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Default Norms in Labour Law: From Private Right to Public Law

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Default Norms in Labour Law: From Private Right to Public Law

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Abstract: This chapter considers the appropriate limits of default norms in labour law, in light of the notion of 'ordre public'. It then considers two regulatory issues in the modern law of the employment contract: the role of 'contract' in determining employment status; and the scope for waiver or 'contracting out' of the implied term of mutual trust and confidence. The chapter argues that 'contract' is always prone to destabilising legal tests of employment status. It would be better to dispense with 'contract' altogether in favour of an 'employment relationship' test. Further, that mutual trust and confidence should be treated as *ius cogens* rather than *ius dispositivum*, by reference to public policy and the statutory restrictions on contracting out of employment rights.

Keywords: employment status; contract; implied terms; mutual trust and confidence

I. Introduction: The Problem of Default Norms in Labour Law

Even if the Latin terminology seems unfamiliar, the substantive matter of the distinction between *ius cogens* and *ius dispositivum* is fundamental to the historical development of British labour law. As we shall see, while there is some variation in the definition of these categories, *ius dispositivum* describes norms that may be varied by the will of the parties. By contrast, *ius*

cogens describes mandatory or imperative norms that are imposed on the parties by operation of law and may not be varied by private agreement.

Broadly speaking, the historical development of British labour law may be understood as the journey from *ius dispositivum* to *ius cogens*. The legal 'cornerstone' of the structure of British labour law is still the employment contract.[1] Historically, the contract of employment was firmly in the realm of *ius dispositivum*. Its norms were amenable to variation by the parties. In part, this reflected the dominance of freedom of contract in English contract law. The unusual feature was the wide scope of 'the parties', which usually included norms negotiated by employers and trade unions and that were incorporated into individual employment contracts from time to time. When statutory rights were introduced, such as wages regulation, unfair dismissal, or trade union discrimination protections, these were generally defined in the legislation as *ius cogens*. This flowed from the basic justification for labour law itself.[2] Employment contracts were marked by an inequality of bargaining power. 'Contracting out' of statutory rights undercut the very reason for imposing those rights on the employment contract in the first place. Individual waivers in labour law always had dubious legitimacy given these background conditions of structural inequality. The widespread erosion of fundamental rights by 'contracting out' could also undermine important public goods such as a decent labour market, or a culture of respect and equality in the workplace. In this way, *ius cogens* was inscribed into the very soul of labour law itself.

Like any broad brush portrait, this picture needs some adjustment to capture its subject with more precision. Some statutory norms are amenable to variation through individual

[1] O Kahn-Freund, 'Legal Framework' in A Flanders and HA Clegg (eds), *The System of Industrial Relations in Great Britain* (Oxford, Basil Blackwell, 1954) 42, 45.
[2] There is now a rich literature on waivers in employment law: see G Davidov, 'Non-waivability in Labour Law' (2020) 40 *Oxford Journal of Legal Studies* 482; and V Bogoeski, 'Nonwaivability of Labour Rights, Individual Waivers and the Emancipatory Function of Labour Law' (2023) 56 *Industrial LJ* 179.

agreement.[3] There are important debates around regulatory design, identifying procedural and substantive rules that can permit individual waivers while limiting the scope for abuse and coercion by the more powerful party.[4] And the vital regulatory role of collective agreements has always given *ius dispositivum* a stronger relevance to labour law than the statute book and mandatory individual rights might at first suggest. As will be discussed further below, the role of collective agreements in many labour law systems highlights the relativity of 'imperative-ness'. Where there are conflicting norms derived from multiple sources, this raises the issue of how to rank those norms. It is a well-established legal principle of 'favourability' in many European systems that accords primacy to the norm most favourable to the weaker party.[5]

This chapter will not engage with these important debates. Instead, it will consider a more basic issue which lurks in the foundation of British labour law itself. Generally speaking, imperative statutory norms supervene on an employment contract rooted in the agreement of the parties. This interface between statute and common law is absolutely fundamental.[6] Like tectonic plates, *ius dispositivum* and *ius cogens* are always in contact with each other, always in motion. From time to time, the seismic activity erupts into the English jurisprudence with spectacular legal effects.

In the next section (section II), I begin with three classic reflections on the distinction between default and imperative norms. As befits a workshop held at Brasenose College, Oxford, in which this chapter originated, these pieces all have a Brasenose connection. While there are some differences of emphasis and approach between them, they converge on an

[3] The most widely discussed instance is the individual opt-out from the 48-hour maximum weekly working hours' limit in the Working Time Regulations 1998, Reg 5. For broader discussion of its practical operation, see C Barnard, S Deakin, and R Hobbs, 'Opting Out of the 48-Hour Week: Employer Necessity or Individual Choice? An Empirical Study of the Operation of Article 18(1)(b) of the Working Time Directive in the UK' (2003) 32 *Industrial LJ* 223.
[4] A Bogg, 'The Regulation of Working Time in Europe' in Bogg, C Costello, and ACL Davies (eds), *Research Handbook on EU Labour Law* (Cheltenham, Edward Elgar, 2016) ch 12.
[5] M Freedland and N Kountouris, *The Legal Construction of Personal Work Relations* (Oxford, OUP, 2011) 186–87.
[6] A Bogg, 'Common Law and Statute in the Law of Employment' (2016) 69 *Current Legal Problems* 67.

important proposition. This is the primacy of a notion of public policy or *ordre public* over *ius dispositivum*. Broadly speaking, where legal norms have a 'public law' quality, they tend to be less amenable to individual waiver.

In the third section (section III below), I examine two regulatory problems of modern labour law. They are problems because they arise principally out of the tectonic friction between statute and common law, between *ius cogens* and *ius dispositivum*. These are the problems of contractual employment status and the problem of terms implied in law. Drawing upon the notion of *ordre public* developed in the previous section, I suggest some ways in which the law could limit *ius dispositivum* within appropriate boundaries. This is followed by a short conclusion and some reflections on rational and coherent legal development in light of the arguments in this chapter.

II. Imperative Norms and Default Norms in Labour Law: A Brasenose Meditation

It is fitting to begin our reflections on the role of default norms in labour law with three papers authored by scholars with a Brasenose College connection: Professor Otto Kahn-Freund, Professor Bernard Rudden, and Professor Mark Freedland. Kahn-Freund and Rudden were both holders of the prestigious Chair in Comparative Law at the University of Oxford, which is still associated with Brasenose College. Freedland arrived at Brasenose as a graduate student from University College London in 1966, before his election to a Junior Research Fellowship at St John's College in 1967. All three scholars were doyens of general comparative law, and across their distinguished careers Kahn-Freund and Freedland were also leading scholars of comparative labour law. It is surely no coincidence that the dimension of comparative law links these three foundational papers on default norms. The conceptual distinction between *ius*

cogens (imperative norms) and *ius dispositivum* (waivable norms) was most highly developed in the Civilian legal tradition. The default norm is *ius dispositivum*. It is unsurprising, therefore, that it should be the legal comparatists grappling with the translation of systematic Civilian legal categories into a suitable Common law idiom.

A. Kahn-Freund on Status and Contract

The earliest of these three papers was Kahn-Freund's justly celebrated article, 'A Note on Status and Contract in Labour Law'. It was published shortly after his election to the Chair of Comparative Law in 1964, and it was focused on imperative and default norms in labour law.[7] At first glance, the relevance of the article to default norms is not obvious. In it, Kahn-Freund examined the ambiguities and difficulties in applying Maine's famous distinction between 'status' and 'contract'[8] to the modern development of societies and legal cultures. According to Kahn-Freund, the definition of 'status' in Maine's original sense described a situation where 'the sum total of the powers and disabilities, the rights and obligations, which society confers or imposes upon individuals' is operative regardless of their volition.[9] By contrast, 'contract' described the situation where the parties' rights and obligations arose out of the parties' own volition, and were reflected in their agreement. Broadly speaking, European societies had witnessed the eclipse of 'status' relations and the rise of 'contract'. This no doubt reflected the broader development of a liberal legal and constitutional culture. According to Kahn-Freund, the formal juridical category of 'status' was very narrow in scope. It was restricted to special statuses such as 'lunacy' or 'aliens' or 'citizens' where the ascription of legal incidents was entirely non-volitional. The puzzle for Kahn-Freund was the tendency of modern writers to

[7] O Kahn-Freund, 'A Note on Status and Contract in Labour Law' (1967) 30 *Modern Law Review* 635.
[8] HS Maine, *Ancient Law* (London, John Murray, 1861) ch 5, esp 170 ('from status to contract').
[9] Kahn-Freund (n 7) 636.

describe a counter-movement from 'contract' back to 'status', particularly within the context of the welfare state and protective employment legislation. As he put it, in these contexts, 'the law operates upon an existing contractual relation, but it moulds this relation through mandatory norms which cannot be contracted out of to the detriment of the weaker party (employee, passenger, consumer in general).'[10] There was a tendency to treat this as a regression to 'status', a characterisation that was deliberately bound up with negative connotations.

Kahn-Freund rejected this status-based characterisation of mandatory norms in employment contracts. Employment contracts were volitional at their inception and termination. The fact that the content of these contractual agreements was shaped by statutory imperative norms to protect the economically weaker party did not justify their characterisation as status relations. Kahn-Freund traced this confusion of status and contract to a conceptual gap in the legal categories of the English Common law:

> 'The distinction between *jus cogens* and *jus dispositivum*, between 'imperative" and "optional" norms of the law of contract, is familiar to every practising lawyer in any Continental legal system. It fits naturally into the thinking of lawyers brought up and working in a world of legal thought in which the systematic regulation of the law of contract through general norms applicable to all contracts and special norms applicable to defined types has for almost two centuries been a commonplace.'[11]

This conceptual gap led some English lawyers to treat imperative norms in protective statutes as a status-based extra-contractual imposition on the employment contract. Such

[10] Ibid 640.
[11] Ibid 641.

imperative norms were not integrated into the contract itself, because contractual norms were treated by the courts as *ius dispositivum* and rooted in the intention of the parties. According to Kahn-Freund, the clarification of these distinctive conceptual categories would assist in the task of rational codification.[12] It would also facilitate a deeper integration of imperative norms into the structure of the employment contract itself, thereby also providing a justification for the law's shaping of the normative content of those contracts.

