

Guest Editorial

Labour Law in the 1990s: An Unweeded Garden that Grows to Seed?

INTRODUCTION

The dawn of the New Year 1997 heralds dramatic events in the fields of comparative and international labour law and industrial relations. With reform of the structures for the development of social policy firmly on the European Union's agenda of controversy for the on-going Inter-Governmental Conference,¹ and in the wake of the Singapore gathering of the World Trade Organisation, the increasing international dimension of policy in these areas is clear for all to see. More parochially, with governments in the Member States of the European Union struggling to ensure that their economic 'performance indicators' satisfy the criteria to qualify for participation in 'monetary union', social and industrial unrest has returned to the headlines in a significant number of economies. Seen in a longer-term perspective, such manifestations of unrest can also be seen to have followed hard upon the heels of swinging budget cuts for the maintenance of 'the Welfare State', coupled with a clear distancing of numerous European governments from long-held 'traditional' social policy objectives such as the achievement of 'full employment' or the provision of generous publicly-financed income maintenance schemes.

For a British commentator in this area, 1997 perhaps carries even more significance — and no little sense of trepidation!

Highlighting the international controversy which surrounds the stance on 'social affairs' currently adopted by the United Kingdom, a series of recent decisions by the European Court of Justice have touched upon matters in the social field of close and sensitive concern to domestic British policies. Particular high profile

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1. The Amsterdam Summit in June of this year is intended to be the occasion for the next revision of the Treaties. See, most recently, the draft prepared under the Irish Presidency for the Dublin Summit of December 1996: 'The European Union Today and Tomorrow: Adapting the European Union for the Benefit of its Peoples and Preparing it for the Future — A General Outline for a Draft Revision of the Treaties (Dublin II)', (CONF 2500/96), of 5 December 1996. See also pp. 37-50 of this Journal; see also the editorial at pp. 1-9.

adjudications by the Luxembourg Court — including, most recently, the decision in relation to the 1993 Working Time Directive² — have been received on the shores of 'perfidious Albion' with undisguised hostility and unreserved condemnation in the British media. What such judicial decisions — together with the socio-economic debates surrounding the issues in question — have done, above all else, has been to demonstrate a marked lack of congruence between what has come to be described as 'the continental European social model' and an apparently contrasting 'Anglo-Saxon model' as illustrated by the current British government's declared policies on this front. Of particular significance to the distinction drawn between these two 'models' is the role of 'regulation' considered to be appropriate for the labour market and industrial relationships, and the extent to which the operation of 'the market' is to be left untempered by any form of social 'Welfare State' provision.

However, by far the most significant event of 1997 for British observers will be the General Election scheduled to take place on 1 May 1997. The imminence of that (ostensibly domestic) event has already demonstrated a remarkable ability to influence the pace of developments at the level of the European Union. Nor is this something confined only to matters in respect of social policy.³ Certainly, the period of uncertainty over the orientation of United Kingdom government policy post-May 1997 has given rise, both domestically and at the international level, to a widespread 'wait and see' attitude being adopted in many quarters. Meanwhile, a few confident soothsayers are overtly 'planning for change' in the anticipation of a defeat for the incumbent governing Conservative Party under Prime Minister John Major.⁴

