

Conversations with Professor Sir Bob Hepple
Third Interview: Published works

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Between August 2007 and June 2008, Sir Bob was interviewed three times at the Squire Law Library to record his reminiscences of over forty years of an eventful legal career, during the last thirty of which he has been involved with the Faculty of Law at Cambridge. The interviews were recorded, and the audio version is available on this website with this transcript of those recordings. The questions and topics are sequentially numbered in the three interviews for use in a database of citations made across the Eminent Scholars Archive to personalities mentioned therein.

Interviewer: Lesley Dingle, **her questions and topics are in bold type**

Sir Bob's answers are in normal type.

Comments added by LD, *in italics*.

All footnotes added by LD.

87. Professor Hepple, for this third interview in which we will talk of some of your scholarly works, I have divided the material into three categories which represent particular areas of your interest:

- **human rights,**
- **labour law and industrial relations**
- **tort.**

As we run through each book and one paper, perhaps you could give the background and particular circumstances and where appropriate, I might ask you a few general questions. So could we start with human rights and the first book in this section is *Race, Jobs and the Law in Britain*¹.

Well, thank you very much. This was my first major book after coming to the United Kingdom. I had arrived, as you know, as a refugee from apartheid South Africa and I was shocked to find the extent of racial discrimination in Britain. In particular, one would see signs in windows of landladies, saying: no coloureds, no Irish, no dogs and workers would go on strike when so-called coloured Asian and Afro-Caribbean workers were engaged to drive the buses, and so I became interested in the subject. I came to Cambridge to do the postgraduate LLB as it was then called and I had to be here for two years and in the second year had to write a short dissertation. So I suggested that I look at the subject of racial discrimination and the law in Britain and several prospective supervisors whom I approached thought it was unsuitable because at the time in 1964/65 there was no law against racial discrimination. However, Dr Paul O'Higgins² expressed enthusiasm and immediately saw how important it was to ask, why was there no law on the subject and what role could law play and how did the existing common law and legislation impact on discrimination. So, under his guidance, I started writing a short dissertation, but I never completed it because it grew into a major book and Dr O'Higgins, as he then was, arranged for its publication. First

¹ 1968, 1st Edit., Penguin Press, 280pp, 1970, 2nd Edit, 343pp.

² See item 46



edition 1968 by Allen Lane³ - Penguin Press in hardback and immediately followed two years later by a second edition in the Law and Society series, published also by Penguin and edited by Otto Kahn-Freund⁴ and Bill Wedderburn⁵. Now, when I wrote the first edition there was as yet no law against racial discrimination in employment. There had been the first Act of 1965, which dealt with discrimination in public places and the 1968 Act was under discussion when I wrote the first edition and of course in the debates about the 1968 Act. I believe my book was used by parliamentary committees and others, both because I had compiled an appendix showing examples of the kind of racial discrimination that was going on - many people at that time didn't believe there was much racial discrimination - and secondly, I discussed the legal issues. Parliament then enacted the 1968 Act and I was asked to prepare an edition based on the 1968 Act and that was the second edition, published in 1970. There were quite a lot of changes in the structure of the book and I explained the new law, and I also was critical of it in some respects. And I'm glad to say that many of my criticisms were met in the 1970s because first the Sex Discrimination Act was passed in 1975 and then the Race Relations Act in 1976, which adopted or followed many of the suggestions I had made in the second edition of my book. I never followed that up with a further edition, but that was the sort of way in which the whole thing came into being.

88. Well the second edition was favourably reviewed. Sir David Williams⁶ said that it was widely welcomed and it was a very imaginative and stimulating legal study. Did you feel, Professor Hepple, that you actually had enough time to assess the impact of the Act?

No, I wasn't able to assess the impact of the 1968 Act because it had only come into force, but I had a number of views about it. I think one of the most important was that the 1968 Act, under pressure from the employers and the trade unions, had provided special voluntary procedures outside the law for dealing with employment cases. I tried to explain the whole nature of British industrial relations, the voluntarist tradition which had brought this about, but at the same time I was very critical of it because I didn't think it would work and I proved it to be correct in that. It didn't work and by 1975 and '76 the new legislation swept it away and gave people a right of individual complaint to the industrial, now called employment, tribunals. So I didn't have time actually to assess it; that wasn't what I was trying to do in the second edition.

89. Right. That brings us to the second item in the human rights category and this is the equality report – *Equality: A New Framework: A Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*. This was published in 2000⁷. It

³ Sir Allen Lane founded Penguin Press in 1935, and the Allen Lane imprint in 1967, so Professor Hepple's book was one of its first titles.

⁴ See item 51

⁵ See item 46

⁶ See item 51

⁷ Oxford, Hart.



was co-authored by your wife, Mary Coussey⁸ and Tufyal Choudhury⁹. The Advisory Committee was stellar including Lord Lester of Herne Hill¹⁰, Judge Beatson¹¹, Sir David Williams and on the panel of experts you had Professor Catherine Barnard¹² and Dr Stephanie Palmer¹³. The reviews were very complimentary; Lord Lester in his preface described it as a brilliant report.

