

A SOCIAL RECOVERY,
WORKPLACE DEMOCRACY
AND SECURITY:
COVID-19 AND LABOUR LAW

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Abstract

The Covid-19 pandemic has shown the painful consequences of poor job security and workplace democracy. The UK government's initial flirt with 'herd immunity', the delay in lockdown, and the absence of a work strategy that prioritised safety after the summer of 2020, caused among the most appalling death rates in the world, worse than Trump's America. However, a swift change in the job security policy stemmed mass unemployment, after initial reports of 2.1 million people claiming unemployment benefits. The 'Coronavirus Job Retention Scheme' eventually meant that the unemployment statistics (as opposed to claimant count) showed only a modest jobless rise. Comparison with the US where there are effectively no rights, and other countries with strong rights, shows that universal social security and workplace democracy are at the core of successful economic performance. This paper explains the UK's health and safety rights, how the job retention scheme was unfurled with extension to employed and self-employed, and the connection between votes at work and employment. It shows how reality discredits the minority views of economic theorists who oppose labour rights, and suggests the legal reforms we can undertake to achieve a social recovery.

Keywords: COVID-19, coronavirus, labour law, labor law, employment law, health, education, university, pandemic, Coronavirus Job Retention Scheme, health and safety, social security, workplace democracy

JEL Codes: K10, K31, K32, K34, I10, I13, I14, D01, D21, D22, E01, E24

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1. Introduction

In 1918, an influenza epidemic reverberated around the world killing somewhere in ‘the order of 50 million’ people.¹ Out of a desire to foist blame on someone else, as whole populations died, this became known as the ‘Spanish flu’ and the ‘Bolshevik disease’. Waves continued over the end of World War One until 1920. Now, 101 years later, the Covid-19 pandemic has killed 2.3 million people worldwide, when we have four times the world population. ‘Peace’, wrote the Treaty of Versailles of 1919, ‘can be established only if it is based upon social justice’, and this included ‘the protection of the worker against sickness, disease and injury arising out of his employment’.² The response to Covid-19 has been a world away, because we now have a World Health Organisation, the Universal Declaration of Human Rights, and most countries live up to the ideals forged over a century before. Yet some countries have done far better than others, and they have for a reason. The UK’s experience painfully illustrates this, both in what we did well, but with among world’s the highest death rates, the desperate weakness of rights at work.

Part 2 of this article explores the UK’s approach to Covid-19 and the empirical impact of labour law through three main rights. First, there is a universal right to a safe system of work,³ but although this right is a basic part of international law, it has not been properly upheld in UK workplaces. This was particularly true at universities where fee-obsessed managers, with landlords and airlines, caused the government to demand unnecessary face to face teaching. This led over two million students to move round the country, move in from abroad, mix in predictable ways, and surge Covid-19 cases and death. There were other reasons for a second wave, including temperature, and a Covid-19 mutation in September.⁴ But the movement of over two million people must be regarded as a significant, and probably the dominant cause. It was not necessary. Second, there is a universal right to social security,⁵ including job security. In the UK, this was fulfilled in the ‘furlough’ scheme, subsidising 80% of people’s wages with government money. While seemingly without conditions to keep jobs at the start, by May 2020 it was administered effectively and has helped avert mass unemployment.

Third, there are universal rights to work and leisure,⁶ rights which entail positive duties on the state to guarantee full employment at fair wages and working time. Comparative evidence shows that in Covid-19, like in the global financial crisis, the best performing economies are those with the strongest systems of job security, through workplace democracy: that is the right to vote for a board of

directors in an enterprise, and to elect work councils with binding voice over dismissals and important staff issues. The UK here occupies a middle position between the catastrophe in the US, and the more stable economies such as Germany or Denmark. Through government action the UK furlough scheme artificially replicated the effects of democratic workplace decisions, where costs of a crisis are not externalised onto workers, but coordinated in everyone's interests. The tragedy of the UK is that its successes in economic policy, and the resilience of the National Health Service, were eclipsed by abysmal public health and education policy.⁷ Part 3 reviews how the Covid-19 experience discredits the minority views in economic theory, that 'rights kill jobs'. Part 4 summarises the prudent legal reforms we should follow, to uphold universal rights for a social recovery. Part 5 concludes.

2. Covid-19 and labour rights

To understand the social effects of Covid-19, differences in laws are best viewed with evidence of comparative economic and health data. The three most important rights involved are those to (1) workplace safety, (2) social security, and (3) work and leisure, through full and fair employment. Far from 'herd immunity',⁸ at the start of the pandemic the real need was to stop 'herd behaviour', leading to a twin health and economic collapse. This is because without labour rights, if labour is a commodity, and if humans are just resources, people are dismissed. They lose income. Consumer spending plummets, business income falls, leading more people to be dismissed.⁹ The downward spiral toward depression happens if people are used as a means to others' ends. What seems like individually rational 'cost cutting' by firms becomes a socially irrational economic implosion. The role played by labour rights is made vivid by comparing the UK to countries with different laws.

2.1 Working safety and danger

The first, and most fundamental right, is to life, health and a safe system of work, a right founded in common law,¹⁰ in statute, and in international law.¹¹ In the Health and Safety at Work etc. Act 1974, reflected in the Health and Safety Directive 1989,¹² section 2 says there is a 'duty of every employer' to provide 'systems of work that are, so far as is reasonably practicable, safe and without risks to health'. This means that where there are 'systems of work' that are 'without risks', they must be used unless they are not 'reasonably practicable'. These duties are backed by loose codetermination rights, namely a duty on the employer to consult with workplace representatives (a union, elected work

