

Learning our time's fables

Thank you to Lady Hale. And to Dana, and to James, and to the Next 100 Years Initiative for inviting me to speak this evening, in the name of a most inspirational, pioneering woman. It is both an honour and a pleasure to speak on this subject, as we embark on this next century as women, as lawyers, as lawmakers and as leaders. We are fortunate to have in Dame Heilbron and in Lady Hale two paragons of brilliance, of courage, and of success to light our way. We owe them a considerable debt. How better to repay that than to commit ourselves to yet more leaps forward in promoting equality and in expanding opportunities for women. And I want tonight to reflect briefly on how we might begin to do that.

In doing so, I should say at the outset, although I suspect I don't need to, that what I say today I say in my personal capacity, and what follows are not the thoughts or opinions of the Law Commission of England and Wales. If I don't make that clear, I might get locked in the Tower.

All hours contain 60 minutes. But not all hours are the same length. We learn this early on in life – the days before holidays and birthdays as a child seem to go on forever, and yet a fairground ride lasts no time at all. It doesn't change as we get older, albeit that the moments of significance do. I have never known minutes as short as those that follow my pressing of the snooze button, or as long as those when I am late for a meeting and my train is waiting for a free platform. 40 mins of this lecture to say all the things I want to say seems like a very short time indeed. I imagine, for some of you at least, it will feel like a lot longer than that.

And I realised, as I started to think about what I was going to say this evening, that, the older I get, the more I think about time. Inevitable perhaps, but hastened I think by the pandemic, and the strange vortex that we were all placed in by the life limitations it imposed, and continues to impose. I also realised, as I pondered on the slippery and shape-shifting thing that is time, that most of the lines of poetry that have etched themselves on my brain over the years, and that return to me on a regular basis, are all about time; both its relentless march and its promises. It is the ultimate arbiter of what stays in and what gets left out of our stories. We know we should use it wisely, and yet we tend to describe as “good times” those periods when we don't...It's little wonder then that time has been a focus of art and poetry for all, well, time.

Less than a month ago, for instance, as Carole Ann Duffy so lyrically put it, “The clocks slid back an hour and stole light from my life”. Nobody can convince me that a brittle day in winter is equal in length to the elastic hours of late spring and high summer.

Also, there have been periods of my life, for example, (familiar I am sure to many here) when I was keenly aware of what my professional peers were getting on with whilst I experienced the exquisite conflict of privilege and burden that is parental leave. Andrew Marvell's words were never far from my thoughts:

“...at my back I always hear/Time's wingèd chariot hurrying near”.

In an environment in which one is judged by what (and how much) one has done in absolute terms, rather than according to one's time spent at work, there were times when I could have

sworn that wingèd chariot had Lewis Hamilton at its wheel and the full genius of Maclaren involved somehow in its mechanics.

Similarly, I imagine there are few people listening to this who will not identify with the line that is never far from my thoughts the evening before a deadline; a plea which manages, in the mouth of Marlowe's Faustus, to be both visually delightful and viscerally dreadful:

“Stand still, you ever-moving spheres of heaven, that time may cease and midnight never come”.

Midnight always comes, of course. But it doesn't always bring Mephistopheles. And that's my point.

Time is the thing we're all given that none of us can keep. But it is also a healer and a space. Outside of the impotent spectator-sport that is memory, it denies us access to the past and so leaves us no choice but to move on and move forward. It gives us the opportunity to learn from its younger siblings how best to interact with its elders. On this point, I give you Arthur Clough, and one of the most sustaining lines I know:

“If hopes were dupes, fears may be liars” And there's really no arguing with that.

I suppose, if there is an overarching theme to my lecture this evening, it is that we are yet to see what midnight brings. But although those spheres of heaven are not going to stop moving, we do not have to, nor should we, passively wait and see what it brings. At the risk of mixing morality tales, the ghost of workplace past has shown us what has been, and how that worked out. It is vital that we combine that knowledge with our observation of what is happening in this, present state of flux, uncertainty and transition, to make sure that the workplace of the future is one we would sell our souls to have. But that we won't have to.