Yes, well they were very complimentary but let me tell you the background. It did involve Lord Lester. Because before the 1997 general election, Lord Lester and I, who had worked together for a long time, discussed this and we thought the time had come to bring together something like nine different acts of parliament and over a hundred other laws dealing with discrimination. The field was just exploding and it was very difficult for people to know their rights and there were a lot of inconsistencies between the different strands of discrimination. There was EU law coming into it, there was the question of whether we were complying as well with international covenants and so at Lord Lester's suggestion, we first wrote a little pamphlet calling for a review of the legislation and then after the election, when the Labour Government was elected, we went to see Jack Straw¹⁴ who was then the Home Secretary and asked him to set up a government committee. And he said, no, the government didn't have the time or the ability to do it, why didn't we do an independent review? He wrote a very nice letter which assisted us in getting a grant from the Nuffield Foundation and the Rowntree Trust and we did that here in Cambridge in the Centre for Public Law and we spent one year on it. I took a year's or six month's leave and as you say, my wife, Mary Coussey, who's an expert in the field of equal opportunities did a lot of the fieldwork and Tufyal Choudhury was our research associate on that project. And so we then produced it in a very short space of time, there was a lot of public involvement. There were public consultations. Lord Falconer¹⁵, who later became Lord Chancellor, was at the time a minister in the cabinet office, he gave us his backing for it and it has had, I think, a very significant impact on the development of employment and generally on equality legislation in general, because I think people accepted we had shown the need for a Single Equality Act and for a Single Equality and Human Rights Commission. And step by step, the government has been

⁸ See item 67

⁹ Lecturer in Law, Durham University, specialising in human rights, Senior Policy Advisor to Open Society Institute's Muslims in EU Cities Project: <http://www.eumap.org>

¹⁰ See item 72

¹¹ Sir Jack Beatson, b. 1948, Judge of the High Court, Queen's Bench; Rouse Ball Professor of English Law, Cambridge 1993-2003.

¹² See item 71

¹³ Senior Lecturer, Fellow of Girton College

¹⁴ John Whitaker Straw, b. 1946, Labour politician, Home Secretary 1997-2001, currently Lord High Chancellor of Great Britain and Secretary of State for Justice, 2007 - .

¹⁵ Charles Leslie Falconer, Baron, b. 1951, Labour politician, Lord Chancellor 2003-07, First Secretary of State for Constitutional Affairs 2003-07. Lost political position when Gordon Brown became Prime Minister. Joined US law firm Gibson Dunn & Crutcher, 2008.



implementing these things, sometimes not in ways we would approve of, but generally following those lines. They first set up an Equality and Human Rights Commission which started work in October 2007. They have announced that there will be the Single Equality Bill introduced in 2008/2009 session. I should say that after Lord Lester's bill in order to... Lord Lester and our work on this, we drafted a bill with the aid of parliamentary counsel. We got a further grant from Nuffield Foundation to fund the drafting of a bill and found an excellent former parliamentary draftsman, who drew up a bill which, in 200 clauses, dealt with what previously had been in many, many volumes of legislation. Lord Lester introduced this in the House of Lords. It passed through all its stages. The government, itself, welcomed it and over 200 MPs in the House of Commons moved an Early Day Motion, asking the government to take it over. But there's been a lot of delay and still more discussion over the past few years, so it looks like about ten years after our report was published we may actually finally have a Single Equality Act.

90. Very interesting. Professor Hepple, still in the Human Rights category, we come to your paper published in the 1971 *Modern Law Review: Aliens and Administrative Justice -The Dutschke Case*. And here, you emphasise the point that the United Kingdom up until the Dutschke Case had always had an open policy and provided sanctuary. Your conclusion in this article is very moving, and I quote from it: "Perhaps tears were shed as well for modern administrative justice which failed to rise phoenix-like from the ashes of 19th century liberalism". Do you feel that the Home Office has taken on board your criticisms?

Well, I was told that Lord Hailsham¹⁶, who was then Lord Chancellor, had read it and agreed with its conclusions and initially, their reaction was to take appeals by aliens, who were being deported on the grounds of what we now call national security, should only go to the so-called three wise men rather than through a tribunal in which the person to be deported had not been allowed to hear all the evidence. But unfortunately, even that procedure suffered from defects of not disclosing evidence and it's a problem which still remains in all the counter-terrorism legislation – how are people expected to answer a case when they're not shown the evidence? And I don't think it's a problem that's yet been resolved. So, I think it certainly aroused interest in the problem and it was taken on board to that extent, but a solution hasn't been found.

The background to this was that I was teaching Administrative Law with Sir David Williams¹⁷ and later Professor Stanley de Smith¹⁸ in Cambridge. Rudi Dutschke¹⁹ was a German student who had been shot by a right-wing fanatic in Berlin. He had brain damage as a result of this and he was allowed into Britain for a very short period and then wanted to study. He was accepted as a student at Clare Hall, which is the daughter college of my

¹⁶ Quintin McGarel Hogg, Baron Hailsham of St Marylebone, 1907-2001, judge and Conservative politician, Lord Chancellor 1970-74, 1979-87.

