HUMAN RIGHTS, SOCIAL JUSTICE AND LABOUR LAW

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1. Introduction

It has been argued that between 1850 and 2000, there were three (overlapping) 'globalisations' of legal thought.[1] The first really 'global' legal consciousness spread during the second half of the nineteenth century up to the First World War: Classical Legal Thought (CLT). It relied on a sharp distinction between public and private law, freedom of contract, individualism and legal formalism.[2] This legal consciousness developed into a political ideology: formerly classical liberalism, and more latterly neoliberalism, which continues, of course, to be of central influence and importance.[3] The second globalisation of legal thought occurred from the beginning of the twentieth century up until the 1960s. This mode of legal thought attempted to move away from the individualism and liberal foundations of CLT in the first wave of globalisation. It advocated that social groups were central both to the formation and the effectiveness of law. Rather than the CLT model of a sovereign state ensuring individual rights, the 'Social' model focussed on those institutions between the individual and the state. Social classes, particularly labour and capital became legal subjects, and the aim of the law was to represent the compromise between these social classes. Labour legislation was seen as a central example of this type of law, aiming towards redistribution in the name of social justice.[4] In relation to the third globalisation (1968-2000), the central organising principle was that of human rights, which replaced the 'private rights' of the CLT movement and the 'social rights' under the Social model. The universality of this principle tended to eclipse the social compromise under the Social model, and reinvigorated many elements of the CLT phase (liberalism, freedom of contract, the separation of private and public rights).

Of course, this presentation of the different modes of global legal thought is highly stylised, and is of very general application. There will be difficulties with the direct application of this theory to any particular legal context, and the direct application of this model to the context of labour law is not attempted in this article. However, it is argued that this separation of the different modes of legal thought is interesting and important in terms of any discussion of the relationship between the concepts and methodologies associated with social justice and human rights in the labour law field. It illustrates that these two concepts and methodologies can be described as emerging from different *paradigms* of legal thought. This helps in some way to explain the early separation of social justice arguments from human rights arguments in the early development of labour law when applied to different national contexts. It also helps to explain the difficulties and controversies that emerge from attempts to merge these two concepts and methodologies together: for example by arguing that social justice is achieved through having human rights instigated in the legal system.

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[1] D Kennedy, 'Three Globalisations of Law and Legal Thought: 1850-2000' in D M Trubek and A Santos, *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006) 19

[2] Ibid 25

[3] L Rodgers, 'The Regulation of Vulnerable Workers and Precarious Work: A Liberal Framework' in M Sargeant (ed) *Vulnerable Workers and Precarious Work in a Changing World* (Adapt Labour Studies Book Series, 2013 forthcoming)

[4] The position of the UK will be discussed in more detail below, but appears on the face of it to be an exception to this pattern. A basic floor of statutory rights did not appear until the 1960s with the advent of the Contracts of Employment Act 1963. However, this did not mean that redistribution and social justice were not important concepts during this period in the context of the regulation of labour.

This article starts by an exploration of the development of labour law in the era of 'social justice', and the particular meaning of this term in the context of this development. It then proceeds to explore the relationship of labour law to the global hegemony of human rights, but how even within this context, other norms remain important and continue to be emphasised in the field of labour law. The particular focus will be on the relationship between human rights norms and the norms of social justice in the context of the interpretation of labour law in the courts. It is the argument in this article that although human rights are increasingly being promoted as encapsulating the social justice aims of labour, in fact there are tensions and difficulties which run both *within* the human rights regime and the regime of social justice and *between* these two regimes. These tensions mean that the use of human rights to achieve social justice is by no means guaranteed, and depends on a particular judicial interpretation of these norms.

2. Social justice foundations of labour law

According to the model, social justice was a central element of the 'Social' globalisation of legal thought between 1900 and 1968. Social justice was important to this model because it represented the idea that justice did not have to be achieved through a set of abstract legal rights which had little to do with the experience of general society. Justice could be achieved through a consideration and involvement of different social groups in the design and application of law. Social justice meant that the law could expand to meet social compromise, and was not constrained by the liberal commitment to non-intervention and the free market under the CLT model. This gave a space for the development of labour law to meet the social compromise of the early twentieth century. New legal forms came to the fore, which recognised the interdependent activities of employers and workers and a need to coordinate those activities in the 'public interest' (for example social insurance against industrial accidents and compulsory collective bargaining). To a certain extent, the creation and the development of the ILO is a good example of this social moment. This organisation was formed in 1919 as part of a broader peace project at the end of the First World War.[5] Its Constitution explained the importance of social justice to that mandate, and the importance of the creation of labour standards in the achievement of that social justice.[6] A commentary on the seven policy concerns in the Constitution discerned three priorities in the ILO in terms of 'social justice'. The first was the concern with work as a source of livelihood and fulfilment, the second was the goal of the prevention of exploitation (for example by limiting hours of work and 'taking measures to protect those who might be particularly vulnerable') and the third was the need to protect workers against the difficulties of working in dangerous or inadequate environments.[7] Social justice thus required a redistribution of power from employers to workers, but also meant the recognition of the value of work to both workers and to the social system as a whole. Social justice represented an idea

[5] F Hendrickx, 'Foundations and Functions of Contemporary Labour Law' (2012) 3 (2) *European Labour Law Journal* 108, 110.

[6] The Preamble of the Constitution (available at http://www.ilo.org/ilolex/english/constq.htm last accessed 19 April 2013) states that 'Whereas universal and lasting peace can be established only if it is based upon social justice; And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising from his employment, the protection of children young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principles of freedom of association, the organisation of vocational and technical education and other measures;

[7] G Rodgers, E Lee, L Swepston, J Van Daele, *The International Labour Organisation and the quest for social justice, 1919-2009* (International Labour Office 2009) 9

of work *quality* given the social value of work.[8] It was understood that this recognition guarded against the treatment of labour 'merely as a commodity or an article of commerce'[9] and ensured that (global) industrial peace could be maintained.[10]