I want now to address the fables of our time, to which I refer in my title. These are the realisations that life during a pandemic has either hastened or created, and which I find both fascinating and terrifying: fascinating because my thoughts about some of them are different to how they were two years ago, and terrifying because they are huge. Terrifying because they are all both traps and opportunities. I feel slightly breathless contemplating the magnitude of the choices we as women and we as lawyers must now make, and the work that we need to do.

I should also say at the outset that I use the term “women” as a meta-title in a sense: to recognise the full range of accomplishments and aspirations of the Next 100 Years Initiative. It goes without saying that “women” as a term does not refer to a homogeneous group, but rather to a rich mosaic of socio-economic variations, family structures, individual contexts and, intersectional concerns – that complicates the negotiation, of course, but since when was being one-dimensional something to aspire to?

- Work is something you do, not somewhere you go

This was a phrase that I learnt in my first full-time job, and I had always subscribed wholeheartedly to it. Until about 12 months ago. I have always been someone who finds working from home incredibly productive – in fact, in terms of pure output, far more productive than being in the workplace. But I have realised recently that this is because it has always formed part of a work equation – and was always balanced against time in the workplace: seeing people

(planned and unplanned); drinking coffee; eating cake; watching; learning; absorbing; being amused; being irritated; being tired; having got dressed properly and occasionally having brushed my hair; getting rained on and getting stuck in traffic (of all kinds). Seeing people and being seen.

That equation is a delicate balance, but a balance it has to be. Work is of course something we do. But, without more, that makes our relationship with work sound very passive. There is, I have little doubt, much to be said for reconstructing our relationship with it. So, it is something we do, but it is also somewhere for us to go; a space for us to inhabit; a vehicle for us to drive; a force for us to harness. Why does it feel so alien to say that we should make work work for us?

I am not of course the only person to talk about this topic in recent weeks. I imagine most, if not all of us are aware of the talk recently given by Catherine Mann: a member of the Monetary Policy Committee of the Bank of England. Speaking recently at a virtual coffee morning of the FN100, she warned of women having suffered from a “she-cession” as a result of the pandemic, which is in her view likely to continue if they allow themselves to be absent for too long from the workplace. Catherine talked of “extemporaneous spontaneity”: basically highlighting the intangible benefits of interacting with tangible others. She predicts the development of two employment tracks in the future – a physical track and a virtual track, and says it’s easy to guess who will be on each.

It is certainly true that women were absent from the workplace for too long – it will be all too easy to leave again. Last in, first out. Let’s not do that.

Let me be clear, though. My purpose is not to suggest for a moment that we, any of us, should return to the models and expectations of the past, that we should passively accept that the old ways will return, and that we will be in trouble if we don’t conform. My point is rather that we need to be alert and alive to relevant dangers: to recognise that the she-cession is a risk and why it is a risk, and to decide therefore in a fully-informed way what we want to do about it. Before midnight comes, in other words, we need to come up with a better model – one that has the interests of all workers and workplaces at its centre – not one that evolved in a world in which both work and workers were very different to how they are today. The “future of work” is a hot topic at the moment – there are many perspectives and opinions on it. It is hard to deny, however, that whatever the future of work brings will depend on our collective efforts in the present.

Now, more than ever before, women have to be at the negotiating table – to make sure that the benefits of the tectonic shifts that are undoubtedly on the horizon work for women and not against women. We **must** have lines in this play.

“Practical men who believe themselves to be quite exempt from any intellectual influence are usually the slaves of some defunct economist”

Ignoring the pronoun for the moment, this line from the well-known poet, John Maynard Keynes, is instructive in alerting us to the importance of decision-makers not being unconsciously shaped by their own past experiences: experiences which relate to a world that has now passed.