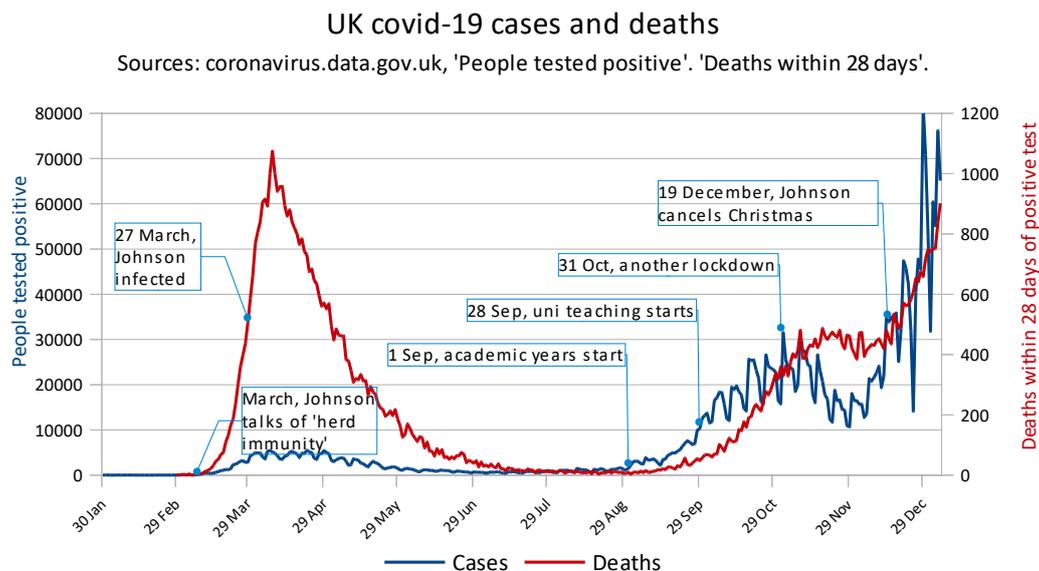
council, or both) and arrange ‘to co-operate effectively’, usually on a workplace health and safety committee.¹³ As Lord Hoffmann put it in *R v Associated Octel Co Ltd*, these duties are ‘indifferent to the nature of the contractual relationships by which the employer chooses to conduct’ the workplace.¹⁴ Those duties are universal, and section 3 extends them to the self-employed.

This general duty on employers to codetermine a safe system of work is supported by an individual right in the Employment Rights Act 1996 section 44(1)(d). An ‘employee has the right not to be subjected to any detriment’ where ‘in circumstances of danger which the employee reasonably believed to be serious and imminent’ the employee ‘refused to return to his place of work’.¹⁵ For example, in *Edwards v Secretary of State for Justice*, a group of prison officers claimed they reasonably believed it was dangerous to go to work at HMP Dartmoor. Heavy snow on the road up had led the road to be closed. The Employment Appeal Tribunal agreed.¹⁶ This right also extends in section 44(1)(e) to taking ‘appropriate steps to protect... other persons from the danger’. So, in *Masiak v City Restaurants (UK) Ltd*, it was accepted that a chef potentially had a good claim for refusing to serve chicken that he believed was unfit for human consumption. If those facts were made out, he could claim he was automatically unfairly dismissed.¹⁷ An employee’s belief that there is danger is what counts, not the employer’s, although the belief must be reasonable. In *Hamilton v Solomon and WU Ltd*, HHJ Stacey held that an employee did not reasonably believe he was in danger from wood dust, when he had been given a face mask.¹⁸ Of course, wood dust is not deadly, and Covid-19 is. Over 100,000 are dead in UK because of Covid-19, at the time of writing.

The pandemic probably arrived in the UK in December 2019,¹⁹ before the Health Commission of Wuhan had informed the World Health Organisation about the virus. On 5 March 2020, the first two people died in Milton Keynes and Reading, but British people still packed into pubs to watch the football from France, where the stadiums had eerily been emptied and lockdowns had already begun. Many workplaces acted far faster than the government, but it chose to delay any lockdown until 20 March 2020. By this time, with breathtaking complacency, the Johnson government had made it inevitable that the UK would have among the highest rates of death in Europe.²⁰ As over 40,000 people died, the first lockdown succeeded in stopping the virus’ spread. The summer went quiet.

But then lobby groups began to clamour for the economy to reopen so that they could make more money, particularly airlines, landlords and universities.²¹ Universities (also major landlords) told their students that there would definitely

be face to face teaching on campus in the new academic year. So, parents and students made preparations, and then they moved, spreading the virus again. Over two million students are in the UK, and they were moving around, moving in from abroad, mixing in predictable ways. Covid-19 cases and deaths surged. They did this because universities told them to move in, to make money, even as staff said online teaching was the only feasible option. The chart below shows the effect.²²



Watching the surge in cases, already by 21 September 2020, the UK government’s Scientific Advisory Group for Emergencies gave the ‘sage’ advice (or blindingly obvious advice) that all teaching should stay online.²³ The government ignored SAGE. Its deadly guidance emphasised ‘safety’ in distanced classrooms. Thousands of staff were bullied,²⁴ pressured or threatened with suspension or dismissal, if they refused teaching face to face. At King’s College, London, a union branch survey showed that among 456 respondents, 21.6% felt pressure to return to work in class, the low proportion attributable to the random policies of different departments forcing face to face teaching or not, and the failure to coordinate.²⁵

Universities’ role in death, caused by government policy, must not be underestimated, because they uniquely encouraged mass movement of people.²⁶ In the UK, USA, France, Italy or other northern hemisphere countries university term dates start at roughly the same time, and the rise in cases is uniform, unlike in Argentina, Chile or South Africa or other southern hemisphere countries. Temperature is likely also a factor in deaths, and virus mutation in September,²⁷ but these are not causes that society can control, as we can the mass movement of people. Germany had online teaching for the start of the late 2020 academic year,²⁸ and also saw a rise in cases (albeit lower). This indicates that it was not

enough to halt face to face classes, but it was also necessary to stop people moving to different university homes ahead of term time. It was not students' fault. It was a calculated policy in the UK to encourage the mass movement of over two million people in the middle of a pandemic.

This disaster could have been averted with a prepared union response. As well as taking a position early in the summer,²⁹ it would have meant communicating a strategy to every university union branch, and using injunctions to uphold both the employer's duty for safe systems of work, and the right against any detriment for doing online teaching. Already in March 2020, before the government lockdown, at least 41 labour lawyers had publicly explained this right.³⁰ In the unlikely event that use of the law failed, there should have been advance ballots for industrial action. Instead, the central office of the University College Union launched a peculiar judicial review into the government's advice,³¹ too late to achieve anything. Students coughed and shopped, the pandemic raged, and people packed together for the Christmas rush. Inevitable lockdowns came too late, at the end of October, and then again in December, as after this wild, erratic, self-interested, and greed driven policy agenda, Johnson cancelled Christmas. This was not the incompetence of some bumbling chump. It was avarice and deceit. And thousands more have died.

