
Core Labour Rights – The True Story (Reply to Alston)

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‘... it would be a mistake to view the place of the market mechanism only in distributive terms’.

Amartya Sen, *Development as Freedom* (1999).

Abstract

The concept of ‘core labour rights’ has, over the last decade or so, assumed a central role in debates about the role of international labour law in an integrated world economy. Some, including Philip Alston, see this development as a retreat from and a threat to the existing international labour law regime, especially the International Labour Organization’s international labour code. On this view the new concentration upon core rights undermines the existing regime from within by narrowing its focus, weakening the legal status of the core rights, relegating the ‘non-core’ to a second-class status, watering down its ‘enforcement’ mechanisms, and so on. This view, while popular, is available only on a very narrow and conventional understanding of the purpose of international labour law. A better understanding is available which enables us to see core labour rights as conceptually coherent (and not politically arbitrary), morally salient (and not merely part of an empty neo-liberal conspiracy) and pragmatically vital to the achievement of our true goals, including the ‘enforceability’ of the ‘non-core’ (and not an undermining of the whole regime from within). This essay defends this second and positive account of core rights by reacting to Philip Alston’s recent essay in this journal, which is taken as the most comprehensive and aggressive articulation of the ‘anti-core rights’ point of view.

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1 Introduction

This is a reply to Philip Alston's recently published "Core Labour Standards" and the Transformation of the International Labour Rights Regime'.¹ This piece is a lengthy and comprehensive discussion of the most important recent developments in international labour law by one of our most celebrated and knowledgeable international human rights lawyers. Its publication is an important moment in academic discussions of the international labour law regime. However, in spite of its length and the fact that it touches upon many critical issues, Alston's critique is based upon a stock set of arguments about the way the world is going and, surprisingly, when all is said and done, he ends up presenting the case for a much romanticized status quo. While our author makes many claims which are very wide of the mark, the core problem with Alston's argument is that it relentlessly evades the central critical issues clearly at play. That is, while the list of shortcomings is long, the most critical one lies at another level – in what is avoided and not said about the case for or against core rights. In this reply I address these issues directly. When this task is undertaken one ends up with a very different view not only of core rights but of their true potential for changing our ideas about international labour law and renewing institutions such as the International Labour Organization.

On the other hand, one has to admire Alston's ambition and style of attack. A journal article which declares that there has been a 'transformation' in the international labour rights regime is sure to attract attention, and this is the tactic that Alston has adopted. But international regimes are notoriously hard to change or improve or reform – let alone transform. Even more remarkable is Alston's further claim that this transformation has taken place in less than a decade – really in the last six years or so. And still more remarkable is the claim that the key player in the piece is an idea – the idea of core labour rights. (I deal below with Alston's use of the terminology of core labour 'standards'.) As we shall see, Alston's claim is largely a claim about the International Labour Organization's 1998 Declaration on Fundamental Principles and Rights at Work,² which Alston takes, rightly, as a key moment in the recent renewal of interest in the idea of core labour rights. His claims are in large part about the impact of the Declaration upon the long established (going back to the founding in 1919) and traditional ILO role in standard-setting, meaning basically the creation of ILO conventions and their 'enforcement' through equally longstanding monitoring and reporting mechanisms. To put it simply, Alston takes a dim view of the Declaration and its focus upon the idea of core labour rights. He believes a concentration upon them will radically water down rather than toughen up this pre-existing international labour law regime. In his view this is and will be true not only at the ILO, but at other points of contest and in other fora, such as regional and bilateral trade negotiations, due to a knock-on effect. In his view, we are witnessing a regressive transformation of the labour rights regime, with the ILO playing the complicated double role of both being in the vanguard of this movement and also being its chief victim. And as we shall see, Alston believes this is intentional on the part of the ILO and others. He does not shy from the all-out attack.

¹ 15 *EJIL* (2004) 457 (cited herein simply as Alston).

² The text of the Declaration is available at www.ilo.org.

Details will follow. But we should pause at this early stage to consider Alston's thesis in the large. It is truly breathtaking – that we have had a transformation, at spectacular speed, organized around an idea (of core labour rights), resulting in a new and deeply flawed international labour law dispensation, all brought about as a result of an 'inside job' by the very people who are in place to protect that regime. That makes for quite an article. On the other hand, a journal piece trumpeting, but that would sound the wrong note, the grudging and gradual evolution of the international labour law regime, especially at the ILO, developed along lines long relevant within and deeply salient to that institution (indeed following a historic (50 year-old), explicit, and celebrated, precedent within that very institution), resulting in perhaps some improvement in the system as we know it, and perhaps even some positive changes in the real world (although noting that in all honesty it is early days and pretty hard to tell), brought about at least in part by those whose job it is to try to make such improvements, would not, obviously, be as exciting. But such a journal article would have another virtue. It would be true.

In this current article I do spend some time replying to various of Alston's claims and arguments. But as I have said, my main point is that to address the issue of core labour rights, and their impact upon the international labour law regime, on Alston's terms is to largely miss the point. Leaving aside the specific mistakes, the chief flaw in the piece lies in what it steadfastly, relentlessly refuses to do. The idea at the centre of Alston's thesis is what he refers to as core labour 'standards' – although they are better called core labour rights. What any account, critical or praiseworthy, of a 'transformation' of the international labour law regime based on the concept of core labour rights must do is actually explicate that very idea. What is this idea? Is it conceptually coherent? Can this very idea bear the conceptual weight being placed upon it? And if normative conclusions are to be drawn about the transformation alleged – an exercise Alston so robustly takes part in – then we require a normative assessment of the new idea. And if conceptually coherent and normatively compelling, is the new idea useful in the real world? Will it change more than the law? That is, will it help bring about real improvement in real people's lives? In short, is the idea of core labour rights a good thing? Was the old regime a good thing? Is the resulting change a good thing? These are the core questions about core labour rights and about the current state of the international labour law regime. Yet these questions do not appear, let alone get answered, in Alston's negative account of this 'transformation'. You search in vain, what you find is a complete avoidance of these vital questions. Just when you think they cannot be avoided, they are avoided, usually by one of two techniques. First, the text just stops. Second, just when the normative knock becomes unbearably loud on the door, Alston is content to exit out the back with some empirical observation about what some people say or what some document says. He never asks the critical question – are they right? This kind of legal formalism and blank sociological reporting of the views of others cannot take the place of argument. And this lacuna is particularly glaring when our author is simultaneously drawing such heavy normative conclusions. The reason, I believe, why Alston adopts this approach is that it is a natural consequence of his effortless adoption of a broader package of views, what I referred to above as a stock set of arguments about how the world is going. This involves, among much else, a view about 'globalization' and the

relationship between economic progress and human rights. I expand on this familiar received wisdom below and explain my view of it as being deeply shallow. But while the popularity of this set of attitudes may help explain Alston's omission in not addressing the core issues at stake in his thesis, it does not amount to an argument for them.

In my view, we must first pose the interesting questions about core labour rights – is there something to the very idea? Is it a normatively compelling idea? Is it pragmatically useful? Only then can we assess the reality and desirability of any 'transformation' alleged. Answering these questions is the required prolegomena to any useful account of recent developments in international labour law. And what I propose to do is to give at least an outline of the answers to those questions.

But first I take a bit more time to set out the core of Alston's thesis in his own language. Then I comment upon several large problems with various arguments. Finally, I return to my main point and our central problem – the absence of an argument on the basic issue of what we should think about core labour rights from a basic conceptual, normative and pragmatic point of view.

2 Alston's Thesis

Setting out Alston's thesis should be an easy task – he states it broadly in his first paragraph. It is that 'the international labour rights regime has undergone fundamental change in the space of less than a decade' and that 'the system [as we shall see this means the ILO system] that was long held up as one of the most successful of the international regimes has been transformed in almost every respect'.³ But I actually had some difficulty in setting out Alston's thesis because of several, tricky, argumentative strategies which Alston deploys. The first is basically the time-honoured one of 'bait and switch'. Rather than provide a clear contrast between an alleged new regime (the ILO with its new Declaration and idea of core labour rights) and the old (the ILO as it was with its conventions and monitoring systems but without the Declaration), and criticize the former as being inferior to the latter, we actually continually run up against a third player – the old ILO system as it might be in a better, idealized, but not our, world. That is, we are tempted (baited) with the idea of a transformation from the old to the new and a critique of the new as inferior to the old. But then comes the switch. When pressed on the account of the old as superior to the new, what we actually get is vague references to a non-existent account of the ILO as it might be. Thus, the very idea of a real transformation, and a critical assessment of it, is obscured.

The second disturbing argumentative strategy is one of strategic, periodic, and to my mind quite jarring, hedging of bets. So, for example, we see from time to time our author inject sentences such as 'this is not to say that the new regime is irremediably flawed'.⁴ Or, '[i]t cannot be taken for granted that this new development is necessarily a positive one'.⁵ While there is much to be said for careful argumentation I think it must go hand

³ Alston, *supra* note 1, at 457.

⁴ *Ibid.*, at 461.