Before this century even began, a group of experts was commissioned by the European Commission to write a report on the future of work and labour law. Led by Alain Supiot, Emeritus Professor of Law at the College de France, nine scholars produced an analysis that has not only stood the test of two decades’ time but has turned out in many ways to be remarkably

perspicacious. It remains, therefore, relevant and helpful today. In fact, whilst some of its projections have already eventuated, others are happening now, and others set to begin or to intensify in the post-pandemic world.

The Report (known widely as the Supiot Report for those not familiar with it) focuses mainly on the shifting patterns of work from an early capitalist industrial mass-production model to the less formal, less hierarchical system with which we are here and now far more familiar. The Report is concerned, therefore, with the last significant transition in employment relations, (the last transition, that is, before the storm whose eye we are currently in).

Strikingly, and I quote from the English language translation, published in July 2000, a year after the original (French) version emerged, the Report observes: “Variable working hours, on-call hours, and annual scheduling of working time are the most tangible signs of a change coming about in response to the evolution of technology (teleworking, which shatters working space/time)... That phrase, “shatters working/space time” is elemental to today’s questions. It is worth bearing in mind that, when that Report was written, few people had mobile phones, the phones of those who did (each one the size of a small dog) were really just for calling people and texting in huge black letters on a grey screen. Email was both novel and the Next Big Thing, and anyone who was anyone had a pager. And yet, even then teleworking (remote working) was seen as having shattered working space/time.

Now, we can “telework” using a watch. It’s not hard to understand why the pieces of the working space/time continuum have themselves been shattered into ever smaller pieces. This phenomenon; this destruction of work/time boundaries, is the thing that connects and underpins all of our times’ fables.

- More connected does not mean less isolated

Technology has, as we all know, developed so as to ensure that we can now be connected, should we want to, all the time. We can speak to and see people on the other side of the planet in real time and for very little cost. Or at least, very little financial cost. Constant connectivity has enabled professional and personal relationships to continue even during lockdowns and under social distancing restrictions. It has been in many ways transformative. But it has also revealed what perhaps should have been obvious all along, but which escaped most people’s notice – that connection does not preclude or prevent isolation. In subordinating physical presence to virtual appearance, remote communication technology has disembodied interaction. In so doing, it threatens to disempower and disenfranchise some of its users.

This technology, that has played a huge role in saving lives, jobs and economies, is of course to be welcomed and applauded. But, like anything, what it gains in moderation, it loses in excess. It has allowed people to be both at work and at home simultaneously, and this gives more people, and certainly more women, access to work opportunities that they would not otherwise have had. But, in the very process of providing that option, and eliding the geography of work and home, it has also provided something of a trapdoor for those who have, or perceive that they have, compelling reasons to be physically present in the home space and physically absent from the workspace. There has been much talk of a “right to disconnect”. But perhaps the default inherent in that is wrong. Maybe the right, should we choose to exercise it, is to connect. Systems such as these stand or fall by their baselines.

- More time “in” does not mean more “time out”

For many, more time spent in the house does not, despite what we may have anticipated, mean more “time out”.

The Supiot Report remains meaningful today, I think, because it shows both how far we have come and how far we have left to go. One of its standout observations, for me, is that it is a fiction to presume that work is detachable from the worker. The breaking down of formal paid work patterns for increasing numbers of workers has brought undoubted advantages: greater autonomy, more flexibility, and the potential for leisure time to be individually arranged. Such informalisation, however, has, along with the forces driving it, also led to an increasing projection of work time on to “free time”.

Never has this been truer than during the pandemic, when, for many of us, all of our work had to be done from the place that forms the base for the rest of our lives, and with which we associate family, social, rest, leisure and sleep time. This was often made all the more extraordinary by such spaces being made to accommodate those things for everyone: housemates, partners, children, parents, lodgers, guests and so on. Separability became an unattainable luxury for many. For others, of course, it was solitude that provided the challenge – physical absence from work, along with social restrictions, meant the absence of human contact, and left work itself as the sole connection with the outside world: a lifeline, a tether and a bind.

