia).

The extent of support for strikes and industrial action to create pressure on employers in the course of negotiations is often regulated by the countries' governing legislation. This has ranged from complete bans on strikes and lockouts to liberal strike laws, but commonly industrial action will be permitted in limited and specific circumstances.

Individual Rights and Entitlements

The laws may also directly provide for employment conditions, as a minimum, and in effect confer individual rights. These statutes are a significant source of labor rights in the vast majority of jurisdictions. Labor law plays a significant role in ameliorating the harsh effects of the market and protects weaker groups and more vulnerable employees. The protections range from standard labor matters, such as minimum wages, hours of work, paid holidays and sick leave to unfair dismissal protection and provisions for flexible work.

The extent of the legislated safety net or minimum standards is largely a reflection of the prevailing ideology. Neo-liberals seek to minimise interference in the free labor market; they argue that minimum wages can be set artificially above market rates, thereby discouraging hiring and altering competitiveness, including globally. The controversy of unfair dismissal laws arises from clashes of the neo-liberal view against those of left wing or labor movements. The neo-liberal view espouses that such laws prevent justifiable terminations of employment, add to labor costs, diminish productivity, impact detrimentally on competitiveness and so on. Labor or left-wing movements on the other hand propound that unfair dismissal protection prevents the worst of capricious and arbitrary employer actions, promotes job security, enables workers to have a 'voice' in resisting unfair changes in work or unsafe workplaces without threat of job loss and creates fairer workplaces. Many jurisdictions without unfair dismissal protection may nonetheless protect against terminations of employment for union activities and provide for redundancy pay or procedures. The ability of small businesses to comply with such unfair dismissal laws has also been in issue.

Thus countries may have minimal safety nets, as in the United States; a core of safety net conditions in legislation which cannot be altered by agreement, as in Australia; a core of minimum provisions, some of which may opted out of, as in the case of maximum working hours in the United Kingdom; or a considerable array of minimum rights as in Brazil where the Labor Act, Consolidacao das Leis do Trabolho, is an important source of employment rights. Standards too may be fluid and fluctuate over time, with changes in philosophy and governments, government's response to

global financial crises, globalisation, privatisation and so on. Different systems reflect different values or the weighting of values.

There are additionally other forms of minimum entitlements, for example in industrial awards which might be made by tribunals and binding on the parties setting out minimum rights and conditions. These are not statues but are made pursuant to statutory processes and procedures (in Australia).

5. THE EMPLOYMENT RELATIONSHIP[59]

This relationship which arises when the parties enter into an individual agreement between employer and employee has traditionally been at the heart of labor law. It not only defines entitlements and obligations in the contract, but significantly will also determine the application of other laws (statutes) which grant rights and obligations to employers and employees.

In common law jurisdictions the modern form arose out of the relationship of master and servant which was very much a relationship of one party being subservient to the other, with the master giving the servant orders as to the tasks and the methods of completing the tasks. Frequently the servant worked alongside the master and was subject to his direction and control in a real sense. This mode of small-scale production working changed and over time the master-servant relationship as one of status was replaced by the employer-employee relationship in modern form.[60] Now, express terms are agreed upon and the courts imply terms either in fact (depending on the particular negotiated circumstances) or in law, where terms are implied in all contracts of a particular type, in this case the employment contract, as necessary to facilitate the operation of the contract. Terms implied in law have been the greatest source of change in the contract over the years – not only have terms such as the duty to obey reasonable and lawful orders been part and parcel of the contract but also terms relating to matters such as health and safety obligations and the duty of mutual trust and confidence.

The contract is now no longer subject to the free, unimpeded bargaining of the individual parties. Labor laws step in to rectify imbalances in power between the parties and to ensure that basic conditions are met. However the extent of legal intervention differs according to the jurisdictions, very often as a result of historical circumstance and political and ideological views of the extent to which the inequities of free markets should be controlled or diminished by intervention. Even where jurisdictions have minimum wage legislation, the minimum wage level may not be a 'living' wage, a wage to ensure that workers and their families are not living below the poverty line.[61]

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[59] This is addressed in detail by Guy Davidov, Nicola Countouris and Mark Freedland, 'The subjects of labor law: "Employees" and other workers', Ch 4 in this volume.

[60] Peter Cappelli and J R Keller, 'Classifying work in the new economy' *Academy of Management Review* July 24, 2012.

[61] Robert Pollin, 'Economic prospects: Making the federal minimum wage a living wage', (2007) 16(2) *New Labor Forum* 103.

Contractor/Entrepreneur or Employee?

One of the vexed questions is whether a contract is in law a contract of employment, that is, a contract *of* service; or a relationship of principal and contractor, that is, a contract *for* services. Commonly there is a spectrum (of facts and circumstances of the arrangements) where the true employer-employee relationship is evident at one end of the spectrum and the true principal-contractor relationship is evident at the other end, but in between are contracts for the provision of labor services which might have features of both types of arrangements as contractor or employee. In this grey area the courts have been called on to make rulings – common law courts have devised various tests to work out which is the true legal position, while the European approach is to focus on 'subordination' of the worker to the principal. Even so, the tests are not always easy to apply and the litigation that still occurs in common law countries indicates that this terrain is fraught with uncertainties.[62] In some instances legislatures have intervened to deem workers 'employees' even where the common law might regard them as 'independent contractors'.

The distinction has been subject to much criticism and, even self-employed or contractors may be dependent workers, dependent on one principal for work and remuneration.[63] However the distinction is significant because rights, entitlements and duties largely depend on, and flow from, that categorisation – duties implied in law in employment contracts, obligations and entitlements in Acts and regulations, workplace policies and codes are usually predicated on the concept of 'employee'.

Role of the Contract

On the role of the contract in various jurisdictions, Professor Mark Freedland observed, particularly in comparing the United Kingdom and the United States:

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[62] See, eg, in the United Kingdom, Mark Freedland, *The Personal Contract of Employment*, Oxford University Press, 2006; in the United States, eg, see Jeffrey M Hirsch, 'Employee or entrepreneur' (2011) 68(1) *Washington and Lee Law Review* 353–68; Noah D Zatz, 'Beyond misclassification: Tackling the independent contractor problem without redefining employment' (2011) 26(2) *ABA Journal of Labor & Employment Law* 27–994; Micah Prieb Stolzfus Jost, 'Independent contractors, employees, and entrepreneaurialism under the National Labor Relations Act: A worker-by-worker approach' (2011) 68(1) *Washington and Lee Law Review* 311–52; in Australia, see eg Pittard and Naughton, *Australian Labour Law*, (n 28 above) Ch 3 and Pittard and Naughton, *Australian Labour and Employment Law*, (n 28 above), Ch 4; in South Africa, see eg, Rochelle Le Roux, 'The evolution of the employment contract in South Africa' (2010) 39(2) *Industrial Law Journal* 139–63. Also generally Guy Davidov, 'Who is a worker?' (2005) 34 *Industrial Law Journal* 57–71; Guy Davidov, 'The reports of my death are greatly exaggerated: 'Employee' as a viable (though overly-used) legal concept', in Guy Davidov and Brian Langille eds, *Boundaries and Frontiers of Labor Law: Goals and Means in the Regulation of Work*, Hart Publishing, 2006, pp 133–52.

[63] See, eg, Esther Sánchez Torres, 'The Spanish law on dependent self-employed workers: A new evolution in labor law'; Stefanie Sorge, 'German law on dependent self-employed workers: A comparison to the current situation under Spanish law'; Judy Fudge, 'A Canadian perspective on the scope of employment standards, labor rights, and social protection: The good, the bad, and the ugly' all in 31(2) *Comparative Labor Law & Policy Journal* 101.