At the national level, there was arguably a similar commitment to 'social justice', but there was a divergence in what was understood by the use of these concepts. In France and Germany for example, the influence of the 'Social' model can be clearly seen, and a 'social law' model of social justice can be discerned in the design of labour law. In Germany, Gierke, a leading theorist in the 'social' movement was very influential in the creation of early labour law. According to his philosophy, the individual could not be viewed separately from society. By entering into a work contract, each worker was entering into a social relationship and therefore should have a particular social status (*Tatbestand*). This social status should be guaranteed by statute; hence the development of civil law relating to employment.[11] Furthermore, anti-discrimination legislation was instigated early on in the development of employment law in this jurisdiction, recognising that the state should be involved in the guarantee of group, as well as individual status. In a similar way, statutes were created in France during the period of the Social movement (1900-1968), which purported to create legal protections for workers on the grounds of public policy (*ordre public)*. As such, worker contracts become 'socialised' and labour law became dominated by role of public (government) power in the regulation of the employment relation.[12]

By contrast, in the UK the focus was on the specific nature of the employment relationship (aside from other social relationships). In particular, labour theorists referred to the particular problems associated with the unequal relationship between employers and employees, and the need to challenge this unequal distribution of power in order to achieve social justice (for workers). This view had clear Marxist foundations. The employment relationship was seen as imbued with elements of 'subordination' and 'exploitation' as a result of the insertion of employers and employees into the capitalist system of production: 'There can be no employment relationship without a power to command and a duty to obey, that is without this element of subordination in which lawyers rightly see the contract of employment'.[13] In the UK, there was initially great scepticism about the role that the government and the law should play in achieving social justice for workers. It was felt that if workers were to challenge the lack of social power (or inequality of bargaining power) in their employment relationship, then this could only be achieved through collective bargaining: the 'spontaneous creation of a social power on the workers' side to balance that of management'.[14]

[8] The relationship between social justice and work quality was also promoted theoretically by social theorists influential to the 'Social' movement. For example, Durkheim professed that work quality was central to both personal satisfaction for workers and the social order in general. He argued that where workers did not have the freedom to work according to their capabilities, this would undermine the legitimacy of the whole social order and lead to social breakdown. See E Durkheim *The Division of Labour in Society* (Macmillan Press Limited 1984 [1893]) 313

[9] This quotation is part of the first guiding principle of the ILO as stated in Article 427 of the Treaty of Versailles (which established the ILO).

[10] However, there are a number of differences between the view of the social theorists towards social justice, and the priorities asserted by the ILO. Under the 'social' model, law is primarily created as a set of norms within social groups. Those norms become cemented over time into legal rules which are guaranteed by the state. The law is thus a 'living' entity which is subject to constant revision and amendment. By contrast, for the ILO, legal (and unchanging) standards are seen as the best way to achieve social justice for workers. This consistency is required to ensure that there is an institutionalised redistribution of resources and risk from workers to employees.

[11] Now in the Bürgerliches Gesetzbuch, sections 611-630

[12] A Supiot, *Critique du droit du travail* (Presses Universitaires de France 2007, 2nd edition) 30

[13] O Kahn Freund *Labour and the Law* (Stevens 1983) 17

[14] Ibid 18

Increasingly however, theorists of labour law came to be persuaded by the value of labour law in helping to equalise the unequal power relation between employers and workers. A role was recognised for the law in limiting the 'duty' of obedience of the worker and increasing the 'range of his freedom'.[15]

3. Human rights foundations of labour law

Although most scholars locate the foundations of human rights discourse in the period of the enlightenment, arguably the modern idea of human rights did not emerge until after the Second World War.[16] Following the war, there was a commitment to an international organisation (the UN) which would impose certain standards of decency on the world's governments. It was hoped that the rights and liberties created by this organisation would guard against the large-scale oppression (under Hitler's Nazi regime) which instigated the need for war.[17] Freedom was the most fundamental basis of this new human rights regime: the signatories of the early UN Charter pledged to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'. The Universal Declaration of Human Rights, which followed the Charter, established the global meaning of human rights as universal, inalienable and immutable rights which belong to every human being by virtue of their humanity.[18] The early Declaration presented civil, political, economic and social rights in the same document (albeit with civil and political rights presented first). Later Treaties separated civil and political rights (the International Covenant on Civil and Political Rights (ICCPR)) from economic and social rights (International Covenant on Economic, Social and Cultural Rights (ICESCR)). Arguably, this separation reinforced the existing hierarchy between civil and political which were seen as 'universal, paramount, categorical moral rights' and economic and social rights which had a much lower status, with some authors proclaiming them not to belong to the human rights scheme at all.[19] It was argued that the positive obligations on government attendant with the social rights scheme, along with their lack of universality, meant that they were incompatible with liberalism and therefore any scheme of human rights created under a liberal regime.

In terms of labour law, the human rights scheme has become increasingly important and pervasive. There are a number of reasons for this. Firstly, human rights have hegemonic status and political appeal. Human rights claims can therefore be used instrumentally by civil society organisations and labour rights movements to gain public support for their activities. This has been particularly important in the context of the decline in union membership globally and the need for labour movements to redefine their aims to reflect a more 'modern' approach.[20] Framing their claims in the human rights discourse means that labour movements can move away from economic arguments and special interest politics, and towards a stance based on ethics and morality which transcends any controversy over the (detrimental) impact of unions on the economy. Secondly, human rights have significant normative power. They are high priority, compelling claims which are 'not absolute but are strong enough to win most of the time when they compete with other considerations'.[21] Labour rights which gain this status are not easily dismantled. Perhaps a good example of this is the current status of anti-discrimination law, which is increasingly based on the notion that discrimination in employment is a breach of human rights. In the UK, there has been significant

[15] Ibid 18
[16] J Nickel, *Making Sense of Human Rights* (Blackwell Publishing 2009 2nd edition) 12
[17] Ibid 8
[18] M-B Dembour, *Who Believes in Human Rights: Reflections on the Convention* (Cambridge University Press 2006) 1
[19] J Donnelly *Universal Human Rights in Theory and Practice* (Cornell University Press 2nd Edition 2003) 28
[20] K Kolben, 'Labor Rights as Human Rights?' (2010) 50 *Virginia Journal of International Law* 449, 462
[21] Nickel (n 16) 9

deregulation of unfair dismissal and other employment laws, but the status of anti-discrimination law has meant that the government has not been able to significantly amend these laws.