This forced merger of the workplace and home has had some surprising, and some less surprising, results. Less surprising is that it has been easier for those carers newly working from home to combine paid work with life’s work. Particularly where young children are the recipients of that care, an increased physical presence in the home has made certain aspects of parenting easier. (You will note, I am sure, how carefully I am choosing my words here.)

But perhaps more surprising is that the bright lines that used to exist, for better or for worse, between paid work and our life’s work have been eroded, and with them the boundaries they marked. 20 years ago, the Supiot Report highlighted a general failure to recognise reproductive and domestic work as being part of the work-life equation, recognising at the same time that this had a disproportionate effect on women. This phenomenon, which is still very real, is something we need to have at the forefront of our minds as we figure out how to redraw boundaries in a way which enables and empowers women to combine the multi-dimensional aspects of their lives, rather than in a way that restricts them, geographically, professionally or spiritually. Being “at home” is, for obvious historical reasons, more charged for women on the whole than it is for men. We have been told for generations that it is our place. Maybe it is. But only if we want it to be.

- Less commuting time does not mean more personal time

One of the reasons we expected to recoup more time for ourselves whilst working from home was the loss of commuting time: something which continues in many cases to be a silver lining to the pandemic and its effects. It is remarkable, however, that many of the people I speak to who have lost a commute (and, in many cases, quite a considerable commute) report that it has not resulted in their apparently gaining anything. Apart from a longer working day. Guilt is a great thief of time, after all. Commuting time feels like it belongs to paid work rather than to life’s work, and this is the case even though it is very often done before “work” starts and after “work” ends. But many of us have left it on work’s account. The question is whether we should

continue to do so. Yes, it is a demand and a task that has reduced or disappeared, but that is not in itself something we need to “make up” for. In the aggregate, we are very unlikely to make the world worse by reducing commuting times: it is not obvious that employers get less out of employees who have not travelled anywhere, and the environmental benefits of reduced travel are, at least potentially, significant. Duty, though, is in the eye of the beholder. I think it’s clear that we need to re-evaluate our perception of work space as well as work time, and accept that changing places for work *can* be important, but it is not intrinsically so.

Geographical flexibility is not only important for the logistics of individual lives, it is an inescapable truth that environmental considerations can no longer be subsidiary or incidental to human decision-making. That is one dimension in which time has seemingly lost patience and started to run like the wind (perhaps to prove the power of that particular sustainable resource). Ignoring this as a crucial factor in our decision making will likely cost us the earth.

So what do we do with this knowledge? This knowledge of what’s now possible, what should be avoided, what’s gone wrong and what we really, really want?

As women in law, we have the privilege of not having passively to accept anything. Anymore. Dame Heilbron, the remarkable woman after whom this lecture series is named, did not do so. And hers was a more solitary charge than any we are likely to have to make. The same of course can be said for Lady Hale; both women with first class minds, being the first in time. So what, actively, are we to do?

I don’t presume to have a complete answer to that, of course. But there are some ideas, some stage directions, that I don’t think we should ignore. And I am not necessarily talking about a need for law reform here – it is as likely to be achieved at least in part through cultural reform, or through incremental shifts in attitudes and expectations.

I have referred earlier this evening to baselines and to defaults. Choices such as those we are faced with in terms of the organisation of work are made within a broader structure. Individualised arrangements and adjustments are all very well, but they are always made relative to a baseline (as the very word “adjustment” suggests). But what if the baseline is the problem? If we need to adjust away from it to reach a reasonable arrangement, what function is it performing? What work is it doing?

I have already made the point, (perhaps the “taken as read” point) that women’s voices need to be heard in shaping the new. Professor Sandy Fredman, Professor of Law at the University of Oxford, whose work has done an enormous amount to advance equality in the workplace, describes substantive equality as a multi-dimensional concept. She points out that it “resists capture by a single principle, whether [that] be equality of results, equality of opportunity, or dignity”. Professor Fredman makes the point, as I have tried to here, that such equality “should not exact conformity as a price”. Rage, rage against the dying of the right. “Instead, it should accommodate difference and aim to achieve structural change.. and facilitate full participation in society, both socially and politically”.