> In English law, and the laws of the United Kingdom more generally, the contract of employment is a central organizing concept, many would say *the* central organizing concept, for labor and employment law, and indeed for the legal representation and regulation of the individual employment relationship more generally. It is easy for English common lawyers to imagine that this is a universal proposition for all legal systems, but that would be something of a misconception; for example, the US labor law system analyzes the basic employment relationship in the absence of an express contract as 'employment at will'; the contractual status of which is very debatable, at least according to the way in which the contract of employment is constructed in English law.[64]

Thus even within common law countries there is variation in the role and importance of the contract. Employment relationships in Japan too are in stark contrast to the United States:

> Above all, however, the concept of Japanese management has entailed duties towards employees, notably in avoiding dismissals, together with the participation of employees in many decisions reserved in United States to discretionary managerial rights. In these important respects Japan deviated from the Fordist, free-market employment model, enjoying decades of success.[65]

In the United States, contracts may be written or oral, although they are more likely to be written for senior executives. At common law, contracts are 'at will', meaning that an employer or an employee can terminate the contract at any time during the contract and without cause. Nonetheless, parties can negotiate terms in the employment contract which limit the ability of either party to terminate 'at will', setting out causes for termination of the contract. Alternatively, contracts may be entered into for a specified duration without ability of either party to terminate early. An employee whose contract has been breached by the employer may seek damages to compensate – to put the employee back in the position they would have been under the contract as if it had been performed. As with many other jurisdictions, the employee has a duty to mitigate financial loss by seeking another job. Workplace policies play a role in setting employment conditions and minimising employer liability. Frequently, for example, employees will be required to sign confidentiality agreements and trade secret agreements.[66]

Notably, Brazil has a principle of 'acquired rights'. Once a right has been acquired under law, any contract or amendment to that law cannot diminish the right. Even where an employee may agree to a reduction in wages (the entitlement of which has

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[64] Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law,* Oxford University Press, 2008, p 221.

[65] David Kettler and Charles T Tackney, 'Light from a dead sun: the Japanese lifetime employment system and Weimar labor law' volume 1997 19(1) C*omparative Labor Law Journal* 1.

[66] For the range of approaches to confidentiality and restraining competition post employment see Marilyn Pittard, Ann Monotti and John and Duns (eds) *Business Innovation and The Law: Perspectives from Intellectual Property, Labor, Competition and Corporate Law*, Edward Elgar Publishing, 2013. See generally, Alan Hyde and Emanuele Menegatti, 'Legal Protection for Employee Mobility', Ch 7 in this volume.

been established), the reduction will be null and of no effect. Hence this concept is a way of enshrining rights and the role of contract is apparent.

A Standard Employment Relationship?

> [The] notion of what constitutes employment must … be revisited because the model of permanent, full-time employment was largely predicated on the archetype of a job – working permanently at the same workplace – and on the archetype of the person doing that job – a white male. Clearly, neither archetype is now predominant.[67]

The standard employment relationship described above is undergoing massive change, as 'the employment relationship in companies is increasingly situated in complex network-based forms of organization, which are part of international chains of production and services. The relationship between time, place, and space of action has thus been changed in profound ways'.[68] There is now frequently a triangular relationship where agencies are interposed between employer and worker casting doubt on the status of workers and employees and their rights, and also raises the fundamental question as which entity (or entities) is the employer.[69] Telecommuting is a new way of working enabled by technology. Short-term contracts, casual, temporary or at call work, and homeworking aggravate uncertainty of working hours and income. 'Precarious work', embracing non-standard employment, is as an accepted term and the subject of policy and academic debate, including at ILO level.[70] 'Flexible work' may in some cases be a euphemism for work with no job security, resulting in work that is not 'decent work'.

The burgeoning of precarious work has produced responses and legislative interventions from some countries to increase protection of non-typical workers. For example:

> Some countries, like Argentina, Uruguay, and Brazil, have sought to strengthen labor market oversight (inspection) and universalize social policy in order to include workers who do not have standard employment in the coverage offered labor legislation. These countries have even sought to expand the scope of their labor coverage, so as to guarantee fundamental

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[67] Marie-Ange Moreau, 'The reconceptualization of the employment relationship and labor rights through transnationality' 34 *Comparative Labor Law & Policy Journal* 697, 697–698.

[68] Ibid.

[69] Guy Davidov, 'Joint employers status in triangular employment relationships' (2004) 42 *British Journal of Industrial Relations* 727.

[70] ILO Conventions have been directed to this field – eg, conventions relating to part-time work, homework and decent work for domestic workers; and the ILO has a focus on decent work, see Sangheon Lee and Deirdre McCann (eds) *Regulating for Decent Work. New Directions in Labor Market Regulation* (ILO, 2011). Academic writings on decent work is vast; see, eg, Nicola Kountouris, 'The legal determinants of precariousness in personal work relations: A European perspective' 22 *Comparative Labor law & Policy Journal* 21 and issue addressing precarious work: *Comparative Labor Law and Policy Journal,* Vol. 34(1) (Fall 2012) and Guy Standing, *The Precariat: The New Dangerous Class,* London and New York, Bloomsbury Academic, 2011.

> rights, such as access to protection in justice and family benefits. It is still timid and insufficient progress, because large contingents of workers subsist without effective protection.[71]

Intervention in some jurisdictions aims to limit the types of non-standard contracts that can be entered into. For example Sweden, under its Employment Protection Act (EPA), in addition to *Indefinite or permanent employment* (the contract of employment which continues until further notice)[72] provides for:

1. *Contract for probationary employment*: EPA's section 6 permits such contracts, where the probationary period does not exceed six months.
2. *Fixed term contract*: section 5 of the EPA permits fixed term contracts for 'general fixed term employment'; temporary substitute employment; seasonal employment; or for an employee who has reached 67 years of age.

The legislature has intervened to compel compliance with certain matters – whilst the contract may be reduced to writing or be oral, the EPA provides that the employer must provide written information about certain matters essential to the relationship. These include the place of work, commencing date, job description and title, period of notice, pay and benefits, annual leave entitlements, working day or week, and any collective agreements which might relevant. There is also provision under the Swedish Contracts Act for declaration or amendment of unreasonable terms.

As in the case of Sweden, contracts in Brazil are usually of indefinite duration. Temporary employment and fixed term contracts are permitted in certain circumstances. In Brazil, the multi-layer of regulation is evident. The contract of employment, which need not be written, sets down minimum rights under the law. Under law, the following are set out as minimum rights: 30 vacation days per year of employment are required; in December, a 13th month of salary is payable; and contributions to the Fundo de Garantia por Tempo de Servico (unemployment guarantee fund) must be made. Additional rights may be conferred by collective bargaining agreements, which might include topics such as meal vouchers and health insurance.

Implied Duty of Good Faith and Duty of Mutual Trust and Confidence

Factors such as misrepresentation and deceit at the hiring stage may be relevant to contractual remedies, for example where a person has misrepresented his or her qualifications or falsely claimed to have a clean criminal record, in order to secure the contract. Occasionally, statutes may govern misleading and deceptive conduct in entering into employment relationships.[73]

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[71] Graciela Bensusán, 'Legislation and labor policy in Latin America: Crisis, renovation, or restoration' 34 *Comparative Labor Law & Policy Journal* 655, p 676.

[72] See Jonas Malmberg 'Employment and other long-term contracts, between unequal parties in Sweden', Arbetslivsrapport, 'National Report for the 16th World Congress of the International Society for Labor Law and Social Security', Jerusalem, 2000.

[73] See, eg, Australian Competition and Consumer Act 2010 (Cth).