The relationship between human rights and social justice in this scheme is not straightforward. Social justice arguments relating to the need for labour law have been abandoned as outdated, and increasingly there has been a reliance on human rights to achieve the same ends. On the one hand, such a strategy is risky because of the traditional 'second generation' position of social rights as opposed to civil and political rights. Many labour rights, if they can be considered human rights at all, sit far better with the economic and social rights of the ICESR and other treaties which have followed it. For example, legislation on the minimum wage seems more consistent with the right to a 'fair wage' under the ICESR rather than any civil and political right. Furthermore, it could be argued that minimum wage legislation has more in common with the character of a social rather than a civil/political right, given that the level of the minimum wage will vary according to what the relevant society can afford, and will vary over time. Indeed, it is difficult to see the minimum wage as consistent with the universality of the human rights standard necessary under the civil and political regime (this applies only to workers), or as consistent with a vision of human rights operating as the base standard below which no government should be permitted to operate.[22] On the other hand, there is increasingly the argument that human rights can and should be viewed holistically (to include civil and political as well as economic and social rights).[23] It is argued that, on closer scrutiny, there is no logical distinction between the two groups of rights. For example, political and civil rights require state obligation and responsibility to be realised, and not all civil and political rights apply to all human beings equally.[24] It is asserted that social groups should rely on a holistic view of human rights, and that this reliance is the best way in which to achieve social justice for those groups.[25]

4. Social justice and human rights as legal methodology

So far, this article has discussed, at a high level, the content of social justice and human rights norms and the theoretical compatibility of those norms. The aim of this next section is to discuss the application of those norms in practice: that is in the design and interpretation of labour law statutes. On the one hand, it could be argued that labour law statutes can accommodate both social justice and human rights norms, and can achieve both ends. For example, recent American scholarship has reinforced the idea that anti-discrimination law has always embodied both social justice and human rights aims. The distinction is made here between anti-subordination (social justice) and anti-classification (human rights) norms in the design and interpretation of anti-discrimination law.[26] Anti-classification theory fits well with the human rights tradition. The cornerstone of this theory is that in order to achieve equality any consideration of a relevant protected characteristic (age, race etc) should be outlawed.[27] It is closely aligned with the notion of formal equality: that likes should be treated alike. It fits with human rights theory in general terms because it professes no preferential treatment between groups, and therefore requires little in the way of (state) reallocation of material resources or wealth. By way of contrast, anti-subordination theory asserts that consideration of the situation and particularly the historical disadvantage of certain groups should be central to discrimination law. This consideration gives the required justification for the selection of a particular protected characteristic, and it also makes anti-discrimination law more effective. If structural

[22] H Collins, 'Theories of Rights as Justifications for Labour Law' in B Langille and G Davidov, *The Idea of Labour Law* (Oxford University Press 2011) 142
[23] R Copelon, 'The Indivisible Framework of international Human Rights: A Source of Social Justice in the US' (1998-2000) 3 *New York City Law Review* 59, 59
[24] V Mantouvalou, 'Are Labour Rights Human Rights' (2012) 2 *European Labour Law Journal* 151, 166
[25] Copelon (n 23) 77.
[26] B A Areheart, 'The Anticlassification Turn in Employment Discrimination Law' (2012) 63 *Alabama Law Review* 955
[27] Ibid 963

disadvantage is not considered, and certain groups treated more favourably, then anti-discrimination law cannot hope to achieve equality. This kind of argument is in line with social law readings of social justice. This social justice argument is able to contemplate a redistribution of resources and law targeted towards the protection of particular groups.

It is argued that in US anti-discrimination jurisprudence there has always been a vacillation between anti-subordination and anti-classification principles. Likewise, it could be argued that both kinds of principles can be found in UK and European anti-discrimination law. For example, the UK Equality Act 2010 (which embodies the main anti-discrimination provisions relating to employment) is fundamentally based on formal equality between individuals with different protected characteristics. This kind of formal equality, as we have seen, sits well with a human rights or anti-classification reading of anti-discrimination law. However, there are a number of provisions of the Equality Act which aim towards a more substantive reading of equality, and are underscored more by anti-subordination or social justice norms. Section 149 EA 2010 is concerned with imposing a duty on public sector authorities to promote equality. The duty is triggered where there is a pattern of group-underrepresentation or evidence of structural discrimination. This section is not concerned with individual fault or liability, and so does not follow the legal ethos of individualism of the human rights regime. Rather, this section is concerned with group disadvantage and positive action to ensure that groups achieve more than formal equality; the section aims towards a reading of equality which is more substantive and gives groups the real possibility of equality of opportunity with other groups who may not have suffered the same disadvantage in the past.

This does not, of course, give the whole picture. The US jurisprudential theory is limited in an important way when it comes to a consideration of the theory and application of UK and European anti-discrimination law. In the US theory, anti-subordination theory is limited to the general principles of social law: that 'law should reform institutions and practices that enforce the secondary status of historically oppressed groups'.[28] There is no scope for the specific employment perspective of subordination which implicates the employment relationship in the creation of specific vulnerabilities for (all) workers.[29] It is argued that this approach is central to the design of UK and EU employment law. It represents the second 'Marxist' view of social justice outlined in section 2 of this article. It is also central to the application of UK (and EU) law, as illustrated by the recent case of *Jivraj*.[30] The *Jivraj* case concerned an international commercial agreement between Mr Jivraj and Mr Hashwani which provided for the appointment of a panel of three arbitrators in the event of a dispute. Mr Hashwani claimed that the clause was void because the three arbitrators had to be members of the Ismaili community and this constituted unlawful religious discrimination. The main issue was whether the arbitrators were 'employed' for the purposes of the Employment Equality (Religion or Belief) Regulations 2003 (the 'Regulations').[31] The Commercial Court found that the arbitrators were not 'employed' for the purposes of the Regulations, but this decision was overturned in the Court of Appeal. The Court of Appeal gave a broad interpretation to the meaning of employment under the Regulations, defined in the Regulations as: 'employment under a contract of employment, a contract of apprenticeship, or a contract personally to do work'. It held that the concept of a contract personally to do work under the definition 'employment' in the Regulations included those contracts which were essentially in the nature of a 'client or customer of a profession

[28] J M Balkin and R B Siegel, 'The American Civil Rights Tradition: Anticlassification or Antisubordination?' (2003) 58 *University of Miami Law Review* 9, 9

[29] C McCrudden, 'Two Views of Subordination: The Personal Scope of Employment Discrimination Law in *Jivraj v Hashwani* (2012) 41 (1) *Industrial Law Journal* 30, 51

[30] *Jivraj* v *Hashwani* [2011] UKSC 40

[31] These Regulations have since been superseded by the Equality Act 2010, but it was found in this case that there was no significant difference between the definition of employment in the Regulations and that in the Equality Act 2010 (section 83).