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2. Case 84/94, *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union*, judgment of the Court delivered on 12 November 1996. The case dealt with the United Kingdom's action for annulment of Council Directive 93/104/EC concerning certain aspects of the organisation of working time. For the text of the Directive, see (1994) 10 Int.J.Comp.L.L.I.R. 71.
 3. Indeed, of particular concern for the labour market perspective is the impact upon policy initiatives to facilitate cross-border movement and to remove formal immigration controls throughout the area of the European Single Market.
 4. Although not a matter to which this comment is directed, it should be noted in passing that, even if there were to be a change in political complexion for the British government in the wake of the 1997 election, this would by no means necessarily give rise to dramatic shifts of position at the supra-national level. The British Labour Party has indicated its willingness to participate in the declaratory ethos generated by such instruments as the 1989 Community Charter of the Fundamental Social Rights of Workers. It is also anticipated that an incoming Labour government would review the United Kingdom's approach to the social policy 'opt-out' which was negotiated during the Maastricht negotiations leading to the Treaty on European Union. See, on the contemporary background to that 'opt-out', *inter alia* the contributions of Weiss and Barnard in (1992) 8 Int.J.Comp.L.L.I.R. However, at the domestic level, any large-scale initiatives to 'turn the clock back' in relation to the regulation of industrial relations and in respect of the role of the Law in labour relations has already been firmly discounted. Pre-election pronouncements in relation to the basis upon which the British economy might be run by a future Labour Chancellor of the Exchequer also suggest that a return to 'Welfare State' notions of the 1960s or early 1970s would not constitute a strong policy imperative for such a newly-elected Labour government.

This brief comment is not, however, penned particularly with a view to assessing the future of United Kingdom social policy after the 1997 General Election. Nor is it concerned with canvassing the labour law and industrial relations policies of successive British governments since the rise to power of Prime Minister Margaret Thatcher. It is not even directed towards the challenges faced by the European Union, the World Trade Organisation, and other increasingly influential regional blocks in relation to basic labour standards and the role of labour law in employment policies.

Rather, these few observations are directed towards what the author notes as appearing to be some widely received legacies of what have come to be known in the United Kingdom as 'the Thatcher Years'. The aim is to attempt to illustrate a growing — and what may appear to some to be highly worrying — tendency to undertake studies and to conduct debate within an ideologically-imposed straightjacket which departs significantly from notions such as 'social protection', 'countervailing power', or 'social justice' which have historically underlain 'classical' approaches to regulation of labour markets and 'the world of work'.

In particular, it is suggested that three significant trends have emerged:

- (i) we find ourselves in a context where the demand for 'economic justification' to underpin 'social' policy initiatives as a *sine qua non* for action may be distorting the way in which the very values underlying those social policy initiatives are addressed;
- (ii) there has developed a tendency to present social policy initiatives in the guise of 'Charters', 'Social Contracts', 'Declarations of Rights', or the like, rather than to introduce specific initiatives for measures which might deliver the aspirations embedded in such declaratory instruments; and
- (iii) there has been an apparent trend towards the presentation of social policy analysis and proposals in highly 'polarised' form, with a fast diminishing tolerance for reasoned and balanced argument and debate.

EVERYTHING HAS ITS PRICE

At the root of many of the problems to which these observations are directed is a division drawn ever more sharply in the political consciousness between the 'economic' and the 'social' dimensions of trans-national and national economies.

By way of example, the European Union has long grappled with tensions brought about by recognising a 'social dimension' of the labour market within a context which has proceeded on a predominantly 'economic' footing. This schism is amply illustrated by two 'White Papers' published in 1994 — *Growth, competitiveness and employment — The challenges and ways forward into the 21st century*, and *European Social Policy — A Way forward for the Union*.⁵ The 'Chinese Wall' developed between these two aspects contrasts significantly with the rhetoric of the Madrid Summit of 1989, to the effect that '...in the course of the

5. The first of these was the 'competition' White Paper, *Growth, competitiveness and employment — The challenges and ways forward into the 21st century*, (COM(93) 700 final). This was followed by the 'social policy' White Paper, *European Social Policy — A Way forward for the Union*, (COM(94) 333 final). The social policy White Paper followed a period of debate around an earlier Green Paper, *European Social Policy: Options for the Union*, (COM(93) 551 final).

construction of the single European market, social aspects should be given the same importance as the economic aspects and should accordingly be developed in a balanced fashion'.⁶