How can we make sense of this conceptual gap in English contract law? In retrospect, there were four main factors explaining it. The first factor was the relatively underdeveloped body of doctrinally focused taxonomy and systematisation in the English universities compared with their European counterparts.[13] By contrast, 'dogmatic' legal science was well-established in the Law Faculties of the ancient universities of Europe. The second factor was the relative absence of a body of legal thought in English law based on 'systematic regulation of the law of contract through general norms applicable to all contracts and special norms applicable to defined types.'[14] The legal 'atrophy' of the employment contract, resulting from the primacy of dispute resolution through collective bargaining procedure, meant that a body of special norms for employment contracts had not developed.[15] This hobbled the emergence of a rich taxonomy of categories, concepts, and legal distinctions. It also impeded the development of an autonomous body of special common law rules regulating personal employment contracts. The third factor was the general dominance of an 'oil' and 'water' approach to statute and common law in English legal thought.[16] The imperative norm was the domain of the legislator and statute law. The default or optional norm was the domain of the courts and the common law, which gave primacy to freedom of contract. This strong separation of statute and common

[12] Ibid 644.
[13] G Samuel, 'Can Doctrinal Legal Scholarship Be Defended?' (2022) 4 *Amicus Curiae* 43.
[14] Kahn-Freund (n 7) 644.
[15] O Kahn-Freund, 'Blackstone's Neglected Child: The Contract of Employment' (1977) 93 *LQR* 508, 524.
[16] See J Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 *LQR* 247.

law, which no doubt reflected broader constitutional ideas around separation of powers and parliamentary sovereignty, reinforced the exclusion of *ius cogens* from the law of contract.

The final factor was the relatively late development of many of the terms 'implied in law' in the employment contract, such as the implied term of mutual trust and confidence. Unlike express terms or terms implied in fact, such terms are not derived from the parties' intentions. They represent normative propositions, necessary legal incidents of a category of contracts, which reflect a judicial assessment of sound public policy such as promoting efficient cooperation or restricting party exploitation.[17] Terms implied in law represented the most powerful way in which the content and performance of the employment contract could be moulded by law other than through legislative intervention. This legal technique provided a more supple regulatory role than Kahn-Freund's rather blunt view that the common law of public policy 'in a few extreme cases, may destroy a contract, but which cannot mould it.'[18] Terms implied in law occupied an ambiguous place along the *ius cogens*/*ius dispositivum* axis. On the one hand, they are not derived from the parties' intentions but are grounded in independent normative arguments. On the other hand, contractual orthodoxy suggests they are highly vulnerable to exclusion by express agreement.

B. Rudden on *Ius Cogens* and *Ius Dispositivum*

Professor Rudden's article, 'Ius Cogens, Ius Dispositivum',[19] was specifically concerned with the conceptual distinction in the title. It was a fine piece of scholarship, steeped in legal learning and considering a wide range of material from Roman law, English legal history, and modern Civilian legal systems. Rudden's background in comparative law enabled him to provide an

[17] H Collins, 'Implied Terms in the Contract of Employment' in M Freedland, A Bogg and others (eds), *The Contract of Employment* (Oxford, OUP, 2016) ch 22 at 471 et seq.
[18] Kahn-Freund (n 7) 641.
[19] B Rudden, 'Ius Cogens, Ius Dispositivum' (1980) 11 *Cambrian L Rev* 87.

acute perspective on the nature of the distinction. In terms of its substantive legal focus, the article focused particularly on problems drawn from the law of contracts, wills, and property. This was because the conceptual distinction was of general relevance across a wide range of doctrinal areas. Interestingly, the article did not consider the application of these categories in labour law. It did however address the area of leaseholds and the protection of security of tenure in some detail, and the permissible role of contractual waiver. The parallels between the leasehold tenancy relation and the employment relation are striking, engaging similar regulatory challenges of protecting the security of the weaker party in a power relationship.[20] Where there are standing concerns about the validity of consent, or a strong public interest in the effective enforcement of imperative norms, the scope for *ius dispositivum* might be legitimately curtailed. This had direct relevance to *ius dispositivum* in the law of employment.

Like Kahn-Freund before him, Rudden's analysis linked the distinction between *ius cogens* and *ius dispositivum* to the constitutional division between legislated norms and other types of norm: 'The issue I wish to consider is that of conflict between norms of the legislator or the general law and those made by citizens, sometimes by unilateral juridical act but usually by contract.'[21] Rudden also defined the categories in terms of the scope for norms to be waived or set aside by the will of the parties: 'I shall adopt the convenient jargon of *ius cogens* to mean norms which cannot be set aside by the will of the citizen, and *ius dispositivum* to mean those which can.'[22] Again, this was similar to Kahn-Freund's account of the distinction, which was framed around the role of the intention of the parties.

Beyond these definitional preliminaries, the true originality of Rudden's account was based in his elucidation of three maxims that provided the legal context to the distinction. These

[20] See, for example, ACL Davies' comparative consideration of 'shams' in tenancies and employment in ACL Davies, 'Sensible Thinking About Sham Transactions: *Protectacoat Firthglow Ltd v Szilagyi* [2009] EWCA Civ 98; [2009] IRLR 365**'** (2009) 38 *Industrial LJ* 318.
[21] Rudden (n 19) 87. Note that Rudden adds 'or the general law' to 'norms of the legislator', which appears to suggest that some imperative norms may be based in the common law itself.
[22] Ibid 87.

maxims could sometimes pull in different directions. One effect of this underlying normative complexity was that the division between *ius cogens* and *ius dispositivum* was better understood as a 'spectrum' rather than a simple categorical distinction.[23] It reflected the balance between maxims which was ultimately contingent on the balance of political forces. According to Rudden, these three underling maxims, derived from the works of Roman and English jurists, were: (i) public law cannot be altered by the agreement of private citizens; (ii) a benefit is not forced on the unwilling; (iii) agreement conquers law.[24] Freedland suggests that the third maxim may be understood as an overarching general principle.[25] The primary tension in legal systems is between the first and second maxims. The adjustment between them varies over time, across legal systems, and is relative to the specific issue being regulated. The private law default in the law of contract is the second maxim. Nevertheless, there is no simple relation of lexical priority of the second over the first, establishing a neat hierarchy of norms. The balance between them is far messier and less mechanistic than that. It depends upon shifting evaluative judgements of *ordre public*. There has never been a naturalised province of imperative norms. The first maxim is most obviously concerned to vindicate imperative norms as *ius cogens*, whereas the other two maxims support a role for *ius dispositivum*. Given its importance as a foundation for imperative norms, what is the meaning of 'public' in this first maxim? It could describe the formal source of a legal norm, for example its basis in a statutory enactment. Alternatively, it could describe the basic legal taxonomy of a norm, such that it is properly described as a norm of public law rather than private law. This 'form' approach is overbroad. For example, it is demonstrably false that a statutory norm can never be altered by private agreement. In labour law specifically, there may be very good reasons why collective agreements should be permitted to vary statutory norms tailored to particular businesses or

[23] Ibid.
[24] Ibid 88–91.
[25] M Freedland, 'Ius Cogens, Ius Dispositivum, and the Law of Personal Work Contracts' in P Birks and A Pretto (eds), *Themes in Comparative Law: In Honour of Bernard Rudden* (OUP, 2002) 165, 168.

sectors. The taxonomical characterisation of a norm as one of public law is not straightforward either: many legal norms may be equally well situated within both private law and public law.[26] Rudden wisely rejects form-based approaches, of which source and taxonomy are examples. Instead, he favours a substantive test of 'public'. This substantive approach is based in a notion of public policy, captured in the Civilian idea that private agreement cannot derogate from legal norms concerned with *ordre public* and good morals.[27] As Rudden acknowledges, this category of imperative higher norm, understood in terms of *ordre public*, will vary in scope across different legal systems and different periods. It is also not easily translated into a common law formulation, where there is no exactly comparable doctrinal category. It would seem to capture those norms where there is a strong public interest in their universal application, perhaps because individual waiver threatens the dignity of the waiving party or where the erosion of the norm would undermine important public goods. While the flexibility of a substantive approach means that the maxim can accommodate a broad range of situations, this may also lead to a loss of predictive power. The clearest situation is where the statute itself prohibits contracting out of the statutory norm.[28] This is of fundamental importance in the law of employment, given the pivotal role of anti-contracting out provisions in the main employment statutes.[29]

If the first maxim supports the role of *ius cogens*, the second maxim both supports and demarcates the role of *ius dispositivum*. According to Rudden, it is an ancient principle that a beneficiary may renounce a benefit where it is conferred through a legal facility such as a gift, a will, or under a trust.[30] This basic default in favour of waiving benefits represents an anti-

[26] The classic account in this vein is D Oliver, *Common Values and the Public-Private Divide* (Cambridge, CUP, 1999).
[27] Rudden (n 19) 89 refers to a provision of the 19th century *Code Napoléon* (ie the French Civil Code) as an example of this substantive approach.
[28] Rudden (n 19) 89.
[29] See eg Employment Rights Act 1996, s 203(1).
[30] Rudden (n 19) 90.

paternalist approach to the legal subject. However, voluntary renunciation of benefits also has its legal limits. These legal limits represent the intersection of the first and second maxims, in that they turn upon the scope of public policy or *ordre public*. As Rudden explains, 'In the present context the difficulty stems from the fact that the best way to promote a public policy may be to confer rights on private citizens; and that policy may be thwarted if those rights can be discarded.'[31] He uses an example from the law of tenancies to demonstrate this limiting role of public policy. In relation to security of tenure for tenant farmers, non-waivable security of tenure was not only a 'protection of the weak against the strong', but supported the public interest in the stewardship and husbandry of the land.[32] We have already noted the significant affinities between security of tenure and security of employment. Many imperative norms in employment law are also concerned with the 'protection of the weak against the strong'. The constraints on waivability of statutory employment rights are also justified by important public goods. For example, mandatory rest and leave periods limit the health and safety risks posed by exhausted workers to co-workers and service users. More generally, a mandatory 'floor of rights' supports the public goods of a decent labour market and a stable protective framework for employment contracting. These public policy arguments are concerned with the integrity of the legal institutions within which employment contracting takes place, rather than the fairness of discrete individual waivers.