¹⁷ See item 51

¹⁸ See item 51

¹⁹ Alfred Willi Rudi Dutschke, 1940-79, spokesman for left-wing German student movement in the 1960s



college, Clare College and the President of Clare Hall, then Professor Brian Pippard²⁰, asked me if I would give some legal assistance and I worked closely with his solicitor, Rosemary Sands²¹ in Cambridge and Brian Wigoder QC, his counsel, on the case. I sat through all the hearings and the conferences with Dutschke and his wife and so on. And at the end of it all, I wrote this article based on the transcripts and what I had seen and heard and I raised a number of questions about the inadequacy of Administrative Law to deal with this sort of case.

91. Thank you. We come then to the second category, which is Labour Law and Industrial Relations and the first book here was published in 1971. In fact, the *Encyclopaedia of Labour Relations* was published and this book, *Individual Employment Law*, was the first part of it. It was a monograph which you brought out in 1971. It was very favourably reviewed, Professor Hepple. D. Gareth Lewis said “ of the plethora of books published after August 5th 1971 this must surely rank as the most significant”.

Well, this encyclopaedia of which this formed part, and is published as a separate monograph, was the idea of Peter Alsop, who was the managing director of Sweet and Maxwell. In the early 1960s I had spent six months working as an editorial assistant at Sweet and Maxwell, so I got to know Peter Alsop. And he came to see me soon after the Industrial Relations bill, introduced by the Heath²² government was going through parliament and he said there's a major publishing opportunity because this was making huge changes in the practice of industrial relations. He saw the opportunity and he said, we've published a number of encyclopedias and we'd like to do one on Labour Relations Law. So I, together with my colleague Paul O'Higgins²³, agreed to be the general editors. It had sections with statutes and cases and all the usual things that an encyclopedia has, but this was written as an introductory monograph and the aim was just to provide an introduction to the law governing the employment relationship. But I think if it had any originality, it was that it was the first book to try and give a systematic and an integrated view of the Common Law and statutory regulation. It was essential to understand how the new Industrial Relation Act integrated with the existing Common Law and previously there had been lots of books on master and servant and lots of separate books on the Factories Act or the Truck Acts or separate Acts. There had not been an attempt to integrate these two sources of law and that's the main thing we tried to do.

We were also very interested in the way in which industrial custom and practice became enforceable as law, again an area which hasn't been much explored and so we set about it. I think, again, an original part of the work was explaining how these customs are incorporated from collective agreements and works rules into the individual contract of employment. In working on the book in later years, I was very much helped by my work first as a part-time and then as a full-time Chairman of Industrial Tribunals because I got a lot of practical experience. So it went through various editions and the last of these was published in 1981, quite expanded because it meant we also then wrote an introductory chapter on

²⁰ Sir Alfred Brian Pippard, b. 1920, Cavendish Professor of Physics 1971-84.

²¹ Wife of Ken Polack - see item 44

²² Sir Edward Richard George Heath, 1916-2005, Prime Minister of UK 1970-74.

²³ See also item 46



collective labour relations law, because we felt that the individual aspects couldn't be properly understood without the collective framework. We didn't continue after that, largely because Professor O'Higgins and I went in different directions. He went to Dublin and I went to be a chairman of tribunals, and also again the character of labour law was changing because by then we had the Thatcher government which was beginning to deregulate and change the law so it needed another completely new book which we did not write.

92. Right, you did, however, with Professor O'Higgins do your *Employment Law* book and this is the next item. It deals primarily with cases brought before Industrial Tribunals.

Can I just say that this is the same book. This is the fourth edition of the Introduction to the Encyclopaedia. We did several editions and this is the same book as I have just been talking about.

93. Perhaps I can just ask you then - as I understand it, there isn't a rule of precedent on Industrial Tribunals except at a higher level. So in these circumstances, how is a degree of certainty achieved?

Well although one tribunal is not bound to follow another, they do have persuasive influence and in a case you may be referred to other first instance decisions. But over the years there have been more and more precedents and so the tribunals can normally just rely on appeal cases. I was fortunate because I came into the tribunals as a chairman in the very early stages and there were a lot of unanswered questions and because of my academic interests, I always tried to do more than had been said by counsel in the case and do some research of my own. So, for example, there was a case about a young woman who was subject to some sexual harassment by her female employer and members of the tribunal, who were lay people, said well this is clearly unfair but it had to be a breach of contract for her to succeed. So they said you find a reason. So I went and did some research, I had been a teacher for the law of contract and I looked at the implied duty of trust and confidence and the general duty of collaboration in contracts. I derived from this a rule that in employment law, there was an implied duty of trust and confidence which had been breached in this case. That was reported in the *Law Reports* and it was soon picked up in later cases and now... probably one of the largest areas of Employment Law is implied trust and confidence. And I think I wouldn't have been able to do that had I not also been an academic, because I had been interested in the theoretical structure of the law as well. But that just gives you an example of how tribunals, themselves, can contribute to the growth of precedent.

