

A Manifesto for Labour Law: towards a comprehensive revision of workers' rights

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**THE
INSTITUTE
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RIGHTS**

A Manifesto for Labour Law: towards a comprehensive revision of workers' rights

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‘Just as the current legislative regime in Britain abhors, as did the law of the nineteenth century, combination by workers, so an alternative labour law sees collective organisation as a necessary condition both of workers’ freedom and of a free society more generally. A reform not founded on that principle cannot be an alternative labour law, no matter how attractive the packaging. ... An alternative labour law cannot be enacted in a void; it carries conviction only if based on hard legal analysis allied to an alternative social vision. For those who aim to give it effect in government in the real world we must reserve our patience and our sympathy, so long as they do not give up the fight.’¹

preface

The world of work has changed and with it the nature and role of the workforce. For the UK's 31 million workers, many of the changes have had a devastating impact on their working lives and their living standards. Britain's workers are amongst the most insecure, unhappy and stressed workers in Europe.

A prime factor in moulding the lamentable features of the world of work in which UK workers find themselves is a framework of law recognised as 'the most restrictive in the Western World'. It is a framework of law born out of 19th century conditions, which has bypassed many advances of the 20th century, which ignores today's economic and workplace realities, and which is not fit for purpose in 21st century Britain.

It is time for the law to change. This Manifesto represents an IER contribution to a long overdue debate on the future of labour law. We believe this Manifesto shows how the law can be used to create fair, just, secure, democratic and productive conditions of work which will diminish inequality and benefit the economy.

At the heart of our proposals is the need to ensure the voice of Britain's 31 million workers is heard and respected; in government (via a Ministry of Labour), in the economy (via a National Economic Forum), and in industry (via Sectoral Employment Commissions). The role of employers in building a vibrant economy is acknowledged but the concept of management's unrestricted 'right to manage' is rejected as undemocratic, unproductive and undesirable.

Instead our Manifesto uses as its model the experience of those economies (including post-War Britain) with extensive sectoral collective bargaining structures underpinned by strong trade union rights. The benefits are threefold: collective bargaining helps to counter the unequal power of the employer; helps to reduce inequality in wealth and health; and helps to promote a stable and productive economy.

While the Manifesto aims to shift the weight of regulation from legislation to collective agreements, that does not mean there will be no role for legislation. So our Manifesto sets out the role legislation will play in underpinning the collective bargaining process and protecting

workers' rights. Consideration is given to ways to improve wages and working time, equality at work, pay equity and health and safety issues.

The Manifesto also addresses the growing problem of precariousness experienced by so many UK workers. It sets out radical dispute resolution solutions, based on the view that labour rights should be universal in their application (covering all 'workers'), and effective in their enforcement (via the creation of a Labour Inspectorate and a Labour Court).

Our proposals for collective bargaining are placed in the wider context of the international treaties and human rights Conventions (almost all of which are already ratified by the UK) which establish the minimum standards for labour globally. Particular attention is given to freedom of association protections, standards on trade union autonomy, and protection against acts of anti-trade union discrimination. We highlight the need to repeal the Trade Union Act 2016 and replace it with positive rights to improve the organisational and financial security of trade unions, and to ensure that independent trade unions have access to workplaces and improved rights to represent their members.

As has often been said, collective bargaining without the right to strike is little more than collective begging. But in the UK, the law has developed in such a way that industrial action is always unlawful unless the union can demonstrate it satisfies the complex requirements to gain limited statutory protections against judge-made law. Over the years, attainment of statutory protection has been made repeatedly and seriously more difficult. The time has come to change the default legislative position and provide a positive right to strike in line with the UK's existing international obligations.

Our Manifesto offers an alternative vision for labour law. This is a Manifesto for raising labour standards and improving working conditions for all workers. It proposes changing the way in which working conditions are regulated by embedding the voice of workers at national, sectoral and enterprise levels and moving responsibility for regulation from legislation to collective bargaining. It is a model that has form – and proven successful outcomes.