or business undertaking'. This meant that arbitrators were covered by the Regulations. The Supreme Court disagreed with this approach. It held that to give such a broad interpretation to the meaning of employment took it outside the understanding of even the broadest interpretation of employment in UK law, and could not be accommodated by the definition in the Regulations. The Supreme Court emphasised that the 'definition does not refer to a contract to do work but to '*employment under'* such a contract'.[32] Thus the legislation aimed primarily to capture those persons in a relationship of subordination vis-a vis their employer. It did not extend to the protection of consumers generally, and to the protection of arbitrators in this particular case.[33]

It is therefore important to recognise that in considering the design and interpretation law relevant to employment there are (at least) two possible approaches to social justice. The first approach is that derived from social law, in which employment relationships are part of the wider scheme of anti-discrimination law. Approaches here emphasise the anti-classification element of anti-discrimination law, such that the relevant protected characteristic is given the widest interpretation possible to avoid any stigma attached to this element (the designation of protected characteristics being viewed, of itself, with suspicion).[34] By contrast, the second approach follows the Marxist idea that it is the inequality of bargaining power between employees and employers which it is the job of the law to address. Protected characteristics and qualification for anti-discrimination law are determined narrowly: according to those in need of protection because of the level of their subordination. These two views of social justice interact more or less well with the 'human rights' element of anti-discrimination law. On the one hand, it is possible for all three elements to be seen as working together to achieve the best outcome for the worker. This potential position will be discussed in the next section. On the other hand, there can be conflicts both *within* and *between* the social justice and human rights approaches, which will be addressed in sections 6 and 7.

5. Social justice and human rights in harmony

Arguably, it is possible to see all three elements of employment law theory mentioned above (the social justice of social law, Marxist social justice and human rights) in the design of EU law. A good starting point is the atypical work Directives: the Directives on Part-Time (PTWD), Fixed Term (FTWD) and Temporary Agency work (TAWD).[35] These Directives aim, on the one hand to eliminate discrimination and on the other, to improve the 'quality' of work.[36] In terms of the anti-discrimination aims of the Directives, these are largely couched in terms of formal equality, for example that part-time workers should not be treated in a 'less favourable manner' than full time workers[37], or that agency workers should not be treated less favourably than workers employed

[32] *Jivraj* (n 30) para 23
[33] Arguably, this reasoning is analogous to the reasoning in the previous case of *Autoclenz v Belcher and others* [2011] UKSC 41. Here the Supreme Court decided that the 'relative bargaining power' between the parties to an employment relationship was an important factor in the determination of their agreement. Individuals in a weak (subordinate) bargaining position were unlikely to be able to influence contractual terms, so that in this situation the court would be justified in looking behind the contract to determine the true agreement between the parties (and therefore employment status for the purposes of the relevant law).
[34] McCrudden (n 29) 50
[35] Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on Part-time work concluded by UNICE, CEEP and the ETUC, OJ [1999] L14/9; Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term work concluded by ETUC, UNICE and CEEP, OJ [1999] L 175/43; Article 2 Directive 2008/14/EC of the European Parliament and the Council of 19 November 2008 on temporary agency work OJ [2008] L327/9.
[36] Clause 1 PTWD; Clause 1 FTWD ; Article 2 TAWD
[37] Clause 4 (1) PTWD

directly.[38] This idea of formal equality is arguably part of the general EU principle of equality couched in human rights. There are certain concessions to the idea of equality of opportunity, which may go beyond a very formal equality reading and towards a social law reading of social justice. For example, in the PTWD, there is a provision that 'where appropriate' employers should allow part-time workers to access vocational training 'in order to enhance career opportunities and occupational mobility'[39], and this is repeated in the FTWD.[40] However, this does not suggest that these groups of workers should be treated *more* favourably in this regard, and so does not go very far in the achievement of the principle of anti-subordination in the social law scheme.

The anti-discrimination provisions appear alongside provisions to improve the quality of atypical work. The idea of quality in work is traditionally aligned with a social justice approach, and it can satisfy social justice in both the Marxist and social law scheme. It promotes the idea that workers should be able to satisfy their wants and their needs through work, and that they should not be compromised by the 'commodification' processes of capitalism (the Marxist approach). The idea of work quality also satisfies the broader principles derived from social law that work quality is necessary for the achievement of wider social goals such social inclusion and industrial peace. Furthermore, it could be argued that the idea of work quality embodies a value which is fundamental to the design and interpretation of human rights: the idea of dignity. As such, the idea of work quality is increasingly forming the point of cross-over between social justice and human rights approaches in the academic and policy literature. For example, the Report of the ILO's 100th International Labour Conference states that both (human) rights and of social justice are central to the ILO mandate and to its constitution,[41] but that 'joblessness and low-quality jobs' are the main threat to these ideals, as well as economic growth.[42] Likewise, in the academic literature there is increasingly the assertion that work quality requires fundamental rights, and that fundamental rights should be structured to improve work quality.[43]

In terms of the application of the non-discrimination and work quality elements in the atypical work Directives, it appears that these can work together to produce a favourable outcome for workers. A good example is the case of *Bruno and Pettini*,[44] which concerned access to pension rights for Italian part-time workers. The workers challenged an Italian statutory rule that qualification for pension rights depended on length of service on the basis that this was contrary to the PTWD. The Court held that this statutory rule was in breach of the PTWD for two reasons. The first was that it was directly discriminatory against part-time workers, and so was in breach of the anti-discrimination provisions of the PTWD. The arguments put forward by the Italian government in relation to the objective justification for this direct discrimination were rejected.[45] The second reason was that this Italian

[38] Article 5 (1) TAWD
[39] Clause 3 (d) PTWD
[40] Clause 6 (2) FTWD
[41] The Report refers to the 'fundamental objective' in the *Declaration concerning the aims and purposes of the International Labour Organisation,* adopted in Philadelphia in 1944, namely 'the right of all human beings to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity'. Report of the ILO Director-General, *A New Era of Social Justice* (International Labour Conference, 100th session 2011), para 167
[42] Ibid para 131
[43] S Borelli and P Vielle 'Introduction' in S Borelli and P Vielle (eds) *Quality of Employment in Europe* (Peter Lang 2012) 24. Here it is stated that 'The EU has to seek a new architecture for employment quality, rooted in fundamental rights'.
[44] Cases C-395/08 and C396/08 *INPS v Bruno and Pettini, INPS v Lotti and Matteucci* [2010] 3 CMLR
[45] Clause 4 (1) allows different treatment between part-time and comparable full time workers where that difference in treatment is justified on objective grounds. The arguments put forward by the Italian government were that the part-time workers had a free choice to decide between two types of working arrangement: 'horizontal' or 'vertical-cyclical' work patterns. The qualification for pension rights under 'horizontal' work

statutory rule ran counter to the aim of the PTWD to promote work quality. This rule made part-time work less attractive, because the effect of choosing part-time work was to postpone the date on which the worker would receive a pension. It was therefore contrary to the 'fundamental' quality objectives of the PTWD which existed to achieve social justice aims, namely the 'proper social protection of workers' and the 'improvement in living and working conditions' in the EU.[46]