Only by the new year, in 2021 was there any real shift, led not by central UCU, but its branches, and the National Education Union for school staff. Two opinions by Queens' Counsel outlined the duties of employers for safe work including potential responsibility for corporate manslaughter,³² and the right of teachers to refuse to work dangerously based on section 44.³³ In schools, there were different considerations to universities, since younger children may struggle far more with online classrooms, and there was an inevitable demand from parents struggling with home schooling. Schools in local areas also did not involve the mass movement of people. But, as the pandemic had surged over Christmas, the NEU in January led concerted action based on the safety of their members, and forced the government to suspend classroom teaching. The moral of the story was that the UK government had attempted to trade off health for the economy. It lost both,³⁴ at a terrible cost for the dead and families.

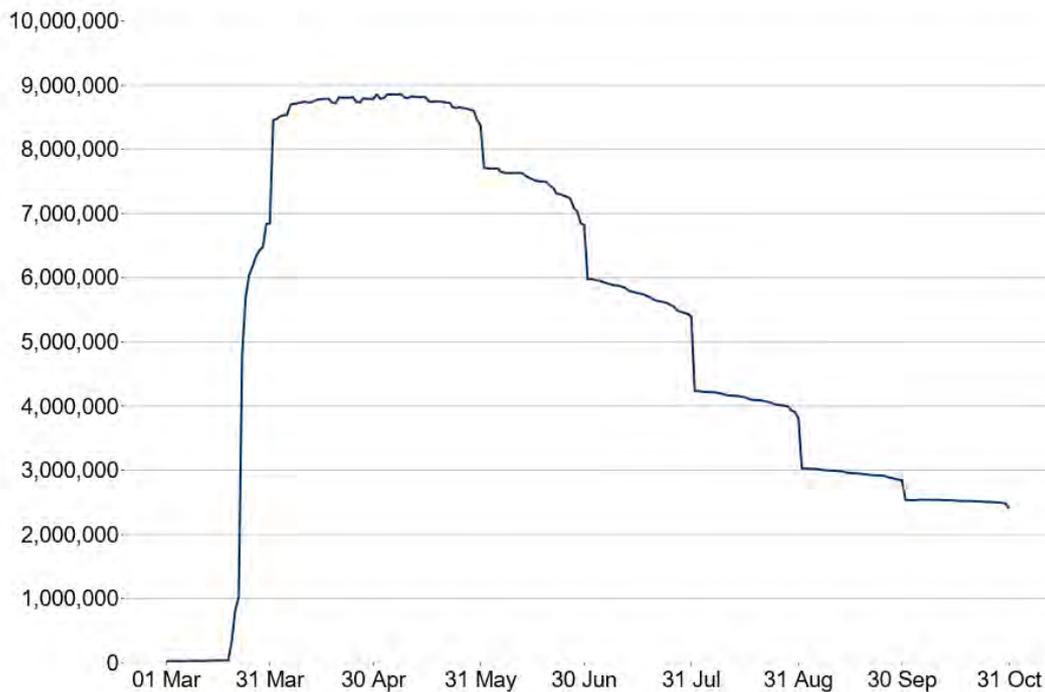
2.2 Job retention and furlough

The second main right is to social security, and in the Covid-19 pandemic this led to one of the most interesting labour rights policies in modern UK labour law.³⁵ The 'furlough' or Coronavirus Job Retention Scheme was introduced under the Coronavirus Act 2020,³⁶ to let the government subsidise 80% of

people's wages if the employer applied to 'furlough' their staff. It was not 'unprecedented' as political self-aggrandisers claimed,³⁷ because the UK government had been rescuing bankrupt banks with tremendous loans and cheap interest since the global financial crisis,³⁸ it had been giving oil companies subsidies through tax and decommissioning projects despite their destruction of the ecosphere,³⁹ and it has subsidised 'app' and 'tech' corporations like Uber, Deliveroo, Google or Amazon with negligible rates of tax and by allowing the evasion of employment rights.⁴⁰ Moreover, the Employment Subsidies Act 1978 was renewed eight times by Margaret Thatcher's administration.⁴¹ All of these were precedents.

The UK government's furlough scheme seemed most immediately to copy Denmark. This was a 75% wage subsidy to employers if they promised not to cut staff, and employers paid the other 25%.⁴² A few days later, without the requirement for employers to contribute, an 80% subsidy was announced for UK employees. However, sham self-employment is rife in Britain, a phenomenon driven by government tax and its non-law-enforcement policy,⁴³ despite the case law of the UK Supreme Court which could readily be applied to end these problems.⁴⁴ So, given that close to 5 million 'self-employed' people might go destitute, it was quickly realised that another Self-Employment Income Support Scheme was needed to extend protection.⁴⁵ Then it transpired that despite the schemes, 2.1 million people had claimed unemployment benefits (universal credit and jobseeker's allowance) in April anyway, a catastrophe that would have amounted to over 10% unemployment.⁴⁶ Fortunately, it seems that changes in tax administration ensured that the initial claimants were kept on, and so the ultimate unemployment statistics did not show what the initial claimant count did. Mass unemployment was averted.⁴⁷

Figure 1: Total employments furloughed, 1 March 2020 to 31 October 2020



The salient fact is that by 13 December 2020, when a replacement scheme was underway,⁴⁸ £46.4 billion had been claimed under the Coronavirus Job Retention Scheme. The point is not that this is a lot, but how little it is. In perspective, the UK government March 2020 budget projected total spending of £928 billion, making the CJRS by then under 5% of that total, with tax receipts of £873 billion.⁴⁹ The fact that a peak of 8.86 million people were paid 80% of wages by the government, over a quarter of the 32.8 million workforce,⁵⁰ with under 5% of the UK government budget, indicates two main things. First, it shows just how extreme income inequality has become. There is vast wealth accumulated by private enterprises, and even government spending dwarfs the sums of money that most people receive. Second, it shows how much value is taken from people's labour. The people who create *The Wealth of Nations*, like Britain, get far less than they have earned.⁵¹