As already noted, Rudden examines the operation of *ius cogens* and *ius dispositivum* across the general areas of private law rather than in employment law. The most relevant of these general areas to employment law is contract law. Rudden's introduction to his analysis of general contract law draws a fundamental distinction between 'the operative fact of the parties' *agreement* and the legal consequences of *contract* ascribed thereto.'[33] How is this

[31] Ibid.
[32] Ibid.
[33] Ibid 92.

relevant to the *ius cogens*/*ius dispositivum* distinction? The ascription of legal consequences of 'contract' to an agreement seems to reflect the domain of *ius cogens*. For agreements to have contractual effect, this presupposes a general framework of norms within which those agreements must be embedded. The general doctrines concerned with enforceability, the construction and interpretation of terms, and the remedial consequences of breach, all presuppose an overarching structural framework of legal rules. There is only so far that *ius dispositivum* can go. At some point, the framework must depend upon imperative norms and a stable structure for contracting, otherwise that basic structural framework will be undermined. In terms of the maxims, we might say that the structural preconditions of contract law represent a public good or *ordre public*. Since we all benefit from this structural integrity, and depend upon its stability for making our own contractual bargains, it cannot be a matter of private waiver and *ius dispositivum*.

This is reflected in his discussion of some specific doctrinal areas of general contract law, but ones which are also relevant to the modern law of the employment contract. The first is described as 'choosing the category'. The issue is crystallised with great perspicuity by Rudden: 'Given that the parties intend their agreement to have legal consequences, the question arises as to whether they can select those consequences by reference to some known category; whether, in short, their will, or some higher norm, classifies the deal.'[34] According to Rudden, the classification function in legal systems should be understood as *ius cogens* rather than *ius dispositivum*, an approach that originated in the courts of equity but in due course came to dominate the common law approach.[35] In other words, the legal characterisation of a contract, and the legal incidents of that characterisation, were critical elements in the structural framework for contracting. While the conceptual distinction is clear enough, this could be

[34] Ibid 93.
[35] Ibid.

difficult to apply in practice. This is because the contract is based on the parties' own agreement, and the content of the agreement is the material upon which the legal characterisation is based. This meant that there were opportunities for stronger contracting parties to steer the characterisation through the imposition of terms in written documents. This fraught interaction between 'contract' and 'agreement' has formed the basis to the legal doctrine of sham terms and arrangements.[36] While Rudden's discussion was focused on the law of mortgages and demise, it also had evident importance to the law of employment. The legal characterisation of personal work contracts is foundational to the entire law of employment, given that inderogable statutory protections (and certain terms implied in law) were allocated only to specific types of personal work contract. If the determination of the type of personal work contract was for the parties themselves, as a form of *ius dispositivum*, the entire basis of statutory imperative norms was constructed on foundations of sand. As we shall see, Rudden's rich insights on legal classification as *ius cogens* was taken up by Professor Freedland and developed specifically within the context of employment contracts.

The second doctrinal area in contract law was 'setting aside some of the norms'. Rudden's treatment of this issue again takes this notion of the background legal framework as its focus. In developing this argument, he engaged with Lord Diplock's speech in *Photo Production Ltd v Securicor Transport Ltd*.[37] In this case, Lord Diplock affirmed the centrality of *ius dispositivum* in the law of contract, which flowed from the default norm of freedom of contract. He also emphasised the limits of this default norm in terms of the structural legal preconditions of a law of contract. So, while the primary obligations of a contract may be modified by express agreement, the basic constitutive features for the agreement to be capable of qualifying as a contract could not be waived. This is because such a waiver would negate

[36] On which, see A Bogg, 'Sham Self-Employment in the Supreme Court' (2012) 41 *Industrial LJ* 328.
[37] *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, esp 848–49.

the very legal characteristics necessary for it to function as a contract at all. Similarly, the contractual exclusion of all remedies for breach would subvert the basic structural framework necessary for contracting practices to be reliably enforced. In terms of the first and second maxims, such exclusions would undermine *ordre public*.[38] Using examples from French law and Roman law, Rudden suggests that *ordre public* may go further than defending the basic structure of contract law. For example, a contractual waiver that concerned the 'integrity of the human body' or liability for deceit might undermine the human dignity of a contracting party or undermine norms of fair dealing upon which a system of contract law depends.[39] Interestingly, while the surest way to restrict contracting out is through *statutory* prohibition, Rudden's discussion certainly leaves open the possibility that public limits on *ius dispositivum* may sometimes be internal to the general Civil or Common law. In Common law systems, this could be derived from contractual techniques under the general umbrella of 'public policy'.

C. Freedland on Ius Cogens, Ius Dispositivum, *and the Law of Personal Work Contracts*

The final piece in our Brasenose troika is a chapter by Professor Mark Freedland, published in a *festschrift* for Professor Rudden following his retirement from the Chair in Comparative Law.[40] By this time, Freedland was Professor of Employment Law at the University of Oxford and Fellow at St John's College. The chapter is an extended reflection on Rudden's *Cambrian Law Review* piece from 1980, developing those themes within the specific context of the law of personal work contracts. As one would expect from the scholar, this chapter was neither

[38] At the other end of the spectrum, *ordre public* may also explain why many legal systems are reluctant to enforce penalty clauses in contracts: see Rudden (n 19) 95.
[39] Ibid. Rudden doesn't frame his examples in these dignitarian terms, but in my view it provides an attractive rationalisation of the law's reluctance to treat such waivers as valid.
[40] Freedland (n 25).

hagiographic nor derivative of Rudden's earlier arguments. Indeed, the specificity of Freedland's focus on employment law provided a perceptive and original perspective on the *ius cogens*/*ius dispositivum* distinction. This reflected the distinctive shape of *ordre public* within the context of employment law as an autonomous legal discipline.

The significance of locating this discussion within the context of employment law is evident in the opening reflections on the definition of terms. The comparative context is as important as it was for Kahn-Freund and Rudden, but this is now identified by Freedland as based principally in European Community law. Freedland proposed the discourse of 'inderogability' as the most appropriate theoretical framework for analysing the distinction in employment law. This concept of 'inderogability' was first deployed in English labour law by Lord Wedderburn, drawing upon his own formidable grasp of comparative and European labour law.[41] 'Inderogability' was concerned with the hierarchy of sources of norms, such as norms derived from collective agreements, statutory norms, and the individual contract of employment. In many European countries, collective agreements performed a public regulatory role, and so were much more akin to social legislation than private contract. This public characterisation was very significant in light of Rudden's three maxims and the pivotal role of *ordre public*. These issues were particularly acute in relation to the implementation of European Directives in employment law. For example, the Working Time Directive[42] contained a mix of inderogable norms (the right to paid annual leave), derogable norms through individual variation (the right to a weekly working hours' limit of 48 hours), and a role for collective agreements (on daily and weekly rest periods).

[41] Lord Wedderburn, 'Inderogability, Collective Agreements, and Community Law' (1992) 21 *Industrial LJ* 245.
[42] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p 9.

British collective labour law had developed in a rather haphazard way, subject to a liberal voluntarist ideology of collective laissez-faire.[43] By contrast, European labour law had been informed by a much more systematic taxonomy of legal sources. Interestingly, Freedland departed from the tendency of both Kahn-Freund and Rudden to overlay the treatment of imperative norms with a constitutional gloss – both had been keen to convey that *ius cogens* was especially characteristic of the legislative domain. Instead, Freedland's definition was constitutionally agnostic: '[W]e should think of *ius cogens* as referring to legal norms which are not derogable by agreement between employers and workers, and of *ius dispositivum* as referring to legal norms which are derogable by agreement between employers and workers.'[44] This agnosticism was surely facilitated by the regulatory wildcard of the collective agreement, which simultaneously displayed both private and public characteristics. It was negotiated by private parties in circumstances of freedom of (collective) contract, but it was also a source of regulatory norms akin to social legislation. Even at the level of basic definitions, then, the specific focus on employment law opened up new intellectual vistas. Freedland was also astute to connect the fate of the particular distinction to the global fate of freedom of contract. The value of *ius dispositivum* was rooted in an ideology of freedom of contract, individual (between the worker and her employer) and collective (between the trade union and the employer). During political periods when 'deregulation' was a dominant economic policy, the frontiers of *ius cogens* were liable to constrict. At a deeper level, since general private law operated as the default legal regime for personal employment contracts, the underlying tilt of the legal system was to favour *ius dispositivum* over *ius cogens*. Consequently, 'deregulatory' employment statutes were moving very much with the legal grain of the law of contract. The effect of this legal default was to treat imperative norms in the personal employment contract as standing in

[43] For a critical account of this legal concept, see K Ewing, 'The State and Industrial Relations: "Collective Laissez-Faire" Revisited' (1998) 5 *Historical Studies in Industrial Relations* 1.
[44] Freedland (n 25) 166.

need of special justification, as exceptions to the legitimate contractual default of *ius dispositivum*.

Having formulated the general regulatory issue as one concerning 'inderogability', Freedland then examined some specific legal problems in the contemporary adjudication of the employment contract. As indicated by Rudden's three maxims, the critical matter in tracing the complex boundary between *ius cogens* and *ius dispositivum* was the scope of *ordre public.* There was no single naturalised boundary to this legal category. What was 'public' depended on political ideologies and legal culture. Let us focus on two of the specific legal issues identified by Freedland, significant already in 2002, but with a significance that would only magnify in importance in the decades that followed. The first issue was the legal characterisation of the employment contract, given its public function as an allocative basis for statutory employment rights. Fundamentally, there was a tension between 'contract as agreement' and the use of that 'agreement' to allocate imperative statutory rights. Contract was the domain of *ius dispositivum*; statute was the domain of *ius cogens*. The conundrum was whether statutory *ius cogens* could be constructed on a foundation that was contractual *ius dispositivum*. Freedland described this problem as 'derogation by classification'.[45] Most statutory employment rights were allocated to a general type of contract, such as a 'contract of employment'. Under 'derogation by classification', the parties might exclude imperative statutory rights by selecting a different contractual form through their private agreement. The extent to which the law should defer to the parties' agreement has been central to employment status litigation over the last fifty years.

The second issue was the extent to which fundamental rights, as specified in the European Convention on Human Rights, were waivable through contractual agreement. This brought the tension between private law and public law into sharp relief. Convention rights

[45] Ibid 173.

constituted ‘public law’ in the broad sense of that terminology, in that it represented a body of norms that were constitutional in nature. They also represented *ordre public*. Some of these norms, such as privacy or freedom of conscience, were of such importance that there was arguably a public interest in restricting their negation by powerful private actors. Matters could be even more complex where implied terms – a private law technique – might provide the legal vehicle for protecting human rights in the employment relation.[46] Decent work, which includes systematic protection of fundamental human rights in the labour market, is a strong candidate for a public good. The derogation from fundamental human rights, by private contract, could undermine decent work as a public good even where the weaker party was content to ‘sell’ her right through an agreed waiver free of coercion or manipulation.