However, it is possible to argue that this particular decision will be limited to its facts, given the wide margin of appreciation usually granted to member states. Certainly, the recent development of the case law in this area serves more to highlight the potential difficulties associated with the three approaches to employment law theory identified above, and their application in the case law. These difficulties exist *between* human rights and social justice theory and practice as well as *within* these approaches. This section will concentrate on the difficulties *within* the scheme of social justice and *within* the scheme of human rights as related to employment, whereas section 7 will concentrate on the difficulties between the scheme of human rights and social justice as applied to employment law.

6. Tensions within human rights and social justice

A good example of the conflicts *within* both the human rights and *within* the social justice approaches is provided by the recent case of *Ministry of Justice v O'Brien*.[47] In this case a part-time recorder (fee-paid judge) challenged his exclusion from pension entitlements, arguing that he should receive a pension calculated pro-rata with that that of a full time salaried judge. There were two major hurdles to this claim. The first was that in order to argue for a pro-rata entitlement, he needed to prove that he fell within the scope of the Part-Time Worker (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR) which implemented the PTWD in the UK. On the facts, the Claimant was outside these Regulations by virtue of the exclusion of fee-paid holders of judicial office under Regulation 17. Secondly, the Claimant needed to prove that he was a worker (rather than self-employed) for the purposes of these Regulations. The court found that there was no substantive difference between fee-paid holders of judicial office and other workers which would justify the exclusion of this class in general, or the Claimant in particular, from this legislation. The Claimant could therefore take the benefit of the provisions on pro-rata treatment of part-time workers under UK and EU law.[48] On the face of it, this appeared to be a vindication of the (social) right of the Claimant to equivalent treatment with full-time workers by virtue of his part-time status.

However, there was still the need to prove that there was no objective justification which would permit the Ministry of Justice to exclude part-time workers from pension entitlements. This kind of objective justification or system of derogation is common to human rights-type provision (and was also considered in *Bruno v Pettini* above). The idea is that human rights can only maintain their legitimacy if they are recognised as part of a democratic system, and this system directs that human rights need to be 'balanced' with (other) public interest goals. Although this 'balancing' is pervasive,

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patterns was analogous to qualification for pension rights among full timers, and was therefore not discriminatory against part-time workers. It was held that this justification was not legitimate. In reality, there was no opportunity for part-time workers to chose the horizontal pattern of work, which would require those workers to 'leave the office' part way through a shift. This was a practical impossibility for these part-time workers whose office was a aircraft in mid-flight. See the Opinion of Ms Sharpston, para 125, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008CC0395:EN:NOT, last accessed 26 April 2013.

[46] *Bruno and* Pettini (n 44) para 30

[47] *Ministry of Justice (formerly Department for Constitutional Affairs) v O'Brien (Council of Immigration Judges intervening)* [2013] UKSC 6

[48] Clause 4(2) PTWD; Regulation 5 (3) PTWR

it remains theoretically and practically controversial.[49] There is the risk that this kind of balancing exercise reduces the strength of the human right claim, which is established precisely to protect those values that should not normally be overridden by 'general utility' or the public interest. In the face of these potential problems, the Court of Justice has tended to restrict the scope of the derogation from anti-discrimination rights. In *Adelener*,[50] the Court stated that objective justifications used by Member States to avoid anti-discrimination provisions should only be permitted where these respond to a genuine need, are appropriate for pursuing the relevant objective, and are necessary for achieving that purpose. Subsequent cases have added that those objective reasons must relate to precise and concrete factors relevant to the particular context, and those factors must be governed by objective and transparent criteria.[51] In the *O'Brien* case, the objective justifications put forward by the Ministry of Justice were considered in detail. There were 3 justifications referred to: (i) fairness in the distribution state funds; (ii) to attract sufficiently highly qualified candidates to full-time positions and (iii) to keep judicial pensions within limits which are 'affordable and sustainable'.[52] None of these justifications was accepted by the Court, which held that the Claimant was entitled to receive a pension on terms equivalent to a circuit judge.

However, the reasoning of the Court in relation to these justifications revealed not only the difficulties in determining worker rights within the human rights scheme (how to maintain the high priority of the right to anti-discrimination if that must be balanced with other considerations), but also the tensions and conflicts *within* the social justice regime (between social law and Marxist approaches). The difficulties *within* the social justice scheme stem from different ideas about who social justice is for. On the one hand, social justice can be promoted as necessary for all workers suffering from inequality of bargaining power (the Marxist position). On the other hand, social justice can be seen to demand that those groups who have been recognised by the state as in need of protection should be so protected (the social law position). These former and latter positions are potentially in conflict, given that those recognised by the state as in need of protection, through, say anti-discrimination law, may not be representative of the position of all workers, or may not be characteristic of workers in a subordinate position. The difficulty is that once this social position has been decided, it is not easy then to distinguish between individuals which fall within a particular social group (such as part-time workers).