94. Well that takes us to the next book in this category which is your *Public Employee Trade Unionism in the United Kingdom*, published 1971. I notice this was under the auspices of the Institute of Labor and Industrial Relations at Michigan Wayne State University. Was it written primarily for an American audience?

Well it was a research project. They were doing a comparative study of public employee trade unions in a number of countries and they brought together academics and Professor O'Higgins and I were selected to do the study related to the United Kingdom. But there were other countries covered like Canada, Belgium, France, Germany and so on as well and they published a series of monographs based on our work and then they did an overall comparative volume. So this was part of a research project and I suppose it's one that would be read, not only in the United States but also by others who are interested in issues of public employee trade unionism, because they're comparative works.



95. I notice Professor Hepple that a point you emphasise is that almost surprisingly at that time, 1971, there was, in fact, a great deal of unionisation in the public sector and although this was prior to joining the common market and the Thatcher years, you concluded that growing militancy of the public sector unions was already beginning to put the voluntary way of doing things under great pressure.

Yes. That's right and this was a book written in a period when, what Professor Kahn-Freund called, collective laissez-faire was still the dominant way of regulating labour relations in this country. But that changed with the Industrial Relation Act 1971, when they tried to use law as the main instrument for bringing about reform of industrial relations. It failed miserably with the defeat of the Heath government in 1974 and the new Labour Government introduced, or rather reintroduced, the collective laissez-faire but even strengthened it in various ways. That culminated in the winter of discontent in 1979 when the whole thing collapsed and the Thatcher government made a massive attack on trade unions and on this whole system of regulation. So, of course, looking back over 40 years there's been a complete transformation. Public employee unions, however, are the one area in which trade unions have remained relatively strong. They've declined very greatly and so has collective bargaining in the private sector, but they still seem to be fairly strong, but they are under lots of legal restraints in using their collective power. So there has been a major transformation. One attempt to explain this transformation in the, I think it was the early 1990s, was by a research student of mine, Gillian Morris²⁴, together with Sandra Fredman²⁵ who wrote a book on *The State as Employer*²⁶, which took our work a bit further, but even since then there've been other developments.

96. Right. Interesting. That brings us to the publication with Professor Otto Kahn-Freund: *The Laws against Strikes*²⁷.

Yes, this was just actually a Fabian pamphlet, but it's worth mentioning because this was also something which was a product of the Industrial Relations Act. The Industrial Relations Act sought, for the first time, to bring strikes under fairly close regulation. If trade unions registered under that Act, they got a lot of privileges or rights such as the right to strike. If they were unregistered, their strikes would generally be unlawful. And the Fabian Society approached Professor Otto Kahn-Freund, who was the greatest of all German and British labour lawyers, to write a pamphlet and he very kindly approached me and that was a great experience. I think almost more than any other academic, Kahn-Freund has influenced

²⁴ Associate Professor at Brunel University, Chair of the NHS Pay Review Body; Deputy Chair of the Police Negotiating Board and of the Police Advisory Board for England and Wales; a Deputy Chairman of the Central Arbitration Committee; and a member of the ACAS Panel of Arbitrators.

²⁵ Professor of Law, Fellow of Exeter College, Oxford.. Studied at Wits, Rhodes Scholar. Written, *inter alia*: *Human Rights Transformed: Positive Rights and Positive Duties*, OUP, 2008; *Labour Law and Industrial Relations in Great Britain* (2nd ed, Kluwer, 1992) with Bob Hepple.

²⁶ *The State as Employer: Labour Law and Industrial Relations in the Public Sector* Sandra Fredman & Gillian Morris, 1990, Mansel, 510pp

²⁷ 1972, London, Fabian Society



my approach, his great comparative knowledge and his sense about these things and so it was a great privilege to work with him. Eventually, he said that we should say who had written separate chapters, but I have to say all the chapters I wrote were influenced by his views. It was a substantial pamphlet of perhaps about 60 pages, where we gave an appraisal of why there should be a right to strike, what limits there should be on the right to strike and so on. And I know it's something that is still today quoted, it's not easy to come across, but it is and I think it was at the time, quite an important contribution to the debate.

97. Fascinating, I mean, he was trained in Germany and he had a great impact upon English law, so...

Yes.

98. It might be fair to say that there is, perhaps, German influence...

Oh very much so. He was very influenced by his continental upbringing and he had experience also as a labour court judge in Germany, but he'd had to flee the Nazis because he gave an adverse decision against the Nazi government in a labour court. And in any event, he would have had to leave because he was Jewish... but he came to this country and he was startled by the voluntarism of the system here, the lack of law unlike Germany and that enabled him to make a very unique contribution. I think we've felt something in common, because I also come as an outsider into the system which, in a way, gives you an opportunity to look at things differently from those who've grown up in the system.

99. Professor Hepple, we come then to your *Bibliography of the Literature on British and Irish Labour Law*²⁸, which you published with Professor O'Higgins and J M Neeson. Effectively, this was a database which was compiled in the era long before computers were widespread.

