F. W. GUEST MEMORIAL LECTURE: COMPARATIVE LAW AND JOB SECURITY

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The F. W. Guest Memorial Trust was established to honour the memory of Francis William Guest, M.A., LL.M., who was the first Professor of Law and the first full-time Dean of the Faculty of Law at the University of Otago, serving from 1959 until his death in November 1967.

It was felt that the most fitting memorial to Professor Guest was a public address upon some aspect of law or some related topic which would be of interest to the practitioners and the students of law alike.

I.

It is a great honour and privilege to have been invited to deliver the 1973 Francis William Guest memorial lecture. I am proud of this honour, but at the same time I feel very humble. Although I never had the good fortune to meet Professor Guest in person, with the aid of those who knew him I have formed his picture as a man of the highest calibre: a memorable educator, efficient administrator, incisive lawyer and erudite scholar. His critical mind did not merely accept law as it existed, but he always looked for the reason and purpose of legal rules. He firmly believed that law must serve the needs and aspirations of society, and that principles of law, however venerated they may be, should be carefully reassessed in the light of changed social conditions. The importance he placed on achieving the aim that law should be abreast with social change was strikingly manifested by the leading role he played in promoting law reform. The necessity to re-examine the validity of principles has not diminished during the years passed, and I submit that to consider some aspects of an especially sensitive area of law, with a view to reform, would be an appropriate way to pay respect to the memory of Francis William Guest.

The two components of my title, *Comparative Law and Job Security* at first sight may convey a somewhat artificial juxtaposition but upon deeper examination of these concepts their interrelation becomes self-evident. The reform of labour law purported by the Industrial Relations Act 1973 should have given an opportunity not only to reshape the present collective wage determination system — and in general, collective labour rela-

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tions — but also to clarify and firmly restate the rights of individual workers. The trade unions, of course, by the very reason of their existence aim at promoting the workers' welfare and standing; this is the ultimate purpose of their collective endeavours. Job security, nevertheless, has remained a mere desideratum — or call it a wishful dream? — and neither collective agreements nor individual employment contracts have succeeded in achieving a satisfactory measure of it. Indeed, it springs from the very character of the service contract that it creates an ephemeral relationship, which can easily be terminated by either party. Should this transient tie between employer and worker be made more lasting, more solid? Would it be in the interest of the workers themselves? The effects of technological changes, both overseas and in this country, resulting in redundancy, indicate an affirmative answer.

Redundancy and the resulting unemployment pose immense economic and social problems, and the ultimate solution must be found in a co-ordinated, well-planned economic and social policy. One of the principal tasks for law is to shape and give effect to such a policy. It is for the law to build the bridge from plan to implementation, to reality. What new legal rules should be formed, what legal institutions created? At this point the relevance of comparative legal studies becomes obvious.

II.

More than a century ago, Sir Henry Maine[1] said that one of the principal objectives for comparative law was "to facilitate legislation and the practical improvement of law." In the late 19th and in the 20th century a number of internationally renowned scholars such as Pollock,[2] Bryce,[3] Holland,[4] and Jenks[5] in Britain, De Francisci[6] in Italy, and Kaden[7] in Germany, regarded comparative law mainly as an academic exercise, a particular method of study and research to find differences and similarities. Even Gutteridge[8] and Lawson[9] were inclined to hold this view. Hamson,[10] however, urged to examine law "in its function as a social institution" and as "an element of social

1 Maine, *Village Communities,* (6th ed., 1890), 4.

2 Pollock's statement at the first International Congress of Comparative Law held in Paris in 1900 as quoted by J. Hall, *Comparative Law and Social Theory* (1963) 7.

3 J. Bryce, *Studies in History and Jurisprudence,* (1901).

4 T. E. Holland, *The Elements of Jurisprudence,* (13th ed., 1924).

5 E. Jenks, *The New Jurisprudence,* (1933).

6 See (1921) *Rivista Internazionale di Filosofia del Diritto,* 246.

7 E. H. Kaden, "Rechtsvergleichung" in *Rechtsvergleichendes Handwoerterbuch* (1936).

8 H. C. Gutteridge, *Comparative Law,* (2nd ed., 1949) 241 and *passim;* though he recognised that the political, social or economic purpose of the law must not be disregarded; *Id.* 7 and *passim.*

9 F. H. Lawson, *The Rational Strength of English Law* (Hamlyn Lecture 1951) 4; see also *A Common Lawyer Looks at Civil Law,* (1953) 7 and *passim.*

10 C. J. Hamson, *The Law: Its Study and Comparison* (1955) 21; with T.F.T. Plucknett, *The English Trial and Comparative Law,* (1952) 7 and *passim.*

scene." René David[11] similarly advocated that in order to reach sound conclusions not only the legal rules but "the history, politics, economics and the cultural background" upon which they are built should be studied.