In the *O'Brien* case, it was argued by the Ministry of Justice in relation to the first 'objective justification', that the PTWD and the PTWR which followed it were designed with the Marxist vision of social justice in mind. That is, they were established for the protection of 'low-paid workers who were driven to take part-time jobs by their personal circumstances....and were in a very weak bargaining position compared with their full time colleagues'.[53] The Ministry of Justice asserted therefore that the recorders were not the kind of vulnerable workers that the PTWD was designed to protect, and social justice demanded that they are treated differently to other workers. The Ministry argued that the great majority of recorders held other positions as practising lawyers, and so were in a position to provide for their pension in other ways. Other workers, including full time salaried judges who may not have had the opportunity to provide for their pension in other ways, were more vulnerable and were more in need of the pension entitlement. These arguments were rejected on the basis of the anti-classification argument that the Ministry was not in a position to make these assumptions about the relative vulnerability of one specific sub-set of workers, assumptions which may not prove to the true in practice. Once the decision had been made to

[49] L Rodgers, 'Labour Law and the Public Interest: Discrimination and Beyond' (2011) 2 (4) *European Labour Law Journal* 302, 312
[50] C-212/04 *Adelener v Ellinikos Organismos Galaktos (ELOG) [2006] ECR I-6057*
[51] C-307/05 *Del Cerro Alonso v Osakidetza-Servicio De Salud* [2007] 3 CMLR 55
[52] *O'Brien* (n 47) para 49
[53] *O'Brien* (n 47) para 51

protect the set of part time workers (presumably due to some historical disadvantage), then as a matter of social justice (in the social law sense), it was not just to take away that protection. The Ministry of Justice also sought to rely on the fact that social justice demanded that judicial pensions were limited, related to the first argument that part-time judges were not particularly in need of these pensions. Other social groups were more in need of this public money. Again, the Court rejected this argument: once public money had been allocated to a particular area, the government was not at liberty to apply a discriminatory rule in relation to its distribution.

7. Tensions between human rights and social justice

As has been suggested above, there are not only tensions within the social justice and human rights approaches, there can also be quite dramatic tensions between them. As a starting point, it is worth noting that, in the *Jivraj* case mentioned above, both the arguments in favour of a broad approach to the interpretation of the concept of employment for the purposes of anti-discrimination law and against it, were made in the name of EU law. On the one hand, anti-discrimination law was deemed to be derivative of the general human right to equality in EU law. As such the Court of Appeal was persuaded to give a broad interpretation to the employment discrimination provisions. On the other hand, the Supreme Court relied on the norms of EU employment law, in which the definition of non-discrimination did not include those who were selecting a person to deliver a service. The argument was that if the definition of employment became more expansive, this would circumvent the intention of the EU in the separation of employment from other kinds of relationship.[54] The employment relationship had particular features, which anti-discrimination law based on a general 'human rights' approach was ill-equipped to protect. The different approaches adopted by the Court of Appeal and the Supreme Court lead to quite different outcomes for the parties in the case.

It might be possible to argue that the main problem or tension is between a human rights approach and a social justice approach based on the specific features of the employment relationship (as occurred in the *Jivraj* case) rather than a social justice approach based on social law. This would make sense, given the sympathy in both the human rights and social law regimes to anti-discrimination law in general. Certainly, social law is more sympathetic to anti-discrimination legislation designed in accordance with anti-subordination norms, whereas the human rights approach favours anti-classification, but both can potentially accommodate the other's position to a certain extent. The main and major difficulty appears to be between the human rights approach and the social justice approach based on specific subordination. A very pertinent example of this tension lies in the increase in the use of *private* justifications for the avoidance of human rights claims made by workers. These justifications function as derogations derived from the human rights scheme of anti-discrimination law (although whether these justifications are in fact in line with the human rights scheme is a moot point). However, they appear to be in direct conflict with the employment notion of social justice in the Marxist scheme. These private justifications stem from the will of the *employer* to limit costs or to increase flexibility. This means, theoretically, that inequality of bargaining power is reinforced rather than reduced by the possibility of private justifications for the avoidance of human rights claims.

The area of law in which this has become obvious is that of age discrimination. Like the atypical work Directives, the provisions on age discrimination under Directive 2000/78/EC (ADD)[55] permit derogations from *direct* discrimination between workers (as well as indirect discrimination). In the ADD, differences in treatment between workers on the grounds of age can be justified for a number of 'legitimate reasons' under article 6(1): 'employment policy, labour market and vocational training

[54] McCrudden (n 29) 50
[55] Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation OJ L 303/16

objectives'. These legitimate reasons must be 'objectively and reasonably justified' and the means for achieving those aims must be appropriate and necessary. A number of acceptable conditions are given: (a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection; (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment; and (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

In a sense, the nature and width of these possible derogations from the principle of equal treatment on the grounds of age is particularly surprising, given the status accorded to the protection of workers from discrimination on the grounds of age. In the Preamble to the ADD, protection from age discrimination at work is presented as a 'universal' human right in line with the main human rights treaties.[56] On a human rights reading, the status of the right to protection from discrimination on the grounds of age would therefore be at the highest level. On the face of it, it would be higher than the status of the protection from discrimination under, say, the atypical work Directives. These Directives employ the techniques of human rights law, and cases applying these Directives have referred to the rights under these Directives as 'human rights'.[57] However, the Directives themselves are couched in the language of 'social rights', with the main reference being to the Community Charter of Fundamental Social Rights which provides at point 7 that 'the completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community; this process will be achieved by harmonising progress on these conditions, mainly in respect of forms of work such as fixed-term contract work, part-time work, temporary agency work and seasonal work.'[58] These social rights have a lower status in the human rights regime, and it might be argued on this basis that these rights should be subject to wider derogations, including derogations in relation to direct as well as indirect discrimination, which is not permitted for other types of discrimination.[59] This argument does not appear to hold true in relation to age discrimination.

Even more surprisingly perhaps, the application of these (already) wide derogations has been subject to broad interpretation by the courts.[60] In the context of the EU and state justifications, it

[56] Preamble para 25 ADD, which refers to the Universal Declaration on Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[57] The *O'Brien* case refers to the 'human rights' context of the PTWD. For example, at paras 47 and 48, the judgement of Baroness Hale states: 'The Ministry of Justice face the difficulty that they have not until now articulated a justification for their policy...However in this *as in any other human rights context*, this court is likely to treat with greater respect a justification for a policy which was carefully thought through by reference to the relevant principles at the time when it was adopted.'

[58] The references are in the preamble to the TAWD, para 2, the preamble to the PTWD, para 3 and the preamble to the FTWD, para 3.

[59] For example the ADD concerns protection from the discrimination on the grounds of age, and also on the grounds of religion or belief, disability and sexual orientation. For all these grounds objective justifications are permitted in relation to indirect discrimination. It is only in the context of age that objective justifications are permitted for direct discrimination.