For Freedland, both of these were areas where *ius dispositivum* could be seriously disruptive of *ordre public*. The integrity of the public interest could only be assured if imperative norms were protected through strong legal intervention. Unsurprisingly, perhaps, this was aligned with Kahn-Freund’s own normative position defended in 1967. Both scholars have been leading proponents of worker-protective labour law. The objective of labour law was to protect the weaker party – the worker – from the risk of contractual exploitation by the stronger party – the employer. This supported a strong normative preference for imperative norms. If ‘freedom of contract’ was the basic normative problem of the law of personal work contracts, the *ius dispositivum* technique was hardly likely to be an effective general legal solution.

[46] H Collins and V Mantouvalou, ‘Human Rights and the Contract of Employment’ in Freedland, Bogg and others (n 17) 188, 200–02, 205–08.

III. Default Norms and Imperative Norms in Employment Contracts: Two Regulatory Challenges

This section will examine two of the most fundamental regulatory challenges in modern labour law, in light of these classic reflections on *ius cogens/ius dispositivum*. The first regulatory challenge is the classification of personal work contracts. Most protective statutory rights are defined in legislation as *ius cogens*. The allocation of the statutory right depends upon the underlying characterisation of the contract. Depending on the statutory right, only 'employees' or 'workers' qualify for the statutory protection. Can an imperative statutory norm be transformed into a default norm in virtue of a private agreement to opt to provide labour through a commercial contract for services? Recent jurisprudential developments in English law reveal a greater conceptual grasp of the *ius cogens/ius dispositivum* distinction than the case law critiqued by Freedland in 2002. However, the contractual foundation of imperative statutory rights reveals an instability that is unlikely to be eliminated so long as 'agreement' continues to provide the basis to mandatory employment laws.[47] The second regulatory challenge is the entrenchment of terms implied in law, specifically mutual trust and confidence, from waiver. Can contractual norms ever be *ius cogens* in English contract law, given the dominance of freedom of contract? I argue that there is a strong case for regarding mutual trust and confidence as *ius cogens*, and I suggest three ways in which that might be achieved using existing legal techniques. These techniques do not go nearly far enough. There is a compelling case for a more expansive doctrine of public policy, developed within the specific domain of personal employment contracts.

[47] For an early and perceptive criticism of the role of 'agreement' in employment status, see B Hepple, 'Restructuring Employment Rights' (1986) 15 *Industrial LJ* 69.

A. The Classification of Personal Work Contracts

Both Rudden and Freedland discuss the legal classification of types of contract within the context of the *ius cogens*/*ius dispositivum* distinction. Freedland's discussion is especially instructive because it examines the most fundamental issue of employment law, the characterisation of the personal employment contract. It does so in a startlingly original way, using the idea of 'derogation by classification'.[48] The employment contract is based on a private agreement negotiated against a background common law regime of freedom of contract. It also has public significance as an institutional platform for the allocation of statutory employment rights. Many such rights are enacted by the legislator as inderogable. How far is the legal characterisation exercise sensitive to the parties' freedom of contract in negotiating their agreement? On the one hand, too much latitude to the parties' agreement, and there are risks that it can be manipulated by the employer to exclude employment status when the weaker party is in substantive need of the employment protection. This statutory protection depends upon contractual employment status, hence an inderogable statutory right rests upon a common law foundation. This could undermine parliamentary intention by allowing the stronger party to exclude work relations envisaged by the legislature as needing the relevant statutory protection from the statute's personal scope. This transforms rights that have been legislated as *ius cogens* into rights that are in practical reality *ius dispositivum*. The development and expansion of the 'sham' doctrine is testament to the regulatory challenge of 'derogation by classification'.[49] On the other hand, too little latitude to the agreement, there is a risk that genuine exercises of contractual autonomy would be obstructed where there is no justification for doing so. The unjustified encroachment on contractual liberty should certainly be avoided.

[48] Freedland (n 25)173–74.
[49] See, generally, Bogg (n 36).

Liberty is an important personal value, and the systemic protection of (genuine) contractual freedom is an important public good. The unjustified restriction of contractual liberty will also lead to inefficiencies and rigidities in the functioning of the labour market. This boundary between mandatory public categorisation of the contract and private agreement reflects the interaction between Rudden's first two maxims, and the vital role of *ordre public* in delineating imperative and derogable norms.

In retrospect, Freedland's analysis of this issue in 2002 was undertaken just as the judicial approach to employment status was entering a crucial transition point in the late 2000s. This began with the expansion of the sham doctrine, which originated in the now famous Employment Appeal Tribunal (EAT) judgment in *Consistent Group Ltd v Kalwak and Others*.[50] Although it was overruled by the Court of Appeal,[51] Sir Patrick Elias' judgment in the EAT has had an enduring influence on the law of employment status. The Court of Appeal judgment is now all but forgotten. He penned what must now be one of the most famous and frequently cited paragraphs in the history of the EAT:

> 'The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship.'[52]

Eventually, this overruled EAT judgment was the gateway to the one of the most important landmark judgments in employment law by the United Kingdom Supreme Court, *Autoclenz Ltd v Belcher*.[53] It is worth reflecting on Freedland's discussion of 'derogation by

[50] *Consistent Group Ltd v Kalwak* [2007] IRLR 560 ('*Kalwack* EAT').
[51] *Consistent Group Ltd v Kalwak* [2008] EWCA Civ 430, [2008] IRLR 505.
[52] *Kalwak* EAT (n 50) [57].
[53] *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] 4 All ER 745 ('*Autoclenz*').

classification' in its own historical context. It is especially interesting to reflect on how that discussion might be conducted today, in 2024.

Let us begin with Freedland's discussion. Many of the early employment status cases were concerned with unfair dismissal claims. As with most statutory employment rights, unfair dismissal was enacted as an inderogable right. As Freedland observed, this was codified in section 203(1) of the Employment Rights Act (ERA) 1996, which provided that any provision in an agreement is void 'in so far as it purports … to limit the operation of any provision of this Act.'[54] At this stage of legal development, the existence of section 203(1) was treated as providing definitive confirmation that the statutory right was *ius cogens*. Nearly twenty years after Freedland's chapter, the United Kingdom Supreme Court in *Uber BV and others v Aslam and others* would treat section 203(1) as *directly relevant* to the underlying categorisation of employment contracts.[55] This, however, is to get ahead of our story.

Freedland examined two early employment status cases. In *Massey v Crown Life Assurance Co*, an accountant had entered into a contract for services; following his dismissal, he claimed unfair dismissal which required him to assert that he worked as an employee under a contract of employment.[56] There was little sympathy for the claimant, whom Lord Denning clearly regarded as opportunistic. This was because the claimant was viewed as attempting to resile from a legal arrangement which had suited the claimant perfectly well in better times when he benefited from important tax advantages. It was explicitly couched as an issue of fairness by Lawton LJ, with the claimant speaking in two different voices so as to take the benefit of favourable tax advantages while avoiding the burden of loss of employment rights. Accordingly, he was to be treated as self-employed, reflecting the valid agreement that had been made in 1973. In terms of the *ius cogens*/*ius dispositivum* distinction, we could understand

[54] Freedland (n 25) 173.
[55] *Uber BV v Aslam* [2021] UKSC 5, [2021] 4 All ER 209 ('*Uber*').
[56] *Massey v Crown Life Assurance Co* [1978] ICR 590.

Massey as exemplifying Rudden's second maxim. It is a situation where the law should respect the free disavowal of a benefit, in this case the suite of protective rights allocated to a contract of employment. This was compelling if that disavowal occurred in circumstances where the claimant enjoyed the fiscal advantages of self-employment. In the subsequent case of *Young & Woods Ltd v West*, the Court of Appeal supported the employee characterisation.[57] Freedland noted the reservations of two of the judges, and the perceived unfairness of an employee wanting his cake (in the law of personal taxation) and eating it too (in employment law).[58] Sir David Cairns, by contrast, identified the public policy that favoured the effective enforcement of the employer's statutory duties, such as health and safety or fair treatment, and the risk of abuse where contracting out of those duties was effectively facilitated by a permissive regime of freedom of contract.[59]

Freedland was surely correct to suggest that 'public policy has a rather precarious grasp on the distinction between *ius cogens* and *ius dispositivum* in the field of employment law.'[60] The cases considered by Freedland appeared to indicate a very pronounced tilt in favour of *ius dispositivum* and freedom of contract for the parties. In fact, many of these early employment status cases were also in the orbit of a well-established public policy, in the guise of the illegality doctrine. In circumstance of illegality in the performance of a contract, public policy may prevent its enforcement by the parties.[61] Where the renegotiation of work contracts strayed into the fraudulent misrepresentation of the true legal relationship to the tax authorities, for example by presenting an employment arrangement as one of self-employment, public policy might bar its enforcement (including the statutory rights that depended on the contract). This public policy was alluded to by Lord Denning in *Massey*. In the later case of *Daymond v*

[57] *Young & Woods Ltd v West* [1980] IRLR 201.
[58] Freedland (n 25) 174.
[59] *Young & Woods Ltd v West* (n 57) 209.
[60] Freedland (n 25) 174.
[61] This general topic is covered in S Green and A Bogg (eds), *Illegality After Patel v Mirza* (Oxford, Hart Publishing, 2018).

Enterprise South Devon, Underhill J considered the illegality doctrine within the context of an individual opting to be paid through a company rather than through the payroll as an employee.[62] Since this arrangement deprived the Revenue of payments to which it was entitled, the contract was unenforceable because of the public policy of illegality.[63] In its effects, this public policy often operated harshly and punitively against workers, many of whom may had been lured into 'self-employment' because of economic necessity.[64] This public policy aspect to contract categorisation was finally restrained in *Enfield Technical Services Ltd v Payne* and *Grace v BF Components Ltd*, where the Court of Appeal restricted the operation of illegality to situations where the parties had been acting in bad faith by deliberately misrepresenting self-employment.[65] Since the boundary of genuine self-employment was often ambiguous, illegality was a draconian intervention unless there was clear culpability in setting up the contractual arrangements. In circumstances where there was a joint intention to misrepresent the true nature of the legal arrangement to a third party for gain, the treatment of the contract as a 'sham' would usually be a Pyrrhic victory for the claimant, because any legal claims would presumably be barred by the illegality doctrine anyway.[66]

The EAT judgment in *Kalwak* marked a significant turning point in the categorisation of employment contracts. The true significance of the *Kalwak* judgment was realised more fully in the landmark Supreme Court judgment in *Autoclenz Ltd v Belcher* in 2011.[67] In *Autoclenz*, the Supreme Court considered the correct approach to categorising employees and 'limb (b) workers' for national minimum wage and working time claims under the relevant legislation. The claimants had been presented with comprehensive written contracts which

[62] *Daymond v Enterprise South Devon* (2007) UKEAT/0005/07.
[63] See also *Salvesen v Simons* [1994] ICR 409.
[64] A Bogg, 'Illegality in Labour Law after Patel v Mirza: Retrenchment and Restraint', in Green and Bogg (n 61) 257, 258.
[65] *Enfield Technical Services Ltd v Payne; Grace v BF Components Ltd* [2008] EWCA Civ 393, [2008] ICR 1423.
[66] On this narrow sham doctrine as a joint intention to deceive third parties as to the true legal nature of the arrangement, see *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786.
[67] *Autoclenz* (n 53).

contained specific terms that negated employment status. Those written contracts were signed by the workers. These written terms included a substitution clause (reserving a wide contractual power for the putative worker to designate a substitute to provide work to the employer) and a 'no mutuality' clause (no reciprocal duties to provide ongoing work or to accept work). There was no suggestion that these contracts involved a *Snook* sham. The employer had presented the written contracts on a take-it-or-leave-it basis, seemingly with the object of avoiding statutory protections; the workers signed the contracts and appeared to be oblivious to the legal ramifications of those written terms.