Yes.

100. It must have been quite a task?

Well, this whole Bibliography was the idea of Professor O'Higgins, he was a great bibliophile – he had published many bibliographies. And he really said to me that there just are no proper bibliographies on Labour Law and we managed to get a grant, I think also from the Nuffield Foundation, for this bibliography. We employed Jeanette Neeson²⁹, who had been a labour historian student at Warwick University for a year and she did the dogsbody work. She collected most of the entries. We had to. As you say it wasn't computerised and what we had to do was we had cards, and we had these carbon-ated cards, where you had a duplicate of everything, a tear-off slip and she collected these thousands of entries. The earliest book there is 1542 and it goes all the way down to 1972. There are very few books on what we now call labour law: master and servant and that. The first book on master and servant was actually published in Dublin in 1723. But we had all of these and all the periodical literature and went right up to the end of 1972 and then a supplement, down to the

²⁸ 1975, Mansell, 331pp.

²⁹ Associate Professor, Social history of Britain, York University, Toronto:
<http://www.yorku.ca/uhistory/faculty/cv/neeson.htm>



end of 1978³⁰, and then it stopped. Professor O'Higgins did publish in the *Industrial Law Journal* several other updates of it.

101. Sounds a monumental task, when you consider all the cross-referencing and checking.

Yes. I did... I mean, I again, I have to say I was helped in this by my parents who were then living in Cambridge and later when I went to Canterbury, they were also living there. They were retired and my mother just loved this sort of work. When we'd been in Cambridge, she helped sort out the O'Higgins collection of papers and filed them and so on and then she helped with the supplement. You'll see she's one of the co-authors of the supplement, and she helped and occasionally, my father helped as well with the editing, the indexing and so on. I have to say, I didn't do a lot of the hard labour. I did some of it, but not much.

102. I notice that you acknowledge them and I wondered whether... I thought they might be your children.

No, no! They were my parents.

103. My mistake.

My children were also set to work on various things!

104. That brings us to *The Making of Labour Law in Europe*³¹, published in 1986, a volume which you edited and about which Lord Wedderburn was very complimentary. Why was 1945 chosen as the cut-off point?

Yes, well again, let me explain how this project began. There was a view among a number of us here working in, generally in Europe, in Labour Law, that all the comparative work just had snapshots of the law in the country at a particular date. Nobody saw law as a motion picture, in other words, something that was changing, and we felt very strongly that to do a proper comparison you had to set it in its historical context. Professor Tilo Ramm³² who at the time was at the FernUniversität³³, the Open University in Germany, approached me and five or six other contributors, each from a separate European country, as to whether we would collaborate to do a historical study which was intended to go all the way to the current time, which when he approached us was about 1978. And we got this group together and it was a really most exciting project, one of the ones I've enjoyed more than anything else, because we met to discuss each chapter in a different country. So we would go to Bordeaux in the wine season, we would go to a Bad in Germany, we went to Canterbury in the spring and so

³⁰ *Labour Law in Great Britain and Ireland: A Companion Volume to the Bibliography of the Literature on British and Irish Labour Law to 1978*: Hepple B., Hepple, J., O'Higgins, P., Stirling, P., London, Sweet & Maxwell, 1981, 131pp.

³¹ *The Making of Labour Law in Europe: A Comparative Study of Nine Countries Up to 1945*, B. A. Hepple (Ed), 1986, Continuum International Publishing Group-Mansell, 412pp

³² Emeritus Prof. Dr. Tilo Ramm, Rechtswissenschaftliche Fakultät, ret. 1991.

³³ <http://www.fernuni-hagen.de/rewi/profil.shtml>



on, and Germany... Holland in tulip time. So there was always an interesting social interaction as well as the work, but it took us eight years and that was published in 1986. Now the cut-off point of 1945 was just pragmatic. That was, of course, an important period... end of a certain period in Labour Law, so it was a convenient cut-off point, but we realised we'd need two volumes. Now, unfortunately, we never got together to write the second volume, we all went off in different ways. But I'm glad to say that we are now actively... some of the original contributors and several new ones, we now hope to publish the second volume which will go up to the year 2004 and publish it in 2009. It is almost complete and that will complete the story. The second volume is to be called *The Transformation of Labour Law: A Comparative Study of 15 European Countries from 1945 to 2004*. We chose 2004 because that's the point at which the enlargement of the EU took place and we didn't want to cover the countries that had been under the communist rule because it would enlarge the book too much.

105. I can imagine! Well, Professor Hepple we come then to your most recent book, published in 2005, *Labour Law and Global Trade*³⁴ and this had extremely good reviews. Adelle Blackett³⁵, for example, called it masterful, high standard, textured. Professor Ewing³⁶ described it as a seminal text with a long shelf life which will shape the thinking of a generation of lawyers and Weiss³⁷ says it is a must for everybody interested in the construction of a globalised world. What was the audience for this book?