Some jurisdictions require parties to act or perform in good faith *during* the employment relationship. This may be couched in different ways as a covenant of good faith or fair dealing (as in the United States) or a duty of mutual trust and confidence (as in the United Kingdom), although it is argued that while these two concepts are related they may not be the same or identical.[74] In the United States almost no state has recognised a duty of good faith and fair dealing owed to an at-will employee.[75] United Kingdom courts, by way of contrast, have embraced the implied duty of mutual trust and confidence.[76] In Australia, however, the status of this duty remained uncertain,[77] until the High Court of Australia ruled definitively in 2014 that there was not such duty of mutual trust and confidence implied by law into the contract of employment, but left open the question of any implication of the duty of good faith.[78]

Enforcing the Employment Contract

Jurisdictions commonly have their own rules and laws for enforcing contracts. In the common law jurisdictions the courts of law are the enforcement bodies with individuals bringing claims for breach of contract. Private enforcement is the main approach. However it is a matter between the two contractual parties and the courts do not generally impose penalties or fines for contract breach, as would occur for breach of a legislative provision. Rather provision for payment of monetary 'damages' or compensation for loss is the norm.

Many jurisdictions have a reluctance to enforce contracts of a personal nature by orders of specific performance or injunctions and will do so only in limited and special circumstances. The court's reluctance to oversee whether the order has been fulfilled also operates against specific performance – and forcing the contracting parties back into a personal relationship is not one favored by the courts. These arguments are increasingly irrelevant where large corporations are the employers and, where countries or jurisdictions have unfair dismissal jurisdictions, tribunals have been given power to overcome the 'continual supervision' argument by legislative provisions providing for reinstatement in employment.

Actions in tort may occur if another party has induced or interfered with the contractual relationship – although these actions are more likely in the context of industrial action which is not otherwise lawful or permitted under statute (see further section 9 below).

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[74] See, for example, Joellen Riley, 'Siblings but not twins: Making sense of "mutual trust" and "good faith" in employment contracts' (2012) 36 *Melbourne University Law Review* 521.

[75] James J Brudney, 'Reluctance and remorse; The covenant of good faith and fair dealing in American Employment Law'; (2010–2011) 32 *Comparative Labor Law and Policy Journal* pp 773–774.

[76] Alan L Bogg, 'Good faith in the contract of employment: A case of English reserve?' (2011) 32 *Comparative Labor Law & Policy Journal* 729.

[77] See Pittard and Naughton, *Australian Labour Law* (n 42 above) Ch 4, and Mark Irving, *The Contract of Employment*, LexisNexis, 2012.

[78] See Pittard and Naughton, *Australian Labour and Employment Law*, (n 28 above), Ch 6 and *Commonwealth Bank of Australia v. Barker* [2014] HCA 32.

6. CUSTOM, POLICY AND 'SOFT LAW'

Custom at the workplace or in an industry, such as practices of paying bonuses at the end of year or the basis of selecting persons for retrenchment, may influence employment relations. Whether these are enforceable rights may depend largely on whether they are terms of the contract or there is a legal basis to regard these as rights. The common law courts have traditionally shown reluctance to find contractual terms based on custom and practice.

Policies at the workplace are more likely to be binding on the parties. Employees may be engaged on the basis that they must abide by employer policies, or the contracts may require them to sign up to the policies in force from time to time. Continuing to work for the employer after a newly promulgated policy may be taken as affirmation of the employee's agreement to be bound by the policy. The employee's duty to obey orders may be used to compel adherence to policy. In the United States where managerial discretion is more pronounced, there may be less disputation over their application to the workplace.

'Soft law' is an increasing phenomenon in the workplace. It may embrace norms of behavior, such as corporate social responsibility,[79] global compacts, guidelines or codes of conduct, ranging from the global to workplace level. A specific global example is the UN Global Compact. Based on the ILO Declaration on Fundamental Principles and Rights at Work, it enshrines ten principles which businesses can voluntarily adopt.[80] Four labor principles are included: freedom of association and the right of collective bargaining; the elimination of forced and compulsory labor; the abolition of child labor; and the elimination of discrimination in respect of employment and occupations. In the ordinary case these 'soft laws' may not be legally binding as they are voluntary and consensual; rather they may be the basis for moral suasion or 'shaming' the employer into compliance. The idea is that the good corporate citizen (employer) should 'do the right thing' by employees and sign up to or embrace fair standards. Reputation as a 'good employer' may affect employee attraction and retention and so be incentives for employers to voluntarily agree.

7. IMMIGRATION, CRIMINAL, TAX, SUPERANNUATION, EDUCATION LAWS: IMPACT OF OTHER LAWS AND POLICIES

Labor law, as we have seen, may be based on contract law as well as statutory law, and tort law can also play a role. Other laws play, or have played, a part, commonly by operating on the labor market (affecting the supply and demand for labor) or by altering or prohibiting certain behavior through criminal or quasi-criminal sanctions. Criminal laws have played a part in labor relations matters in different jurisdictions and

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[79] Bryan Horrigan, *Corporate Social Responsibility in The 21st Century: Debates, Models and Practices Across Government*, *Law and Business*, Edward Elgar Publishing, 2010.

[80] Lisa Whitehouse, 'Corporate social responsibility, corporate citizenship and the global compact: A New approach to regulating corporate social power?' (2003) 3 *Global Social Policy* 299.

at different times. Trade unions themselves were regarded as criminal or unlawful combinations in the United Kingdom, with workers being subject to imprisonment for joining,[81] until laws were passed to declare them lawful associations.[82] Some breaches of labor laws or codes are regarded as quasi-criminal offences; and some jurisdictions impose the 'criminal' sanction of imprisonment for industrial manslaughter or criminal negligence for workplace deaths. Criminal offences (e.g., assault, battery, property damage, besetting) may be committed in the course of industrial action. Criminal laws relating to bullying are contemporary examples of the potential application of criminal law in the workplace.

Immigration laws and policy themselves directly affect the freedom of movement and mobility of workers and therefore the supply of labor, and indirectly affect the wages and conditions of domestic workers. The ease (or not) of the entry of workers to countries on temporary work visas and as guest workers has long been an issue for domestic policy makers. Incentives may operate to encourage short-term immigration to relieve particular shortages, as in the case of seasonal workers in fruit picking. A worldwide problem is the engagement of 'illegal immigrants' or undocumented labor on exploitative terms, beyond the reach of protective of labor laws. Exploitation by unscrupulous employers can occur, because these immigrants, with no legal right to work in the country, could be deported if they complain.

Incentives and barriers to employment can be imposed through tax laws, thereby affecting the supply and demand for labor. Education policies and incentives directly affect the level of, and opportunity for, training of workers and educating the workforce. Barriers to entry to work may be imposed by professional registration requirements, as in the case of doctors, dentists and lawyers; and by the need to have a clean criminal record, in the case of working with children.[83]

Superannuation laws may require employers to contribute to superannuation funds for their employees' retirement and govern portability of superannuation. Social security laws are often directly coupled with labor laws: the buffer of social security may operate to influence a person's decision to undertake paid work while there are commonly limits on social security payments for striking workers.

Corporate laws may affect business structures, and therefore employment and insolvency laws may in turn affect employee entitlements. Directors' duties may be proscribed.

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[81] The Combination Acts 1799 (full title, eg: An Act to prevent unlawful combination amongst journeymen to raise wages).

[82] In 1825 the Combination Acts were repealed. The Trade Union Act 1871 UK then ensured that unions were not unlawful as being in restraint of trade.

[83] For example, the Criminal Records Review Act [RSBC 1996] ch. 86, and the Working With Children (Criminal Record Checking) Act of 2004 in Western Australia.