Lord Clarke delivered the unanimous judgment of the Supreme Court. It emphasised the important differences between commercial contracts and employment contracts, which sometimes justified the development of different legal rules. These differences were based upon the structural inequality of bargaining power between employers and workers. This inequality meant that there was a greater risk that written employment contracts might not reflect the parties' true legal obligations. This was because the written documentation was usually drafted by the employer's lawyers with little scope for genuine bilateral negotiation of terms. There were also significant economic incentives for employers to deflect a finding of employment status, because they could then get the benefits of subordinated labour without the costs of statutory employment protections. Some legal rules might be regarded as the 'general part' of contract law applying to all contracts, such as consideration or intention to create legal relations. This divergence in legal rules was reflected in the legal treatment of signatures for example. In the law applicable to written commercial contracts, the signatures of the contracting parties would generally be conclusive evidence of the parties' agreement.[68] In employment law, by contrast, the task of categorisation needed to be sensitive to discrepancies between the written agreement and the 'true agreement'. As Lord Clarke put it:

[68] On the 'signature rule', see *L'Estrange v Graucob Ltd* [1934] 2 KB 394.

> 'So the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem.'[69]

Where there was no realistic expectation that a written term would be treated as valid by the parties, such as a worker exercising a substitution clause, it was open to tribunals to disregard that written clause. They might conclude that the 'true agreement' was instead based upon an obligation of personal performance.

Autoclenz has been treated as a 'landmark' case of historic significance.[70] It certainly shifted the relevant contractual paradigm by signaling a relatively autonomous body of common law principles constituting a law of the personal employment contract. In practical terms, it also liberalised the strict law on shams, and this liberalisation gave workers much greater scope to challenge sham terms in written documentation. Reflecting back on Freedland's innovative use of the *ius cogens*/*ius dispositivum* framework for contract categorisation, did *Autoclenz* give the courts a less precarious grasp of this distinction compared with the early judgments analysed by Freedland? The answer to this is less clear. While *Autoclenz* is rightly regarded as a progressive landmark, the statutory context of *ius cogens*, while not entirely absent, is not a prominent aspect in Lord Clarke's reasoning.

There are certainly some important allusions to statute in the judgment. For example, in explaining counsel's appropriate reliance on authorities from landlord and tenant and housing law, Lord Clarke said, 'Those cases were examples of the courts concluding that

[69] *Autoclenz* (n 53) [35].
[70] See J Adams-Prassl, '*Autoclenz v Belcher* (2011): Divining "The True Agreement Between the Parties"' in J Adams-Prassl, A Bogg, and ACL Davies (eds), *Landmark Cases in Labour Law* (Oxford, Hart Publishing, 2022) ch 13.

relevant contractual provisions were not effective to avoid a particular statutory result.[71] These cases included *Bankway Properties Ltd v Pensfold-Dunsford.*[72] A rent increase clause was inserted into a tenancy agreement in order to trigger a compulsory statutory ground for possession: it was 'real' in the sense that the landlord intended to rely on it. In holding that the clause was an impermissible attempt to contract out of the protective legislation, Arden LJ based her analysis primarily on statutory construction, and the court's role to give effect to the intention of Parliament in applying the statutory scheme.[73] She contrasted her own approach with that of Pill LJ who preferred 'an analysis of the terms of the contract'.[74] Pill LJ held the rent clause was not part of the true agreement because it was repugnant to the overarching commercial purpose, which was to enter into a statutorily protected assured tenancy. Arden LJ rightly emphasised the intention of Parliament, *not* the intention of the contracting parties, in identifying the legal nub of the issue. It is significant that Lord Clarke in *Autoclenz* referred approvingly to Arden LJ's judgment in *Bankway* as exemplifying an approach that relevant contractual provisions were not effective to avoid mandatory statutory protections. He did not refer to Pill LJ's contractual approach to the problem of statutory avoidance. In addition, Lord Clarke described his own approach as 'purposive'.[75] It was not immediately clear as to which 'purpose' Lord Clarke was referring to in his 'purposive' approach. It could have been referring to the commercial purpose of the contract or the protective statutory purpose of the right being claimed. In the immediate aftermath of *Autoclenz*, some commentators considered the potential range of 'purpose', and defended a preference for the statutory reading of 'purposive'.[76] Yet

[71] *Autoclenz* (n 53) [24].
[72] *Bankway Properties Ltd v Pensfold-Dunsford* [2001] EWCA Civ 528, [2001] WLR 1369.
[73] Ibid [49].
[74] Ibid [66].
[75] *Autoclenz* (n 53) [35].
[76] See Bogg (n 36) 341–44. In a note that preceded the Supreme Court judgment (and which was referred to by Lord Clarke at [28]), I argued in favour of a 'purposive' approach linked to the statutory context: A Bogg, 'Sham Self-Employment in the Court of Appeal' (2010) 126 *LQR* 166.

all of this remained to be clarified by later cases. The appearance of statute, as a marker for *ius cogens*, was still somewhat Delphic in 2011.

By contrast, the 'contract' dimension was a far more dominant feature of the judgment. Ultimately, it was still the *agreement* that was determinative in the categorisation exercise. Following *Autoclenz*, the main difference was that courts could now consider a broader range of evidence to determine the content of the 'true' contractual agreement as a basis for its categorisation. The tribunal was not restricted to the signed written documentation, as with a commercial contract. Yet the contractual agreement was still at the centre of things, the 'cornerstone', if you like. In terms of its contribution to legal taxonomy, the enduring importance of *Autoclenz* was internal to the common law of contract. The judgment recognised an important division between within the common law as it applied to commercial contracts and employment contracts. It was now possible to discern a relatively autonomous body of rules and principles that constituted a common law of the personal employment contract.[77]

From this internal common law perspective, however, freedom of contract was still the keystone of the English law of contract(s). Consequently, *Autoclenz* had the likely effect of entrenching a strong tilt in favour of *ius dispositivum*. This was not merely a quibble about taxonomical elegance. It was also fraught with the potential for regressive effects on imperative statutory norms. In some cases, like *Autoclenz* and *Bankway*, the balance between contractual and statutory emphases was unlikely to lead to a practical difference in outcome. But what of a situation where there was no obvious discrepancy between the written contracts and the working practices? *Autoclenz* was always an easy case because there was never a realistic expectation that the substitution clauses would be operative and valid. What of the situation where the employer included a written term inconsistent with employment status, regarded by it as entirely genuine, but included with the overriding object of avoiding the mandatory

[77] Bogg (n 36) 344–45.

statutory regime? The contractual validity of the term may even be sought by the employer as a way of putting the 'derogation by classification' beyond doubt. The Supreme Court had to confront this very dilemma a decade later in another landmark case, *Uber BV and others v Aslam and others*.[78] It was only after *Uber* that the Supreme Court displayed a much firmer grasp on the *ius cogens*/*ius dispositivum* distinction.

The facts in *Uber* revealed the elusiveness and instability of the 'purposive' approach of *Autoclenz*. This case was concerned with whether Uber drivers were 'workers' for the purpose of the National Minimum Wage Act 1998 (NMWA) and the Working Time Regulations 1998 (WTR). The legislative definition of 'worker' embraces both individuals who are employees at common law and a wider statutory category, usually called 'limb (b) workers'. This statutory category is sometimes described as an 'intermediate' category. This is because it is wider than 'employee' in including some self-employed workers within its scope. This is typically the case in situations where the worker undertakes to provide any personal work for the other party to the contract other than as a business undertaking to a customer. It is possible to be a 'limb (b) worker' without being an 'employee'. There may fiscal and other advantages to being 'self-employed' workers, but not employees, in benefiting from a favourable tax regime while still enjoying some (but not all) statutory protections. For example, statutory unfair dismissal protection is still restricted to employees. The intermediate 'limb (b) worker' sometimes represents a compromise zone where workers opt for a trade-off in terms of economic advantages (including contractual flexibility) versus legal entitlements

Crucially, this intermediate category still depends upon there being a 'contract' based upon an agreement between the parties. The drivers signed up to extensive written terms with Uber BV, a Dutch company which owns the app, stating that the acceptance of a trip by drivers created a contract between the driver and the passenger, to which no Uber entity was a party.

[78] *Uber* (n 55).

Separate written terms between the passenger, Uber BV and Uber London Ltd (ULL) asserted that ULL accepted bookings as disclosed agent for drivers. It was these two sets of written terms, purporting to constitute ULL and Uber BV as no more than intermediaries facilitating contracts between passengers and drivers, which counsel for Uber argued the courts below had been wrong to disregard. Interestingly, there appeared to be no direct written terms between ULL and the drivers. The Employment Tribunal had concluded that the true agreement was that drivers were providing services under a contract to ULL, and so they were working for Uber, rather than Uber providing its services to the drivers as a commercial agent.