Well I think, like most of my books, I always think of three audiences - one is the student, and in this case, it would be usually the graduate student. Secondly, one thinks of policy makers and it was very much concerned with policy makers in governments and in international organizations. And the third is, if you like, that fiction of our imagination, the intelligent reader. who doesn't know much about the subject but wants to get some idea of what it's all about. In fact, I know that the book is being used not only in law courses but also in politics and international relations and so on. So it has had a wider audience than law. This is a book which comes directly out of my teaching. For many years, both in London and Cambridge, I taught courses on international and comparative Labour Law. I also did quite a lot of work for the International Labour Organisation as an expert, for example, working in Namibia and Russia and other countries, and the book was something I wrote in the year immediately after my retirement as Master of Clare College. I had been working on it for a long time, but I brought it to, you know, its final point in 2005. So it's a kind of reflection of a long submersion in that subject and I'm glad that it's had a good audience.

106. And as your most recent book, it reflects your ideas, your current thinking

Yes.

³⁴ 2005, Hart Publishing,

³⁵ Faculty of Law, McGill University

³⁶ K. D. Ewing, Kings College London

³⁷ Manfred Weiss, see item 65



107. ...on many subjects.

Yes, I think globalisation is what's having the major effect on Labour Laws all over the world, both internationally and locally, and my kind of thesis is that this has gone beyond national regulation and the question is: what kind of international regulation is possible and desirable? But also I stressed the point there is a lot of scope for a national regulation of labour relations but it has to play on the comparative institutional advantages of each country. I think, if I may say, that one of the most original parts of this book is an attempt to look at the competition between Labour Law systems, because people are very worried about exporting jobs to cheap labour countries. I think my argument is that every country must have a competitive advantage based on what it's got, as long as they comply with basic human rights, and it's wrong, if you like, of the developed western countries to expect all of the underdeveloped or developing countries to adopt standards which are so much like the European ones, or the American ones, that these countries can't compete. But I always stress there must be basic human rights in all of these countries, but nevertheless countries have to play to their own strengths. Now that's not a very popular thesis particularly among you know, some of the older and more traditional labour lawyers, who feel everything must be immediately to the higher standard achieved in the West. But after all, we achieved industrialisation in the West without these standards and you can't expect others to immediately have those standards, although they should improve over time.

108. Right, thank you, very interesting. I did actually have a chance to look at this book and I have learned so much from it.

Thank you.

109. We come then to your books on tort and here we have your sizeable *Tort: Cases and Materials*, which was first published in 1974. Millner³⁸, when reviewing it, described it as the best exploratory adventure in this field since C A Wright's³⁹ *Cases on the Law of Tort* in 1955.

Yes, well, in fact, the history of this book does include the Wright⁴⁰ casebook. It's based directly on my teaching experience. My first lecturing job in this country was at Nottingham University, where the Head of Department was Professor J C Smith⁴¹ who had produced a wonderful casebook on tort... not on tort I beg your pardon, on contract and I was allocated to be the main teacher in the Law of Tort and he encouraged me to use the case method of teaching. I put together a collection of materials for my class in Nottingham. One

³⁸ See item 16

³⁹ Cecil Augustus Wright, 1904 – 1967, Canadian jurist, law professor and important figure in Canadian legal education reform. Among the first law professors to import the Harvard case method into Canadian legal education.

⁴⁰ University of Toronto

⁴¹ See item 48



of the students in that first year I taught then in 1966 was Martin Matthews⁴², he was brilliant, the best student in the class and when he finished at Nottingham, he actually came to Cambridge at the same time as I had returned to Cambridge and I asked him to help me produce this. I had been asked by Butterworth's to bring out an English edition of Wright's Canadian Casebook, which was a very good casebook along the lines of what I wanted to do. However, I thought it wasn't appropriate to just adapt a Canadian casebook; I wanted to do my own thing and Butterworth's agreed. And it took us some years, but in 1974 it was published and I've always used it in teaching. When I can, I've used it for case method teaching.

Now the problems which I think we faced in trying to put together a collection like this was, first of all, in England and particularly in Cambridge, case method teaching was not known at that time. The pattern was, students go to lectures and they keep quiet and then they have a lot to say in small supervisions or tutorials. Whereas the American system, you make them prepare for each class and you ask them questions and I had some experience of the American system and when I was teaching at UCL, for example, I followed exactly the American system of a class of 100 students, sitting in named seats, and I would call on them and they would have to discuss. When I came back to Cambridge, I tried to do this and it failed completely, just as Glanville Williams⁴³ had tried to do it some years before and had a lecture room specially designed for the purpose, it failed there because it just doesn't fit in the Cambridge system of lectures and supervisions.