The views of Hamson and David are nearer to the ideas of those scholars who regard comparative law as not merely a method but as a distinct legal and social science, equally law and sociology. In Lambert's[12] conception this science has the task of collecting facts as manifestations of the development of society's legal life, pointing out not only differences but also the common elements which indicate the same origin and derivation of certain laws and legal institutions. Rheinstein[13] also favoured functional comparison and sociological examination. In his introduction to the English translation of Max Weber's *Law in Economy and Society*[14] he defined the goals of this science as

> [A]n investigation into the relationship between all legal and social phenomena. . . .

and listed some of the fundamental questions to which, among others, answers should be searched for:

> What factors influence the content of those rules which are legally enforced? Why, how and in which ways is the content of these rules changed with changing social conditions? Which factors determine which fields of human conduct are under given circumstances to be subject to legal control? Which are to be subject to ethical, religious, conventional or other forms of social control, and which are to be left free of all social control altogether?

Rabel[15] likewise preferred the functional approach, "the examination of the social purpose of the rules of the various legal systems", and Pound[16] was of similar opinion. Wigmore[17] placed even more emphasis on the importance of the underlying social, ethnical and economic facts in the study of legal institutions of a particular community. He explained the reason lucidly:

> Since the individual rules and institutions are bound and related together as the gross product of the social and political life of a particular race or community, their evolution cannot be fully understood without first conceiving the whole system in its political environment and its chronology.[18]

Jerome Hall[19] carried further the sociological view, and expressed his belief that comparative law would ultimately evolve into a humanistic sociology of law which should carry out socio-legal inquiries into the complex cultural, political and economic infrastructure of given societies.

11 R. David, *Traité Elémentaire de Droit Civil Comparé*, (1950).
12 E. Lambert, *La Fonction du Droit Civil Comparé*, (1920) *passim.*
13 M. Rheinstein, "Teaching Comparative Law" (1938) *5 Univ. Ch. L.R.* 617; "Teaching Tools in Comparative Law" (1952) 1 *Am. J. Comp. Law*, 98, 99.
14 Max Weber, *Law in Economy and Society*, (tr. E. Shils and M. Rheinstein), 1966) xlvii.
15 E. Rabel, *Some Major Problems of Applied Comparative Law, especially in the Conflict of Laws*, (1948).
16 R. Pound, "Revival of Comparative Law", (1930) 5 *Tulane L.R.* 15.
17 Wigmore, *A Panorama of the World's Legal Systems*, (1936).
18 Wigmore, "A New Way of Teaching Comparative Law", (1926) *Journ. Soc. Pub. Teachers of Law*, 7.
19 J. Hall, note 2 *supra*, esp. 33 and *passim.*

At this juncture a perfectly reasonable question may be interjected: If law as a social phenomenon is closely related to given geographical, ethnical, historical, political and economic co-factors, — to the whole life of a community, — how can foreign law be used to improve ours? Why examine, say, German labour law when it has clearly evolved from a wholly different social background, historical, political and economic conditions? Not even English industrial law, despite sharing the heritage of common law, can always be applied and adapted to New Zealand circumstances because of the wide discrepancy in the economic and industrial structure of the two countries.

It must be remembered, however, as Lloyd[20] observed, that despite all apparent differences the basic postulates of legal systems, while by no means identical, can have a remarkable uniformity. The ostensible contrast, said Kahn-Freund,[21] lies far more in formal principles of structure than in positive norms or institutions. The basic postulates, in the views of Del Vecchio,[22] Escarra,[23] and Jessup,[24] arise from the fundamental identity of human problems. The daily bread, the security of earning the daily bread, is equally important in a highly industrialised society and in an agricultural community. The "job" means the same to the wage worker as the land to the villager. And, whether the worker is employed by a huge enterprise in a giant industry in the United States, Britain or Germany, or by a small workshop in New Zealand, his basic needs are the same.

Upon this essential evenness could Saleilles[25] envisage the development of a universal legislation, "the common law of mankind," or in the words of Levy-Ullman[26] "the world law of the 20th century." Translated to somewhat less elated terms, by Saleilles himself, the practical purpose of comparative law is the development of municipal legal systems. Perhaps it would not be irrelevant to observe that comparative legal science actually plays this role in the enlarged European Economic Community by harmonising certain branches of the national law systems and developing a law common — if not to mankind — at least for Western Europe. Harmonisation and unification has advanced to the furthest in the field of commercial law, particularly sale of goods and companies. Harmonisation of company law and the draft statute for the European company

20 D. Lloyd, *Public Policy: A Comparative Study of English and French Law*, (1953), 7.

21 O. Kahn-Freund, "Introduction" to the English translation of K. Renner's, *The Institutions of Private Law and their Social Functions*, (A. Schwarzschild), (1949) 1, 15.

22 G. Del Vecchio, "The Unity of the Human Spirit as a Basis of Judicial Comparison" (1953) *Actorum Ac. Un. Jur. Comp.*, 175-6.