In the Court of Appeal, Underhill LJ delivered a powerfully reasoned dissent where he argued that *Autoclenz* was not triggered on the facts of the case.[79] There was no overt discrepancy between the written contracts and the actual working practices. While this may have constituted a disadvantageous bargain for the drivers, the task of the tribunal was to construe the agreement as it was, not to rewrite the agreement to assist the weaker party. In the Supreme Court, Lord Leggatt upheld the tribunal's original decision on worker status. In so doing, he clarified the scope of the *Autoclenz* principle: 'Critical to understanding the *Autoclenz* case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation… In short, the primary question was one of statutory interpretation, not contractual interpretation.'[80] This entailed a purposive approach, in which the question is whether the worker protective legislation, construed *purposively*, was intended to apply to the relevant relationship, viewed *realistically*.[81] The relevant purpose was the worker-protective purpose of the statutory rights being claimed. Where the employment relationship displayed

[79] *Uber BV v Aslam* [2018] EWCA Civ 2748, [2019] 3 All ER 489.
[80] *Uber* (n 55) [69].
[81] For an argument defending a purposive and realistic approach, based on statutory construction, see A Bogg and M Ford, 'Between Statute and Contract: Who is a Worker?' (2019) 135 *LQR* 347.

features of exploitation-vulnerability, such as economic dependence or subordination/control, this favoured applying the statutory definition of worker in an inclusive way.[82]

It followed from this that elevating the importance of the contractual documentation in the employment status enquiry risked subverting the protective statutory purpose:

> 'The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterized in the written documents determine, even prima facie, whether or not the other party is to be classified as a worker'.[83]

Lord Leggatt also linked this to the statutory restrictions on 'contracting out' of statutory employment rights which is a common feature of employment statutes conferring inderogable rights.

The relevant provision under the Employment Rights Act 1996, section 203(1), provides that:

> *'*Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports –
>
> (a) to exclude or limit the operation of any provision of this Act, or
>
> (b) to preclude a person from bringing any proceedings under this Act before an employment tribunal.'

[82] It does *not* follow from this that the application of employment status definitions should be strained to exclude 'high status' professional workers such as lawyers or doctors, who would otherwise satisfy the relevant criteria. Factors indicating exploitation-vulnerability, such as economic dependence or direct/indirect control, should only operate in borderline cases and in an inclusive way. In most cases, the relevant legal criteria can simply be applied in accordance with their ordinary meaning.

[83] *Uber* (n 55) [76].

According to Lord Leggatt, this provision had a broad scope in rendering void provisions setting out 'agreed' legal classifications or even agreed 'facts' about their relationship which prevented workers claiming their statutory rights.[84] This approach acknowledged the imaginative range of ways in which drafting could be used as a subtle form of 'contracting out', particularly where 'armies of lawyers' were alive to the futility of more obvious forms of contractual evasion. Although there was no specific reference to section 203(1) in *Autoclenz*, Lord Leggatt indicated that it provided further legal support for the reasoning and outcome in that case.[85]

The explicit connection to section 203(1) is the decisive move in *Uber*'s statutory interpretation approach. Where inderogable statutory rights depend upon a contractual foundation, section 203(1) now tilts the law back in favour of statutory *ius cogens* rather than contractual *ius dispositvum*. Is *Uber* simply a rationalisation of *Autoclenz*, or is it an extension of it? Lord Leggatt's judgment certainly reads as a clarification of *Autoclenz* and its animating principles, which removed the genuine ambiguity reflected in the divergence in the Court of Appeal in *Uber*. In certain respects, however, *Uber* does seem like a genuine extension. The overriding emphasis in *Autoclenz* was on identifying the 'true agreement'. This is still very much located in the contractual land of *ius dispositivum*. Yet in *Uber*, the apparent absence of any direct contract between ULL and the drivers was passed over lightly by Lord Leggatt in treating ULL as the employer of the drivers. In *Autoclenz*, Lord Clarke suggested it was uncontroversial that

> 'If a contractual right, as for example a right to substitute, exists, it does not matter that it is not used. It does not follow from the fact that a term is not enforced that such a term is not part of the agreement'.[86]

[84] Ibid [80].
[85] Ibid [86] with reference to *Autoclenz* (n 53).
[86] *Autoclenz* (n 53) [19].

The emphasis on the 'realistic' application of statutory norms in *Uber* may now mean that evidence of non-exercise could be more relevant to negating the written term: it is not evidentially inert. Finally, the *Uber* approach may be engaged even where a term does form part of the 'true agreement' where it is deliberately inserted with the 'object' of avoiding statutory protections. This scenario would demonstrate clear blue water between *Autoclenz* and *Uber*, although the point has not yet arisen for consideration.

After *Uber*, we can certainly say that the courts have a less precarious grip on the *ius cogens*/*ius dispositivum* distinction than when Freedland considered it in 2002. To an ineradicable extent, however, there will always be some instability as a result of the importance of *agreement* to contractual employment status. Although this is somewhat speculative, I think this instability may be exacerbated by the presence of intermediate categories which imply a mode of selective contractual choice for workers themselves. In the recent case of *Ter-Berg v Simply Smile Manor House Ltd*, for example, the EAT considered the status of *Autoclenz* after *Uber*.[87] This decision may be viewed as a reassertion of the primacy of contract (even if not the primacy of the *written* contract). The case considered the correct treatment of written documentation by the tribunal in determining employment status. After *Uber*, should the written terms in an agreement now be treated as having attenuated significance? Should they be disregarded, even? Or did they remain central to the characterisation exercise? The EAT offered a conservative reading of *Uber*. According to Auerbach J, *Uber* ought to be understood and applied as a clarification of *Autoclenz* rather than a displacement of it. Contract was still a central element of employment status, and the written terms could not simply be disregarded. Where there was doubt that the written agreement reflected the true agreement, it was legitimate for the tribunal to consider the wider context to the relationship (including the reality

[87] *Ter-Berg v Simply Smile Manor House Ltd* [2023] EAT 2.

of working practices). But this approach was still decidedly contractual in focusing on the true agreement.

Of course, the statutory context meant that some relevant rules of commercial contract law, such as the signature rule or the parol evidence rule, needed to be modified for employment contracts. This much was clear from *Autoclenz* itself. It did not follow from that contract was irrelevant to the employment status enquiry, nor that the written terms could simply be overlooked in a roving examination of the whole context. It may even be legitimate in appropriate cases for a tribunal to have regard to the designated label in a written agreement.[88] Significantly, Auerbach J stated that the *Autoclenz*/*Uber* approach did

> 'not mean that it is no longer possible for parties genuinely and in an informed way to agree that they want to form a working relationship which is neither one of employee nor of worker, once consequence of which will be that various statutory employment protection rights will not apply to the individual who will be doing the work. Nor does it mean that a written agreement might not in a given case truly reflect everything that the parties have in fact agreed.'[89]

The continuing presence of contract (and party agreement) probably means that the influence of *ius dispositivum* is liable to instability. It will likely continue to fluctuate in importance, sensitive to the facts in particular cases, the prevailing judicial culture, its view of freedom of contract and the proper approach to interpretation of statutes, and so forth. In the end, the full entrenchment of *ius cogens* probably necessitates detaching statutory rights from underlying contractual categories entirely.

[88] Ibid [66].
[89] Ibid [45].

B. The Implied Term of Mutual Trust and Confidence

One of the central issues in the law of the employment contract is whether the implied term of mutual trust and confidence is excludable by the parties through express agreement. As a mandatory term implied in law, and hence a necessary legal incident of all employment contracts, should it be regarded as *ius cogens* or *ius dispositivum*? The resolution of this conundrum depends upon the scope of Rudden's first maxim, that public law (or *ordre public*) cannot be altered by the agreement of private citizens. Given the tenacity of freedom of contract within the English law of contract, it is difficult to identify common law techniques to fortify implied terms against exclusion. In constitutional terms, this 'public law' dimension of *ius cogens* is still strongly determined by proximity to an inderogable statutory employment right. It is still an orthodox and fundamental proposition of English law that implied terms (even if not the background structural rules facilitating contractual agreements) must give way to express terms. As we have seen, *Autoclenz* indicated that some common law rules applying to general commercial contracts could be modified or even dispensed with for employment contracts. This is because employment contracts are marked by a structural inequality between employers and workers. In *Autoclenz*, for example, the 'signature rule' and the 'parol evidence rule' were displaced. As yet, this *Autoclenz* gateway into a distinct law of personal employment contracts has not yet been crossed within the context of derogation of implied terms. In the leading authority on mutual trust and confidence, the House of Lords decision in *Malik v BCCI*, Lord Steyn observed that '[s]uch implied terms operate as default rules. The parties are free to exclude or modify them'.[90] This still represents the orthodox position on derogation and the implied term in English law.

[90] *Malik and Mahmud v Bank of Credit and Commerce International (BCCI) SA* [1998] AC 20, 45 ('*Malik*').

As we shall see, many specific applications of the implied term of mutual trust and confidence instantiate public law values to restrain abuses of power.[91] In basic normative terms, Lord Leggatt's articulation of the regulatory predicament in *Uber* is identical to the regulatory predicament here. The 'efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterized in the written documents determine' whether that protection applied at all.[92] By allowing the stronger party to exclude those common law norms targeted specifically at preventing abuse of power in an unequal relationship, public institutions are effectively creating the conditions for exploitation.[93] Contracting out subverts the very justification for the common law protective norm.

The implied term of mutual trust and confidence is now widely recognised as an integral element of the common law of employment contracts. It has been described by one of our leading appellate employment law judges of recent times as 'certainly amongst the most important developments in the law of the employment contract in the last 50 years.'[94] The context for its initial emergence was the statutory law on constructive dismissal in the unfair dismissal legislation.[95] As with the developing law on employment status, then, the complex interactions between statute and common law has been central to the evolution of the implied term. The statutory concept of constructive dismissal was defined as termination of the contract by the employee 'in circumstances in which he is entitled to terminate it by reason of the

[91] On the public law roots of mutual trust and confidence, see D Brodie, 'Beyond Exchange: The New Contract of Employment' (1998) 27 *Industrial LJ* 79. For a public law taxonomy for the case law on mutual trust and confidence, see A Bogg, '*Bournemouth University HEC v Buckland*: Re-establishing Orthodoxy at the Expense of Coherence?' (2010) 39 *Industrial LJ* 408. This taxonomy rationalises the case law into (i) avoiding dignitary injuries, (ii) ensuring rationality in exercise of contractual powers, and (iii) promoting the rule of law (including the doctrine of legitimate expectations).
[92] *Uber* (n 55) [76]. Cf text to n 83 above.
[93] On the role of public institutions in creating or maintaining 'structural injustice', see V Mantouvalou, *Structural Injustice and Workers' Rights* (Oxford, OUP, 2023).
[94] P Elias, 'Changes and Challenges to the Contract of Employment' (2018) 38 *OJLS* 869, 887.
[95] See A Bogg and M Freedland, 'The Wrongful Termination of the Contract of Employment' in Freedland, Bogg and others (n 17) 537, 545–47.

employer's conduct'.[96] This needed a coherent and stable judicial elaboration of the employee's 'entitlement to terminate'. Eventually, the courts adopted a contractual test of repudiatory breach for the entitlement.[97] This triggered 'a process of formulation of implied terms, which were in effect back-formations, in the sense that they were terms the breach of which would amount to expulsive or repudiatory conduct sufficient to constitute constructive dismissal by the employer'.[98] The elaboration of these behavioural standards, which often involved dignitary injuries against the employee, came to be rationalised at common law through the implied term. In practical terms, it involved bad contract-repudiating behaviour by employers and managers, such that the prospect of continued employment was intolerable for the employee. The encounter with statute was critical to the genesis and development of the term, especially in these early cases addressing behavioural standards.