⁵ *Ibid.*

in hand with a certain level of modesty in the type of claim being made and the level of rhetoric used in expressing them. But Alston seeks to have it both ways – that is, to make large and dramatic claims about core labour rights, and the motivations of those in favour of them, and to use quite unrestrained language in doing so (see below), while at the same time tossing in a note of civilizing reasonableness and moderation every now and then. It is, as I say, jarring to see our author pursue a scorched earth policy about the origins of, motivations behind, and effect of the core labour rights agenda, while from time to time issuing careful and distancing descriptions of the claims made.

In the end, I think it is better simply to put forth Alston's thesis using Alston's own very direct and strong language. This results in a presentation of the ideas that a reasonable reader would take away from the text and, I believe of what Alston wishes such a reader to take away.

Here is what Alston has to say. As we have already noted, the basic idea is that the international labour rights regime has undergone fundamental change in the space of less than a decade. The system that 'was long held up as one of the most successful of international regimes has been transformed in almost every respect, albeit with little acknowledgement of the implications and consequences of the far reaching changes that have taken place'. For there to be a transformation there must be something pre-existing to be transformed. In this case this is the 'international labour rights regime'. What this turns out to be is one aspect or dimension of the ILO – what people call the labour standards, or the 'normative' (to us an internal ILO word), or legal dimension. This is perhaps the best-known aspect of the ILO, even if not the most significant in budgetary or personnel terms.

Here is a required aside for non-ILO experts: this legal dimension or labour standards dimension has been central to the ILO mandate since the beginning and large chunks of the original 1919 Constitution are given over to establishing the processes by which international labour conventions (and also recommendations) are to be created in Geneva and, it is hoped, ratified at home by the (now) 178 member states, thus becoming binding international treaties. But there is absolutely no duty to ratify any convention created in Geneva. Ratification is an entirely voluntary domestic act. The Constitution also specifies reporting obligations for members who do ratify and for a review of these reports by supervisory mechanisms – first by a committee of independent legal experts and then by the tripartite (workers, employers, and governments have independent representative and voting status) political processes of the ILO. The Constitution also provides for two sorts of complaint system and, even more interestingly (as we shall see) for a reporting obligation upon members regarding conventions they have not ratified. There is also a special procedure for Freedom of Association complaints. But, and this is pretty important, all of this is a game of moral persuasion and, at most, public shaming. It is a decidedly soft law system. There are in fact no sanctions. And readers will recall much discussion in recent years to the effect that the ILO has 'no teeth' and this is why, at least in the view of some, we need to push for a labour dimension in the WTO, or in regional trade arrangements, and so on – to get some 'teeth' into the system. There exist now something short of 200 conventions covering almost all aspects of labour law, social policy, employment pol-

icy, labour law administration, and so on. (While it is true that a significant number of the older ones are considered ‘inactive’, they are still on the books and in any event we still are left with a large number.) Some are very specific and detailed and are often about work in one industry (mining or seafaring, for example). They often look like international versions of domestic labour law statutes, on hours of work, etc. Others are general and often about basic principles and rights, such as freedom of association. And as one might expect, these conventions have remarkably different rates of ratification. It is a common view, both within the ILO and without, that the problem is not one of a need for more conventions (in fact, as we discuss below⁶ there are too many which are too detailed, too irrelevant to many economies, too out of date), but of the need for better and smarter instruments and more effective, ie real world change-inducing, processes. The ILO has invested heavily in trying to find solutions to these problems in recent years. There is also a view, both within the ILO and without, that the concentration on the Geneva-based legal dimension, either as an end in itself or the only means of advancing ‘social justice’ (the ILO’s core constitutional insight is that eternal peace is impossible without social justice), is a mistake and a guarantee for continued marginalization of the ILO (and the labour rights agenda) in the modern world. And there has also been a rearguard action by those who see any investment in other approaches as undermining this legal jewel in the crown of the ILO. But these are issues which touch upon what Alston is arguing, and to which we will return.

It is true, as Alston notes, that some writers have singled out these ILO processes, particularly the supervisory mechanisms, as particularly good on a number of dimensions in comparison to the cadre of other international schemes.⁷ But, and this is indicative of things to come, Alston never pauses to ask what this actually amounts to. Be that as it may, on his account this is the ancient regime which has undergone a ‘revolutionary transformation’. It is this international labour code with, as we shall see,⁸ its very uneven record of ratifications, and its crucial gap between ratification and implementation, which is at the centre of Alston’s positive view of the old regime and his negative assessment of where the idea of core labour rights is taking us – basically, to hell in a hand basket. It is this legal, ‘normative’, labour standards dimension of the ILO world, this world of the conventions and the supervisory procedures, which Alston takes as the old regime and says was a good thing. The idea of core labour ‘standards’ is the new transforming idea and it has not so much come along as been invented to undermine the old regime. The idea of core labour ‘standards’ is a bad thing both in its purposes and in its results.

For Alston, the harbinger, the defining moment, the symbolic centrepiece, and the main manifesto of the core labour ‘standards’ movement is the ILO’s 1998 Declaration on Fundamental Principles and Rights at Work. The Declaration acts as the engine both driving, ‘accelerating’,⁹ and legitimating the revolution. In this 1998

⁶ See *infra* at 16, 18.

⁷ See, e.g., A. Chayes and A. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements* (1995).

⁸ See *infra* at 17.

⁹ Alston, *supra* note 1, at 495.

Declaration the ILO took the very interesting step of ‘declaring’ that all members, even if they have not ratified any relevant conventions and are thus not bound by the detail contained therein, and simply in virtue of membership in the Organization, have a constitutional obligation to promote and to realize the principles concerning four fundamental rights: freedom of association and free collective bargaining, the elimination of forced labour, the abolition of child labour, and the elimination of discrimination. These four labour rights are the ‘core’. The Declaration, with its idea of the core, is on Alston’s view a ‘regressive’¹⁰ step, brought into being by ILO officials and political interests, especially American, advancing a ‘neo-liberal’¹¹ or, ‘modified neo-liberal’,¹² agenda, which they are cleverly motivated to ‘downplay’¹³ while maintaining a ‘façade’¹⁴ or, if you prefer, a ‘hollow façade’¹⁵ of labour rights while actually putting in to play instruments, such as the Declaration, and a dynamic which has either (1) the ‘potential [as well as the purpose] to undermine and undo much of what has been achieved in this field’¹⁶ or, if you prefer your analysis in even more robust form, (2) ‘a very real risk of undermining the whole regime’.¹⁷ The old ILO regime of labour conventions, and the ILO itself, have been ‘marginalized’.¹⁸ The Declaration is part of an ‘almost universal lip service’¹⁹ paid to labour rights in an era of trade liberalization. All of this is true ‘whatever rhetorical assurances to the contrary might issue from the ILO or those other actors’.²⁰ And those supporters of labour rights not part of the plot ‘appear to be oblivious’²¹ to this revolution.

Strong stuff. But the basic question this set of views, no matter how strongly expressed, raises is *How* does the Declaration with its identification of the four core labour rights pull off this feat? This is not, at first blush, clear. Recall that the logic of the Declaration is to expand respect for labour rights. It declares, for the first time, that *even those states that have not ratified* the relevant conventions are bound, simply in virtue of membership in the organization, to promote and realize the basic principles concerning the four core labour rights. It puts in place a follow-up mechanism which, drawing upon existing constitutional obligations of members to report regarding unratified conventions, calls for reports, review by outside experts, and then by the ILO political bodies – all very familiar ILO procedures. It explicitly makes no change to the existing legal regime, which is simply and explicitly taken as a baseline. This is, on its face, an expansion and

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*, at 483.

¹³ *Ibid.*, at 458.

¹⁴ *Ibid.*, at 518.

¹⁵ *Ibid.*, at 521.

¹⁶ *Ibid.*, at 518.

¹⁷ *Ibid.*, at 520.

¹⁸ *Ibid.*, at 518.

¹⁹ *Ibid.*, at 471.

²⁰ *Ibid.*, at 488.

²¹ *Ibid.*, at 458.

not a contraction of labour rights. So Alston's account must be one of either unintended secondary effects or, and this is the path he chooses, one of intended secondary effects which overwhelm, or in this case undermine, the *prima facie* legal result. And here is the thesis. The Declaration undermines the prior labour rights regime because:

1. It replaces the heterogeneous and wide ranging set of labour 'rights' with a 'new normative hierarchy'.²²
2. This new hierarchy 'privileges' the four core rights at the top with all the rest 'who did not make it into the premier league' suffering an 'inevitable'²³ relegation to 'a second class status'.²⁴
3. The choice of the four core rights is 'highly selective, even arbitrary'²⁵ and 'not based on the consistent application of any compelling economic, philosophical, or legal criteria'.²⁶ Rather they were chosen because they suited the neo-liberal political agenda of key players, most critically, the United States.
4. The Declaration detaches or 'unhinges'²⁷ the core rights themselves from the details of the relevant conventions and the 'painstaking'²⁸ work done by the supervisory bodies in applying those standards over the years, which has resulted in a detailed jurisprudence, and substitutes both the label and content of vague general 'principles'.
5. This in fact legitimizes the use of 'a regressive terminology'²⁹ in which the core rights, long recognized as rights, are downgraded to mere 'principles'.
6. Furthermore, and going beyond the core, one of the Declaration's 'principal objectives'³⁰ is to 'make it easy for other actors ranging from corporations, through international financial institutions, to international labour rights monitors, to narrow their gaze and focus on the core labour rights . . . and by implication take the pressure off them in relation to the non core'.³¹
7. This is all attended by an emphasis upon soft promotional techniques and a 'gradual downgrading',³² both in spirit and in terms of ILO resources, of the role of the ILO's traditional "enforcement" mechanisms'.³³
8. This leads to a world in which not only have the details of the core rights, all of the other 'rights', and the method of their enforcement been downgraded, but in which the ILO itself is 'decentralized'³⁴ and remains 'only nominally at centre

²² *Ibid.*, at 458.