We need to look to the interests of those in work. But we also, importantly, need to look to the interests of those not in work, or those returning to work, whether, for instance, as a result of illness or of caring responsibilities. Equality will never be attainable whilst allowance is not made for those who take on an extra burden of life’s work at the expense of their paid work. I have long been amazed at the lack of recognition of this by institutions that should know better: by an insistence, for instance, on first past the post promotion or appointment processes, judging

CVs by the number of lines on them, with no allowance made for time away from work. The need for such recognition is universal, and is important not only for women; shared parental leave, for example, is a case in point, and equitable is as equitable does. But we know, empirically, that the failure to make such a recognition falls disproportionately on women. In many cases, women have to do more in less time to keep up in professional terms. And there still seems to be a sense of wonder and confusion from some quarters about why we have a gender pay gap, glass ceilings and predominantly male gatekeepers. In making this argument in the past, I have used the analogy of limited overs cricket: failure to evaluate workers on the basis of time actually spent working as opposed to time since first appointment is analogous to giving one team 50 overs and the opposition, say, 30 overs, and awarding the trophy to whoever gets the most runs regardless. In the sporting arena, that would be regarded as just not cricket.

And yet it is standard practice still in many professional contexts. If a cricket team loses its chance to bat for the full number of overs (a not infrequent occurrence thanks to British summer weather), the total number of runs they are chasing is correspondingly reduced, according to a set mathematical formula. Why haven't we got a Duckworth Lewis method for work is beyond me.

This is a public project. We need to be bold and we need to be positive. On one view, the current, working model has had its time; it has for too long been limping from reactive response to reactive response, imposing negative duties to fill the gaps between our paid work and our life's work. The formulation of positive duties by contrast, designed to fit work to workers, to avoid problems, and to avert unequal results before they happen, would seem preferable to accepting that damage is inevitable and that it can merely be limited and patched up on an ad hoc basis.

As recent and concrete examples of this sort of approach, we can look to Portugal, a jurisdiction in which employers can now be fined for contacting employees outside of work hours. Closer to home, several financial firms are now offering unlimited paid annual leave and imposing a minimum number of days that must be taken by each employee. Or mandating a four day week, with a set number of hours to be worked across those days. To many, these measures might seem extreme, or counter-productive, or unfeasible, or all of the above. They are certainly unlikely to work for every employer-employee relationship. But they move baselines. They say something extraordinary about the possible redistribution of time.

Several of the things I have said tonight startled me when I first thought them or encountered them. But I don't think we should shy away from that sort of response. We live in interesting times, and that feels like a backdrop conducive to bold moves. It feels in many ways as if we are sat on the cusp of something: change undoubtedly, but beyond that, I am not sure of exactly what. This is a good time to act, and to remember that line: "If hopes were dupes, fears may be liars"...

Perhaps, for instance, the shattering of working space/time will be a good thing. Perhaps it is a boundary that has outlived its usefulness. But we need boundaries, so its replacement should be chosen with great care. If we accept that workers and work cannot satisfactorily be separated, and that a binary distinction between work and non-work is not necessarily feasible or constructive, what can we do instead? We could build a structure that recognises this as a fundamental principle, and builds on it accordingly: perhaps, as some employers are already doing, imposing not regimented working days or even patterns, but specifying instead aggregated maximum time during which one is directly accountable to an employer (or, indeed to oneself, in

a paid work capacity). This is not to remove worker autonomy, but rather to enhance it and to ensure that our life's work is not subordinated to our paid work.

Because maybe it's more important than ever to ask "What life is this if, full of care, we have no time to stand and stare?" William Henry Davies asks a very pertinent question. Even for those of us lucky enough to enjoy our jobs, there are many good reasons to ensure that we always make time to stand and stare. There is no getting away from the fact that we are having the time of our lives, whether we like it or not.

Sarah Green

Bristol

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