23 J. Escarra, "The Aims of Comparative Law," 7 *Temple L.Q.* 309.

24 P. C. Jessup, *Transnational Law*, (1956) ch. 1, "Universality of Human Problems".

25 First Congress of Comp. Law, Paris, 1900, quoted by Hall, *op. cit.* note 49, 130.

26 H. L. Levy-Ullmann, "The Teaching of Comparative Law: Its Various Objectives and Present Tendencies at the University of Paris," (1925) *Journal Soc. Pub. Teachers of Law*, 18.

by accepting the German co-determination principle, had also a great influence on the shaping of labour laws.[27]

The sociological approach, the examination of law as a phenomenon which "cannot be separated from other components of the structure of modern society," as Schmitthoff[28] remarked, in any case is not a weakness, but a strength. Wigmore[29] defined the purpose of comparative legal studies as threefold: first, descriptive; secondly, analytical or evaluating; thirdly synthetical or utilising. The first step, in itself, represents only the beginning. The second stage requires a study of the society, the laws of which are examined, an appreciation of the reasons and purposes for the rules, and of the human relations and economic transactions intended to be governed by them, in order, — as Gorla[30] pointed out — to obtain an understanding of the particular indigenous spirit of that legal system, and at the same time to learn the common spirit of different systems.

The third stage necessitates a similarly deep understanding of our own society, and a clear appraisal of the effects which would follow introduction of laws based on foreign models. Utilisation by synthesis is a scholarly but also a practical task, and at times of social and economic crises, — as Ireland[31] emphasised during the 1931 depression, — the community minded lawyer or the legislature in search of remedies should expect comparative law to be ready with its contribution. The ultimate purpose of comparative law is to influence the development of the community in a socially desirable direction by the utilisation of principles derived from the study of various legal systems. Utilisation does not mean slavish imitation but adaptation of ideas to our particular social and economic circumstances.

III.

Returning to the transitory nature of the employment relationship in private enterprise, as a universal phenomenon, first we must examine the safeguards already existing, or recently introduced, in New Zealand law. Although the Industrial Relations Act 1973 is primarily aimed at regulating collective relations between the employers and trade unions, I intend to focus attention on the few sections which refer to workers not as members of unions but as individual employees, and which vitally affect their job security, — or the lack of it. These are sections 81, and 150, then particularly sections 158, 159, 160 and 117.

27 Treaty of Rome, Art. 54; five directives were issued for harmonisation; the draft statute for the European Company was presented by the Commission of the European Communities to the Council on June 30, 1970.

28 C. M. Schmitthoff, "The Science of Comparative Law," (1941) 7 *Cambridge L.J.* 94.

29 Wigmore, *A Panorama of the World's Legal Systems*, vol. 3, 1120.

30 G. Gorla, "The Theory and Object of Contract in Civil Law," (1954) 28 *Tulane L.R.* 443.

31 G. Ireland, "The Progress of Comparative Law," (1931) 6 *Tulane L.R.* 68.

Sections 81 and 150 prohibit dismissal, but they have a strong collective correlation. Section 81 re-enacts section 166 of the former Industrial Conciliation and Arbitration Act 1954 (hereafter referred to as the I.C. and A. Act) and provides that during a dispute before a Conciliation Council, the relationship of employer and employed shall continue. Section 150, a repetition of the victimisation section in the I.C. and A. Act, section 167, purports to prevent dismissals for involvement in union or dispute activities by imposing a rather insignificant fine on the employer: $50 in the old Act, $100 in the new one. This anti-victimisation provision has failed to be an effective safeguard in the past. It has been said several times that a small sum is a cheap price for an employer if he wants to remove a person whom he finds an embarrassment.[32] The 1973 Act has improved the position by giving power to the Industrial Court, as in the grievance procedure, to order reimbursement, compensation, or even reinstatement.

Sections 158, 159 and 160 again merely re-enact sections 211, 212 and 213 of the I.C. and A. Act. These sections provide alternative procedures for the recovery of unpaid wages, either in the same manner as penalties for breach of award, or by civil proceedings. The breach of award action, according to the new Act, is to be heard by the Industrial Court, while the previous Act designated the Magistrates Court for this purpose. There is no express direction either in the new or in the old Act regarding jurisdiction in civil proceedings, therefore presumably the normal rules apply. I suggest that the Industrial Court should have exclusive jurisdiction in all actions for wages. I shall return to the role of the Industrial Court later.

The most effective machinery for protecting workers against dismissal is contained in section 117 of the new Act which establishes the grievance procedure. Personal grievance is a relatively new concept in New Zealand, first introduced by the Industrial Conciliation and Arbitration Amendment Act 1970, as section 179 of the principal Act, but the distinction between disputes of interests and disputes of rights, though well-known in practice, is being given legislative recognition by the new Act only. Interest dispute is defined as one created with the intent to procure a collective agreement or award settling terms and conditions of employment of workers in any industry; a dispute of rights can be a group dispute concerning the interpretation, application or operation of a collective agreement or award arising during their currency, or it may relate to an individual dispute; a personal grievance.[33] The Industrial Relations Act envisages interest disputes to be settled by the Industrial Commission,[34] while in rights disputes the Industrial Court[35] would have jurisdiction, thus dividing the legislative and judical functions of the Arbitration Court. The Industrial

32 N. S. Woods, *The Position of the Individual Worker in Labour Relations Land Organisation in New Zealand*, (1966). See also s. 128.
33 Industrial Relations Act 1973, s. 2.
34 *Id.* ss. 17-31.
35 *Id.* ss. 32-62.