²³ *Ibid.*, at 462.

²⁴ *Ibid.*, at 488.

²⁵ *Ibid.*, at 483.

²⁶ *Ibid.*, at 485.

²⁷ *Ibid.*, at 494.

²⁸ *Ibid.*, at 494 and 509.

²⁹ *Ibid.*, at 483.

³⁰ *Ibid.*, at 488.

³¹ *Ibid.*

³² *Ibid.*, at 458.

³³ *Ibid.*

³⁴ *Ibid.*

stage'³⁵ as other actors (see above) are given 'the green light'³⁶ to become involved with and expand the core labour rights agenda.

9. The net result is an intentional watering down of the prior regime.

Although very strongly worded, this is a brave thesis, about an important and timely issue. There will be those in the ILO who will take solace in the fact that someone, even outside the organization, is brave enough to articulate it. The fact that such a distinguished human rights lawyer has advanced it adds to the power of the thesis itself. Philip Alston has not only followed and written insightfully about the ILO,³⁷ but has direct experience in administering other UN human rights mechanisms and so can appreciate the distinguishing characteristics of the ILO system, particularly its detailed conventions, expert processes, and often detailed jurisprudence. But, in spite of all that, it is in my view a thesis which is wrong at every step of the way. Let me explain why.

3 An Overview of the Thesis

I am sorry to report that this is one of those theses which may help give lawyers a bad name. It is a thesis addicted to law, or more accurately, one formal vision of it. Law is important – but cannot be all that there is, and it does not operate only in one way. Most critically, law and laws do not exist as ends in themselves but for the welfare of society. It is also a thesis which gives lawyers pause about their international lawyer brethren. It is a thesis addicted to international law or rather, again, a particular vision of it – a vision at once noble and highly formalistic. It is a thesis which, as a result, romanticizes and indeed almost hallucinates about the impact of the 'old' ILO regime. On the other hand, while legalistic, it makes large legal errors (for example, in eliding concepts of rights, in its misreading of the Declaration, in banking on 'author's intent', and so on). But at bottom it is a thesis whose main problem is that it does not ask the hard questions about the very issue it raises. It is a thesis which offers a way of seeing recent events, but does not ask what it all amounts to. It has a view, to be sure. But this is the core problem – that view is not actually once defended or argued for.

On the other hand, it is a popular view. It is popular, I think, because it fits hand in glove with a broader, and very common, package of views about the modern world, 'globalization' and, at its most basic, the relationship between economic progress and social justice. On this familiar view, labour rights (as one aspect of social justice in general) are a cost and a barrier to economic development. Economists and trade theorists are in radical disagreement with human rights activists, even speaking untranslatable languages. On this view there is a big 'trade-off' between these two realms. The economic agenda is prior to the social agenda and the social agenda,

³⁵ *Ibid.*

³⁶ *Ibid.*, at 509.

³⁷ See, e.g., a much different Alston in 'Post-Post Modernism and International Labour Standards: The Search for a New Complexity' in W. Sengenberger and D. Campbell (eds.), *International Labour Standards and Economic Interdependence* (1994), at 95.

including labour rights, is viewed as a set of luxury goods which can be purchased, if so desired, with the fruits of economic progress generated elsewhere. The social agenda, including labour rights, is merely redistributive and workers are viewed as people ‘in need of protection’. This is combined with a *realpolitik* view of the nature of the task of managing globalization – the task is to carefully manage the level of redistribution so as to maintain law and order. The common narrative continues in the following way. For the medium-term past, say the last 25 years, the economic view (more and more meaning the neo-liberal economic view) has been in the ascendant as states rationally try to attract mobile capital by avoiding the cost of the social agenda. The role of international labour law and the ILO on this view has always been to try to (legally) block this sort of rational ‘race to the bottom’ type collective action problem by putting in place the well-known antidote to such problems – i.e., by getting states to sign onto ‘enforceable’ contracts in the form of ILO conventions establishing a common baseline for all. The recent past is just a time of heightened incentives to enter the race. And within institutions such as the ILO the ‘collapse of communism’ has moved the yardsticks downfield, redrawing the line of where the balance of redistribution must lie in order to avoid social unrest in favour of economic interests and also reducing the need to paper over the fundamental rift between the economic and the social. All in all, a neat if unsettling, for some, picture. Many people share this understanding of how things are and the way the world works – from both sides of the fence it erects. The only difference between pro- and anti-globalization forces, or between labour rights supporters and neo-liberals, for example, is where their political preferences lie – which side of the fence they are on. As we shall see and as with many public debates these days, the solution to this problem lies not in answering the question as put, but in seeing that it is incorrectly posed. (No fence, no problem.) But this is not to deny the popularity of this set of views.

Starting from this perspective you are pretty much bound to end up with a view of the Declaration and core rights pretty much like Alston’s – they are bound to be objects of suspicion because they are bound to be seen as simply manifestations of the current political reality just described, in which the neo-liberal economic view is triumphant and there is less need to play by the ILO’s old rules. But of course the promoters of these ideas, even though in the driver’s seat, could not, given the ILO’s tripartite political structure, attack the existing system directly. Moreover, to the extent that they must still maintain some version of the whole charade in order to keep a lid on things, they would not want to. So, there was a need for them to act discreetly and indirectly. Thus they came up with the idea of introducing a Trojan Horse, the Declaration, into the very citadel of labour rights, the ILO itself.

But while this package of views is familiar, popular, and helps explain the appeal of Alston’s thesis, it is a deeply shallow understanding of our fundamental problems and the role of the ILO in solving them. We can start our thinking here by pausing to consider one of Alston’s most startling claims – that the ILO is being ‘moved off centre stage’. This should give us pause. I have never heard anyone, inside the ILO or out, claim that the ILO was at centre stage in any meaningful sense. Indeed, those who care about the ILO’s mission view this as precisely the problem – not that it is being

moved off centre stage, but that in spite of all its work and even successes, it is yet to get there in the first place. The ILO needs to join the international (economic) institutions which occupy centre stage currently. (Think of the domestic parallel – of someone making the claim that the Ministry of Labour was being moved off centre stage – not Finance, Trade, etc.) I think Alston believes that the ILO was at the centre of the international *legal* labour rights empire. But even if we limit ourselves to the legal dimension of labour rights, the idea that the ILO, or any other single institution for that matter, is, was, or should be at the centre of it is very odd, except perhaps from a very formalistic perspective. There is a lot of backbone in the international labour law community, on both the employer and worker sides, but the idea that the ILO is losing its centre stage position is not a shiver running up it. The idea that there is a centre stage and that it is located in Geneva is probably a bad idea to start with. The international labour law regime is probably, and probably always was, much better regarded as a very complex motley of actors, sites of contest, modes of action, at different levels, etc., probably without a single centre and shifting overtime.

To put it sharply – the key to understanding the core labour rights idea is that it precisely calls into question this received wisdom and the comforting dichotomies it assumes and deploys, between labour rights on the one hand and economic progress on the other, and even between economic and human rights theory. As a result, we also need, but are also provided, a new and as it turns out better rationale for the ILO. Briefly, on the old, familiar, and Alstonian view, the role of the ILO is to provide legal rules, and a mechanism for ‘enforcing’ them, aimed at preventing member states from making the economically rational move of trading off lower labour standards in order to secure economic benefits. The legal dimension of the ILO aims at blocking this rational move and as such is central to the *raison d’être* of the organization. Any attack on this legal regime is an attack on the ILO’s core mandate and purpose and, as a result, a real attack on respect for, and enforcement of, labour rights. Again, in all fairness to our author, this is a very common view of the ILO’s mission and it is one which has a long history in commentary about the ILO. But all of this is, as it turns out, a view which underestimates the ILO, its purposes, and its possibilities. The proponents of core labour rights are not to be faulted because they have forgotten some bit of received wisdom, but rather should be seen as bringing a deeper and better account of international labour law, and the ILO, into view. This better account depends most basically upon a richer and better account of the relationship between social justice and economic progress. A compact, but not simple, way of putting this is to say that this new view takes (very) seriously the claims in the ILO Constitution about the centrality of social justice. (The first sentence of the Preamble to the ILO Constitution, written in the immediate aftermath of World War I, reads: ‘Universal and lasting peace can be established only if it is based on social justice.’)³⁸ On this view social justice (including labour rights) is both the goal of, and the precondition to, the creation of durable economies and societies. The role of

³⁸ ILO Constitution, available at www.ilo.org.

the ILO is not to block through some legally binding agreement and legal ‘enforcement’ mechanism the member states from pursuing their individual self-interest, but rather to help member states see where their self-interest actually lies and to assist them in getting there. This has many advantages, including avoiding the impossible task that the old view assigned to the ILO. This is not a view which undermines the ILO or its legal regime of conventions and monitoring. Far from it. It is, rather, a view which gives us larger and better reasons for believing and investing in the ILO and its legal processes. It lets us have an idea of what internal and external ILO reform might look like. What it does call into question is the received wisdom, as well as the vision of the purposes of international labour standards, and of law as an ‘enforcement’ mechanism, that goes with it. This better view is not dangerous for the ILO, it is critical for its future and for the future of labour rights. The only danger here is to the stock package of received wisdom just outlined. It is that convenient and familiar package of views which is the real threat to the ILO and which guarantees its continued marginalization.