8. HUMAN RIGHTS AND/OR DISCRIMINATION LAWS: SOURCE OF PROTECTION OF LABOR RIGHTS?[84]

In addition to the impact of other laws, human rights and anti-discrimination laws may provide employment rights and obligations, although the scope of these laws is general and not limited to employment situations. These laws usually provide the following:

1. Grounds of discrimination that are unlawful or prohibited – for example, race, sex, pregnancy marital status, age, disability, physical appearance;
2. Areas of discrimination – relevant to labor law, these are employment including in hiring, during employment and in the termination of employment;
3. A tribunal to deal with complaints via designated processes, such as mediation, arbitration or referral to courts of law;
4. A mechanism for individual enforcement and remedy – for example reinstatement in the person's former job and/or monetary compensation.

How far do equal opportunity laws protect fundamental labor rights, such as freedom of association? These laws may not expressly protect union activities; such protection may have to be sought by resting the discriminatory ground on 'political opinion' which frequently is not defined in the legislation.[85] Some legislatures though have chosen to protect trade union activities via anti-discrimination laws. The Australian Human Rights Act, for example, expressly identifies trade union activity as a ground of unlawful discrimination;[86] other Acts use the terminology 'industrial activity';[87] while others may identify membership or non-membership of associations of employers or employees as a ground for discrimination.[88] Thus these laws, utilising an individual rights approach, preserve the rights of individual workers to engage in industrial activity and provide a statutory remedy. There is potential overlap with unlawful termination and its governing rules, which adds to complexity and potentially provides different remedies.[89]

Freedom of association is protected in the United Kingdom Human Rights Act 1998 as is the prohibition on discrimination. Essentially this Act gives force and effect to the Convention for the Protection of Human Rights and Fundamental Freedoms. The Australian Capital Territory's Human Rights Act 2004 protects freedom of association[90]

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[84] See Kevin Banks, Roberta Nunin and Adriana Topo, 'The Lasting Influence of Legal Origins: Workplace Discrimination, Social Inclusion and the Law in Canada, the United States and the European Union', Ch 8 in this volume.

[85] See, eg, Human Rights Act 1993 (NZ) where some grounds are defined or fleshed out but political opinion is not.

[86] Other Acts which identify trade union activity as an express ground of discrimination include Anti-Discrimination Act (Qld), the Northern Territory Anti-Discrimination Act 1996.

[87] See, eg, Anti-Discrimination Act 1998 (Tas).

[88] See, eg, the Australian Capital Territory Discrimination Act 1991.

[89] See, eg, Fair Work Act 2009 (Cth).

[90] Section 15(2) provides 'Everyone has the right to freedom of association'.

and freedom from forced labor or being held in slavery,[91] as does the Victorian Charter of Human Rights and Responsibilities Act 2006.[92]

Discrimination or equal opportunity laws may be used to challenge employer policies because they are indirectly discriminatory, meaning that they impact disproportionately on a particular group. Examples may include the case of 'last-in or first-out' policy of retrenchment which might impact heavily on more recently employed workers who are women;[93] or policies that applicants must not have a criminal history, which might fall disproportionately on particular racial groups.[94] Class actions, too, are permissible in some jurisdictions but in the United States these have met with some judicial hostility.[95]

9. 'INDUSTRIAL TORTS' AND THE PROTECTION OF PROPERTY AND ECONOMIC RIGHTS: COMMON LAW JURISDICTIONS

In common law systems, the role played by the law of torts (or 'civil wrongs') in regulating industrial action cannot be underestimated. Laws developed by the judges to effectively promote rights to carry on business unimpeded by trade union industrial activities crushed the ability of unions to support demands with direct industrial action. The 'business torts', 'economic torts' or 'industrial torts', as they have been variously described, extend to enabling employers and businesses affected by strikes to seek injunctions to restrain the activity and/or at damages as monetary compensation. The following are the main industrial torts:

1. *Inducing breach of contract or interfering with contractual relations*
   In this tort, a third party, C, which induces a person, A, to breach a contract with another party, B, would commit the tort where there is intention to effect breach and the terms of the contract are known. In industrial relations strikes, C might be the union which persuades the employee A to breach his or her contract of employment with the employer B.

   An indirect form of that tort developed so that the union C, as a result of persuading A to breach the contract might interfere with B's contract of supply to another business D. The indirect action on the employer where unlawful means

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[91] Section 26.

[92] Section 11 of the Victorian Charter provides freedom from forced work; and section 16 provides for freedom of association, which includes the right to form and join trade unions.

[93] *Australian Iron and Steel Pty Ltd v. Banovic* (1989) 168 CLR 165.

[94] See eg, for the United States, Steven Raphael, *The New Scarlet Letter? Negotiating the U.S. Labor Market with a Criminal Record*, W. E. Upjohn Institute for Employment Research, 2014 and eg. for Australia, Bronwyn Naylor, Moira Paterson, and Marilyn Pittard, 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' (2008) 32 *Melbourne University Law Review* 171 and Marilyn Pittard, 'Discrimination Law: Constraints on Criminal Record Checks in Recruitment' (2012) 18 (8) *Employment Law Bulletin* 124.

[95] Judith Resnick, 'Fairness in numbers: Comment on *AT&T v. Concepcion, Wal-Mart v. Dukes*, *and Turner v. Rogers'*, 125 *Harv. L. Rev.* 79 (2011).

are used, such as breach of the employees' contract of employment, might mean that the tort was made out.

Over time, the courts relaxed the element of breach of contract, ruling that a technical breach was not needed, simply interference in the contractual relations between the parties. The broad tort of causing economic loss by unlawful means is recognized in some jurisdictions.

2. *Conspiracy to injure*
   A combination of two or more persons, for example union and members, to inflict injury on an employer by taking direct industrial action are essential elements of this tort. Where the overwhelming purpose was to injure the employer, the tort would be made out.

   In the development of the tort, however, the courts acknowledged that where a trade union purpose, for example improvement of wages and conditions of its members, was the real purpose of the combination, then the tort would not be made out.
3. *Conspiracy to injure by unlawful means*
   The tort of conspiracy by unlawful means nevertheless might be committed where the combination used unlawful means (for example breach of employment contract, breach of industrial award governing the employment relationship, breach of statute) to inflict damage. The predominant purpose of the combination to promote a union purpose did not save the conspirators from liability where unlawful means were involved. While conspiracy to injure is unlikely to be made out today in industrial relations disputes, conspiracy by unlawful means is often readily committed.
4. *Intimidation*
   Developed from a tort involving two parties, the tort of intimidation applies to industrial disputes whereby an employee, whose employment is lawfully terminated by an employer – at the behest of, and under unlawful industrial strike threats made by, unions – can claim intimidation by the unions and/or other employees. No industrial action need actually occur for the tort to be made out – the threat of industrial action which involves unlawful means, for example, interference with contractual relations is sufficient.

The full impact of these torts has been ameliorated in many jurisdictions by legislation which permits industrial action to take place in certain circumstances or which grants immunity from tort action in the course of bargaining for an enterprise agreement. However, the torts have been used in notable cases to require unions to pay not inconsiderable damages to compensate for the economic loss caused by industrial action. Jurisdictions which require strict compliance with strike notices and the support by ballot of strike action find that industrial torts are still very relevant today – it is easy for a strike to become unlawful through failure to comply strictly with the legal requirements preceding strike action.[96]

[96] Hazel Carty, *An Analysis of the Economic Torts*, Oxford University Press, 2010; Pittard and Naughton *Australian Labour Law* (n 28 above), Chs 13 and 17; and Pittard and Naughton, Australian *Labour and Employment Law* (n 28 above), Chs 14 and 18.

Other torts, such as nuisance and trespass to property or goods, may also occur in the course of an industrial dispute. Picketing, for example, may set up a public nuisance, or involve acts of trespass to the property of the employer. Frequently, informational picketing, handing out leaflets about strike action and claims being advanced, is not caught by tort law.