Yet, this development of a chasm between the 'economic' and the 'social' is, in many ways, a manifestation of a much more fundamental process which has been under way for the past two decades. Against the background of a shift from the values of 'the Welfare State' to those of 'neo-liberal market' doctrines, governments throughout Europe and elsewhere in the global economy have pursued policies which reflect the *diktats* of Finance Ministries rather than the aspirations of social affairs ministries, public health ministries, or ministries of labour.⁷

One consequence of this has been that those advocating 'social' measures — and *a fortiori* public expenditure on such measures — have felt obliged to resort to techniques of self-justification which range from the 'linguistic slight of hand' to the patently bizarre. In common with Oscar Wilde's celebrated characterisation of the 'cynic', government ministers ostensibly charged with the safeguarding of social protection in modern society have increasingly come to appear like the man 'who knows the price of everything and the value of nothing'.⁸ Within the European Union, as already noted, such a perception has been heightened by the resurgence of social unrest in the wake of economic measures introduced with a view to ensuring satisfaction of the 'convergence criteria' for future monetary union.

Arguments in favour of social policy actions — which hitherto would have been presented (as many would maintain they truly are and remain) as 'social measures' or measures for the protection of vulnerable workers at work — are nowadays dressed up in the language of 'efficiency' and 'added value'. Pseudo-justification is sought through the jargon of 'the avoidance of distortions to competition' or 'the avoidance of social dumping'. Underlying values, while dimly shining through, are overshadowed by a species of 'econo-speak' which bears remarkable overtones of Orwellian 'Newspeak'.⁹ At the same time, any genuine commitment to social protection or reform becomes, too often, clouded by a defensive and bewilderingly oblique linguistic resort to jargon purporting to reflect approaches attributed to 'Chicago economists' or other economo-ideological 'think tanks' prayed in aid during the 1980s by right-of-centre governments throughout Europe and North America. Protection against exploitation at work is thus dressed up for public and political consumption as 'measures to counter anti-competitive tendencies in the globalised economy', while any proposal for reform or innovation is accompanied

6. Madrid Summit 'Conclusions', 26/27 June 1989, Point 2.

7. Indeed, if one looks at the situation in the United Kingdom, the former Department of Employment (the closest one had in that country to a Ministry of Labour) has been abolished, and its old responsibilities distributed between a variety of government departments concerned with education, industry, and training.

8. Oscar Wilde, *Lady Windermere's Fan*, Act III.

9. George Orwell, *Nineteen Eighty-Four* (see Appendix, 'The Principles of Newspeak').

by an ostensible 'case' resting upon what passes for a 'cost-benefit analysis' of the implications associated with such proposed action.¹⁰

Yet, when one stands back from this process, what is particularly notable when looking at the academic and research literature in the field of labour law and industrial relations is a marked absence of 'cost-benefit analysis' techniques utilised in the cause of justifying social policy interventions. Whether addressed, for example, to the impact upon measurable welfare payment savings inherent in reductions of the numbers of citizens out of work, to direct and indirect savings in public health care expenditure flowing from safer or less physically demanding modes of performing work, or to quantifiable productivity gains to be derived from that increasingly rare creature, the 'secure, loyal, and committed employee', the tools of 'cost-benefit analysis' do not appear to have been put to effective use by those who would defend 'the continental European social model'.¹¹ By contrast, there can be no doubt that they have been very effectively exploited by the proponents of 'the Anglo-Saxon model', and that the agenda-setting initiative has belonged almost exclusively to this latter camp.

SLOGANS SPEAK LOUDER THAN ACTIONS

A particularly unattractive trend to emerge from this picture has been the enthusiasm for presenting social policy initiatives in 'programmatic' form. While recognising the benefits which particular initiatives can receive from being placed within a coherent politico-economic framework, there remains a danger that the attraction of this approach may have more to do with contemporary 'sound-bite politics' or harnessing the power of sloganistic banner headlines in the popular press, than with the development of genuine programmes of *action* for social reform, development or improvement.