It is this better view which underwrites my criticisms of Alston and to which I return when I discuss the very questions Alston ignores – the conceptual, normative and pragmatic case for core labour rights.

But first let me address a number of smaller but still significant points in our author’s analysis which cannot pass without comment.

4 Some Specific Problems

First, I believe that Alston misreads the political dynamic and times that made the Declaration possible. He believes that the Declaration is an exercise in pulling the legal ‘teeth’ of the ILO. For him the Declaration is a kind of self-imposed structural adjustment programme for the ILO. This is backwards. The idea behind the Declaration was to give the ILO if not some sort of ‘teeth’ at least something more than its existing bark, and to take the benefit of a political moment which made this possible. On Alston’s account the Declaration is simply the product of another day at the neo-liberal workbench, another moment in the relentless playing out of a regressive agenda dominant since the end (in the 1970s) of the post-World War II ‘golden era’ and especially acute for the ILO since the fall of the Berlin Wall. But the dynamic which made the Declaration possible was much more complex and interesting than that. The result was the ILO as the subject and not the object of change. In my view the story goes like this: the modern international consensus on the core labour rights took shape in the 1990s as the result of the international community’s endorsement of the idea in a number of fora – at the Copenhagen Social summit, in the OECD, and from the ILO’s point of view most critically at the WTO Singapore Ministerial in 1996. The context of that meeting was very much the large public debate about a ‘social clause’, or a labour dimension for the WTO, precisely to get some real teeth into the international labour standards regime, teeth, it was widely noted, the ILO precisely lacked. This was a broad public debate which carried on to the WTO Seattle Ministerial meeting, and beyond. The WTO was, as it turns out, over-anxious in its desire to

crush the idea of any labour dimension within its mandate and, as a result, created the somewhat ironic result of providing a space for the ILO to make some progress on its own. To simplify, in its over-energetic efforts to expel the labour issue from its agenda and deliberations, the WTO membership and the Singapore Declaration not only removed the issue from the WTO agenda but used some very strong language to propel the issue back into the ILO's court by reasserting its views on the importance of the core rights dimension of globalization and the leading role of the ILO in managing that issue. This provided an opportunity for the ILO, not its enemies, to advance its agenda by in fact calling the hand played at Singapore. To the ILO's credit it made this call, rather than passing and remaining satisfied with the (marginalizing) status quo. This was, to be sure, making the best of a second-best world. But such is progress. In fact the ILO took the view that a need could be said to have been created at Singapore and it sought a way to meet it. The result is the Declaration which, as we have seen, brings a broadening of labour rights and perhaps more significantly, the opening up of additional room, through the use of pre-existing legal techniques and well-used real world promotional methodologies, for advancing their realization.

Alston also makes very explicit his contempt for the role of the United States in promoting the Declaration and the core labour rights agenda. I have no ability or reason to doubt his account of the United States' promotion of these ideas – but I am not very interested in this history and I certainly do not, as Alston does, believe it controls or dictates what the Declaration is or can be. On his view, the US needed the Declaration to escape from the embarrassing fact that, along with such interesting company as Myanmar, it has ratified only two of the eight conventions concerning the four core rights. It needed to be able to deflect the political heat from this fact, especially since it was a great promoter of labour rights in its domestic trade law and at the WTO. The idea is that the Declaration gets the US out of a difficult situation by letting it say it is in favour of labour rights while still avoiding the conventions. Even though this is irrelevant to my main concerns, I must say that this is the most optimistic reading of the current American politics of labour law that I have seen in some time. The idea that there actually was any need for the Americans to spend real capital, political and otherwise, to avoid political heat arising from the non-ratification of ILO conventions would be for most observers a novel one. Labour law reform, and the idea of ratification of ILO conventions is, I would have thought, about as far off the American political map as you can get. The idea that the Administration is paying a big political price for any inconsistency this reality provides seems equally remote. But leaving these sorts of musings aside there is a larger point. Alston is very strongly of the view that the private motivations, as he understands them, of those who were involved in the creation of the Declaration control both its meaning and its future. This is a very odd view. The question is not 'what did people think they were doing?', nor 'why did they do it?', nor even 'what did they want to do?' Rather, the question is 'what did they do?'. This is not a matter of being naïve about the politics of this or any other change, but of noting the basic truth that when all is said and done, wishing does not make it so. You have to look and see what is there. But, as we have noted, this is the sort of question – is the Declaration in fact a good thing? – Alston will not ask.

If Alston has the political context (and motivation) for the Declaration wrong, he also makes very heavy weather of reading its text. Our author spends considerable time explicating a set of distinctions which he considers critical to a proper understanding of the transformation that the Declaration has wrought. First, we have a set of distinctions between rights, standards and principles. As I read Alston, he believes that we had a lot of labour rights, contained in the almost 200 ILO conventions, and we have switched to mere principles, and fewer of them, in the Declaration. This seems to me to be simply backwards in any meaningful sense. Alston's case for a shift from rights to principles is in reality the distinction between detailed legal instantiation of a particular human right (in a form equivalent to a domestic statute, on collective labour relations, for example, say the Ontario Labour Relations Act in my province of Ontario, Canada) and the right itself – to freedom of association as articulated in the Canadian Constitution, or other domestic constitutions, or in international treaties, declarations, and human rights documents where one finds instead of several hundred statutory sections, a statement of fundamental importance – the articulation of a right. There is no doubt a distinction here – but it is not the one Alston needs and banks on. It also has the effect of putting Alston in a very odd predicament. At the core of the problem here is Alston's elision of two concepts of right – the concept of a fundamental human or constitutional right, on the one hand, and the concept of a detailed, legal, statutory, enforceable (although here there is an additional and obvious problem for Alston) right on the other. In Canada freedom of association is a human and constitutional right – but that does not mean that every section of the legislation giving concrete instantiation of the right, the Ontario Labour relations Act, is a constitutional or human right. Far from it. Most provisions of that Act are constitutionally neutral – neither suspect nor guaranteed. There is a wide variety of ways in which the constitutional right can be enshrined in a statute. And if this is true for a single jurisdiction such as Ontario, think how true it must be across the globe, where systems of collective bargaining are embedded in very different societies with very distinct industrial relations systems and indeed modes of capitalism. At the 'core' there are some things that no theory of freedom of association can abide. (At the ILO there is a poster which reads 'Stop the Killing – 184 trade unionists murdered in Columbia in 2002.')

There is a basic 'grammar' of the right; that is, a core set of restrictions and entitlements that any account of the right must respect. But that is precisely what the Declaration is doing – capitalizing on this truth. It is not sliding from rights to principles. A more common way of putting it is just the opposite, just as the Declaration does. It is a change of focus from the more detailed labour standards (legal rights if you like – but, again, this will pose a problem for many lawyers in light of the lack of a real enforcement mechanism) to the idea of the basic right itself, i.e., the basic grammar, the basic principles. It is a shift from international labour standards to international labour/human rights, and not the other way around as Alston has it, even in his title. Another way of putting this is as follows. Alston rightly notes that the mere fact of non-ratification by a state of what is clearly a human rights treaty does not mean that the subject matter of the treaty is not a human right. But it is also true that the mere fact of ratification of a treaty does not make everything or anything in it into a human right.

Alston also exerts a lot of energy trying to convince us that the Declaration is a non-starter because it does not pin all of the ILO member states to the details of the applicable conventions. This is his main complaint as I read him. Indeed, he begins and ends the article reminding us that his number one criterion for evaluation of the Declaration is ‘the extent to which the content of the core standards is defined by reference to the specific normative profile which the relevant rights have been given in the appropriate ILO conventions’.³⁹ But this is absurd. To fault the Declaration on this basis is to convert a constitutional impossibility into a criterion for success. The one thing the Declaration could *not* do is tell members they were bound by the details of conventions they have not ratified. It is not a shortcoming of the Declaration that it fails to do this; it is a constitutional requirement. To hold otherwise is to engage in constitutional contradiction. Yet this is the main plank in Alston’s campaign platform against the Declaration.