[60] A full list of the permitted derogations has been provided in the case of *Seldon v Clarkson Wright and Jakes (A Partnership)* [2012] UKSC 16, at para 50. In this case, at para 56, these derogations were categorised according to their alignment with two objectives: inter-generational fairness (for example facilitating access to employment for younger or older people) and dignity (for example avoiding the need to dismiss older workers on the grounds of incapacity or underperformance). In the *Seldon* case, it was argued that the particularly wide

could be argued that this broad interpretation is inevitable. There are constitutional reasons why it is difficult for the CJEU to interfere in either the legitimacy or the application of these derogations by the Member States of the EU. The EU was established as an economic union, under which it was understood that the democratic and policy functions of the Member States would remain undisturbed.[61] The derogations under the ADD fall largely within the ambit of 'social policy', which is viewed as the preserve of the Member States. Dramatic interference in these social policies would be a potential challenge to the legitimacy of the Union. However, more recently, individual actors (employers) have been able to rely on these derogations to justify differential treatment on the ground of age. A case in point is that of *Seldon.*[62] In this case, the Claimant was required to retire when he reached the age of 65, according to a term in his partnership agreement. The Respondent, a solicitors firm, accepted that he had been differentially treated, but argued that this treatment was objectively justified under Regulation 3 of the Employment Equality (Age) Regulations 2006 (AR) which implemented Article 6 ADD.[63] The Supreme Court referred to the general wording of Regulation 3 which had been sanctioned as consistent with the aims of the ADD in a previous case, referred to as the *Heyday* judgment.[64] In the *Heyday* judgement, it was decided that the width of that wording was not a problem, so long as it was understood that justifications under the scheme of Union age discrimination provision must be within the realm of social policy and have a 'public interest' nature (rather than be purely individual reasons). This did not rule out national rules which recognised a certain 'degree of flexibility for employers'.[65]

In the *Seldon* case, the *Heyday* judgement was interpreted as meaning that Regulation 3 legitimately gave employers the flexibility to chose which objectives to pursue to justify age discrimination, provided that (i) those objectives count as legitimate objectives of a public interest nature; (ii) are consistent with the social policy aims of the state and (iii) the means used are proportionate, that is both appropriate to the aim and reasonably necessary to achieve it. The Supreme Court found that the accepted justifications put forward by the Respondent satisfied all of these criteria. The first aim was concerned with staff retention: that compulsory retirement was necessary to ensure that associates were given the opportunity to take on partnership after a reasonable time. Like the second aim put forward (that compulsory retirement promoted efficient workforce planning) this was directly related to government's legitimate social policy of sharing out professional opportunities between generations.[66] The third aim of limiting the need to expel partners by means of performance management, was directly related to the aim of promoting 'dignity' for workers. It was argued that avoiding the need for costly and divisive disputes about capacity or underperformance in the name of 'dignity' was a legitimate social policy aim according to the jurisprudence of the EU.

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derogations in relation to age discrimination were justified because, essentially, age discrimination is of a lesser status than other human rights. It is a 'newcomer' to discrimination law. Whilst that may be the case in relation to the UK, it is certainly not the case in other jurisdictions. In the USA for example, age discrimination legislation relating to employment was introduced in 1967, early on in the modern human rights movement.[60] In terms of importance, it is true that age discrimination was not specifically mentioned in the Universal Declaration on Human Rights. However, the categories of 'protected characteristics' were left open, and subsequent treaties have recognised the importance of protection against discrimination on the grounds of age.

[61] C Joerges and F Rodl, 'Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of *Viking* and *Laval*, (2009) 15 (1) *European Law Journal* 1, 4

[62] *Seldon v Clarkson Wright and Jakes (A Partnership)* [2012] UKSC 16

[63] These Regulations have now been repealed, and the age discrimination provisions are included in the Equality Act 2010.

[64] In *R (on the application of Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform),* C-388/07 [2009] ECR I-1569.

[65] Ibid para 46

[66] *Seldon* (n 62) para 67

The Supreme Court accepted that this was not the end of the matter. The 'general' justifications put forward by the Respondent would have to be justified in relation to the particular individual concerned, given that the AR referred to a specific act of discrimination. However, the Supreme Court followed the reasoning of the Court of Appeal that where the general rule of objective justification was legitimate, it would be 'extremely rare' that the application of that rule would not be justified.[67] In application to the facts of the case, the Supreme Court found that in the context of intergenerational fairness, it must be relevant that the Claimant 'may well' have benefitted from the mandatory retirement age rule. Furthermore, the recent re-negotiation of the rule between the partners also contributed to its justification in this particular case. This re-negotiation process was analogous to the negotiation of rules by collective agreement, which are more easily justified than those unilaterally imposed.[68] The Supreme Court did concede that the choice of the particular age of 65 as the mandatory retirement age by the Respondents needed further scrutiny. It had certainly not been shown by the Respondents that this choice was a proportionate means of achieving the (legitimate) third aim, as the case was being remitted to Tribunal on this point. Baroness Hale also suggested that it would be prudent to consider the proportionality of the chosen retirement age in relation to the first and second justifications, albeit that the consideration must be in the context of the circumstances as they were in 2006 (when there was a designated retirement age for employees), and not as they are now.

It could be argued that, despite the acceptance of the automatic relationship between the general justificatory rules proposed by government and the private legitimacy of these rules by the Supreme Court, this assumption does not make *either in terms of human rights* or in terms of social justice. Certainly, it does not make sense in term of social justice (in the Marxist sense). In these terms, the main problem with this association is that the protection appears to be on the side of the employer. As long as the employer can show that the action forms part of some social policy prescription then it appears that it will be relatively easy to justify (this kind of) discrimination. This decreases the protection afforded to workers against the (arbitrary) use of power by management. As admitted in the *Seldon* case, it means that employers can 'continue to do whatever suits them best'. However, arguably the private nature of these derogations and the automatic relationship between general and private justificatory rules does not make sense in terms of human rights theory either. This whole theory, as a liberal theory of rights, depends for its legitimacy on the clear separation of the private from the public realm. In the private realm, human beings are free to pursue their own particular subjective and arbitrary desires, and as far as possible are unconstrained by law. Law in general, and human rights in particular, are public norms; universal principles which can be demonstrated rationally, not on the arbitrary desires of particular individuals at any particular time.[69] To mix these two domains in this way suggests the dominance of one set of private values, which is ultimately an assault on liberty. It undermines human rights theory, and the practical use of this theory for those it aims to protect, just as it undermines social justice for workers.