2.3 Full employment and democracy

The third universal right, actually a pair, are the 'right to work', and 'to rest and leisure'.⁵² It is increasingly clear that the best way to fulfil these rights is to ensure the 'right to take part in the government of [the] country' includes democracy in the economy, as much as in politics.⁵³ Rights to work and leisure are also intimately connected to social security, because in a coherent system, social security is not a sanction to force people to find jobs that do not exist, but

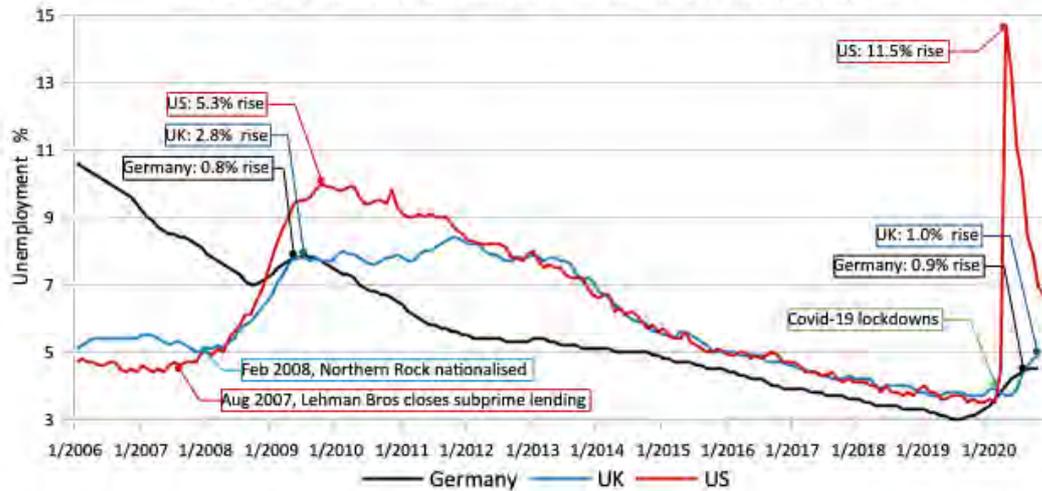
the encouragement for employing entities to provide full and fair employment. Social security internalises the costs of failing to utilise everyone's potential, funded by tax on asset owners who would otherwise hoard capital.⁵⁴ It gives workers bargaining power in the terms of their work, and its funding from productive assets ensures full utilisation of society's resources. 'Full employment' means jobs 'at fair wages' and with fair working time.⁵⁵ It does not include zero hours contracts, underemployment, or precarious pay, but is bound to the right to 'just and favourable remuneration.'⁵⁶ There should also be progressive reduction of working time, as productivity increases, because the goal of life is not just working for someone else. It includes fulfilling our potential to the fullest, and helping one another along the way.⁵⁷ This requires freedom from work, and free time for family, friends and community. We see how much these things matter when we lose them, as all of us have in the Covid-19 lockdowns.

One of the most profound illustrations of the effect of labour rights from Covid-19 is in how different legal systems have produced unemployment, depending on the weakness or strength of their laws for job security and workplace democracy. Here, the UK occupies a middle position, just as it did in the global financial crisis, and the extreme outlier is the US. In times of economic crisis, employers who are driven by asset manager and bank profit, those who respond to so called 'shareholder value',⁵⁸ routinely decide to fire masses of workers in the vain hope that this will protect themselves. In contrast, labour rights ensure that property carries responsibility, and productive property is used in the public interest.⁵⁹

The chart below depicts how this works. First, in the US employers were faced with falling customer demand in both the global financial crisis and Covid-19. They reacted with such extremity that there was a 5.3% unemployment rise by 2009, and an 11.5% rise in 2020. This was because, despite a \$2.2 trillion bailout among other things,⁶⁰ in the US there is no federal right (or state right outside Montana) to job security. The widespread norm, supposedly from the 'common law' but in reality entrenched by reactive legislation, is 'at will employment'. This says that any unaccountable, arbitrary, authoritarian employer can say "you're fired" for a good reason, a bad reason, or no reason at all. A clean slate for US labor law is needed,⁶¹ because its system currently produces among the world's worst results.

Unemployment, global financial crisis, and covid-19, 2006-2020

Sources: OECD, 'Unemployment rate: Total % of labour force'. ONS, Unemployment.



Second, there is the UK. At the very least, UK law requires reasonable notice, before a fair dismissal, and redundancy pay after two years' work.⁶² While weakened, UK law positively protects the right to organise a union, bargain, and the 'right to take industrial action',⁶³ although its minimalism falls short of international human rights standards. But the US fails entirely, because the US Supreme Court allows workers to be bullied and pressured into not joining unions, Republican Senators shut down the National Labor Relations Board to halt union recognition ballots, and people who take collective action can be replaced.⁶⁴ The UK's results in the global financial crisis were a painful rise in unemployment by 2.8%, a rise that helped lose the 2010 election for the then-governing Labour Party. In the Covid-19 pandemic, a more than 1% rise in unemployment (by the time of writing) is again painful, though this was lower primarily because of the furlough scheme and subsidies. Any rise in unemployment, any departure from full employment is bad, but it is nothing compared to the disaster of Trump's America, and the mass poverty that results.

Third, there is Germany, which additionally has credible workplace democracy laws. Some of the UK's most successful enterprises – particularly the Universities of Cambridge, Oxford, those in Scotland, and London⁶⁵ – ensure rights for staff to elect a majority or large proportions of those who sit on governing bodies, and the UK with the US helped implement the post-fascist resurrection of elected work councils.⁶⁶ But in Germany, these principles are applied across all enterprise types, not just universities, based on size. First, there is a constitutional right to organise a union, to collectively bargain across economic sectors, and to take collective action.⁶⁷ Second, with five members of staff, there is a right to an elected work council (*Betriebsrat*) with 13 binding participation rights on important workplace issues, such as leave, pay systems or

pensions.⁶⁸ Third, with twenty staff, there is a right of the elected work council to participate in dismissal decisions, including a veto over conduct or capability dismissals, or delaying and settling redundancies.⁶⁹ Fourth, with 500 staff there is a right to elect at least one-third of a company's supervisory board (*Aufsichtsrat*), which in turn appoints the day to day executive board (*Vorstand*).⁷⁰ Fifth, with 2000 staff there is a right to elect just under one half of the supervisory board, though the chair is a shareholder representative with a casting vote.⁷¹ Sixth, in the old mining enterprises, there is a right to elect half the supervisory board: labour is an equal partner to capital.⁷² Ultimately it means that people cannot be dismissed without a democratic process, and this is why Germany's unemployment rates rose by the least in the global financial crisis and Covid-19.⁷³