10. INTERNATIONAL LABOR LAW INFLUENCES

Most labor law is contained in the domestic law of individual states. Differing political systems, legal traditions and national ideologies have given rise to innumerable methods of regulating the employment relationship. However, states have recognised a role for international law in formulating universal minimum labor standards.

International law is 'the law of the society of states or nations'.[97] International labor law forms part of international law, and is defined as 'the substantive rules of law established at the international level and the procedural rules relating to their adoption and implementation'.[98] The key institutions which create international law are the International Labor Organisation (ILO) and, to a lesser extent, the United Nations (UN). These institutions are constantly creating new international labor law.

(a) International Labor Organisation

The ILO is a specialised UN agency with the mandate to 'promote social justice and internationally recognised human and labor rights',[99] with the main aims 'to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues'.[100]

The ILO's time of formation – shortly after the First World War – is reflected in its aims. First, the creation of an international organisation to encourage higher labor standards was viewed as essential to the maintenance of 'universal and lasting peace'.[101] Secondly, the improvement of labor standards in capitalist countries was linked to containing communism, recognising that 'conditions of labor exist involving such injustice, hardship and privation to large numbers of people as to produce unrest' in capitalist nations.[102] Finally, it was noted that 'the failure of any nation to adopt humane conditions of labor is an obstacle in the way of other nations'[103] doing so, due to international competition. Therefore common standards were a method of preventing labor standards from decreasing to control costs of production. At present there is a

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97 John Westlake, *International Law*, Cambridge University Press, (1904) p 1.

98 Blanpain (n 3 above).

99 International Labor Organisation, 'About the ILO' <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang–en/index.htm>.

100 Ibid.

101 ILO Constitution.

102 Ibid.

103 Ibid.

persisting pressure for common standards, resulting from an increasingly global environment, with reduced barriers to trade and ease of telecommunications.

Specifically, according to the ILO website, the ILO's functions relating to labor standards, policies, training and education expressly include:

1. Formulation of international policies and programs to promote basic human rights, improve working and living conditions, and enhance employment opportunities;
2. Creation of international labor standards backed by a unique system to supervise their application;
3. An extensive program of international technical cooperation formulated and implemented in an active partnership with constituents, to help countries put these policies into practice in an effective manner; and
4. Training, education and research activities to help advance all these efforts.

The 'international labor standards' created by the ILO form the bulk of the sources of international labor law.

ILO sources of labor law

The ILO Constitution lists a number of areas for improvement of employment conditions. Although not a direct source of law, these form the basis for the formation of the international labor standards. The key areas for improvement are:

1. Regulation of the hours of work including the establishment of a maximum working day and week;
2. Regulation of labor supply, prevention of unemployment and provision of an adequate living wage;
3. Protection of the worker against sickness, disease and injury arising out of his employment;
4. Protection of children, young persons and women;
5. Provision for old age and injury, protection of the interests of workers when employed in countries other than their own;
6. Recognition of the principle of equal remuneration for work of equal value;
7. Recognition of the principle of freedom of association;
8. Organization of vocational and technical education, and other measures.

Declaration on Fundamental Principles and Rights at Work

The Declaration on Fundamental Principles and Rights at Work, adopted by the ILO in 1998, 'codifies the ILO's understanding of the fundamental human rights contained in its Constitution and standards'.[104] It is binding on all ILO member states. The Declaration states that all ILO member states have:[105]

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[104] Roger Blanpain (ed.), *Comparative Labor Law and Industrial Relations in Industrialized Market Economies*, Wolters Kluwer, The Netherlands, 2007, 141.

[105] ILO, Declaration of Fundamental Principles and Rights at Work, Art 2; the 'fundamental' conventions are C87: Freedom of Association and Protection of the Right to Organise

> An obligation, arising from the very fact of membership in the Organisation, to respect, to promote and to realise, in good faith and in accordance with the Constitution, the fundamental rights which are the subjects of those [fundamental] Conventions, namely:
>
> (a) freedom of association and the effective recognition of the right to collective bargaining;
> (b) the elimination of all forms of forced or compulsory labor;
> (c) the effective abolition of child labor; and
> (d) the elimination of discrimination in respect of employment and occupation.

Many of these fundamental labor matters (a)–(d), as we have seen, are reflected in Constitutions of the countries.

The Declaration requires that member states that have not ratified all of the fundamental Conventions must submit annual reports to the ILO, 'commenting on the status of the relevant rights and principles within their borders, noting impediments to ratification'.[106] The reports are then reviewed by the Committee of Independent Expert Advisers. In turn, the Committee's observations are considered by the ILO's governing body. The ILO then provides assistance to member states to implement the rights contained in the Declaration.[107]

Conventions and Recommendations: Real or illusory sources of law?

The Conventions and Recommendations of the ILO collectively form the international labor standards. There are 189 Conventions and 202 Recommendations currently in force. The international labor standards establish basic workers' rights, aiming to improve working conditions on a global scale. However, although it is generally agreed that the formulation of international labor standards has had a positive effect on working conditions in ILO member states, the standards are subject to a number of key limitations.

After drafting by the International Labor Office, Conventions and Recommendations are adopted by the International Labor Conference, the key decision-making organ of the ILO. The Conference, made up of delegations from member states, includes representatives of the government, employers and workers. To be adopted by the Conference, a Convention or Recommendation must be passed by a two-thirds majority of all delegates present; hence a simple majority in favor will not suffice.

The ILO Constitution requires that once a Convention or Recommendation has been accepted by the Conference, it must be submitted to the competent authority of each member state within 12 or 18 months respectively. However, the competent authority only needs to *consider* how the standard should be ratified or implemented. It may determine that the Convention or Recommendation should not be ratified or implemented. In that case, no further obligation applies except to report to the International Labor Office on the difficulties which prevent or delay ratification or implementation of

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Convention (1948), C98: Right to Organise and Collective Bargaining Convention (1949), C29: Forced Labor Convention (1930), C105: Abolition of Forced Labor Convention (1957), C138: Minimum Age Convention (1973), C182: Worst Forms of Child Labor Convention (1999), C100: Equal Remuneration Convention (1951), C111: Discrimination (Employment and Occupation) Convention (1958).

[106] http://www.ilo.org/declaration/thedeclaration/lang–en/index.htm.

[107] Ibid.

the instrument.[108] The ILO may be criticised for the fact that insufficient pressure is placed on member states to ratify international labor standards; and there is of course no mechanism to compel countries to adopt the standards. Even where the country has ratified the convention, there is no compelling mechanism to force adoption of it into municipal law.

The international labor standards include both fundamental human rights standards, and more technical instruments. Some Conventions 'can be called promotional – some or all of the obligations they create on ratification are oriented more towards adopting and pursuing a policy than toward precise obligations to be carried out in specified ways'.[109]

Recommendations 'are used mainly to supplement Conventions, in order to indicate in greater detail the manner of giving effect to their provisions or to advocate the establishment of higher standards'.[110] However, the capacity for international labor standards to impact practice in member states can be limited by the flexibility of the standards. Flexibility is required to ensure that the standards are universally applicable. However, flexibility clauses may allow states to conform to less exacting standards. For example, some instruments allow states to lay down 'temporary standards that are lower than those normally prescribed, to exclude certain categories of workers from the application of a convention, or to apply only certain parts of the instrument'.[111] Alternatively, Conventions may require that states establish the means to set standards within their own jurisdictions, rather than containing specific requirements. For example, standards on minimum wages do not establish a set figure, but require that states establish the machinery to set an appropriate minimum wage themselves.[112]

Conventions and Recommendations are intended to be applicable in all ILO member states, while 'significantly advancing on existing practice'[113] across members. In drafting a Convention or Recommendation, the International Labor Office reviews the law and practice on the subject of the relevant standard in each member state. However, the vast differences in practice across ILO member states means that formulating universally acceptable standards can be difficult. Developing nations have consistently criticised the ILO for this reason, claiming that economic underdevelopment hampers the implementation of international labor standards.[114]

Some academic commentators have been critical of the role of the ILO. Professor Standing has been voluble in considering 'how the ILO has failed to come to terms with the Global Transformation, seeing it as trying to play three roles – a standard-setter, a technical assistance agency and a knowledge generator – without developing

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[108] ILO Constitution, Articles 5, 6.