The leading appellate case on the implied term is still the House of Lords decision in *Malik v BCCI*.[99] This was a pure common law claim rather than arising as a subsidiary aspect of a statutory claim. This decision confirmed the existence of the implied term, although it was already deeply embedded in the law of constructive dismissal. In *Malik*, the House of Lords concluded that the implied term could be engaged where the employer (in this case a collapsed bank) was operating a corrupt and dishonest business. The employees sought stigma damages, alleging that the taint of association with the bank's disreputable behaviour had damaged their future employability. Lord Nicholls referred approvingly to the development of the implied term as a fact of modern employment law. It reflected the fact that '[e]mployment, and job prospects, are matters of vital concern to most people… An employment contract creates a close personal relationship, where there is often a disparity of power between the parties.

[96] Originally the Trade Union and Labour Relations Act 1974, sch 1, para 5(2)(c), now Employment Rights Act 1996, s 95(1)(c).
[97] *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761 (CA).
[98] M Freedland, *The Personal Employment Contract* (Oxford, OUP, 2003) 155.
[99] *Malik* (n 90).

Frequently the employee is vulnerable'.[100] This contributed to the shift in judicial perspective on the unequal nature of the employment contract, and the role of mutual trust and confidence in controlling abuse of power. Indeed, *Malik* may be regarded as facilitating the later recognition of a distinctive common law approach to employment contracts in *Autoclenz.*

If anything, the public law dimension of implied terms in employment contracts has intensified since *Malik.* In *Braganza v BP Shipping Ltd and Others*, the Supreme Court drew explicitly on doctrinal analogies with public law doctrines in scrutinising the exercise of a contractual discretionary power in the context of employment.[101] *Braganza* was concerned with the judicial review of a determination (under a relevant clause in the contract) of a factual determination by the employer that the employee, when he disappeared while employed on an oil tanker, had in fact committed suicide. The effect of this determination was to deprive his widow of death benefits under the contract of employment. The question for the Court was whether the decision-maker was entitled to form its opinion, that the employee committed suicide, on the basis of the evidence before it. A majority of the Supreme Court concluded that it was not so entitled because it had failed to take into account a relevant consideration – the inherent improbability of suicide – which could only be displaced by cogent evidence. There was no such cogent evidence on the facts in this case.

In the *Braganza* case, mutual trust and confidence was not centrally in issue, the question being whether the employer had acted 'reasonably' in a contractual sense in withholding death in service benefits from the widow. The majority judgments considered a broad range of authorities on judicial review of contractual discretions, including commercial contracts. Nevertheless, both Lady Hale and Lord Hodge made reference to mutual trust and confidence in their judgments. This should not surprise us, given its established significance

[100] Ibid 37.
[101] *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] WLR 1661 ('*Braganza*').

as an overarching duty and constraint on abuse of discretionary powers in employment contracts. For Lady Hale, the specific contractual context in *Braganza* was important:

> '[T]he party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given.'[102]

Lady Hale concluded that both limbs of the *Wednesbury* test from English administrative law applied.[103] This first limb, which is process-based, meant that the decision-maker needed to take into account relevant considerations and disregard irrelevant considerations in the decision-making process. The second limb, which is outcome-based, meant that the decision could be impugned where it was so outrageous that no reasonable decision-maker could have reached it. In *Braganza*, it was the process-based limb, and the failure to take into account a relevant consideration, that compromised the exercise of discretion. While this was presented as a general proposition of contract law, its specific formulation in employment contracts was through mutual trust and confidence:

> 'Any decision-making function entrusted to the employer has to be exercised in accordance with the implied obligation of trust and confidence. This must be borne in

[102] Ibid [18].
[103] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

mind in considering how the contractual decision-maker should approach the question of whether a person has committed suicide.'[104]

Lord Hodge approached the matter in a similar way to Lady Hale. His judgment had particularly strong echoes of *Autoclenz* in emphasising that discretions in employment contracts might warrant more intensive scrutiny than ordinary commercial contracts because those contracts were personal and relational.[105] He also framed it as a matter of trust and confidence in the employment sphere, with the content of this implied term shaped by public law norms.[106]

Where a legal norm exists to protect a weaker party from abuse by a stronger party, as in *Braganza* itself, *ius dispositivum* effectively permits the stronger party to contract out of its public law restraints. This creates the conditions for exploitation and abuse of power. This may be part of the reason underlying Rudden's first maxim, that public law cannot be altered by the agreement of private citizens. It may also explain the hostility of some leading academic commentators to treating mutual trust and confidence as a derogable norm. We will first consider this united front against *ius dispositivum* in the work of Professors Douglas Brodie and Hugh Collins. Then, the chapter closes by reflecting on the utility of existing legal techniques for underpinning mutual trust and confidence as an inderogable norm.

Brodie's most recent consideration of the scope for contracting out of mutual trust and confidence are set out in his consideration of *Malik* as a landmark case.[107] Brodie notes the relative absence of case law directly on the express exclusion of mutual trust and confidence, which no doubt reflects the fact that very few employers are likely to insert an express exclusion of mutual trust and confidence into a written contract. The relevant case law has

[104] *Braganza* (n 101) [32]
[105] Ibid [54]–[55].
[106] Ibid [53]–[54].
[107] D Brodie, '*Malik v BCCI*: The Impact of Good Faith' in Adams-Prassl, Bogg and Davies (n 70) 245, 261–64.

instead addressed the thorny issue of overlap between express terms and implied terms regulating similar subject-matter, such as procedural rights in disciplinary investigations.[108] The orthodox contractual position is that in a situation of overlap, the express term should have primacy over the implied term. But what of the hypothetical situation where an employment contract purported to reserve an absolute entitlement to an employer to suspend an employee where there were allegations of sexual abuse, immunising that power from review even when exercised capriciously?[109] Brodie regards such an exclusion as intolerable. He suggests that the exclusion of fundamental procedural protections at the core of mutual trust and confidence should be void on the grounds of common law public policy. This development of public policy would depend upon the continuing development of the *Autoclenz* bifurcation between commercial contracts and employment contracts. This is because the courts are more favourably disposed to respecting freedom of contract where commercial parties negotiate an absolute entitlement to determine certain matters under their contract.[110] It is also interesting to note that the proposed restrictions on contractual exclusion are based on public policy. This has strong affinities with Rudden's first maxim on the priority of 'public law' over private agreement, as a basis for restricting *ius dispositivum*. The notion of an inderogable core of fundamental procedural guarantees within mutual trust and confidence is an attractive development of the *Autoclenz* principle. It would nevertheless be a bold step for a court to take given the existing state of jurisprudence, and it would be something more than an incremental step in common law development.

Hugh Collins has offered a nuanced exploration of the desirability of restrictions on contracting out of implied terms, while also acknowledging the doctrinal challenges given

[108] See eg *Burn v Alder Hey* [2021] EWHC 1674 (QB), where the court held that the implied term could not be used to extend procedural entitlements that had been specified with precision in an express term. Discussed by Brodie (n 107) 262.
[109] Brodie developed this hypothetical based around the facts in *Gogay v Hertfordshire CC* [2000] IRLR 703 (CA).
[110] Brodie (n 107), 262.

freedom of contract and the orthodox primacy of express terms.[111] Collins notes that some implied terms might go to the fundamental character of the employment contract, so that exclusion may lead to a different classification.[112] This raises the possibility of using the *Autoclenz* sham doctrine to challenge the exclusion in circumstances where it was designed to exclude employment status.[113] More broadly, Collins proposed an interesting middle way between *ius cogens* and *ius dispositivum*. For Collins, it ought to be possible to derogate from or modify specific particularised instances of mutual trust and confidence, while prohibiting complete derogation from the general abstract duty. This distinction between the general overarching duty and specific sub-duties is attractive. Interestingly, Lord Steyn in *Malik* described the implied term of mutual trust and confidence as developing out of the general duty of cooperation in contract law.[114] It is difficult to conceive of a functioning institution of contract law that is predicated upon *non*-cooperation, at least within the general category of relational contract. This duty of cooperation is therefore fundamental to the basic institution of relational contract. We might even regard it as part of the basic structure of contract law itself, rather than a feature of specific contracts. The restriction of wholesale exclusion of an element of the structure that makes contracting possible in the first place is exactly the kind of thing that should be encompassed by *ordre public* and imperative norms. Otherwise, agreement could destroy the very conditions that make it possible to contract in the first place.

In focusing on public policy or *ordre public*, these academic approaches are certainly engaged in the right sort of enquiry. I will suggest three arguments developing this idea that public policy may entrench the implied term as an imperative norm *ius cogens* and thereby limit contracting out. These arguments link to Rudden's first maxim. The first scenario draws upon common law public policy, and the illegality doctrine. The other two scenarios suggest

[111] Collins (n 17) 471, 483–90.
[112] Ibid 484.
[113] Ibid.
[114] *Malik* (n 90) 45.

ways in which the statutory restriction on contracting out in section 203(1) ERA 1996 might entrench mutual trust and confidence. This is because of the connections between the implied term and the enforcement of statutory employment rights, building on the critical role of section 203(1) in *Uber*.

Starting with common law public policy, *Malik* was concerned with the employer's dishonest and corrupt conduct of its business. On the assumed facts, the House of Lords concluded that this was a breach of mutual trust and confidence. Dishonesty and corruption represent very serious forms of wrongdoing. They are particularly insidious because their perpetration is usually concealed and clandestine. Corruption by its nature has a corrosive and effect on the structures and practices of contractual exchange. It rots them from the inside. The stability of a social practice of like contracting depends upon reliable expectations of trust and honest dealing. This is imperative in large organisations and professions, such as banking and legal services, that play an integral role in the operation of these structures. These wrongs are often treated as public wrongs. It is perhaps for this reason that they have been treated as within the scope of the illegality doctrine. The illegality doctrine is a well-established public policy category. It prevents the enforcement of private law rights (including contractual rights) in circumstances where the claim is tainted by illegality.[115] The relevant turpitude in illegality extends beyond crimes to include 'quasi-criminal' acts that have a public character. This is set out in Lord Sumption's judgment in *Les Laboratoires Servier v Apotex Inc*:

> 'The ex turpi causa principle is concerned with claims founded on acts which are contrary to the public law of the state and engage the public interest. The paradigm case is…a criminal act. In addition, it is concerned with a limited category of acts which, while not necessarily criminal, can conveniently be described as "quasi-criminal" because they

[115] *Patel v Mirza* [2016] UKSC 42, [2017] AC 467. See already the text to and following n 61 above.