In *Seldon* there was at least a recognition that private justifications had to be in line with public social policy norms, rather than simply the (arbitrary) business needs of employers. However, the case of *Woodcock,*[70] decided at the same time, goes even further towards allowing purely private considerations to justify discrimination on the grounds of age. In this case, the Claimant was the chief executive of a primary care trust. He was given 12 months notice of redundancy just before his 49th birthday (which would expire just before he turned 50). Unlike other employees, he did not receive redundancy consultation before his redundancy notice, because this would have meant that

[67] Ibid para 64
[68] Reference was made here to the case of Case C-45/09 *Rosenbladt v Ollerking Gebäudereinigung GmbH* [2011] IRLR 51 in which the existence of a collective agreement facilitated the finding of justification.
[69] J W Singer, 'The Player and the Cards: Nihilism and Legal Theory' (1984) 94 (1) *Yale Law Journal* 1, 42
[70] *Woodcock v Cumbria Primary Care Trust* [2012] EWCA Civ 330

the notice expired after his 50th birthday, when he was entitled to an enhanced pension. The trust was keen to avoid having to pay the extra costs associated with this enhanced pension package. The Claimant argued that this was direct discrimination on the grounds of age. The question arose whether the trust actions constituted a proportionate means of meeting a legitimate aim under Article 6 (1) ADD and Regulation 3 AR. The Court of Appeal referred to the reasoning in the case of *Cross* (a case on indirect sex discrimination), which interpreted European jurisprudence on the use of costs to justify discrimination. The principle was stated as follows: 'A national state cannot rely on budgetary considerations to justify a discriminatory social policy. An employer seeking to justify a discriminatory PCP cannot rely solely on considerations of cost. He can however put cost into the balance, together with other justifications if there are any.'[71] The Court of Appeal recognised that this principle, known as the 'costs plus' principle, introduced a 'degree of artificiality' as '[A]lmost every decision taken by an employer is going to have regard to costs'.[72] Despite this, the Court was able to conclude that the trusts action could be justified on the basis that the costs savings were a by-product of the 'trust's genuine decision to terminate [the Claimant's] employment on the grounds of his redundancy'.[73] The termination of the Claimant's contract on the grounds of redundancy was a legitimate interest. It was a 'legitimate part' of that aim that the trust ensured, in giving effect to the redundancy, that additional costs to the trusts were avoided.[74]

It is true that as a primary care trust, the employer in this case had both public and private functions and responsibilities. However, it appears in this case that the decision has negative consequences in both arenas. One of the main justifications used by the trust for acting to avoid the extra costs associated with the Claimant's enhanced pension was that the trust had a responsibility to the tax payer in the distribution of its funds. The enhanced pension was a mere 'windfall' and therefore unacceptable for reasons of social justice. The difficulty with this approach is that it directly conflicts with the *O'Brien* decision, that to have deliberate differential allocation of funds on the grounds of cost, where that cost has already been allocated (or should so have been allocated) cannot form the basis of a legitimate aim. Indeed in the *O'Brien* case, it was suggested that the *Woodcock* case was incorrectly decided, because the decision in *Woodcock* was in reality, purely a cost decision. There are further problems with the *Woodcock* case, when considering the trust as a private employer. As a private employer, the trust was able to avoid giving a right to an employee (a right to consultation) and to put the employee at a detriment on the basis of cost considerations. This appears to be contrary to principles of social justice, which require employees are protected from abuse of power by employers. The use of the cost plus defence appears to introduce the possibility for the disguise of the employer's real reason for action, especially in the context of the already wide scope of the justifications permitted on social policy grounds in the field of age discrimination.[75] This increases the possibility of the arbitrary use (and abuse) of power by employers.

8. Conclusions

It is perhaps true to say that there is the possibility that human rights can embody social justice norms, and that both human rights and social justice aim generally to the improvement of quality in work. Indeed, on the social law reading of social justice, just the existence of anti-discrimination law (relating to employment) furthers social justice for workers. This because this anti-discrimination law is a social (legal) recognition of previously passed over groups, and as such can be held to promote social inclusion and industrial peace. There is also the possibility that human rights legislation can

[71] Burton J in *Cross v British Airways* UKEAT /0572/04, para 72. This position has recently been reiterated in the Court of Justice in the joined cases of C-159/10 and C-160/10 *Fuchs and Kohler v Land Hessen* [2012] ICR 93.
[72] *Woodcock* (n 70) para 66
[73] Ibid para 67
[74] Ibid para 68
[75] J Lane, '*Woodcock* v *Cumbria Primary Care Trust*: The Objective Justification for Age Discrimination' (2013) 76 (1) *The Modern Law Review* 134, 157

achieve the aims of social justice in a Marxist sense, where that human rights legislation leads to greater worker protection. This is perhaps reasonably straightforward where the workers in question are clearly in a relationship of 'subordination' and where they embody the notion of the type of worker that the law is designed to protect. In this case, any derogations under the human rights regime can be interpreted narrowly, and human rights can function to override competing social policy considerations.

The difficulties arise where the facts of the case involve workers/employees who are not of the traditional 'vulnerable' type, or where matters of social policy (whether in the name of social justice or not) come to override the protection afforded under human rights. In the former case, there is a conflict both within the different schemes of social justice, and there is also a conflict between human rights and social justice aims. This is well illustrated by the *Jivraj* case in which the arbitrators did not fit into the traditional vulnerable type of worker due protection under employment law. There was therefore a real difficulty in deciding whether, as a matter of discrimination law in general (the human right), there was a need to protect these workers. If this was the case, then this would potentially undermine an employment law regime based on the 'emancipation' of workers subordinated to the arbitrary will of the employer. There are also potential conflicts between the different regimes of social justice, where the workers concerned are not of the traditional vulnerable type. This was seen in the *O'Brien* case, where it was argued that social justice dictated that different subsections of the same group should be treated differently according to need. Although this argument could potentially be upheld on a Marxist reading, this would be contrary to the aims and methods of social law.

Social justice and human rights are also seen to be in conflict where matters of social policy potentially override human rights protection (in the form of derogations from the human right). However, on closer inspection, these derogations are rarely in the spirit of either the social justice or human rights regime. This is the case, for example, where social policy 'dictates' that there should be wide derogations from the rights to non-discrimination on the grounds of age. Arguably, these derogations undermine the very principle on which human rights are based (that these rights should 'trump' public policy considerations). They are also rarely in line with the social justice requirements either of the Marxist or the social law regime. A particularly dramatic example of this is given by the recent turn in the case law to the allowing private derogations from age discrimination rights, as long as those are not solely determined by cost and are in line with social policy. These prescriptions are so vague, that the risk is that that they simply subvert the underlying social justice aims of employment law, namely to protect the weaker party in the employment relationship.