[109] Blanpain (n 3 above), p 147.

[110] Ibid., p 140.

[111] International Labour Organisation, 'Rules of the Game: A brief introduction to International Labour Standards', p 18. [http://www.ilo.org/wcmsp5/groups/public/ – ed_norm/ – normes/documents/publication/wcms_108393.pdf.]

[112] Ibid.

[113] Blanpain (n 3 above), p 140.

[114] Victor-Yves Ghebali, *The International Labor Organisation: A Case Study on the Evolution of UN Specialised Agencies*, International Organization and the Evolution of World Society, Martinus Nijhoff Publishers, The Netherlands, 1989.

the professional capacity to do so'.[115] The significant question, he poses, is 'whether the ILO could become an effective development agency given the changing character of work and labor in globalizing labor markets and its antiquated governance structure'.[116]

Case law

Governments often request that various international judicial organs adjudicate labor disputes or offer interpretations of the international labor standards. These decisions form a body of 'case law' which gives content to the obligations imposed by Conventions and Recommendations.

Various ILO organs offer interpretations of Conventions, which are treated as authoritative by member states. Member states often consult the International Labor Office, either formally or informally, as to the meaning of a Convention. If a member state requests a formal interpretation of a Convention, the decision will be published in the ILO's Official Bulletin and circulated to all member states. For example, although the Right to Organise Convention[117] does not expressly deal with the right to strike, 'the case law of the ILO supervisory bodies is that this right is inherent in the right to take action to defend workers' interests'.[118]

In addition, various ILO Committees have developed 'case law' interpreting the ILO Conventions and Recommendations. The Committee of Experts on the Application of Conventions and Recommendations examines reports from member states on the implementation of ILO Conventions. Reports on the deliberations of the Committee of Experts are then submitted to the Committee on the Application of Conventions and Recommendations, which engages in dialogue with each member state on the content of each report. In evaluating the implementation of Conventions, the Committee of Experts 'has to consider and express its views on the meaning of certain provisions of Conventions'.[119]

Supervisory machinery

The supervisory machinery of the ILO is intended to encourage member states to transform the rights and obligations contained in international labor standards into domestic law obligations. The supervisory procedures rely on the examination of periodic reports and the consideration of complaints against member states.[120] It should be reiterated that the ILO cannot compel states to ratify standards, or to give effect to

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[115] Guy Standing, 'The ILO: An agency for globalization?' (2008) 39(3) *Development and Change* 355–84. See also Standing, 'The International Labor Organization' (2010) 15(2) *New Political Economy* 307.

[116] Ibid.

[117] Freedom of Association and Protection of the Right to Organise Convention (1949) No 87.

[118] See Report III(4B), International Labor Conference, 81st Session, 194 paras 61–78 cited in Blanpain (n 3 above), p 147.

[119] See Report III(4A), International Labor Conference, 73rd Session, 1987 para 12 cited in Blanpain ibid., p 143.

[120] Blanpain (n 3 above), p 157.

the standards that they have ratified. Instead, the ILO can only 'name and shame' non-conforming states in the hope that they comply with standards.[121]

Examination of periodic reports

States are obligated to report on Conventions, both ratified and unratified, and on Recommendations. Each member state is required to 'make an annual report to the International Labor Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party'.[122] In respect of unratified Conventions and all Recommendations, each member state must make reports to the International Labor Office regarding:

> the position of the law and practice in their country in regard to matters dealt with in the [Convention or Recommendation], showing the extent to which effect has been given or is proposed to be given, to the provisions of the [Convention or Recommendation].[123]

The two ILO committees with responsibility for the application of Conventions and Recommendations examine these reports. Representatives of the ILO also conduct meetings with individual member state governments to 'discuss difficulties in the implementation of ILO standards'.[124] Although these procedures are not a formal source of international labor law, and do not bind member states, there are over 2,500 examples of governments having taken measures in direct response to comments by supervisory bodies.[125]

Consideration of complaints

Article 26 of the ILO Constitution provides that any member state may file a complaint against any other member state regarding the application of a Convention to which they are both party. After receiving a complaint, the International Labor Conference may appoint a Commission of Inquiry to investigate and report on the issue.[126]

All these various processes – including negotiation of the terms of the obligations initially and the subsequent mechanisms to have potential non-compliance with standards referred to international bodies for review – are means of encouraging individual nations to take steps to ensure that laws are adopted by them to give effect to the ILO Conventions and Recommendations. But, as they depend upon the individual nation's legislative processes, the various ILO mechanisms are at most 'best practice' influences on what a particular country does in domestic law, rather than being determinative of what it does.

Nonetheless, as the data referred to above suggest, the processes can have an effect on domestic law – albeit as a matter of choice on a case-by-case basis rather than a legally-binding consequence of a country having acknowledged being bound by the international convention.

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121 http://www.lse.ac.uk/government/research/resgroups/PSPE/pdf/PSPE_WP1_11.pdf.
122 ILO Constitution, Article 22.
123 Ibid., Article 19(5e), 19(6d).
124 Blanpain (n 3 above), p 158.
125 Ibid.
126 ILO Constitution, Article 26.

(b) United Nations

The United Nations (UN) does not have a specific mandate for labor matters. However, in adopting international instruments concerning human rights, the UN does create international labor law. UN instruments also form part of international law, but no rights are conferred on individuals until the instrument has been transformed into the state's domestic law.

UN sources of labor law

A number of UN Conventions create international labor law. Many of the rights and obligations conferred by UN Treaties include some that are intended to be exercised specifically in the context of employment, such as the rights to equal pay and to join and form trade unions. In addition, UN instruments confer rights that are intended to be exercised generally, but also affect the employment relationship. For example, instruments that guarantee free association require that 'individual workers should have the right to form and join trade unions, and that they should have adequate protection against victimization on account of having done so'.[127]

A broad range of UN Declarations, Covenants and Conventions form part of international labor law, including:

- The Universal Declaration of Human Rights, 1948 (UDHR);
- The International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (CERD);
- The International Covenant on Civil and Political Rights, 1966 (ICCPR);
- The International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR);
- The Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW);
- The Convention on the Rights of the Child, 1989 (CROC);
- The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 2003 (ICRMW).

The UDHR, commonly regarded as the foundation of international human rights law,[128] establishes a number of rights in respect of employment. For example, Article 23 establishes the right to work, to equal and fair remuneration and the right to form and join trade unions. Article 23 states:

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
(2) Everyone, without any discrimination, has the right to equal pay for equal work.

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[127] Blanpain (n 3 above), p 311.

[128] See Jochen von Bernstorff, 'The changing fortunes of the Universal Declaration of Human Rights: Genesis and symbolic dimensions of the turn of rights in international law' (2008) 19(5) *The European Journal of International Law* 903.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
(4) Everyone has the right to form and to join trade unions for the protection of his interests.