Alston is also on poor footing for another reason. Not only does his claim that there has been a shift from rights to standards fail, but he really knows he cannot claim there has been a shift from ‘enforcement’ to ‘soft’ or ‘promotional’ techniques in the meaningful sense his argument requires. I say that he knows this because even he puts the word ‘enforcement’ (under the non-Declaration/ratified convention monitoring regime) in quotation marks. This undermines the dramatic point he is trying to make. The fact is that the techniques at the ILO were and are soft. To be sure, one sees the conventions referred to as ‘hard’⁴⁰ law, but this has to be taken as a reference to their status as ratified international treaties and not ‘mere’ private voluntary measures such as corporate codes; it is not about any real enforcement power. The ILO has never ‘enforced’ anything. The real difference between the Declaration and the ‘old regime’ may be in the nature, purpose and organization of the soft techniques. But there is also no need, as we shall see below, to think that the ‘old regime’ has to be or was locked into a particular set of self-justifications, purposes or ideas about enforcement. What seems clearer at least is that the rhetoric of the Declaration’s follow-up reporting mechanisms centres more around promotion and is clearly tied to the idea of positive assistance in moving a member state from where it is now towards where it should be. It is much more a system of positive incentives than of ‘enforcement’ in a negative sense of condemning. But the idea that this is a problem is one of those issues not explored by Alston.

For our purposes here, however, the key point is that the structure of thought and architecture of argument he requires – rights to standards, enforcement to promotion – is not there. The net result is that Alston ends up in the extremely odd position of claiming that freedom from forced labour is a ‘standard’ and not a ‘human right’ and, by implication, that ILO conventions, such as those dealing with labour statistics, are matters of fundamental human rights. To both recapitulate and anticipate, one of Alston’s main claims is that it is wrong that the Declaration ‘privileges’ the core and

³⁹ *Ibid.*, at 461 – see also at 521.

⁴⁰ See, e.g., Hepple, ‘Rights at Work’, Discussion Paper (International Institute for Labour Studies, 2003), at 22.

that there is no principled economic or moral basis for this. But this is in my view a very strange claim. There is, rather, an obvious, morally compelling, conceptually coherent, and pragmatically important case for ‘privileging’ the core. Within the ILO it is right and obvious that freedom of association be privileged over, for example, labour statistics (important and difficult as that subject may be) or even health and safety regulation. This is and has been true in terms of conventions dealing with these topics, with the longstanding special constitutional status for freedom of association, and it is true regarding the Declaration. The ILO has long recognized that there is a hierarchy of conventions with those dealing with basic human rights at the top.⁴¹ Even more basically this truth is both shown and embedded in the very constitutional structure – the tripartite constitutional structure – of the ILO itself.

Alston can and does make the smaller, less dramatic, and obvious claim that the four core rights as articulated in the Declaration are set out in less detail than the complete texts of the conventions. This is true. But even the meaning and implications of this claim remains unexamined. Without going into complete detail, detail has its own problems for the ILO. Take what should be a simple problem – child labour. The ILO’s main convention on child labour⁴² was detailed. It read like a domestic statute setting out specific age limits for certain forms of work. It came to symbolize the problems of a certain model of ILO conventions and law – a model of detailed prescription and ‘enforcement’. Leaving aside the fundamental philosophical problem it papered over (in many places the idea of a prohibition of work by teenagers is not only morally obscure but to many objectionable) it put jurisdictions in a position where they could not ratify because of justifiable detailed differences in local legislation. The result was the need for a new type of child labour convention,⁴³ one which, rather than setting out detailed schedules of age limits which, for example, Canada could not ratify, identified the basic problem (the worst forms of child labour) which are at the core, if I can use that term, of the international community’s concern. This is a much more sensible approach to many ILO convention topics and law in general. This is combined with a renewed emphasis on, first, the connection between the convention and ILO programmes and technical assistance to eliminate child labour, and second, on the idea that the whole point is to positively assist members in achieving the goals of the convention rather than condemn them in a formal legal manner and proceeding for violating some legislative detail, a result often with little or no verifiable impact in the real world whatsoever. This is not to say that there are not cases in the world where the problem faced by the ILO and the world is not a lack of resources or knowledge, but rather real evil. Myanmar, for example. And it is not to say that there are not some areas of regulation, say of asbestos exposure levels, in which scientific detailed advice is not exactly what the world needs. But to take as the paradigmatic legal model the approach (detailed legal prescription, condemnation, and sanction or ‘enforcement’) which may be relevant only to some, or

⁴¹ See W. Jenks, *Law, Freedom and Welfare* (1963), at 103.

⁴² Minimum Wage Convention, No. 138 (1973).

⁴³ Worst Forms of Child Labour Convention, No. 182 (1999).

only the pathological, cases is a large legal error. Furthermore, and as already noted, we must be careful to keep in mind the idea that promotion is actually a, perhaps the most, vital instrument of ‘enforcement’ for the conventions in any case.

There are other problems with Alston’s lack of detailed contrast between the established ILO convention and monitoring system and the Declaration and follow-up model. One simply has to point to problems with ratification rates. Recall that ratification is the key precondition to the operation of the system that Alston wishes to defend and bolster. Take Convention 102, on a vital issue – social security. Reading the convention now makes one feel one is going back in legal time. The very idea now of drafting a convention which constructs so precise a list of universal and detailed prescriptions, rather than, say, a set of principles and objectives tied to measured progress and assistance, is virtually unthinkable, and for good reason. The result is that only 41 of 178 members have ratified Convention 102 in the last 52 years (it was adopted in 1952). On the other hand, 150 countries have ratified the new convention on the Worst Forms of Child Labour in the five years since its adoption in 1999. The best view of the Declaration is that it makes the expansive and progressive move of bringing this sort of approach to all 178 members regarding all four core rights, whether they have ratified the relevant conventions or not. The point here is that not only is the Declaration a positive achievement, but that its very methodology is, as it turns out, the key to the success of the very system Alston wishes to defend.

But, I have to report, there is even more. The ILO system which Alston holds out as our best hope is widely regarded, most importantly by many who have laboured hard to make it work, as being in deep trouble. As Breen Creighton, a former ILO official put it ‘the traditional system is in a state of crisis of such magnitude as to raise serious questions about its future role and relevance’.⁴⁴ Very recently, another very distinguished ILO hand, William Simpson, made the same point, perhaps more diplomatically, entitling his essay ‘Standard Setting and Supervision – A System in Difficulty’.⁴⁵ Pick your language – the system is broken. A few of Creighton’s statistics make this point dramatically. First, the existing Geneva-based standards creation industry looks like it is gradually going out of business. In the post-war ‘golden era’ the average rate of standard production was 3.15 conventions and 2.94 recommendations per year. For the last 10 years this yearly average has dropped to 1.1 and 1.3 respectively.⁴⁶ Even more startling is the ratification crisis. For all the conventions adopted in Geneva over the last 25 years the average number of ratifications is 20.1. And if the widely ratified Worst Forms of Child Labour Convention is taken out of the calculation the average is 16.05.⁴⁷ Readers will recall that this is out of a possible 178. Yet, there is more. Even if conventions are produced and are ratified, we have the problem of compliance with reporting obligations in order to fuel the supervisory

⁴⁴ Creighton, ‘The Future of Labour Law: Is There A Role for International Labour Standards?’ in C. Bernard, S. Deakin, and G. Morris (eds.), *The Future of Labour Law* (2004), at 253.

⁴⁵ In ILO, *Les normes internationales du travail: un patrimoine pour l’avenir* (2004), at 47.

⁴⁶ Creighton, *supra* note 42, at 258.

⁴⁷ *Ibid.*, at 260.

procedures. Under the two reporting articles of the Constitution the reporting rates are 55 and 65%.⁴⁸

As Simpson and others note, the current state of affairs is not the product of an imagined neo-liberal conspiracy but of real problems with the standards and the supervisory machinery. As Simpson has it, this is about conventions which are ‘too detailed, too complex’ and ‘unratifiable’,⁴⁹ adding ‘There can be little doubt that, over the past twenty years, with a few exceptions, Conventions, rather than spelling out general principles, have become extremely detailed or concern specific sectors of workers’, resulting in a situation in ‘which most member states, in particular the developing countries, are simply unable to ratify’.⁵⁰

But our critique goes even deeper. Leaving aside this list of major problems, and assuming that the system was working as constitutionally envisioned, it is simply unclear that the approach which Alston advocates, of detailed law and its ‘enforcement’ through some form of reporting and review, has as much impact in the real world as he appears to think. At its worst, it is simply a system in which taxpayers pay lawyers in domestic departments of labour to compile reports about laws ‘on the books’ which are sent to other (international) lawyers and then committees in Geneva, without ever achieving any traction with the real world during or after the process at all. At its best it may bring change, but almost never through any recognizable idea of ‘enforcement’. That is, the process that Alston describes and admires (which does not have to be and is not the way the ILO actually gets most things done) is in and of itself and on its face an odd model to take as paradigmatic for changing the world for the better. It may actually have effects, as reported from time to time by the Committee of Experts in its reports. And ‘enforcement’ might even be part of it in the really hard cases such as Myanmar. But even here one has to be extraordinarily patient and generous. Myanmar is a case where all the legal stops which can be pulled regarding violation of a ratified convention have in fact been pulled. It is Alston’s best case. This is the sort of case where reporting, guilt finding, public shaming of a significant kind, and action under Article 33 of the Constitution may, but don’t hold your breath, have some impact. Moreover, the Myanmar case stands alone in getting close to action under Article 33 – it is the first and only case since 1919. And as of early 2005, for all the effort the ILO has expended, it is not clear to the ILO or to anyone else that we are one step closer to ending the problem.