Court instead of being primarily a delegated legislative body functioning in judicial form, will become a specialised court of law.

While in substance the new Act re-enacts section 179 of the old Act it makes improvements in the procedure and gives the Industrial Court the power of the final decision. A most important alteration is that the expression "wrongfully dismissed" in the I.C. and A. Act has become "unjustifiably dismissed" in the new Act. The word "wrongful" denotes unlawful dismissal without just cause and without due notice. Lawful termination of employment with one week's notice or one week's wages would not place the worker in a position essentially different from an instant dismissal — except as far as his dignity and reputation are concerned; in times of unemployment caused by economic depression or by mass redundancy resulting from technological changes he faces an equally bleak future. It is therefore imperative that following the ILO Recommendation No. 119, the valid reasons for dismissal should be clearly defined in two categories: those connected with the worker's personal conduct and capacity, and those arising out of the operational requirements of the employer. "Unjustifiable" should mean every termination of the service contract by the employer, whether with or without notice, which is not based on any of the valid reasons enumerated. Difficulties may arise, admittedly, in deciding what can be a valid reason. In the recent Tasman Paper and Pulp Co. stoppage about 1,900 mill workers were dismissed as a result of the demarcation dispute between the engineers and electricians. Should their case be covered by "operational requirement"?

The common law right of summary dismissal for just cause would be preserved, and Lord Esher's dictum in *Pearce* v. *Foster*[36] stated 90 years ago that "if the servant does anything incompatible with the due and faithful discharge of his duty, the master has the right to dismiss him," still expresses the legal position. Where there is no good reason, the wronged worker at present may commence common law action for breach of contract claiming damages,[37] a declaration[38] or an injunction.[39] Recently even some cracks have appeared in the solid wall of doctrinaire resistance against granting specific performance in employment contracts. In *Giles* v. *Morris*[40] Megarry J. held the rule against specific performance in service contracts not an absolute one; the English Court of Appeal in *Hill* v. *C. A. Parsons Ltd.*,[41] similarly thought the rule not inflexible, and expressed the view that the law must take notice of the recent climate of social thinking.

36 (1886) 17 Q.B.D. 356, at 539 per Lord Esher M.R.

37 *Addis* v. *Gramophone Co. Ltd.* [1909] A.C. 488.

38 *Francis* v. *Municipal Councillors of Kuala Lumpur*, [1962] 3 All E.R. 633.

39 *Lumley* v. *Wagner* (1852) 1 De G. M. and G. 604; *Page One Records Ltd.* v. *Britton* [1967] 3 All E.R. 822.

40 [1972] 1 All E.R. 960.

41 [1971] 3 All E.R. 1345.

Though the value of these remedies should be recognised, the stark reality is that not many dismissed workers commence a civil action. Normally the damages received would not be more than a week's wages.[42] What the worker really wants is his job. He will turn to his union representative to intervene in an informal way, and if it is not successful, and if he has the sympathy of his mates, the matter might turn into a collective confrontation with the employer.[43] As Kahn-Freund warned us, though employers and workers must expect the law to play a part in regulating their mutual obligations and rights,[44] the role of law, when it comes to collective relations, must not be overestimated.[45] Group solidarity may appear a more effective sanction than legal methods of enforcement.[46]

When there is no easily available forum where the aggrieved worker can obtain quick and cheap redress, he naturally will turn to social and economic sanctions through his union. The grievance procedure represents a forward step towards an orderly and strictly legal solution to deal with dismissal complaints. The remedies available in essence are the same as in common law: reimbursement and compensation representing damages not only for lost wages, but perhaps for indignity and inconveniece suffered, and above all a severance payment in case of redundancy. Reinstatement, as an ultimate redress, recognises in effect specific performance,[47] emphasising the primary significance of job security, the notion of "right in the job".

Courts both in New Zealand and Britain have referred to "the right to work" in the sense of a natural human freedom, but never recognised it as a legally enforceable right. The principle laid down at the end of the last century in *Allen* v. *Flood*[48] by Lord Davey, however Victorian it may seem, still expresses the strict legal position:—

> An employer may refuse to employ . . . for the most mistaken, capricious, malicious or morally reprehensible motives . . . but the workman has no right of action against him. . . . A man has no right to be employed by any particular employer, and . . . to any particular employment.

The Race Relations Act 1971, section 5, somewhat modifies this dictum in respect of colour, race, ethnic or national origins, but otherwise it remains valid.