German workplace democracy is far from perfect. There is no real reason (except tragic history⁷⁴) to have a supervisory board interposed between a company's stakeholders and the executive board of directors. The thresholds for board codetermination rights is much higher than, say, Denmark where board election rights begin with 35 staff. Arguably, labour's right to vote should be inherent in every company startup. The German rights to codetermination of capital (capital that is currently dominated by three unaccountable banks) are probably worse than those in the UK,⁷⁵ and it is certainly behind the 2013 model implemented in Switzerland.⁷⁶ And the rules fall far short of the supermajority election by staff of boards seen, for example, in the University of Cambridge. 'Labor is prior to and independent of capital', as Abraham Lincoln once said, 'and deserves much the higher consideration.'⁷⁷ But all this said, the German work councils and trade unions developed, with government, a system of shortened working time and subsidies, known as *Kurzarbeit*, where employees receive up to 80% of wages.⁷⁸ It was 60% at the start of the pandemic, then raised.⁷⁹ In total, Germany has a credible, resilient system of economic democracy, and it produces better outcomes than the defective system of the UK, or the shattered system of the US. So, it is clear that the best guarantee of economic prosperity is democracy and security at work.

3. Economic theory and responsibility

Given the evidence we have accumulated, with modern data and comparative law, it is important to see just how wrong mainstream economics has been about job security. In the view of a dwindling minority of economic theorists, all labour rights and social security kill jobs. Without credible evidence, it has been said since Friedrich von Hayek and Milton Friedman that full employment creates uncontrollable inflation, that unions cartelise markets, and that when you

put up the ‘costs’ to an employer for firing workers, then employers will not hire.⁸⁰ Supposedly we need a ‘flexible labour market’. As Richard Layard has put it we should ostensibly be cutting labour rights to achieve ‘a flexible system of wage differentials. Nothing else will do the trick.’⁸¹

But the evidence shows the opposite, and all the efforts by this narrow school of economists to say that universal human rights are bad have unravelled before our eyes. Many of the most important economics papers in the last few decades, purporting to show that ‘employment protection legislation’ damages employment, are based on the work of the Organisation for Economic Cooperation and Development.⁸² For example, in its *Employment Outlook 2019* the OECD says that employment protection legislation hampers job creation, productivity, and investment. These conclusions owe a great deal to Stefano Scarpetta, who has since the 1990s helped to organise the OECD’s ‘Employment Protection Index’.⁸³ This supposedly shows the strictness of different countries’ labour rights, particularly on job security. Economics papers have used this analysis to argue that job security correlates closely with poor economic outcomes. But the index gets the law systematically wrong. It fails to adequately analyse trade union rights, work councils or board representation, and therefore misses the core norms of the most important employment protection laws. Even on the laws it does examine, the OECD’s index is based on stunning and wilful misunderstandings of employment law.⁸⁴

To give just three examples, first, the OECD index asserts that Italy has more overall job security than Germany even though Italy has no work councils that can veto dismissals, or a full board representation law. Second, the index misses that the UK regulates fixed term contract expiry as a dismissal. Third, it suggests US enforcement of employment rights is high even though the US has no Employment Tribunals.⁸⁵ The list goes on. Why is the OECD’s analysis so wrong? The answer is, it was originally compiled by asking economists and others their opinion on the strictness of a country’s laws, without bothering to examine what the law actually was. This method gave way to a set of unfounded prejudices matching those who led the compilation. But these defects have not stopped the OECD indicators being relied upon by thousands of economics articles. All of their conclusions regarding the effects of employment protection legislation are probably wrong, because their sources are wrong.

In contrast the latest, credible research from the Centre for Business Research’s databases shows that job security and workplace democracy decrease unemployment, while improving productivity.⁸⁶ Even more, labour rights including job security and workplace democracy improve innovation.⁸⁷

4. A social recovery

Given what we have learned from Covid-19, and the beginning of a vaccine rollout at the time of writing, it is essential to ask, what a ‘social recovery’ should look like. Just as we need a ‘green recovery’ to end climate damage,⁸⁸ we need a social recovery to remake the institutions that made us so vulnerable before the pandemic began. It is very clear that serious changes must be made to public health policy, for instance by empowering the NHS to write rules to preempt health problems, subject to Parliament or local government approval. An end to air pollution would have prevented countless Covid-19 deaths, particularly among those who work in transport or in city and town centres. The fiasco among universities over getting students into halls of residence to get rent, and making fanciful promises over face to face teaching to get tuition fees, exposes the depravity of privatised, forced-fee education. The universal human right to the ‘progressive introduction of free education’ including higher education ‘equally accessible to all, on the basis of capacity’, not money, should be upheld by reversing the moral scar of undergraduate tuition fees and debt.⁸⁹ Fee-free university should be integrated into a National Education Service, democratically governed by teachers, students, alumni and public representatives, to coordinate the right to lifelong learning for everyone.