So, it was designed as a casebook but the English teaching methods didn't really lend themselves to it. The second problem is, I didn't want to follow the old-fashioned American approach associated with *Landell* and Harvard, which is a formal legal analysis approach, positive law, black letter law approach. I was more influenced by the spirit of Llewellyn⁴⁴ realist school of law and how the law actually worked. And so we introduced into the casebook a lot of materials that students of tort never usually see, like insurance documents and so on, because tort is very often just about insurance and which insurer should pay and that isn't normally brought out in the textbooks - at the time it wasn't, it is now, I think. So we had to make a compromise between a kind of purely functional study in the Llewellyn mode or a black letter book and the book has always been a sort of compromise between these two approaches. At the time, there was a lot of writing just starting particularly by Professor Patrick Atiyah⁴⁵ on compensation for accidents, in other words, looking at it in a more functional approach. But we couldn't go completely over to that in this book, because that wasn't the way that English law schools were teaching the subject. So it developed... it

⁴² Lecturer in Law and Fellow of University College, Oxford. Lecturer and Fellow at Emmanuel College, Cambridge 1970-73

⁴³ See also item 81

⁴⁴ Karl N Llewellyn 1893-1962, American jurisprudential scholar associated with legal realism. Professor at Columbia Law School 1925-51, University of Chicago Law School 1951-62.

⁴⁵ b. 1931. Professor of Law at: Australian National University 1970-73, Warwick University 1973-77, Oxford University 1977-88.



had an influence, for example in Australia Professor Harold Luntz⁴⁶ very much followed our pattern in doing a brilliant casebook for Australia and I know it has been quite widely used. At one time, I was told it was Butterworth's best seller. They were selling more of this book than any other book and Glanville Williams once said to me, you won't make any money out of writing law books unless you publish other people's work under your name! And that is exactly what we did and it has been the only book from which I ever earned any reasonable royalties, because, as I quote, the writer [Montaigne] who says: I've gathered a posy of other men's flowers, only the thread that connects them is my own and I think that's true. But we did, I think, have some originality in presenting these materials in this way to English and other common law students.

110. That was picked up by another reviewer, this time for your 1991 edition...

Yes.

111. Gerald Dworkin⁴⁷. He said it was an outstanding casebook and he compared it favourably with Mr Tony Weir's⁴⁸ book. Your book had the additional feature, though, of having all these frequent notes, extracts of statutes and detailed references to journals. He said, it mirrored the growing interest of law teachers in examining, as you said, the law that actually works. Do you think, Professor Hepple, that these extra features you can attribute to your hands-on experience in the tribunals?

No, this doesn't have anything to do with tribunals, because it's the law of tort and the tribunals deal with contract and employment issues. But it really came more from a general approach to law, which is I'm interested in its social relevance and how it works in practice. I think that's generally because I've always combined academic and practical work, that's been my approach. So I was interested in it from there and for example, if you look at the first chapter, where it was called: An Action for Damages in Perspective, I got the pleadings first in a series of cases about asbestosis compensation and later arising from the Bradford football stadium fire, so the students could see how a case began, what it looked like, the pleadings, but also we asked a lot of questions about how the law functioned, who is paying, the insurance company, why should they pay in this case, how are risks allocated? All of these questions, so the students would come to it with a critical view and a contextual view. At that period, when we started in the 60s and 70s, the contextual approach was just growing in law, moving away from the very black letter positive approach. Let me just say, you mention Tony Weir's book I'm a very great admirer of Tony Weir's book. I think it's a brilliant book and it fits a certain type of teaching, particularly in the Cambridge supervision system and there are lots of brilliant ideas in it and ours is complimentary to that. It's a different sort of book and I think people often use both books, but in different ways.

⁴⁶ b. 1937, South Africa. Joined Melbourne Law School 1965, George Paton Professor 1976-2002.

⁴⁷ Emeritus Professor of Law, Kings College, University of London; Director of National University of Singapore Intellectual Property Academy 2003-05.

⁴⁸ Fellow of Trinity College. *An Introduction to Tort Law* OUP, 1st Edit. 1967



112. Coming back to your 1974 first edition, the reviewer talked of tort being at a crossroads at that time and I seem to remember that Mr Dias⁴⁹ also spoke about this and I wanted to ask you, Professor Hepple, why does tort always seem to find itself at this mythical intersection?

I think it's partly because the law of tort is a kind of garbage can for all the parts of law that can't be fitted in elsewhere. So, you know, it's things that aren't contract, it's things that aren't restitution, it's things that aren't criminal law and so on, and it covers topics which in other legal systems might be a part of property law, like conversion and so it's a kind of rag-bag and it therefore has to serve a large number of social functions, one of them being compensation for personal injuries and that was the part that was really at the crossroads. But it was Glanville Williams who, in a famous lecture he gave on the aims of the law of tort in about 1951, showed that the law of tort was trying to do too much and that some parts of it should be hived off, for example, the law on compensation in accidents he felt should be more part of social security. But I think what happened was in the 1970s there was a great movement for a reform of the law of compensation, the Pearson Royal Commission⁵⁰ was set up and we focused very much on that. And then in the period of, sort of, deregulation and if you like, neo-liberalism of the 1980s and 90s that disappeared, so Tort law has gone back into the private sphere. Some people think it's a good idea because it emphasises personal responsibility, but it has many defects which have been written about by Atiyah, O'Connell⁵¹ and others.