Distinction should be drawn, however, between a vague "right to work", and a more definite "right in the work". The first, in the words of the Universal Declaration of Human Rights, is

42 *Addis* v. *Gramophone Co. Ltd., supra.*
43 In some years about 40 percent of stoppages originated from dismissal disputes; one of the worst years was 1963 where out of 54,490 man days lost, 26,165 were due to such disputes; see "Alleged Wrongful Dismissal: A Major Cause of Strikes," (1961) *Labour and Employment Gazette,* (Nov.), 36.
44 O. Kahn-Freund, *Labour and the Law,* (Hamlyn Lecture 1972) 23.
45 Kahn-Freund, "Legal Framework" in *The System of Industrial Relations in Britain,* (ed. Flanders and Clegg) (1964), 43.
46 E. Ehrlich, *Fundamental Principles of the Sociology of Law,* (tr. W. L. Moll) (1936), 66 and *passim.*
47 Industrial Relations Act 1973, s. 117 (7) (b).
48 [1898] A.C. 1.

a "natural right of every man to obtain employment;"[49] the second denotes the notion that the employment relationship gives the employee a quasi-proprietary interest in the job. Lord Denning has already alluded to this concept in *Lee* v. *Showmen's Guild*[50] declaring that a man's right to work in his trade is just as important as his property rights. A spokesman of the British Government during the debate of the Redundancy Payments Act, described its philosophical basis as "the proposition that service with a particular employer is . . . a valuable thing . . . for which a man is entitled to receive . . . compensation when the service is brought to an end by reason of redundancy."[51] In the United States the idea of proprietary interest in the employment is particularly well developed, and in Meyers' observation, "workers tend to regard their jobs as if they had property rights in it."[52]

Any such rights, if they exist, and any security that a worker may have felt after long years of service, are now threatened by technological changes resulting in unemployment — or call it redundancy. Redundancy in New Zealand has not yet grown into a burning issue but with the inevitable expansion of automation it may easily become a problem bearing the seeds of future industrial unrest. The Royal Commission on Containers regarded redundancy on the waterfront as a matter of urgency.[53] Disputes on redundancy have in fact occurred in various industries, and mostly have been settled by ad hoc conciliation.[54]

Many highly industrialised overseas countries seek solution to the clash between job security and redundancy. Labour economists and industrial relations experts, while they acknowledge that property rights in the job may not realistically be preserved, point out that if a positive fiscal and manpower policy is implemented, unemployment will not necessarily result from technological transformation. Young and Woods, two New Zealand experts, advocate centralised labour force planning coupled with retraining programmes, following Swedish models.[55] The problems admittedly call for a blueprint on the desired manpower policy to be designed by economists and scientific experts, but the drawing up of the necessary legal framework, and finding the answers for the emerging social and human questions, will be a task for the law. In the meantime, before the ultimate economic answer is found, law must deal with the immediate difficulties resulting from redundancy, and assure a measure of job security in the best possible way. A review of dismissal procedures in overseas legal systems, followed by

49 Art. 23.
50 [1952] 2 Q.B. 329.
51 See Howard-Clayton, "A Proprietary Right in Employment" (1967) *J.B.L.* 139.
52 F. Meyers, *Ownership of Jobs,* (1964) 112.
53 See *Evening Post,* 8/7/72.
54 Mason Engineers Ltd., June 1972; Williams and Davies Ltd., N.Z. Motor Corporation, Oxford Caravans, Levin; Mosgiel Woollens Ltd. taking over the Kaiapoi and Petone factories in September 1972; see *Evening Post,* 8, 15, 16, 20, 28 July, 9 August and 21 September, 1972.
55 See part IV of this paper, notes 76 and 77. F. J. L. Young, *The Supply of Labour in New Zealand* (1971).

their evaluation and comparison with our law, and any applicable synthesis for these reasons must play an important role.

IV.

In Britain the Contracts of Employment Act 1963 as amended by the Industrial Relations Act 1971, regulates the period of notice to be given in case of lawful dismissal; the shortest being one week after a length of service between six months and two years; the longest notice is eight weeks after fifteen years' employment.[56]

The Redundancy Payments Act 1963 provides for compensation assessed in accordance with the length of continuous employment, the rate of pay and the age of the employee.[57] The theoretical maximum that can be awarded is £1,200 — but in fact few assessments have exceeded £200.[58] The concepts introduced by this complex piece of legislation are extremely technical, and it has been pointed out by English critics that some of the main principles purported to be advanced are in conflict: the desirability of labour mobility is incongruous with the aim of compensating for the loss of job in the same way as for loss of property.[59] In Wedderburn's view no clear underlying philosophy can be discovered from the statute, and its "rationale . . . is still shrouded in mystery."[60]

A right not to be unfairly dismissed is guaranteed by the Industrial Relations Act, and every dismissal without good reason will amount to an unfair industrial practice. The reasons show a close resemblance to the grounds in the ILO Recommendation:—

(a) Capability and qualifications of the employee; or
(b) Conduct of the employee; or
(c) Redundancy; or
(d) That the employee could not continue to work in the position held without contravention of a duty or restriction imposed by an enactment.