But what about the reforms to labour law for a social recovery? The key problems are the absence of universality in labour rights, the unemployment and insecurity, and autocracy at work. Fortunately, almost every major measure could be introduced at the stroke of a pen, and without the need for primary legislation, through secondary legislation. To recover our society, this eight point agenda is a start:

- (1) extend all employment rights to everyone who personally performs work, disregarding the terms of any contract, and based on bargaining power and the purpose of rights,⁹⁰
- (2) ensure all job security rights start on day one, eliminating the two year qualification periods for unfair dismissal and redundancy,⁹¹
- (3) increase sick pay from the poorly £95.85 a week, increase universal credit or jobseeker’s allowance to replace a living percentage of people’s former income, and universalise to enroll everyone automatically who is not registered as in employment,

- (4) restore the duty on government to say how it will attain ‘full employment’, defined as below 2% unemployment, and on fair wages,⁹²
- (5) raise paid holidays from the current 4 weeks (or 28 days⁹³), and raise and equalise paid parental leave, to reflect ‘the increase of productivity’ by people at work ‘and other relevant factors’,⁹⁴
- (6) create a right to elected work councils with veto and participation rights over dismissals by issuing a new ACAS Code on redundancy and dismissal procedures,⁹⁵
- (7) require that all listed companies have workers on boards of directors (like Cambridge or Oxford University) by updating the UK Corporate Governance Code and making it mandatory,⁹⁶ and revise the Model Articles for all companies to ensure worker votes in every new company startup,⁹⁷
- (8) ensure that workers and retirement-savers can elect at least half of their pension fund trustees,⁹⁸ and ensure that all asset managers and banks only vote on shares in accordance with instructions from elected trustees by updating the FCA Handbook on conflicts of interest.⁹⁹

The fact that most of these changes can be done through executive action illustrates just how precarious, how discretionary, our core social rights have become.¹⁰⁰ In addition to these, Parliament must legislate to fully restore sectoral collective bargaining, including by removing the suppression of secondary collective action, and placing a positive duty on employers to negotiate in good faith with independent unions. This should ultimately be part of a broader Charter of Social Rights, enshrined in the UK constitution.

5. CONCLUSIONS

The social recovery that we need out of Covid-19 must be based on universal values of democracy and justice, values that were forged in international law a century before when the last global pandemic raged. Pandemics are rare, but they can help us see society anew. Our kaleidoscope was shaken, and through the trauma of death we bear witness to the need for justice for all. Humans are not resources, we are people with rights. Unemployment is not natural, it is a legal and social choice. Our society is democratic, our politics are democratic, but our economy is not there yet. In London the ambulance sirens are still sounding, and they are heard by a society still in crisis. The crisis will pass, but

the defences against the next must be built. We must have democracy and security at work, for a true social recovery.

Notes

- ¹ □ N Johnson and J Mueller, 'Updating the Accounts: Global Mortality of the 1918–1920 "Spanish" Influenza Pandemic' (2002) [76 Bulletin of Historical Medicine 105](#), 115
- ² Treaty of Versailles 1919, [Part XIII](#)
- ³ Universal Declaration of Human Rights 1948 [art 23\(1\)](#). International Covenant on Economic, Social and Cultural Rights 1966 [art 7\(b\)](#).
- ⁴ 'New coronavirus variant: What do we know?' (20 December 2020) [BBC News](#)
- ⁵ UDHR 1948 [art 22](#). ICESCR 1966 [art 9](#).
- ⁶ UDHR 1948 [arts 23-24](#). ICESCR 1966 [arts 7-8](#).
- ⁷ On potential reasons for this, see S Deakin and G Meng, 'The Governance of Covid-19: Anthropogenic Risk, Evolutionary Learning, and the Future of the Social State' (2020) [49\(4\) Industrial Law Journal 539](#)
- ⁸ This was a proposal of letting people get sick deliberately in the hope that immunity develops among the healthy. P Ghosh, 'Coronavirus: Some scientists say UK virus strategy is 'risking lives'' (14 March 2020) [BBC News](#)
- ⁹ See JM Keynes, *The General Theory of Employment, Interest and Money* (1936) [chs 2 and 3](#)
- ¹⁰ *Wilson and Clyde Coal Co Ltd v English* [1937] [UKHL 2](#)
- ¹¹ UDHR 1948 [art 23](#). ICESCR 1966 [art 7\(b\)](#). ILO Occupational Safety and Health Convention 1981 [c 155](#).
- ¹² Health and Safety Directive 89/391/EEC [art 5](#), 'The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work.'
- ¹³ Health and Safety at Work etc Act 1974 [s 2\(6\)](#). Health and Safety Directive 89/391/EEC [art 11](#).
- ¹⁴ *R v Associated Octel Co Ltd* [1996] [UKHL 1](#), [1996] 1 WLR 1543

- ¹⁵ Employment Rights Act 1996 [s 44](#)
- ¹⁶ *Edwards v Secretary of State for Justice* [2014] [UKEAT 0123 14 2407](#)
- ¹⁷ *Masiak v City Restaurants (UK) Ltd* [1998] [UKEAT 683 97 2906](#)
- ¹⁸ *Hamilton v Solomon and WU Ltd* [2018] [UKEAT 0126 18 2409](#)
- ¹⁹ ‘Coronavirus doctor's diary: The strange case of the choir that coughed in January’ (10 May 2020) [BBC News](#)
- ²⁰ A Kirk et al, ‘One in five in England have had Covid, modelling suggests’ (10 January 2021) [Guardian](#)
- ²¹ e.g. R Shrimley, ‘For Boris Johnson, Covid-19 is now an economic not a health crisis’ (1 June 2020) [Financial Times](#)
- ²² This chart does not show the real number of cases or excess deaths, because of poor measurement. Estimates of true case numbers need to be modelled, while ‘excess deaths’ are probably a better guide than recorded deaths. The term dates are taken from the King’s College, London calendar, although other universities vary slightly, e.g. 1 September, Academic year starts, 6 Sept, end of moving in for student halls, 14 Sept, welcome to KCL, 28 Sept, teaching begins.
- ²³ C Summers, ‘The greatest tragedy of England's second wave is that it wasn't inevitable’ (29 October 2020) [Guardian](#)
- ²⁴ A Fazackerley, ‘UK universities ‘bullying’ junior staff into face-to-face teaching’ (25 September 2020) [Guardian](#)
- ²⁵ On file with author. This was carried out by R Barrett and S Papoulias (2020).
- ²⁶ □ See also S Deakin and G Meng, ‘The Governance of Covid-19: Anthropogenic Risk, Evolutionary Learning, and the Future of the Social State’ (2020) [49\(4\) Industrial Law Journal 539](#), on ideological and systemic reasons for different approaches.
- ²⁷ ‘New coronavirus variant: What do we know?’ (20 December 2020) [BBC News](#)

²⁸ ‘Germany opts to keep teaching online to avoid spreading Covid’ (20 August 2020) [Times Higher Education](#)

²⁹ cf ‘Keep teaching online-only until Christmas, says UK academic union’ (30 August 2020) [Times Higher Education](#)

³⁰ ‘Ten things the government can do right now to prevent a Corona depression’ (20 March 2020) [Institute for Employment Rights](#). S Brittenden, ‘The Coronavirus: Rights to Leave the Workplace and Strikes’ (27 March 2020) [UK Labour Law Blog](#).