UN Conventions also provide robust protection against discrimination on the grounds of gender and race. CEDAW provides that: 'States Parties shall take all appropriate measures to eliminate all forms of discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights.'[129] Similarly, CERD provides that: 'States Parties undertake to … guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin … the right to work, to free choice of employment, to just and favourable conditions of work.'[130]

In addition, the more recent ICRMW confers various rights specifically on migrant workers.[131] The ICRMW 'specifies human rights articled in the [ICESCR and ICCPR] and expresses explicitly how different rights apply to different categories of working migrants'.[132] Key rights guaranteed by the ICRMW include the right to leave and return to the state of origin, prohibition of slavery or servitude and of forced or compulsory labor and the necessity to ensure an equitable procedure of recourse to migrant workers and members of their family.[133] The ICRMW is supervised by a UN Treaty body in collaboration with the ILO.[134]

As with ILO instruments, the processes for negotiating, creating and in various ways considering non-compliance with these international conventions – which have potential to be applied in domestic law – can have the effect of encouraging individual nations to take steps to ensure that laws are adopted by that nation to give effect to those conventions as part of the domestic law of the nation.

However, as with the ILO Conventions, these processes are at best influences in what a particular country does in domestic law, rather than being determinative of what it does. Domestic law remains controlled by the legislature of the nation and nothing is ceded by the country in terms of legislative power or authority to any entity outside the country.

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[129] Convention on the Elimination of All Forms of Discrimination Against Women, Article 11.
[130] Ibid., Article 5(e)(i).
[131] See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 2(1). The term 'migrant worker' refers to 'a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national'.
[132] http://www.humanrights.ch/en/Standards/UN-Treaties/Migrant-Workers/index.html.
[133] ICRMW.
[134] Blanpain (n 3 above), p 144.

11. EUROPEAN LABOR LAW: REGIONAL REGULATORY INFLUENCES

The European region has a highly developed, normative set of labor laws. Key bodies that formulate Euro-area labor law are the EU and the Council of Europe. The European regional law is worthy of study as an example of another layer of laws covering the region and above those laws of the sovereign states.

The legal position in the EU – as an economic and political union of 28 member states (as of 2014) located in Europe – is highly distinct from that which has been summarised in relation to the ILO and the UN, as they represent the usual example of general international instruments. Consequences for sources of labor law flow from the fundamentally different legal character of the international arrangements within the EU, which bear resemblance in some ways to nations which have federal governments including powers being ceded by the member entities to a central source of authority.

The European Union: Formation of European Union Labor Law

The countries of the EU have established a *sui generis* legal order with characteristics of both international and domestic law.[135] EU law operates directly on individuals within EU member states. In this respect it is distinguished from international law, which only covers states themselves. The European Court of Justice (ECJ) has held that 'the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights'.[136] The consequence of this is that the subjects of EU law 'comprise not only Member States but also their nationals'.[137] However, the direct effect of EU law is limited to provisions which are 'self-executing', meaning that they are intended to confer rights on individuals, sufficiently clear and precise, and unconditional.[138]

In addition, where the domestic labor law of EU member states is inconsistent or incompatible with EU law, EU law prevails. This is because the transfer of EU member states' sovereignty to EU institutions 'carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail'.[139]

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[135] Timothy Moorhead, 'European Union Law as International Law' (2012) 5(1) *European Journal of Legal Studies* 126.

[136] *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* 26/62 [1963] ECR 1.

[137] Ibid.

[138] See Case 8/81 *Becker v. Finanzamt Munster-Innenstadt* [1982] ECR 53 para 25 where the ECJ said: that the EU provisions must be 'sufficiently precise and unconditional' in order for them to give rise to individual enforcement. See also Moorhead (n 135 above), p 143.

[139] *Costa v. ENEL Case* 1964 Case 6/64 [1964] ECR 585.

The power to formulate EU labor law is shared between the European Parliament,[140] the Council of the European Union[141] and the European Commission.[142] The Council has the power to finalise EU legislation.[143] The 'European Parliament, acting jointly with the Council, the Council and the European Commission' are empowered to 'make regulations, issue directives, take decisions, make recommendations or deliver opinions'.[144] Article 189 of the Treaty Establishing the European Community (as amended by subsequent treaties) further details the effect of each action (italics added):

> A *regulation* shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
>
> A *directive* shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
>
> A *decision* shall be binding in its entirety upon those to whom it is addressed.
>
> *Recommendations and opinions* shall have no binding force.

The EU organs are empowered to legislate with respect to a reasonably broad range of labor law matters set out in the Treaty on the Functioning of the EU (TFEU). These include – health and safety, working conditions; information and consultation in the workplace; equal treatment between men and women regarding labor market opportunities and work; integration of excluded persons; representation and collective defence of the interests of workers and employers; and financial contributions to promote employment.[145]

In addition, a number of labor matters are excluded from the legislative competence of the EU, including pay, and the rights to free association, to strike and to impose lockouts.[146]

Notably though, the power of the EU to legislate is limited by the principles of subsidiarity and proportionality. Subsidiarity provides that the EU organs can only legislate where the objectives of the legislation cannot be better achieved by member states acting alone, and can be better achieved by the Community by reason of the scale

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[140] The European Parliament is composed of 786 directly elected delegates who represent the people of Europe: see Eve Landau and Yves Beigbeder, *From ILO Standards to EU Law: The Case of Equality between Men and Women at Work*, Martinus Nijhoff, Leiden, 2008, 39.

[141] This is not be confused with the European Council which is the body defining 'the general political direction and priorities of the European Union': http://www.european-council.europa.eu/the-institution?lang=en. The European Council includes a minister representing each member state.

[142] The European Commission is composed of one Commissioner from each EU member state, chosen to represent the interests of the European community as a whole.

[143] Landau and Beigbeder (n 140 above), p 39.

[144] Article 189, Treaty Establishing the European Community as Amended by Subsequent Treaties, *Rome*, 25 March 1957 (the Treaty of Rome).

[145] TFEU, Article 153(1).

[146] Ibid., Article 153(5). For how some of these limitations may be avoided in reality, see A C L Davies, *EU Labour Law*, Edward Elgar, 2012, p 32.

and effects of the legislation. Legislation must also be proportional, meaning that it must have no greater effect than is necessary to achieve the intended objective.[147]

Content of EU labor law

Professor Blanpain outlines the broad range of matters actually governed by EU labor law.[148] It is beyond the scope of this chapter to detail all these. However, to demonstrate the development of European labor law, the issue of discrimination will be briefly outlined and the controversial Working time Directive discussed.

Prohibition of discrimination EU labor law prohibits employment discrimination on the basis of gender, racial or ethnic origin, religion, disability, age or sexual orientation. The key EU instruments governing discrimination are: Council Directive No 76/207/EEC of 9 February 1976 (Equal Treatment Directive); Council Directive 2000/78/EC of 27 November 2000 (Framework Employment Directive); and Council Directive No 2000/43/EC of 28 June 2000 (Race Equality Directive).

The Framework Employment Directive establishes a general framework for equal treatment as regards employment and occupation, prohibiting discrimination on the basis of disability, age, sexual orientation, religion or belief, whilst the Race Equality Directive implements the principle of equal treatment between persons irrespective of racial or ethnic origin. The latter Directive establishes a framework for combating discrimination on the grounds of racial or ethnic origin, which requires that Member States implement the principle of equal treatment.[149]

Both Directives relate to access to employment, including selection criteria and recruitment conditions, access to vocational guidance and training, employment and working conditions, and membership of workers or employers organisations.

GENDER DISCRIMINATION Discrimination on the basis of gender is prohibited by a combination of Treaty law, Directives and decisions of the ECJ, the court which carries out the important role of interpreting EU law.

Article 141 of the Treaty establishing the European Economic Community (EEC Treaty) prohibits pay discrimination on the basis of gender. The Article provides that 'Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied'.[150] In addition, a number of Directives prohibit gender discrimination. The most important is the Equal Treatment Directive, which requires that member states give effect to 'the principle of equal treatment of men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions'.[151]

The EU anti-discrimination directives are typical of much legislation in that they require interpretation. The ECJ's jurisprudence on the issue of gender discrimination

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147 See generally, Davies, ibid., p 12.