Other "substantial reasons," not clearly defined, may also justify dismissal if the employer shows the required reason. On the other hand, even a redundancy dismissal can be unfair if other employees to whom the circumstances equally apply were not dissmissed.[61]

Both in redundancy and unfair dismissal claims the industrial tribunals have jurisdiction with right of appeal to the National Industrial Relations Court. Reinstatement is not a recognised remedy, though re-engagement may be recommended.[62]

56 Contracts of Employment Act 1963 (U.K.), s. 1 as amended by the Industrial Relations Act 1971, (U.K.) s. 19.
57 Schedule I to the Act.
58 Cronin and Grime, *Labour Law* (1970) 119.
59 Hepple and O'Higgins, *Individual Employment Law*, (1971) 149; Drake, "Labour Mobility and the Law, (1969) 5 *Bulletin Ind. Law Soc.* 2-22.
60 Wedderburn, *The Worker and the Law*, (2nd ed., 1971) 125-6.
61 Industrial Relations Act 1971 (U.K.), ss. 22, 24.
62 *Id.* ss. 106 and 114.

In the United States dismissal is regulated by collective agreements, and the concept of property rights in the job has developed to a high degree. Distinction is made between termination of employment necessitated by economic factors on the employer's side and dismissal caused by the worker's conduct. The collective agreements prescribe detailed rules for general reduction of labour, called "lay-off", usually on the principle of seniority, with certain compensation and pension rights provided for older workers.

If the dismissal originated from the worker's conduct, there must be a just cause. Any worker denying this may make use of the grievance machinery which has developed into a quasi-judical process. Collective agreements differ, and no uniform method exists but usually four steps are available:—

(a) The worker may ask for written reason for his dismissal.
(b) He may request a meeting with a management official to present his grievance and ask for a remedy.
(c) Upon refusal he may take his complaint to the grievance committee consisting of management and union representatives; this committee proceeds as a quasi-judicial body, and among other remedies, has power to order reinstatement.
(d) Further appeal lies to an arbitrator or board of arbitration, the decision of which is final, and can be enforced by Federal courts.[63]

In Germany since 1951 a special statute[64] protects the great majority of workers from unjustified dismissal. Whether the termination of the employment is "ordinary" with notice, or "extraordinary", in other words summary, the employer's action should be "socially justified". Before dismissal the employer must inform, and have consultation with, the Works Council,[65] established in every enterprise with at least 21 employees. Formerly, under the 1952 Works Constitution Act management could disregard the Council's opinion, though frequently the mere expression of opposition with the possibility of potential deterioration of management-employee relations influenced the employer. Further, if the worker appealed against the dismissal to the Labour Court, proof of social justification was most difficult, or even impossible.[66] Under the Works Constitution Act 1972 replacing the original 1952 staute, the Council may withold its consent, and in such case the Labour Court will decide the

63 See Aaron, "Reflections on the Legal Nature and Enforceability of Seniority Rights," (1962) 75 *Harvard L.R.* 1532; Levy, "The Role of the Law in the United States and England in Protecting the Worker from Discharge and Discrimination," (1969) 18 *I.C.L.Q.* 558; Reynolds, *Labour Economics and Labour Relations* (5th ed., 1968); *Textile Workers' Union* v. *Lincoln Mills* (1957) 353 U.S. 448 (U.S. Supr. Ct.).

64 Law of 10 August, 1951, as amended by law of 25 August 1969, Protection Against Dismissal Act (Kündigungsschutzgesetz).

65 Works Constitution Act 1952, Law of 11 October 1952 (Betriebsverfassungsgesetz), amended by Law of 14 August 1969, repealed and replaced by Law of 10 January 1972.

66 See Sturmthal, *Workers' Councils,* (1964); Kliemt, *Die Praxis des Betriebsverfassungsgesetzes in Dienstleistungbereich,* (1970).

matter. Labour Courts are specialist tribunals established on a parallel level with the ordinary civil courts having a jurisdiction over contracts of service and related matters affecting individual or collective labour relations.[67]

Social justification can be regarded as the German equivalent for the property rights in the job: the employee has a right to retain his employment unless a specific reason socially justifies his dismissal. The concept, no doubt, is rather difficult and vague. The statute gives only a negative definition:

> Socially unjustified dismissal means any dismissal not based on reasons connected with the person or conduct of the employee or on pressing operational requirements which preclude his continued employment in the undertaking.[68]

Matters relating to the worker's person include "social considerations": seniority, age, family status, dependants, but also skill, productivity and usefulness. Dismissal based on operational requirements will not be held socially justified unless the employer proves that all reasonable measures in organising production have been taken to avoid it.

The Labour Court will declare the notice void, if it finds the dismissal socially unjustified. Such a declaration has the effect of deeming the contract to have been continued without interruption. Alternatively, the Court may validate the termination, and order payment for the period of notice or compensation amounting to a maximum of twelve months' remuneration. Appeal lies to the State Labour Appeal Court, and in a limited number of cases to the Federal Labour Appeal Court.[69]

It must be admitted that the concept of social justification is fraught with complexities. German writers have suggested, however, that the very vagueness of the principle gives it elasticity enabling the Labour Courts by the minute examination of the underlying social and economic factors to arrive at the most satisfactory and just solution.[70]

In France, whether the dismissal is a summary one or with notice, the available remedies are not significantly different. The termination in either case may be "abusive." The concept of abusiveness has a connotation somewhat similar to the German "socially unjustified" dismissal.