³¹ D Ferguson, ‘UK academics: opening of universities was illegal’ (24 October 2020) [Guardian](#)

³² ‘UCU publishes advice on legal liability of universities over face-to-face teaching during COVID-19’ (2 December 2020) [Leigh Day](#), from 10 branches.

³³ D Ferguson, ‘Covid fears spark revolt by unions over return to school in England’ (2 January 2021) [Guardian](#) outlining the background. The QC opinion has not yet been made public.

³⁴ cf B Franklin, *Objections to Barclay’s Draft Articles of February 16* (1775) ‘They who can give up essential Liberty to obtain a little temporary Safety, deserve neither Liberty nor Safety.’

³⁵ See KD Ewing and Lord Hendy, ‘Covid-19 and the Failure of Labour Law: Part 1’ (2020) [49\(4\) Industrial Law Journal 497](#), for an extensive background.

³⁶ Coronavirus Act 2020 ss 76 and 86, letting Treasury direct HMRC on functions and authorising money to be spent.

³⁷ e.g. G Parker, C Giles and S Payne, ‘Sunak turns on financial firepower to help workers’ (20 March 2020) [Financial Times](#), the authors add that ‘No government has ever intervened in such a way, even in wartime.’ This, respectfully, is mistaken spin.

³⁸ Bank of England Act 1998 s 13 achieves this, including measures such as ‘quantitative easing’.

³⁹ Petroleum Act 1998 ss 9A and 28A, Finance Act 2016 s 140(1) and ‘Taxpayers may be liable for North Sea decommissioning bill, says study’ (21 November 2016) [BBC News](#)

⁴⁰ e.g. E McGaughey, ‘Uber, the Taylor Review, Mutuality, and the Duty to Not Misrepresent Employment Status’ (2019) [48\(2\) Industrial Law Journal 180](#)

⁴¹ See the Employment Subsidies Act 1978 (Renewal) Orders from [1979 to 1990](#).

⁴² ‘Danish corona-hit firms get state aid to pay 75% of salaries’ (15 March 2020) [Euractiv](#)

⁴³ e.g. S Goodley, ‘Deliveroo told it must pay workers minimum wage’ (14 August 2016) [Guardian](#) ‘...unless a court rules that they are self-employed.’ This is still being litigated as *IWGB v Central Arbitration Committee* [2021] EWCA Civ (pending)

⁴⁴ *Autoclenz Ltd v Belcher* [2011] UKSC 41 held that an employee is identified regardless of a contract’s terms based on the relative bargaining power of the parties, control, personal performance, and the exchange of work for a wage.

⁴⁵ A Bogg and M Ford, ‘Legislating in Times of Crisis: The Coronavirus Job Retention Scheme’ (23 March 2020) [UK Labour Law Blog](#), ‘The contrasts between the employees and the self-employed are stark, with the Federation of Small Businesses estimating that a self-employed person earning £25,000 per year could access only £5,000 of state support.’ Then, ‘Not Legislating in a Crisis? The Coronavirus Job Retention Scheme, Part 2’ (31 March 2020) [UK Labour Law Blog](#) on changes, and noting initial administrative problems for agency workers who may not have a positive ‘furlough’ decision.

⁴⁶ E McGaughey, ‘How do we stop an unemployment pandemic?’ (19 May 2020) [Guardian](#). ‘Coronavirus: Nearly two million claim universal credit’ (4 May 2020) [BBC News](#).

⁴⁷ Chart from Official Statistics, *Coronavirus Job Retention Scheme statistics: December 2020* ([24 December 2020](#))

⁴⁸ cf Ewing and Hendy (2020) [49\(4\) Industrial Law Journal 497](#), 531, remarking on the wave of redundancies.

⁴⁹ *Budget 2020* (March 2020) HC 121, 7-8

⁵⁰ ‘Employment in the UK: August 2019’ (2019) [ONS](#), 27.67 m employees, and 4.96 m self-employed people.

⁵¹ cf A Smith, *The Wealth of Nations* (1776) Book I, ch 8, §12, on the reasons: law and labour’s unequal bargaining power.

⁵² UDHR 1948 [arts 23-24](#). ICESCR 1966 [arts 7-8](#).

⁵³ UDHR 1948 [art 21](#)

⁵⁴ See E McGaughey, ‘Will robots automate your job away? Full employment, basic income and economic democracy’ (2021) [Industrial Law Journal, forthcoming](#), part 2(3) and part 4

⁵⁵ W Beveridge, *Full Employment in a Free Society* (1944) 18

⁵⁶ UDHR 1948 [art 23](#)

⁵⁷ UDHR 1948 [art 29\(1\)](#) ‘Everyone has duties to the community in which alone the free and full development of his personality is possible.’

⁵⁸ On the ‘myth of shareholder legitimacy’, see E McGaughey, ‘Democracy in America at Work: The History of Labor’s Vote in Corporate Governance’ (2019) [42\(2\) Seattle University Law Review 697](#), 745-8

⁵⁹ See AA Berle and GC Means, *The Modern Corporation and Private Property* (1932) Part III

⁶⁰ L Gambino, ‘Trump signs \$2.2tn coronavirus stimulus package into law’ (27 March 2020) [Guardian](#)

⁶¹ S Block and B Sachs, *Clean Slate for Worker Power: Building a Just Economy and Democracy* ([2019](#))

⁶² Employment Rights Act 1996 ss 86, 94 and 135. The common law right against an unjust dismissal is found in *Wilson v Racher* [1974] ICR 428, where there is no qualifying period. It is unlawful to dismiss someone in a way that breaches mutual respect.