But the main point is that almost all ‘cases’ the ILO confronts are not like Myanmar – and the legal methodology which is best suited to, but difficult in even such a case, is even less appropriate in the normal run of circumstances.

There is one final point which I believe draws together and symbolizes all of these problems with the anti Declaration view. It is a point about the 50 year-old precedent of ‘privileging’ freedom of association, a constitutional ‘move’ the Declaration extends to all four core rights. It is a double-edged point. To put it simply, this precedent poses a

⁴⁸ *Ibid.*, at 262.

⁴⁹ Simpson, *supra* note 39, at 48.

⁵⁰ *Ibid.*, at 51.

problem for Alston because it is a striking example, ‘right on point’ as lawyers say, of how things can go just as he says they will not go with the Declaration. That is, this terrific precedent points in exactly the opposite direction to that which Alston requires to bolster his argument. With the Freedom of Association precedent everything had gone exactly as he would have the Declaration go and fulfils almost perfectly his criteria of success for the Declaration, number one of which is the (somehow, given the unconstitutionality of it all) pinning of non-ratifying states to the details of the conventions. So, Alston has to distinguish the precedent away. He is forced to say in effect ‘that was then, this is now’ and then lament that fact. From my point of view I hope he is right that that was then and this is now. This is because of the other edge of the point at stake here. My view is that the freedom of association precedent is very relevant, and quite worrisome, precisely because it shows how what was to have been a set of basic constitutional principles, tied to a new promotional process, which was promised to commit in no way the constitutional sleight of hand of sticking non-ratifiers with exactly what the constitution says they should not be stuck with (ie the details in the conventions or the detailed jurisprudence thereunder), which was promised to not merely replicate existing ways of doing business, and which was to be really helpful in dealing with pressing problems in the real world, ended up becoming another cog in the great machine of detailed, legal, ‘enforcement’ – i.e., not so much part of a new solution but looking very much like part of the old problem. So here is the double-edged point. Alston thinks the life under the Declaration should follow the freedom of association precedent, and worries that it will not. He is wrong on both points. The Declaration should not follow that precedent’s path, and we should worry that it will. To put it bluntly, Alston’s criterion for success is that we replicate our current problem.⁵¹

5 The Path Not Taken

Now we come to the basic point fundamental to any assessment of the impact of the idea of core labour rights upon the international labour law regime. One would think that this requires an evaluation of that very idea – ‘core labour rights’. Is it conceptually coherent? Is it normatively appealing? Is it pragmatically useful? But, as we have seen, these are the very questions which Alston relentlessly refuses to address. As a result, there is a hole of the heart of his analysis which weakens the entire enterprise. To be sure, the paper leaves no doubt about Alston’s intuitions concerning these questions. Alston believes the idea of core labour standards is conceptually incoherent, normatively perverse, and retrogressive from a pragmatic

⁵¹ This is a general concern for me regarding Alston’s position. He is well aware, as he indicates several times, that the old ILO system is in a state of ‘crisis’ (see at 473) – my concern is that his remedies are harmful rather than helpful. But these are not irrational commitments on Alston’s part. As I say, I think the model he wishes us to return to its glory days is linked, rationally, to a certain view of the purposes of the ILO (which is connected to a certain understanding of how the world works) and it is only when those purposes and that view are called into question that the rationality of Alston’s position can be challenged.

point of view. The point of concern is that these conclusions are never argued for. They are, rather and as we have seen, either simply asserted or deemed to be true because someone else has asserted them to be true. And, as I have said, I think this sort of approach only gets a chance in life because of the popularity of the larger set of views set out above, of which this sort of account of core rights forms part. But when the crunch comes there is no actual defence of these positions, popular as they may be in some quarters. So what we have in the text is a constant evasion of the central issue. It is impossible to assess critically the idea of core labour standards, and their impact on the international regime without such inquiry. It is impossible for obvious reasons. First, one needs a conceptual account or map of the ‘old regime’, and of the new idea, as a precondition to any assessment of any kind of impact of the latter upon the former. Second, any normative ‘conclusions’ have the status of mere ‘talk radio’ assertion in the absence of some sound normative analysis. Third, without a sound grasp of the conceptual and normative character of the idea in question, it is pretty hard to get a grasp on its pragmatic potential. What will happen in the real world deeply depends both on whether things make sense and whether they are worth worrying about.

Alston’s view is that the core rights are arbitrary and have no coherent conceptual basis, that they have no normative salience or significance which would justify their being singled out for special attention, and that their impact in the real world of protecting labour rights will be a negative one. Each of these claims is, when you actually address them, wrong.

As we have already noted, the first casualty of Alston’s avoidance of the conceptual issues involved is his title. It should be ‘Core labour rights and the transformation of the international labour standards regime’. (The title would then be correctly formulated – but would still be wrong. It should read ‘Core labour rights and the evolution of the international labour law regime’.) Alston’s transposing of the words ‘standards’ and ‘rights’ captures and is expressive of the central point – that we have here a failure to get to the bottom of the concepts involved.

For labour lawyers this distinction between labour standards and labour rights is fundamental and sounds in the basic conceptual map that labour lawyers use to frame and justify their field. This map is the basic story, narrative, framework of thought, call it what you will, which labour lawyers tell themselves, and it them, about what makes labour law labour law, and why it is worth worrying about. Very simply, this basic understanding can be set out as follows. The objective of labour law is justice in employment, or at work, or perhaps most broadly in productive relations. This will not be obtained because workers in the labour market will, as Adam Smith and others have long observed, be at a bargaining power disadvantage in that contracting process. This is the basic problem and to it labour law responds, in two ways. The first way to secure justice in the face of this problem is by simply rewriting the substantive deal (mostly by statute) between workers and employers – providing for maximum hours, vacations, minimum wages, health and safety regulations, and so on. This is substantive intervention and the results are compendiously called labour standards. Labour law’s second technique of responding to the perceived problem is

not via the creation of substantive entitlements, but rather by way of procedural protection: in short, protecting rights to a fair bargaining process. The logic here is simple – if we are not securing justice at work because of inequality of bargaining power then the law needs to turn up the bargaining power on the workers' side. The most fundamental method of doing this is by legally protecting freedom of association and free collective bargaining. In this part of labour law the point is not to rewrite the deal between the parties but to ensure that a fair contracting process occurs so they can write it themselves. The ethic of substantive labour law is strict paternalism and the results are standards imposed upon the parties whether they like it or not. The ethic of procedural labour law is freedom of contract and self-determination – what people call industrial democracy – and its results are basic rights which, it is believed, lead to better, but self-determined, outcomes. These are two different approaches to securing the overarching goal of justice in employment relations. Taken together, they and the contractual approach they respond to, as joined by the narrative just outlined, are labour law – i.e., what make labour law, labour law, and not family law, or tax law, or anything else for that matter.

While this basic map may be peculiar to labour law, its use of the distinction between procedural rights and substantive outcomes is obviously not. The distinction is basic. There are, of course, other uses of the words 'rights' and 'standards', and other distinctions that can be made. And it is not conceptual nonsense to talk of substantive rights as opposed to procedural rights. This is a familiar conversation. (And it is one with which Alston is very familiar.) But that is a different distinction made for different purposes and involving a different debate. And for labour lawyers the distinction between substantive and procedural components or pillars of labour law is grammatical.

If Alston had paused to enter the fray of debate about what he calls core labour 'standards' (sic) then he would have encountered the obvious claim that these procedural rights are integral to labour law's – and the ILO's – conceptual self-understanding. The course of labour law history (and a lot of detailed labour lawyers' labour law) consists in working out the content of and relationship between these two (bargaining rights, substantive entitlements) modes of public policy alteration of the already legally constructed labour market. The result is that labour law has three great components – 'pure' contract, bargaining (i.e. process) rights, and standards (outcomes). In this light, the recent debate about core labour rights is easy to locate and interpret sensibly. And in this context we can locate recent debates about the ILO, the relevance of its detailed international labour code, and its own internal efforts to make its instruments meaningful. Here the same distinction between procedural rights and substantive standards is playing a leading role, as it has for much of the ILO's history. Indeed the whole point of the ILO's Declaration is to capitalize upon this distinction and to mobilize support around it.

Now Alston would still have a basis for complaint if (a) the content of the core as set out in the Declaration is not a conceptually coherent subject matter; or (b) there is some surprise argument to the effect that the core rights are not of normative significance; or (c) while conceptually coherent and normatively appealing, they are pragmatically

bad news, because, say, an emphasis upon them hinders the otherwise effective advancement of the substantive standards. Let us address these in turn.