> engage the public interest in the same way…this additional category of non-criminal acts giving rise to the defence includes cases of dishonesty or corruption'[116]

This has obvious relevance to any attempts by an employer to limit or exclude mutual trust and confidence where this relates to 'quasi-criminal' behaviour, such as that in *Malik* itself. Where a *Malik*-type employer sought to rely upon a contractual exclusion of mutual trust and confidence, the exclusion would be contrary to the public interest. The underlying rationale of the public policy of illegality is the 'integrity of the legal system' and the importance of the law avoiding 'disharmony' and 'inconsistency'.[117] 'Quasi-criminal' acts, especially in the sphere of contract law, engage these normative concerns directly. Corruption and dishonesty are an attack on the foundations of the legal institution of contracting. Where the dishonest/corrupt wrongdoer attempts to use the legal facility of contract to insulate itself from liability by excluding trust and confidence, permitting this would be a paradigm instance where the law is facilitating a self-defeating stipulation. It is a particularly strong manifestation of the maxim that public law cannot be altered by the agreement of private citizens. In this context, it is rooted in the common law of public policy rather than statute.

By contrast, the final two examples are focused on examining the scope (and limits) of section 203(1) ERA 1996. As we have seen, this statutory provision was central to Lord Leggatt's reasoning in *Uber*. According to Lord Leggatt, the statutory prohibition of any provision that purports 'to exclude or limit the operation of any provision of this Act' extends to the situation where the term has

[116] *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55, [2015] AC 430 at [25].
[117] *Patel v Mirza* (n 115) [100].

> 'as its object excluding or limiting the operation of the legislation. It is just as inimical to the aims of the legislation to allow its protection to be limited or excluded indirectly by the terms of a contract as it is to allow that to be done in direct terms.'[118]

This extension to 'indirect' exclusions was designed to limit the circumvention of imperative statutory rights by the manipulation of the underlying contractual form.

The first scenario involves an attempt by the employer at the complete exclusion of mutual trust and confidence. The implied term may fairly be described as fundamental to the identity of the employment contract. In this respect, it is akin to the obligation of personal performance, the successful exclusion of which may lead to the contract being treated as one of independent self-employment. As Lord Leggatt emphasised, section 203(1) must guard against 'indirect' exclusion of statutory employment rights. Otherwise, the statutory prohibition would risk becoming a dead letter because most well-advised employers would be savvy enough to avoid obvious exclusions or limitations couched in 'direct' terms. There is little evidence in practice of the total contractual exclusion of the implied term. If a court did encounter this extreme scenario, the immediate question would be: why, on an objective consideration of the facts, would an employer seek to exclude an implied term that goes to the fundamental identity of the contract? The inference that the 'object' of this contractual exclusion was to 'exclude or limit' the operation of the legislation may be irresistible. It would appear to be just another variant of the *Autoclenz* problem, where contractual stratagems mutate like a virus in response to adjustments by the legal system. This would leave some space for discrete qualifications to the overarching term by express agreement, focused on specific elements, while precluding its comprehensive exclusion by employers.[119]

[118] *Uber* (n 55) [80].
[119] On this compromise position, permitting targeted modifications of the content of mutual trust and confidence while barring blanket exclusion, see Collins (n 17) 489.

The second scenario is focused on the symbiosis between the implied term of mutual trust and confidence and the statutory law of constructive dismissal. As we have seen, the elaboration of mutual trust and confidence flowed from the judicial concern to elaborate a contractual test for when an employee was 'entitled' to terminate the employment contract by reason of the employer's conduct. This led to an intensive focus on elaborating employer behavioural standards through the medium of the implied term.[120] Where this 'behavioural standard' dimension of mutual trust and confidence is excluded through the contract, the effect would be to curtail the operation of the unfair dismissal legislation very significantly. This is because it limits the scope for a constructive dismissal claim in circumstances of intolerable behaviour by the employer. The prospect of an employer limiting its statutory liabilities for intolerable behaviour that undermines the dignity and self-respect of an employee is likely to be highly unattractive to a court. The court may well take the view that the exclusion of contractual liability for dignitarian injury is an attempt to limit the operation of the statutory right not to be unfairly dismissed by removing constructive dismissal from its scope. This exclusion would also engage section 203(1) ERA 1996 as another form of 'indirect' exclusion.

Given the 'hybridity' of protective employment rights,[121] with statutory entitlements often intersecting with common law contractual categories, *Uber* has given fresh impetus to section 203(1) ERA 1996 as a powerful tool for restricting the illegitimate expansion of *ius dispositivum*. Ultimately, the reach of this statutory provision depends upon the proximity of the contractual term to an inderogable statutory right. In 'pure' common law cases like *Braganza*, where no statutory entitlement is even remotely at issue, section 203(1) can be of no assistance. These cases will depend upon the incremental development of a distinct common

[120] Bogg (n 91) 414–15.
[121] The 'hybridity' description was provided by Sedley LJ in in *Bournemouth University Higher Education Corp v Buckland* [2010] EWCA Civ 121, [2011] QB 323 at [19].

law of personal employment contracts, as indicated in *Autoclenz*. This is most likely to arise in a specifically tailored category of public policy for employment contracts. The starting point for those reflections is surely to be found in the Brasenose College 'classics' on the *ius cogens/ius dispositivum* distinction.[122] In particular, where public law standards are imposed on the employment contract to protect the weaker party from abuse of power, the exclusion of those common law restraints by the stronger party should be regarded as contrary to public policy. This provides an exact common law parallel to Lord Leggatt's concerns in *Uber* about the stronger party designing the contract so as to exclude statutory employment rights. Public law norms ought to have primacy over private contractual agreement, regardless of whether their source is statute or common law. This position is compelling for employment contracts, which often involve a close personal relationship, inequality of bargaining power, and conflicting interests, with all the attendant risks of abuse and exploitation that these features bring in their wake.

IV. Conclusion: Section 203(1) ERA 1996 as the Philosopher's Stone?

In certain respects, section 203(1) ERA 1996 has led a rather obscure and diffident life in the history of British labour law. There are some scattered appearances in the case law and academic literature. The primary function has been to ensure access to a public forum, the employment tribunal, by regulating the role of settlement and arbitration agreements. It also addressed direct methods of contracting out of statutory employment rights, such as express waivers in employment contracts. This quiet life may have led us to underappreciate the rather momentous significance of this statutory provision. It has prevented the destruction of a public system of enforceable rights by foreclosing the routine use of private arbitration clauses to

[122] See above, under section heading II.

shield employers from public accountability in a court, as in the US system.[123] In so doing, it has contributed to the systemic effectiveness of statutory employment rights and the Rule of Law as a public good. By channelling cases such as *Autoclenz* and *Uber* into the public courts, legal doctrine can evolve and address novel challenges in the labour market. The names of the litigants then stand as public and enduring monuments to the legal propositions those cases establish. Millions of workers have benefited from the legal principles established by Mr Aslam and Mr Farrar in *Uber*. Under a system of private arbitration, there is little scope for legal doctrine to develop as a living thing that governs everyone through authoritative legal norms. In the US, the dominance of private arbitration exemplifies a notion of public justice as *ius dispositivum*. In the British system, by contrast, section 203(1) has underpinned a framework of public justice and access to a court as *ius cogens*. Its importance cannot be overestimated.

The significance of this may be seen by considering the recent Canadian case of *Uber v Heller*.[124] This involved a legal challenge to a mandatory arbitration clause in a contract between Uber and an UberEATS driver. The arbitration clause required disputes to be referred to arbitration in Amsterdam, which would be subject to the law of the Netherlands. The clause also required the payment of US $14,500 as an administrative cost. The appellant earned $20,800–$31,200 per year before taxes, and expenses were deducted. Nor did the fee include other costs likely to be incurred in an arbitration, such as travel to Amsterdam, accommodation, and legal representation. In the Supreme Court of Canada, there were two distinct approaches supporting the invalidation of the arbitration clause. The majority favoured an unconscionability approach that was focused on the discrete transaction, specifically the inequality of bargaining power and the improvident nature of that bargain. This may be understood as a modified *ius dispositvum* approach, ensuring that the individual waiver of

[123] The extensive use of private arbitration has been prevalent and devastating to justice as a public good in US labour law: see M Finkin, 'Privatization of Wrongful Dismissal Protection in Comparative Perspective' (2008) 37 *Industrial LJ* 149.
[124] *Uber Technologies Inc v Heller*, 2020 SCC 16.

access to a court represents a valid exercise of a normative power. By contrast, Justice Brown favoured a 'public good' approach based on access to justice, scrutinising whether the arbitration clause effectively excluded the claimant from a just consideration of his legal rights. This was an established public policy enquiry addressing the ouster of courts from the determination of legal rights.[125] This public policy approach is very much in the realm of *ordre public*, and it treats the enquiry as an aspect of public rather than private law.

The enduring significance of *Uber* may yet be in enlivening the dynamic potential of section 203(1). In identifying its role in tackling the 'indirect' exclusion or limitation of inderogable statutory rights, Lord Leggatt's judgment may lead to this neglected statutory provision having a more prominent role. Much will depend upon how far 'indirect' goes. We now know that it extends to the inclusion of terms in written documentation with the 'object' of avoiding statutory rights that are legislated as *ius cogens*. I have suggested that 'indirect' may go even further to encompass purported contracting out of fundamental implied terms, such as mutual trust and confidence. It is also important that the statute not be treated as a ceiling, stymieing common law development. In this spirit, I have also suggested some ways in which the common law of public policy might be developed to tackle the undermining of *ius cogens* by private agreement in employment contracts. A relatively autonomous common law of the personal employment contract, rooted in a strong notion of *ordre public*, would be a fitting legal tribute to our Brasenose troika and their evident concern for justice and coherence in the law.

[125] For further discussion, see A Bogg, '"Labour Law is a Subset of Employment Law" Revisited' (2020) 43 *Dalhousie Law Rev* 479, 500–11.