Before a worker may be discharged the employer must seek permission from the local manpower office, but dismissal without prior approval will merely be subject to a fine without invalidating it.[71] The purpose of the manpower office is not the protection of workers but the most economic use of the available labour. The worker protection aspects are to be found in nationwide collective agreements, which if "extended" by an order of the Ministry of Labour have the same blanket application as awards in New Zealand. The Labour Code makes it

67 Labour Court Act 1953 (Arbeitsgerichtsgesetz), Law of 3 September, 1953.
68 Protection Against Dismissal Act, s. 2.
69 *Id.* ss. 8-12.
70 Nikisch, *Arbeitsrecht* (3rd ed., 1969); Herbst, *Notice of Dismissal and Protection Against Dismissal,* (1963).
71 Ordinance of 24 May, 1945.

compulsory to include in agreements provisions relating to dismissals procedure.[72]

Dismissed workers may appeal to the joint committee which in this respect acts as a quasi-judicial body and its decision binds the parties. Further appeal lies to the ordinary courts where the question of abusiveness will be re-examined. Neither the joint committee nor the court has power to order reinstatement in case of abusive dismissal. The only remedy is compensation.[73]

In Italy a statute passed in 1966[74] based on two nationwide collective agreements and influenced by the ILO Recommendation, has reduced the employers' freedom to terminate the contract to a relatively narrow area. The written notice of dismissal must be based on a "sufficient motive". This concept plays a central role, similar to that of "social justification" and "abusiveness". In addition, if a "just cause" arises which would not allow the continuation of the employment, summary dismissal is possible. The inter-connexion between "just cause", giving right to dismissal without notice, and "sufficient motive", being a ground to give notice, is not quite clear-cut. It appears that just cause is sufficient by itself, and by its very nature incorporates the motive. Thus, the statute preserves the dichotomy between summary termination for just cause, and dismissal with notice based on sufficient motive.

The dismissed worker in either case can seek remedy through an elaborate conciliation and arbitration system, or may turn to the courts. Depending on the nature of the motive, and these are classified in a very technical manner, the dismissal may be declared (a) absolutely void, (b) valid subject to compensation or (c) valid without any remedy to the worker. In case of declaration of nullity the employee must be reinstated within three days.

There are no separate labour courts in Italy but within the ordinary courts specialist judges deal with the individual disputes. Arbitrators and courts have a difficult task in applying the sufficient motive concept. In the view of learned Italian commentators, their attempts have not always been successful. It is recognised, nevertheless, that the statute is built on sound principles, and it can be hoped that by the very reason of its elasticity it may develop into a "property in the job" concept.[75]

The Swedish system places the emphasis on an active manpower policy, and the machinery of handling dismissal complaints can be regarded as merely of secondary importance beside the placement and retraining activities of the National Labour Market Board. In strict law nothing prevents either party from terminating the employment contract. By the Basic Agreement of 1938 the Federation of Employers and that of

72 Code du Travail, I. art. 31.

73 Camerlynck and Lyon-Caen, *Droit du Travail,* (2nd ed., 1969).

74 Statute No. 604, Law of 15 July 1966.

75 See *Statuto dei Lavoratori,* Statute No. 300, 20 May 1970; Richard, *Diritto del Lavoro,* (7th ed., 1970), Vol. 1; Mazzoni, *Manuale di Diritto del Lavoro* (3rd ed., 1970).

trade unions, however, have accepted certain restrictions and a procedure to be followed in dismissal cases.

The employer must give fourteen days' notice to the local office of the trade union to which the worker belongs. If the union does not agree to the proposal, consultations take place, and failing agreement the dispute is referred to the Labour Market Council. Though the Council primarily acts as an administrative government agency, for the purposes of dismissal appeals it is constituted as a quasi-judicial body comprised of equal numbers of representatives nominated by the respective federations.

After inquiring into the reasons for dismissal, unless a settlement has been arranged the Council may (a) uphold the decision; (b) order or recommend reinstatement or re-employment; or (c) order or recommend payment of compensation.