First, the idea that the four core rights is conceptually incoherent, that the list of four is ‘arbitrary’ and ‘not based on the consistent application of any compelling . . . criteria’. It is not only labour lawyers who make a distinction between process and substance (process rights and substantive outcomes of that process). It is conceptually, grammatically basic. Alston recognizes this implicitly in his description of them as ‘process . . . oriented’ and in his labelling of them as ‘neo-liberal’.⁵² But this is a bit of cant as bizarre as it is convenient. If one of labour law’s central concerns – with process, i.e., with freedom of association and free collective bargaining (what people used to call industrial democracy, participation, voice not exit, etc.) – is a neo-liberal conspiracy, then a lot of serious people are in for a bit of a surprise. The distinguishing point of collective bargaining is that it delivers what no employer or state, however benign, can (conceptually, necessarily) offer to workers – the opportunity to participate, to create workplace norms and processes themselves. But we need to go further. There is a difference between putting in place a process and putting in place concrete results. This is not a point which can be brushed aside with the dropping of a term like ‘neo-liberal’. And this basic grammatical truth is, as we have seen, basic to labour law. What the core labour rights idea does is to take this labour law truth and remind us of its true metes and bounds. For many years the procedural spotlight has been on freedom of association. The ILO’s elevation of freedom of association to special constitutional status over fifty years ago is exactly in line with labour law’s conceptual map. But as it turns out there are (and have been for a long time – the forced labour conventions go back to 1929) other aspects of labour market unfreedom, other barriers to free participation, other barriers to a bargaining process in which both parties are actors rather than objects. Human beings can both be excluded from the market (by discrimination) or forced (literally) into it. These aspects of unfreedom are real and dramatic and the reason to respond to them is the same as in the case of freedom of association and free collective bargaining. Recall that collective bargaining is not a guarantee of any particular substantive outcome – it is purely procedural and for unskilled workers in times of high unemployment it may not (and is not designed to) deliver much by way of substance. The right to freedom of association is a necessary condition for justice in employment for many. So too the prohibitions on discrimination, forced and child labour. These are, as Alston rightly notes, rather, preconditions to real market participation. None of them guarantee any substantive outcome – just the chance to get to the bargaining table without these aspects of unfreedom attending. And they have the following structure – they involve legal imposition on the bargaining position of the other bargaining party as to whom it will bargain with. It is a set of constraints on the other party’s freedom to contract with whom it pleases. But not their freedom of contract regarding the substance of any resulting deal. As we all know this set of constraints is not a guarantee of justice. For example, there are other

⁵² Alston, *supra* note 1, at 487.

ways that humans can arrive at the bargaining table in a condition of unfreedom (hunger, lack of bargaining expertise.) There is indeed a difference between formal and substantive freedom, between necessary and sufficient conditions for real human freedom, between real capabilities and empty legal promises. No one maintains that the core is a guarantee of just outcomes. But the fact that these core rights do not guarantee just outcomes, that they are a subset of necessary if not sufficient conditions for such outcomes, is not a conceptual problem – it is rather part of the grammar of procedural regulation of the bargaining relationship. (It is what makes procedural regulation, procedural regulation.) We may have other concerns, but we can also have, coherently, these concerns.

To put this point briefly and in another way, contrary to what Alston and others say, the one thing that can be said about the core rights is that there is indeed a consistent basis for their selection for the long list of labour law concerns. These rights are best conceived as a set of restrictions on the rights of the other party to the bargain as to whom it will bargain with, while saying nothing in the abstract about the substantive outcome of any bargain. That is their strength (and it is critical to keep our eye on the positive democratic, participatory story), and their weakness. But they constitute a package which can have strengths and weaknesses of its own. To be even more precise, when Alston and others assert that substantive guarantees or rights, to workplace health and safety for example, should be part of the core, the answer is not that this is not an important idea – it is that it is not part of this important idea.

But conceptual coherence is not what most people stay awake at night worrying about (although it might not be a bad thing if more people did). And in our case the justification of the core rests on more than refuting Alston's claims on that score. Conceptual coherence goes hand in hand with our deepest normative, ie moral, convictions and our most pragmatic assessments of how things work in the real world.

As we have seen, the concept of the core as a set of procedural rights along the lines set out above is fundamental to the very conceptualization of the field of labour law – it maps out a large part of the terrain. This is not to say that it solves all or any of the controversies in labour law. It is a map that lets us see at a minimum that these are the controversies which are labour law and not something else. But now the point is this – what has been called industrial democracy, self-determination, workplace citizenship, the move from mere exit to voice, the power to contract, the idea of being an author, a subject creating workplace law rather than a mere object on the receiving end of a unilateral imposition of power, is of deep normative significance. Constraining the bargaining power of employers in these four specific ways, removing these (unfortunately) well-known types of unfreedom is basic because this aspect of workplace freedom sounds in the same deep deontological Kantian notions of equal humanity as does most of our constitutional and human rights theory. I think that part of the confusion in recent times about these fundamental points, and core labour rights, flows from the package of views discussed above – about how to understand the politics of the last 25 years or so, about the ascendancy of neo-liberalism and the 'Washington Consensus', about the impact of globalization, and of how to think about the relationship between the economic and the social. That package of views is, as we

have noted, shared by neo-liberals and their critics. They both see a strict division of labour between, a sequencing of, and a large trade-off between, the two realms. As a result, there is a policy apartheid, a dialogue of the deaf, ‘two solitudes’, and a power struggle is inevitable (because there is no common ground for discussion). The two sides do not share a set of common concerns and each advances an agenda which comes at the expense of the other. From this perspective core labour rights are treated with suspicion by human rights promoters precisely because they are seen to rest upon the neo-liberal terrain. In so far as they are known to be part of a human rights agenda it is thought that it is too narrow, too formal, too procedural and not substantive, too market friendly, too much at home with a libertarian’s emaciated conception of an adequate account of the normatively significant. It is, in addition, seen as dangerous to our existing (legal) accomplishments in the form of expanded conceptions of substantive and social rights. But all of this is, in my view, misplaced concern. It is also dangerous to the very values those espousing these ideas actually hold (and it also threatens the continued marginalization of the ILO). One of the great accomplishments of the last decade has been the gradual re-evaluation, and resulting erosion in the power, of this defining way of seeing the world and the brace of political positions which flow from it. The intellectual leader in this effort to think our way out of this intellectual cul de sac and to take down the fence it erects (or, rather, see that it was never there in the first place) is Amartya Sen. In his work on ‘capability’ theory and in his accessible presentation of his ideas in his book *Development as Freedom*⁵³ he has exploded our convenient way of thinking about our current problems. This profound rethinking begins where little modern theorizing does – at the beginning. It begins with the most basic of intellectual reminders, that we must keep our eye on the critical distinction between our true ends and the various means of obtaining them. Contrary to our familiar pattern of thought, our true goals are not to increase GDP per capita, nor to construct an international labour code, nor macro-economic stability, nor to increase union density rates, nor to expand free trade, nor perfect ILO processes, and so on and on, for their own sake. Rather, these are possible means to our true ends. The best conceptualization of our true ends is that offered by Sen – that the point of all our striving is human freedom. By this he means the real capacity for human beings to lead lives which we have reason to value. This is not a formal theory of freedom – not at all. In fact, by focusing on capacity it dissolves the old distinction between formal and substantive notions of freedom. Sen’s work offers two other foundational insights of great benefit in understanding how things should be and actually are. First, human freedom so conceived is not only the destination, it is the way there, the path, the means. Second, human freedoms of various kinds – social, economic, political – interact in complex mutually supportive ways. As Sen writes: ‘What people can positively achieve is influenced by economic opportunities, political liberties, social powers, and the enabling conditions of good health, basic education, and the encouragement and cultivation of initiatives’ and ‘the institutional arrangements for

⁵³ (1999).

these opportunities are also influenced by the exercise of people's freedoms, through the liberty to participate in social choice and in the making of public decisions that impel the progress of these opportunities'.⁵⁴ And,

Political freedoms (in the form of free speech and elections) help to promote economic security. Social opportunities (in the form of education and health facilities) facilitate economic participation. Economic facilities (in the form of opportunities for participation in trade and production) can help generate personal abundance as well as public resources for social facilities. Freedoms of different kinds can strengthen each other.⁵⁵

The combined effect of these insights is what can be called a unified conception of our fundamental and true ends. Human freedom as conceived by Sen is both the end of, and a critical means to, human development. Development is the process of removing obstacles to human freedom which can come, as we would now expect, in a variety of forms. So,

Sometimes the lack of substantive freedoms relates directly to economic poverty, which robs people of the freedom to satisfy hunger, or to achieve sufficient nutrition, or to obtain remedies for treatable illnesses, or the opportunity to be adequately clothed, or sheltered, or to enjoy clean water or sanitary facilities. In other cases, the unfreedom links closely to the lack of public facilities and social care, such as the absence of epidemiological programs, or of organized arrangements for health or educational facilities, or of effective institutions for the maintenance of local peace and order. In still other cases, the violation of freedom results directly from a denial of political and civil liberties by authoritarian regimes and from imposed restrictions on the freedom to participate in the social, political, and economic life of the community.⁵⁶

This way of thinking has powerful implications for our familiar and popular set of views – it dissolves them. This is a view which far from putting human rights arguments merely in instrumental and market terms reminds us of the moral foundations and the point and worth of market activity (as part of the complex story of human freedom). It is a view which removes both the opportunity and the need for moral preciousness by those concerned with human and labour rights just as it puts market theorists on the same moral and common ground. On this view, not only are the core rights conceptually coherent but we can appreciate their deep normative salience within an overall conception of human freedom. The core rights are rights which can be directly denied by others' actions in the market. These direct violations by others can be removed by restricting these actions of others. Again, this is not to say that there are not other ways in which the freedom of workers can be limited, or other sources of worker unfreedom in the labour market (or in the informal economy for that matter). Sen makes this clear. But on a view of human freedom as the end and the key means, the core rights sound in what labour law theory has long known – that while there is much room for and need of other laws and institutions to make for a just workplace, the most valuable legal technique (instrumentally and as an end in

⁵⁴ *Ibid.*, at 7.