148 Roger Blanpain, *European Labour Law*, Kluwer Law International, 2010.

149 See Memorandum of Understanding between the Council of Europe and the European Union 2007 at http://www.coe.int/t/der/docs/MoU_EN.pdf.

150 EC Treaty, Article 141.

151 Council Directive 76/207/EEC of 9 February 1976, Article 1.

has clarified the content of the Equal Treatment Directive in a number of key cases. For example, the Court has determined that a refusal to employ, or dismissal of, a pregnant woman due to her pregnancy or maternity amounts to direct discrimination on the grounds of sex.[152] The Court may also declare national legislation to be incompatible with a Directive; the Court has held for example that national legislation permitting an employer to stand down a pregnant woman without full pay is discriminatory and therefore incompatible with the Equal Treatment Directive.

REGULATION OF WORKING HOURS One of the most significant and controversial of the set minimum labor standards in Directives is the Directive on the Organisation of Working Time (Working Time Directive),[153] which requires the member states to take measures to regulate the working hours of certain employees. The Working Time Directive is 'part of a package of social rules and health and safety standards that the EU adopted … to make the single market programme more palatable to workers and trade unions'.[154]

The key provisions of the Working Time Directive provide that every worker must enjoy:

- A minimum rest period of 11 consecutive hours per period of 24 hours;[155]
- A rest break where the working day is longer than six hours;[156]
- An average weekly working period of no more than 48 hours, inclusive of overtime;[157] and
- Paid annual leave of at least four weeks.[158]

The objective of the Working Time Directive is to protect the health and safety of workers,[159] balancing this with the needs of the modern European economy. The Working Time Directive permits derogations where there is collective agreement between the employers and unions. Derogations may be granted with 'due regard for the general principles of protecting the safety of workers, where the duration of the working time is not measured and/or predetermined by the workers themselves',[160] and also in certain occupations and industries requiring continuity of service (such as

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[152] *Hofman* C-184/83 (12/07/1984).

[153] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.

[154] Katinka Barysch, *The Working Time Directive: What's the fuss about?*, Centre for European Reform, 2013 at <http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2013/pb_workingtimedir_kb_26april13_bl-7268.pdf>

[155] Directive 2003/88/EC, Article 3.

[156] Ibid., Article 4.

[157] Ibid., Article 6.

[158] Ibid., Article 6.

[159] Ibid.s Article 1, s 1.

[160] Ibid., Article 17, s 1(a).

agriculture or hospital care)[161] or foreseeable surges in activity (such as tourism or postal services).[162]

The provisions of the Working Time Directive have also been interpreted by the ECJ. In the *SIMAP case*,[163] the term 'working hours' was defined to include all time when the worker was required to be on site. This decision was affirmed in the *Jaeger* case: the court confirmed that the decision in *SIMAP* applied even if workers (in this case, on-call doctors) could sleep when their services were not required.[164]

The Working Time Directive has been one of the most controversial of the EU labor directives. Particularly in the United Kingdom, opposition has centered on the economic costs of implementing the Directive.[165] There has also been some reform of working hours in EU member states, within the parameters set by the Working Time Directive. That there are variations in the working work is well illustrated by the controversial maximum 35-hour week in France and its progressive dismantling recently.[166] There is also scope for individual workers to opt out of the provisions of the Directive.

Council of Europe: Sources of Labor Law

In addition to the EU, the other key Euro-area international organisation is the Council of Europe, composed of 47 European states. The Council of Europe[167] aims to protect human rights and the rule of law, find common solutions to the challenges facing Europe and to consolidate democratic stability in Europe.

The Council of Europe has formulated a number of international human rights instruments to be ratified by its members. The most important of these are the European Convention on Human Rights (ECHR) and the European Social Charter (ESC).

European Convention on Human Rights

The ECHR – the long title of which is the Convention for the Protection of Human Rights and Fundamental Freedoms – establishes a minimum standard of civil and political rights and freedoms that member states of the Council of Europe are obliged to guarantee. The ECHR has been ratified by all Council of Europe member states.

Two Articles apply specifically in the field of labor law. First, the ECHR prohibits slavery and certain forms of forced labor.[168] Secondly, the Convention guarantees everyone freedom of peaceful assembly and freedom of association, including the right

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[161] Ibid., s 3(c).

[162] Ibid., s 3(d).

[163] *Sindicato de Medicos de Asistencia Publica v. Conselleria de Sanidad y Consumo de la Generalidad Valanciana* C-303/98 [2000] ECR I-7963.

[164] *Landeshauptstadt Kiel v. Jaeger* [2003] IRLR 804 ECJ.

[165] Barysch (n 154 above).

[166] Philippe Askenazy, 'Working Time Regulation in France from 1996 to 2012' (2013) 37(2) *Cambridge Journal of Economics* 323.

[167] This should not be confused with the Council of the European Union discussed earlier. The Council of Europe is not an EU organ.

[168] Convention for the Protection of Human Rights and Fundamental Freedoms, Article 4.

of every employee 'to form and to join trade unions for the protection of his interests'.[169] Moreover, there is a prohibition on discrimination in relation to the rights in the convention.[170] Alleged violations of the Convention may be referred to the European Court of Human Rights (also set up under the ECHR) by parties[171] or can entertain applications from individuals, groups or non-governmental organisations[172] once domestic remedies have been exhausted.[173] Significantly, and in a departure from ILO procedures, all member states of the Council of Europe undertake to abide by the judgments of the Court.[174]

European Social Charter

The Council of Europe Treaty, the ESC, guarantees social rights within member states of the Council of Europe. The ESC was drafted in 1965, and revised in 1996, and has been ratified by 43 member states.

The ESC establishes a large number of rights and obligations. These include prohibiting forced labor, the rights of employees to just conditions at work,[175] to organise trade union and employer associations and to bargain collectively,[176] to strike,[177] to receive vocational guidance and training,[178] to be given information about the economic and financial situation of their employer and to be consulted on decisions which could substantially affect the interests of workers.[179] Further there is the right to equality of treatment in employment[180] and the right to protection in the termination of employment, essentially so that dismissal cannot occur without a valid reason.[181] It is the European Committee of Social Rights which rules on whether national laws conform to the Charter. States parties submit annual reports about compliance with the Charter.

12. CONCLUSION

The richness of the panoply of labor laws – whether derived from private individual agreement, collective bargaining, state legislative intervention, custom, policy and 'soft laws', or the overarching influences of international sources of law – is clear. While separate sovereign states remain in existence, even within such structures as the EU, we will continue to see great divergences in the details of the laws and the degree of

[169] Ibid., Article 11.
[170] Ibid., Article 14.
[171] Ibid., Article 33.
[172] Ibid., Article 34.
[173] Ibid., Article 35.
[174] Ibid., Article 46.
[175] European Social Charter, Article 2.
[176] Ibid., Articles 5, 6.
[177] Ibid., Article 6.
[178] Ibid., Articles 9, 10.
[179] Ibid., Article 21.
[180] Ibid., Article 20.
[181] Ibid., Article 24.

intervention. Challenges may be similar in the different sovereign states – financial crises, globalisation, economic migration, for example – but responses of governments, policy makers and legislatures are many and varied, often multi-layered, and often giving rise to considerable degrees of complexity. The role of labor law in ameliorating or adequately meeting these challenges is under stress and strain, and certainly debate. To what extent ultimately global labor laws or transnational laws will emerge as sources of law – and how strongly – to play a role, and to give a degree of uniformity and certainty to governments, employers, employees and their associations and unions, remains to be seen. We are only now at the beginning of the debate.