There is a difference in the authority of the Council depending on the grounds for the dismissal. If misconduct has been alleged but not proved, reinstatement or compensation may be ordered; in redundancy cases only a recommendation can be made. By longstanding custom the parties always accept the recommendation.[76]

The Swedes, nevertheless, see the real solution for redundancy in a centrally organised but regionally administered retraining and placement scheme, the discussion of which is outside the limits of this lecture.[77]

ILO Recommendation, No. 119,[78] on termination of employment at the initiative of the employer, is, in effect, a model law expounding the leading principle that dismissal can be valid only for stated reasons, either connected with the capacity and conduct of the worker, or based on the operational requirements of the employer. It is noteworthy that involvement in union activities, taking part in complaint proceedings, or race, colour, sex, religion, political opinion, national extraction, social origin and marital status, never can constitute a valid reason.[79]

Normally a reasonable period of notice should be given, except in case of instant dismissal for serious misconduct. When reduction of the work force becomes necessary, consultations should take place with workers' representatives, and these, besides considering redundancy terminations' may extend to restriction of overtime, retraining, transfers and other connected matters. If the proposed dismissal would affect the manpower situation in an area or industry, the employer has to notify also the competent public authorities. In any case precise criteria must be established in advance for selecting workers to be dismissed, giving due weight both to the interest of the employer and the employees. These criteria either relate to the efficient

76 Schmidt, *The Law of Labour Relations in Sweden* (1962); the text of the Basic Agreement in English translation is included in the book; Johnston, *Collective Bargaining in Sweden*, (1961).

77 *Active Manpower Policy in Sweden*, (1970) — a fact sheet issued by the Swedish Institute for Cultural Relations with Foreign Countries.

78 *Recommendation Concerning Termination of Employment at the Initiative of the Employer*, No. 119, 26 June, 1963.

79 *Id.* clauses 2 and 3.

operation of the business or to the personal attributes of the worker, such as qualification, skill, length of service, age and family circumstances. Other matters which are appropriate under national laws may also be considered.[80]

Income protection for redundant workers should be provided in the form of unemployment insurance, social security, severance allowance or other types of benefits, depending again on particular laws, collective agreements and on the personnel policy of the employer.[81]

Any worker dismissed without justifiable reason should be entitled to appeal to a neutral body such as a court, arbitrator or committee which is to be given the right of recommending reinstatement, ordering payment of compensation or granting other appropriate relief.[82]

V.

Evaluating the systems discussed it seems plain that most of them have desirable features, though the attempt to reconcile the apparently incompatible concepts of property rights in the job and freedom of contract, have resulted in massive complexities. The first notion carried to its logical limits prohibiting termination for both parties, would erode the contractual basis of the employment relationship, and ultimately would deteriorate to industrial serfdom; this is manifestly undesirable, and also contradicts manpower planning ideas requiring mobility of labour. The perils of a laissez-faire contractual freedom, and its impossibility in today's economy, are too well known. The task for all law systems, including that of New Zealand, is to find satisfactory solutions between the extremes: to establish a measure of job security, while not to interfere unduly with the parties' basic freedom of choosing their employer or employee.

It is noteworthy that the ILO classification of valid reasons originating either from the worker or from the employer, features more importantly in every system than the old dichotomy between dismissal with or without notice. In certain cases this development has resulted from the ILO Recommendation; in other instances it is more likely that the model law was formulated by accepting certain desirable features of existing national laws and practices.

The provisions of the Industrial Relations Act can be used as a starting point for the necessary amendments to approach the aim of job security. ILO Recommendation 119 should be ratified, accepted as a guide and to a certain extent incorporated in the Act together with some ideas taken from German law. I suggest the consideration of the following measures:—

(1) Termination of employment should be valid only for justifiable reasons on grounds similar to those as set out in the

80 *Id.* clauses 4-8.
81 *Id.* clause 9.
82 *Id.* clauses 4-6.

ILO Recommendation, with or without notice, depending on the nature of the reason.

(2) Except in the case of summary dismissal prior consultation with the appropriate trade union should take place in all cases; if a works council would be established then that should be the consultative body.

(3) Guidelines should be laid down for redundancy dismissals in the manner of the ILO Recommendation. The English redundancy law could be studied but as our experts, Young and Woods, prefer the Swedish system with its broader basis of labour market policy, special attention should be given to the evolution of a scheme most suitable for New Zealand.

(4) Appeals against dismissal, whether summary, or with notice for redundancy or for any other reason, should be processed as provided by the grievance procedure in the Industrial Relations Act 1973 with final appeal to the Industrial Court having full power to grant compensation and order reinstatement.

(5) The Industrial Court, besides being the appeal forum in dismissal and other grievance complaints, should have exclusive, primary or appeal jurisdiction in all individual disputes of rights, such as wage claims, questions arising from retraining, transfer, pension rights, and any matter affecting the service contract or consequent upon the implementation of a manpower scheme. The desired features of the Court should be: quick, efficient and informal procedure, rather investigatory than adversary; parties may appear in person or be represented by a union official, solicitor, or any fit person. Parties without representation should receive all the assistance from the court, but, of course, nobody must think that thereby its impartiality would be in any way affected. On points of law, in certain cases, appeal would lie to the Supreme Court, or even to the Court of Appeal.

These suggestions, I think, are fairly modest and within the realm of possibility. Undoubtedly, more research is needed to work out details, and provide for every contingency. It must be remembered that even if the ideas are accepted and implemented, they represent a small beginning only. Further problems are gathering on the horizon. Law, with the aid of comparative law, should probe into the underlying facts, appraise social goals and formulate the norms which are necessary to promote social progress.