In recent years we have been deluged by variants of 'the Big Idea', in the style of 'Bills of Rights', 'Citizens' Charters', 'Action Programmes', or 'Joint Declarations' of intent. Taking a global perspective, debates over the desirability of a 'social clause' have been prominent in the deliberations of the World Trade Organisation and the International Labour Organisation.¹² So, too, the G7 meeting

10. Indeed, in the United Kingdom it is now reported that the individual Minister responsible for piloting any such measure through the legislative process is required to assure his Cabinet colleagues that such a case can be made out in favour of the proposal, and that the cost-benefit analysis complies with established guidance criteria.

11. This is not, of course, to suggest that there has been no such response at all. See, for example, the papers presented to the 10th World Congress of the International Industrial Relations Association (Washington, 31 May - 4 June 1995), Track 3: 'The Challenge to Government Policy: Promoting Competitive Advantage with Full Employment and High Labor Standards', and the issues raised by Richard Freeman, in his General Report on that subject. However, the limited impact of such studies at the national and supra-national policy-making levels since the late 1970s has been quite remarkable.

12. See, for a sample of the literature exchanges, Hans-Göran Myrdal, 'The ILO in the cross-fire: Would it survive the social clause?', in W. Sengenberger & D. Campbell (eds), *International Labour Standards and Economic Interdependence: Essays in Commemoration of the 75th*

in Lille, in April 1996, gave rise to calls by the European Union's Social Affairs Commissioner for the establishment of 'social standards' at the global level.¹³

Increasingly, too, there has been a growing body of opinion which would set such declaratory initiatives within a framework of developing 'fundamental rights' in relation to the world of work.¹⁴ At the level of the European Union some commentators place reliance upon Article F.2 of the Treaty on European Union,¹⁵ while, in the run-up to the revision of the Treaties envisaged for the Summer of 1997, particular initiatives have caught the headlines.¹⁶ While some of the proposals restrict themselves to traditional 'labour' or 'social' rights,¹⁷ the language used has developed in the direction of 'civic and social rights', embracing 'labour' rights along with a wide spectrum of non-work-specific matters.¹⁸

However, while public sector printing houses are kept busy with the production of glossy brochures and pamphlets extolling the benefits of such 'rights', and emphasising the concern of governments to achieve vaguely expressed 'targets' for the delivery of those 'rights' to a grateful citizenry, a significant dark cloud hangs over this landscape of developing civic and social rights. Common to all of these initiatives is an almost total absence of enforcement mechanisms or 'teeth' with

Anniversary of the ILO and the 50th Anniversary of the Declaration of Philadelphia (Geneva 1994), p.339, and Jean-Michel Servais, 'Les aspects sociaux de la libéralisation du commerce international ou la clause sociale revisitée', (1996) *Bulletin de droit comparé du travail et de la sécurité sociale* 212.

13. See 'Commissioner calls for a new 'social clause' to trade deals', *The Times*, 2 April 1996.
14. For a strong presentation of the arguments in favour of this approach at the European level, see B.Hepple, 'The Development of Fundamental Social Rights in European Labour Law', in Alan C. Neal & Sten Foyn, *Developing the Social Dimension in an Enlarged European Union* (Oslo 1995), p.23.
15. 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community Law.'
16. There is even talk of a 'social constitution' for the European Union. See the publication prepared for the European Trade Union Institute by B.Bercusson *et al*, *A Manifesto for Social Europe* (Brussels 1996).
17. See, for example, the proposal elaborated by R.Blanpain, B.Hepple, S.Sciarra & M.Weiss, *Fundamental Social Rights: Proposals for the European Union* (1996), and see, for later comments on the prospects for such an initiative, M.Weiss, 'Fundamental Social Rights for the European Union', (Lecture delivered on 6 November 1996 at the Hugo Sinzheimer Institute of the University of Amsterdam).
18. Amongst the most significant of these proposals is the 1996 report *For a Europe of Civic and Social Rights*, (Report by the Comité des Sages, under the chairmanship of Maria de Lourdes Pintasilgo).