113. Still on the subject of tort. In 1984 you co-authored *Foundations of the Law of Tort* with Professor Glanville Williams. You were responsible for three chapters and in the last, you viewed the way forward for tort, where you discuss the whole concept of statutory no-fault for liability and state schemes for compensation.

Yes. This little book had a history because what happened was that Glanville Williams, who I think must be the most outstanding and brilliant law teacher there's ever been in this country - most inventive - had been working on the Law of Tort and been writing a textbook. But that suddenly came to an end in 1961, when he started to specialise in criminal law. And in the early 1970s he arrived in my rooms in Clare College one day, with a number of boxes, saying, "this is my text book on tort which I stopped writing in 1961 and this was more than a decade later, I'd like you to finish it". There were lots more boxes which I had to collect from him and of course, I was flattered and honoured because he was such a brilliant man, one of the most rational people, irritatingly logical, but could see through lots of arguments and he was always, also always interested in what was ultimately the social impact of the law. And it was his 1951 lecture and some of the papers I found in his boxes which had emphasised this movement towards no-fault liability.

⁴⁹ See entry in Eminent Scholars Archive:
http://www.squire.law.cam.ac.uk/eminent_scholars/rwm_dias.php

⁵⁰ *Royal Commission on Compensation for Personal Injury (Chairman: Lord Pearson)*, Report Cmnd 7054 (3 vols), HMSO, London, 1978.

⁵¹ Professor Jeffrey O'Connell, University of Virginia School of Law, e.g. P Bell and J O'Connell, *Accidental Justice: the dilemmas of tort law*, Yale University Press, 1997



So I wrote the chapter, that chapter, that last chapter. I built very much on what he'd been doing and I had been running also, as a teacher in Cambridge, a seminar course called, Costs of Accidents which had been using some of the law in economics literature by Calabresi⁵² and others and so I brought this into that particular chapter. The book was intended for students, or anyone else who wanted to know something about the Law of Tort - it was an introductory book. He had wanted me to complete a full textbook, but when I looked at the materials they were outdated and this was the days before emails and computers and so on, and everything was written by Glanville Williams in an almost indecipherable script on tiny scraps of paper – they looked like tissue paper – and I had to go through these and would find little gems, references in it, this was how he worked and it was really... it was too much and I was at the time, you know, I was working on that edition, I was just leaving Cambridge and I wanted to sort of draw to a close. So I said to him let's just make an introductory book and use some of the best parts and not write the full textbook. I regret that I didn't have time to write the full textbook, because I think it would have been... with his contribution, would have been a valuable book.

114. I did actually have the time to read the book, Professor Hepple...

Oh yes.

115. And it certainly explained many of the very difficult concepts in a way which was extremely accessible, I have to say. Do you think that the concept of no-fault for liability has gained ground?

No. On the contrary the idea has gained ground, but it hasn't had a practical effect because at the time we wrote, New Zealand had adopted a no-fault scheme and some American states had done so and the Pearson Royal Commission 1978 recommended certain no-fault liabilities. But, in fact, this all came to end. It was killed by the personal injury lawyers in London, who first lobbied the Labour Government. A lot of their work came from trade unions and they realised they'd be put out of business and they lobbied the government. The government did nothing and then the Thatcher government was elected who had no interest in extending social security law, which was what no-fault really was, and so the New Zealand model was never really followed. Little bits and pieces have come in and the most vital, really, is in the form of medical injuries, where there is many discussions of getting rid of the whole negligence lottery in the medical field, but it hasn't happened because there are too many vested interests - insurance industry, the lawyers and so on and so I don't see any prospect of it in the immediate future. So you have this quite ridiculous system in which some people get enormous sums of damage for a minor fault, whereas others, who perhaps suffer congenital illness or can't prove fault – hit and run accidents or whatever – get nothing. It's a very unfair system, but I don't see prospects of any government moving in a hurry to reform it. They've done little things like miners... compensation for miners and so on, by miners I mean coal miners, but there hasn't been any major move.

⁵² *The Costs of Accidents: a Legal and Economic Analysis*, 1970, Yale University Press.

Calabresi, Guido, b. 1932, Milan, Federal Judge in Second Circuit, US Court of Appeal, & former Dean of the Law School, Yale. Collaborated with Ronald Coase and Richard Posner on law and economics. BA Magdalen College, Oxford.



116. Right. I liked very much the literary illusions with which the book is littered. Was this your idea?

No, no. Glanville Williams, if you look at any of his books, he did this. He came up with the most amazing quotes. I came up with a few others. I thought his best, I'm not sure if it's in the book, that he put for the law of tort, he said... he quoted Arnold Bennett⁵³, who said, "perfection is a form of death" and Glanville Williams said, "in that case the Law of Tort is a lusty infant!"

117. Well, Professor Hepple, that brings us to the end of this interview and I thank you very much indeed, absolutely fascinating, both in terms of international and local political and legal history and I'm very grateful to you for agreeing to come and speak to me.

It's been my pleasure. Thank you very much.

Thank you.

⁵³ Enoch Arnold Bennett 1867-1931, English novelist and journalist.