⁵⁵ *Ibid.*, at 11.

⁵⁶ *Ibid.*, at 4.

itself) has always been, and is, to unleash the power of individuals themselves to pursue their own freedom. Removing barriers to self-help is a core concern. The history of the labour movement and its relationship with the creation and provision of the other elements we value (substantive statutory entitlements for example) is, as Sen predicts, one of human freedom advancing its own cause.

Still there is a larger point. If Sen is right then the traditional framework of thought is not only exploded, but so too is the traditional understanding of the purposes of the ILO. As discussed above, the traditional justification of the ILO was that its critical mission was to create binding and enforceable contracts (treaties) among all of the member states to not pursue their rational self-interest in trading off labour rights for the economic gain this would bring. On this view, nations faced the familiar prisoner's dilemma, which results in a race to the bottom, and the ILO's role was to provide the well-known antidote which game theory prescribed – binding enforceable agreements forestalling any such downward races. We can now put aside the point that this was an impossible assignment for the ILO as constituted – impossible because ILO conventions are neither binding nor enforceable. What Sen makes clear, and what the data increasingly shows,⁵⁷ is that in a world of complex interaction of various human freedoms there is no rationality in the alleged trade-off in the first place. As a result, there is no prisoners' dilemma and any race to the bottom is worse than a mugs game – it's a race in the wrong direction by the ill-informed, not of rational states caught in a collective problem. On this view, we have a new rationale and task for the ILO – not the generally impossible one of dissuading, without any real enforcement power, members from pursuing their own self-interest, but rather the possible task of helping them understand their self interest in the first place, and then assisting them in achieving it. This involves law and institutions and processes, much of which the ILO already has in place. We now have a positive rationale for the ILO and can see a better logic for what it does. This new rationale also provides an orientation for ILO reform – it provides much needed direction about what kind and style of laws it should be producing, what kind and style of 'remedies' are invoked, why 'promotion' is not a weak substitute for 'enforcement', what the point of the review processes should be, how and why the legal machinery in Geneva should be integrated with programmes on the ground in a comprehensive way, and so on. It also allows us to understand why Myanmar and similar cases call for different treatment (even 'enforcement' in a real sense). And so on.

Conceptual coherence and deep normative significance are not the whole story however. Alston is convinced that there is a strong pragmatic argument against 'privileging' the core. He believes that this will divert attention from and undermine the other non-core standards – to health and safety, social security, and so on. Is he right?

This is a very hard argument to follow, especially on the Sen view of the complex interactivity of human freedoms. How can the advancement of the core rights, an attack on this set of clear and central cases of direct unfreedom at the bargaining

⁵⁷ See Langille, 'Re-Reading the Preamble to the 1919 ILO Constitution in Light of Recent Data on FDI and Workers Rights', 42 *Columbia J Transnat'l L* (2003) 87 and the sources cited therein.

table of labour terms and conditions detract from the other rights being secured there? It should unleash human freedom to do the opposite, and this is in fact how the world works. There is clearly some cloudy thinking involved in the Alston view. There must be some subtle but very powerful explanatory and causal mechanism at work to contradict our obvious conclusions – say about the effect of freedom of association and the process fights on the achievement of other, substantive rights. As it turns out, there is a well-known causal mechanism at work, one which Sen would predict, and it disproves the idea that pursuit of the core agenda is dangerous for other labour rights. To put it plainly, the evidence is clear that even in developed countries (again my example is the one I know, Canada) that substantive labour rights (to minimum wages, maximum hours, health and safety, and so on) are much more (one is tempted to say only) effectively utilized in organized workplaces. This, in spite of elaborate, often free of charge, legal mechanisms and protection (against dismissal for example) aimed at and available to all, including non-unionized, workers.⁵⁸ This is a startling fact for many who read the statute books but ignore the data. That is, the most effective way to enforce substantive rights is to put in place the process rights. Labour lawyers know this. So does the Declaration. We should also pause to note that this says nothing of the pretty obvious and important role of collective voice and action in securing the substantive rights, either in statutes or collective agreements, in the first place.

So, in straightforward terms, if you wish to obtain respect for the non-core, respect the core. (We should pause again to note that this is exactly what Sen's views would predict.) In fact, there is no pragmatic tension between respect for the core rights and the advancement of our other concerns. Just the opposite – there is in fact an obvious positive pragmatic relationship. And this single point we have noted ignores all of the other well-rehearsed arguments for private workplace ordering – local knowledge, legitimacy, etc. Thus it remains a mystery why Alston sees the core as being at war with the non-core.

But this disaggregating of the conceptual, moral and pragmatic arguments for the core probably understates the point. We need to see all three of these forces pulling at the same time and in a common direction. This is what Alston would have seen if he had addressed the case for the core on the merits rather than taking the case to be decided on the basis of who promoted the idea, and then fitting it into a standard package of views.

6 Conclusion

It seems to me that the real questions about the core rights, and what they mean for the ILO, are not the ones with which Alston struggles so mightily. The real problems are, for example, how to make any type of rights work in the informal economy. This is a real, difficult, current and pressing question. But once again the general structure

⁵⁸ Adams, 'Employment Standards in Ontario: An Industrial Relations System Analysis', 42 *Relations Industrielles* (1987) 46.

of the answer will be clear – by finding ways, first, to help member states see their ‘self-interest’ lies in advancing real human freedom even and especially here, and in assisting them in the creation of the structures to nurture and mobilize human freedom in its own complex cause in this complex set of circumstances. This is what we should and can do. And this is the path to securing, not destroying, all that we (including Alston, I believe) hold dear.

There are even larger questions, questions for the ILO itself as an institution. The debate about core labour rights, which Alston has so rightly put his finger on, is critical and sensitive because it is a proxy for a larger debate in the ILO – about the role of ILO law and its relationship to the economic/development work of the organization. What is or should be the connection between the two? Are they ‘two solitudes’ – or is there a (necessary) link? As we have seen, the legal dimension, or one version of it, is in trouble. On the other hand, the institution as a whole and its projects in many countries are under real budgetary stress and threat. There are in addition increasingly vocal demands that the broad development agenda of the organization be grounded in constitutionally based decisions and processes. The solutions to all of these problems are, I believe, linked. What would the ILO be without its tripartite law-making and monitoring processes? (It would certainly have a shorter constitution, just one or two lines.) What is its margin of advantage as a ‘development’ institution? The ILO cannot claim that all of its broad purposes, including its human rights and development goals, are its exclusive domain. But it can claim exclusivity and usefulness for its constitutionally central legal processes and tripartite methodologies for advancing those aims. The ILO has broad goals which are expressed in the preamble to the original 1919 Constitution, in the 1946 Declaration of Philadelphia, and in the current organizing concept of Decent Work. But it also has specific methodologies for advancing those goals. Philip Alston is exactly right in drawing attention to this truth. My problem is that his specific ideas about the kind of law we need, and why, make it less likely that this advantage and specialization can be utilized productively. In fact, it will perpetuate an ‘in house’ version of exactly the kind of division between rights and law, on the one hand, and the hard task of economic development on the other, which is so counterproductive precisely because, as we have seen, these are intimately linked. What is required instead, and what we have seen is available, is a new and better rationale for the ILO which, in turn, provides a new and better rationale for ILO law. This then leads to a new view of the possible nature of those laws and of suitable processes for promoting and securing compliance with them. Herein lies the way forward for a unified, integrated, and coherent approach to both the ILO’s mission and its constitutional processes. In fact, this approach lets us see that the ILO is a true ‘law and development’ institution. It shows the way in which the ILO could adapt its own processes to the integrated view which it espouses to the rest of the world.

The Declaration is, on this view, not some Trojan Horse introduced to undermine the ILO, but rather a model aiming to rescue the ILO from its current marginalized status and to cure its internal confusion by demonstrating what an integrated and coherent ILO methodology could and should look like. It makes reform possible and meaningful and not simply evidently necessary. It provides a better way to understand and, as a result, presents a method for revitalizing, standard-setting and

monitoring. It connects ILO law with the ILO's real world agenda. As almost a bonus it provides the way forward to grounding the institutional agenda in constitutional processes and, indeed, makes sense of the Constitution. This unified and integrated view of the economic and legal dimensions of the institution has another and not insubstantial benefit for the ILO – it provides a compelling answer to the obviously relevant question of why its members should support and pay for it. Rather than a house divided between law and economics and in which, as a result, both struggle, we have an institution which both believes in and acts upon our best understanding of an integrated approach to creating durable and just economies and societies. This is the best view of the Declaration and its potential. From this perspective the Declaration and the approach it brings to the core rights is a beginning, a model, and any 'transformation' of the regime is, at least for now, still ahead of us. But at least we can now see what such a transformation might look like and why it is worth pursuing.