which to ensure that ambitious and well-meaning declarations on paper can be turned into real benefits for working people.¹⁹

With public expenditure on social policy measures so obviously under threat across Europe and elsewhere, there is a danger that the public perception will take on an ever-growing sense of the futility of mere declaratory initiatives such as those which have recently attracted so much attention. What remains important is that the commitment to practical social protection and improvement does not become reduced to a state as bleak as the outlook of the Prince in Shakespeare's *Hamlet* — being nothing more than 'Words, words, words.'²⁰

'IF YOU ARE NOT WITH US, YOU MUST BE AGAINST US'

The final matter which has attracted attention for the purposes of this brief comment is, arguably, even more disturbing. This is the extent to which what passes for 'debate' in the field of social policy and labour law has so often been reduced to simplistic encapsulation of propositions presented in a sharply polarised and intolerant climate.

Glossily packaged proposals are presented on an 'all or nothing' basis. Any attempt to respond with constructive criticism is rejected — as manifesting a rejection of the total package. Issues which have shown themselves over decades to pose complex and nuanced challenges to policy-makers and those responsible for the implementation of social policy are reduced to 'comic-strip' slogans. At the same time, politicians of all persuasions queue up to harangue their citizenry with increasingly grandiose promises which, like the King's new clothes, prove to be nothing more than illusions.

Meanwhile, the whole process of research into 'social' matters — sparsely resourced at the best of times — has suffered crippling blows worldwide. At the same time as dramatic cuts have been witnessed in budgets for universities and other traditional research bodies, there has emerged an increasingly disconcerting trend towards what is described as 'results to order'. Increasingly, the only remaining sources of such research funding are found with highly partisan 'interested parties', and allegations are voiced that a species of 'analytical orthodoxy' appears to have become the norm. Certainly, to put it at its lowest, the production of research results which fail to satisfy the political presentational expectations of the project paymasters runs, at best, the risk of non-publication and, at worst, a guarantee of no repeat funding to the researchers in question.

19. See this author's observations in response to Hepple (*supra*): Alan Neal, 'Developing the Social Dimension in an Enlarged European Community', in Alan C. Neal & Sten Foyn *op. cit.*, especially at p.11. It should also be noted that, in some areas, there is an express recognition of the move towards what some would describe as 'soft law' mechanisms, or 'non-legislative' initiatives — see, for example, the resort to a programme of 'non-legislative accompanying measures in order to promote and supplement legislative objectives' included with the European Commission's 1995 Action Programme on health and safety at work. On the emergence of 'soft law' techniques, see also J.Kenner, 'EC Labour Law: The Softly, Softly Approach', (1996) 11 Int.J.Comp.L.L.I.R. 307.

20. William Shakespeare, *Hamlet*, Act II, ii, 195.

Faced with such seemingly discouraging traits, it becomes a matter of crucial concern that academics, journalists, researchers, and others active in the fields of labour law and industrial relations maintain their traditions of careful analysis and reasoned comment upon matters of social policy and law. Notwithstanding the recognition that they may run the risk of being ignored at the political level unless they, too, play the game of simplistic slogan-mongering, the resolve of today's leading figures in the labour relations field needs to be sufficiently firm to withstand the threats currently being offered to their established role and influence.

Although the omens may not be bright, all of us owe a duty to resist the development of a situation in which the cautious 'voice of reason' can be drowned out by 'Newspeak' jargon. So, too, is there a clear need to resist any continued hostile belittling of critical comment by vested interests purporting to speak in the name of 'free market forces', 'globalisation', 'competition', 'flexibility', 'deregulation', or any of the host of other idols which have come to dominate developments in this field over the past two decades. Only then will the ideological straightjacket of recent years be loosened, and a return made possible to a period of considered, dispassionate discourse on the future of work and the intricate relationships which go to make up the world of working life.

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