⁶³ Trade Union and Labour Relations (Consolidation) Act 1992 [ss 180](#) and 219

⁶⁴ *NLRB v Mackay Radio & Telegraph Co.*, 304 US 333 (1938)

⁶⁵ e.g. Oxford University Act 1854 s 6. Higher Education Governance (Scotland) Act 2016. King's College, London Act 1997 s 15 (although the latter was unilaterally undone in 2008, and is only now slowly being restored: see www.kclisdemocratic.net). Further, E McGaughey, 'Votes at work in Britain: shareholder monopolisation and the 'single channel'' (2018) [47\(1\) Industrial Law Journal 76](#)

⁶⁶ E McGaughey, 'The codetermination bargains: the history of German corporate and labour law' (2016) [23\(1\) Columbia Journal of European Law 135](#), at part 3(4)

⁶⁷ Grundgesetz 1949 [art 9\(3\)](#)

⁶⁸ Work Constitution Act 1972 [§87](#)

⁶⁹ Work Constitution Act 1972 [§111](#)

⁷⁰ One-third Participation Act 2004 or Drittelbeteiligungsgesetz 2004

⁷¹ Codetermination Act 1976 or Mitbestimmungsgesetz 1976

⁷² Mining Codetermination Act 1951 or Montanmitbestimmungsgesetz 1951

⁷³ n.b. At the time of writing, the unemployment picture is volatile, with rising levels in both the UK and Germany. In particular, it may prove that the UK's subsidy scheme is more successful at containing unemployment than the German equivalent, known as short-working or *Kurzarbeit*, or it may not.

⁷⁴ E McGaughey, *Participation in Corporate Governance* (2014) ch 4(2), explaining the two-tier board's origins in Prussian authoritarianism, and its entrenchment by Hitler's Public Companies Act 1937.

⁷⁵ Pensions Act 2004 ss 241-3 requires one-third of pension trustees are member nominated, by employees or beneficiaries. However, most votes on securities bought by pension trusts are appropriated by intermediary asset managers: see E McGaughey, ‘Member nominated trustees and corporate governance’ (2013) [KCL Law School Research Paper No. 2015-26](#)

⁷⁶ Following the Swiss People’s Initiative Against Rip-off Salaries 2013, a binding type of federal referendum. This says that banks can only vote upon shares, from other people’s money and pensions, when following instructions.

⁷⁷ A Lincoln, *First Annual Message* (1861)

⁷⁸ K Connelly, ‘Kurzarbeit: Germany's scheme for avoiding unemployment’ (24 September 2020) [Guardian](#)

⁷⁹ Social Security Code III §§104 and 109, and see R Krause and JW Kühn, ‘COVID-19 and Labour Law: Germany’ (2020) [13\(1S\) Italian Labor Law e-Journal](#)

⁸⁰ e.g. FA Hayek, ‘Full Employment, Planning and Inflation’ (1950) [4\(6\) Institute of Public Affairs Review 174](#) and M Friedman, ‘The Role of Monetary Policy’ (1968) [58\(1\) AER 1](#), 10.

⁸¹ R Layard, ‘Getting people back to work’ (1998) Autumn, CentrePiece 24, 27

⁸² e.g. S Nickell, ‘Unemployment and Labor Market Rigidities: Europe versus North America’ (1997) 11 *Journal of Economic Perspectives* 55, 66. See also DT Coe, ‘Nominal Wages. The NAIRU and Wage Flexibility’ (1985) [5 OECD Economic Studies 87](#), 88

⁸³ The first was OECD, *Jobs Study, Evidence and Explanations* (1994).

⁸⁴ See in more detail, E McGaughey, ‘OECD Employment Protection Legislation Indicators and Reform’ (2019) [Remarks to the OECD](#). The misunderstanding must now be regarded as ‘wilful’ because the OECD staff have had the index’s problems explained to them on several occasions but have refused to make their index accurate. Given the disasters in politics since 2016 up to early 2021, and in the pandemic, this can no longer be forgiven.

⁸⁵ McGaughey (2019) [Remarks to the OECD](#) 4-5

⁸⁶ Z Adams, L Bishop, S Deakin, C Fenwick, S Martinsson and G Rusconi, ‘The Economic Significance of Laws Relating to Employment Protection and Different Forms of Employment: Analysis of a Panel of 117 Countries, 1990-2013’ (2019) [158\(1\) International Labour Review 1](#). This is based on the CBR, Labour Regulation Index ([2016](#))

⁸⁷ VV Acharya, RP Baghai and KV Subramanian, ‘Labor Laws and Innovation’ (2013) [56\(4\) Journal of Law and Economics 997](#)

⁸⁸ Green Recovery Act 2020 [c 415](#), on replacing coal, oil and gas with clean energy as fast as technology allows.

⁸⁹ ICESCR 1966 [art 13\(2\)\(c\)](#). UDHR 1948 [art 26](#). Also the European Social Charter 1996 [art 10](#), requiring ‘reducing or abolishing any fees or charges’.

⁹⁰ Employment Relations Act 1999 s 23

⁹¹ Employment Rights Act 1996 s 209

⁹² Welfare Reform and Work Act 2016 s 1

⁹³ This is based on the Working Time Directive 2003 art 7(1). Article 6 makes clear that a ‘week’ is a ‘seven-day period’, notwithstanding the UK’s confused and disingenuous system of calling a ‘week’ 5 days, and then requiring ‘5.6 weeks’ paid holiday in the Working Time Regulations 1998 regs 13 and 13A. No EU country has under 28 days paid annual leave.

⁹⁴ Work and Families Act 2006 s 13 (power to raise holidays) European Social Charter 1961 art 2(1) (duty to reduce work time).

⁹⁵ Trade Union and Labour Relations (Consolidation) Act 1992 s 199

⁹⁶ This can be amended by the Financial Reporting Council, which is appointed by the Secretary of State.

⁹⁷ Companies Act 2006 [s 19](#). On a model, see the Democratic Society Act 2020 ss 2-3, [drafted by this author](#).

⁹⁸ Pensions Act 2004 s 243

⁹⁹ Financial Conduct Authority Handbook, PRIN 2

¹⁰⁰ Arguably none of these powers can be used to diminish workers' rights, because that would risk meeting a swift injunction based upon discriminatory impact or violation of the rule of law: see *R (Seymour-Smith) v Secretary of State for Employment* [2000] UKHL 12 and *R (UNISON) v Lord Chancellor* [2017] UKSC 51.