K D Ewing, John Hendy and Carolyn Jones

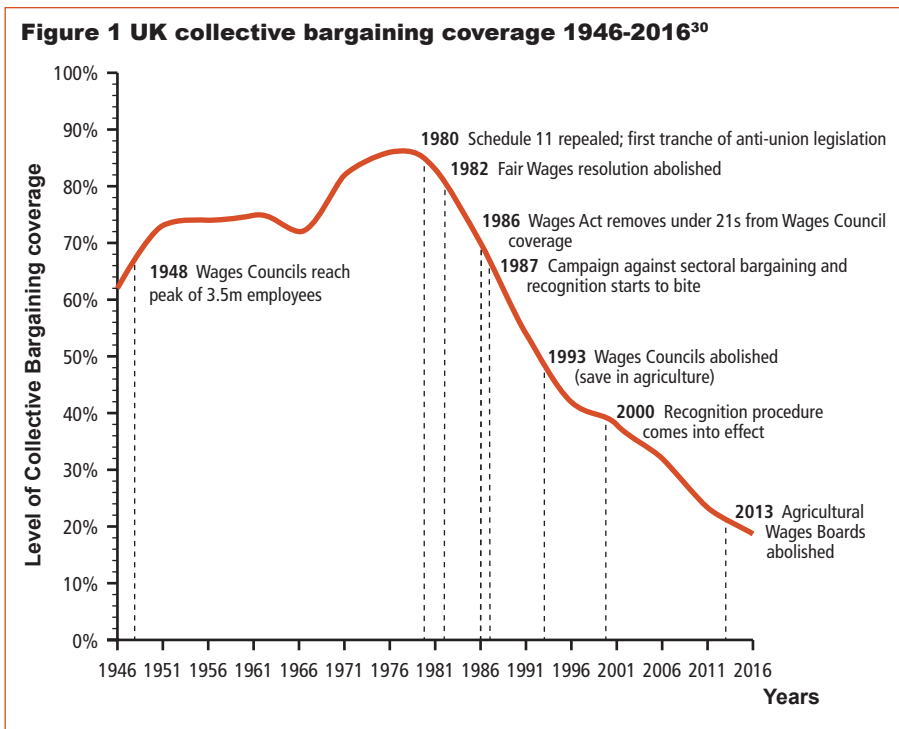
introduction

- 1.1** Britain's 31 million workers² have been devastated by 35 years of neo-liberalism. They are amongst the most insecure, unhappiest and stressed workers in Europe.³ They endure some of the highest rates of bullying.⁴ And they have amongst the least opportunities in the European workforce for making their voices heard at work.⁵

the british workplace

- 1.2** On average, British workers work more hours per week,⁶ more days per year, more years before they retire,⁷ after which they receive lower levels of pension than most of their European counterparts.⁸ In comparison to other European workers they have generally received less education and training,⁹ and (because of lack of employer investment) their productivity is lower.¹⁰ They get fewer paid holidays than almost all European comparators (the Working Time Directive notwithstanding).¹¹ Their pay is so low that a great proportion of them are in poverty¹² (and the State subsidises employers' low wages in respect of a higher proportion of workers) than almost anywhere elsewhere in Europe.¹³ The gender pay gap is at a wholly unacceptable level.¹⁴
- 1.3** In addition, the CEOs of British companies earn a far higher multiple of their workers' average earnings than in any other European State.¹⁵ Britain has a high proportion of its workforce in so-called 'self-employment',¹⁶ agency work,¹⁷ temporary work,¹⁸ and/or in zero-hours contracts.¹⁹ It has more part-time workers who want full-time jobs than other European countries.²⁰ British workers have less entitlement to redundancy pay, sick pay,²¹ and maternity pay²² than most European workers. Workers' rights to remedies for unfair dismissal and discrimination are set low and have been made practically unenforceable by the imposition of high access fees.²³ In Britain, unlike most European countries, there is no Ministry of Labour, no labour inspectorate and a negligible complement of health and safety inspectors.²⁴

1.4 British law on trade unions is ‘the most restrictive in the Western World’.²⁵ This is indisputable in relation to the right to trade union autonomy, right to strike, and the right to bargain collectively. By 2011 Britain had fallen to the second lowest in Europe in terms of the level of collective bargaining coverage.²⁶ Coverage is probably less than 20% today,²⁷ lower than at any time since before the First World War.²⁸ This compares to a European average of around 62% in 2011 (probably a little less today), with countries in western and northern Europe mostly at over 80% coverage.²⁹ Figure 1 represents collective bargaining decline in the UK since the Second World War.



1.5 Amongst 24 countries for which data are available in terms of wage inequality:

the most unequal countries in 2011 (in descending order) were the UK, Portugal, Latvia, Cyprus, Lithuania and Estonia, while the most equal (in ascending order) were Belgium, Sweden, Finland, Denmark and Slovakia.³¹

Britain ranks similarly in terms of disparity of inequality of wealth and income in Europe:³² '[I]nequality, measured in various ways, has been increasing in a majority of developed economies in recent decades. ... In some countries, including the United States and the United Kingdom, the rise in inequality has been particularly stark...'.³³ Hand in hand with the rise in precariousness, inequality and de-unionisation, Britain's economy and industry have been devastated by the impact of neo-liberalism since 1979. Industrial output has dropped dramatically over the last 30 years, the true impact on the economy masked by the rise in financial services (transactions of great value but negligible worth save to the bankers and financial traders involved).

british labour law

- 1.6** It would be a mistake to think that this lamentable state of affairs is the unavoidable product of the operation of the 'labour market', in which workers are now treated as a commodity. Labour law has played its part in bringing this situation about, with legal changes having been constructed and developed in such a way as to be in large part responsible for the situation described above.³⁴ Indeed, especially since 1979, the law has been moulded purposefully to achieve these outcomes.
- 1.7** The other side of that coin is that law can be changed the other way. It can be used to reverse the situation. Our Manifesto shows how the law can be used in a diametrically different way so as to create fair, just, secure, democratic, and productive conditions of work. Changes to workplace law will be to the benefit of workers (and their families), of employers and, crucially, of the country. This blueprint sets out the necessary steps. Of course, these changes need to be seen as part of, and to serve the needs of, a wider economic and industrial policy.
- 1.8** Whilst the law of the land has an instrumental role in determining industrial and employment relations, it is important to recall that there are also international laws which regulate these matters. The UK, along with every country in Europe, has ratified a series of international treaties which establish the minimum legal standards applicable to the workplace. These human rights treaties are the foundational building blocks of the rule of law, established after the defeat of fascism in the Second World War. These are the laws with which the UK consistently demands that its trading partners (and other countries on which pressure is sought to be applied) must conform.

1.9 There is, of course, a problem enforcing international law (whether on labour or other subjects). This is why, for many years, the UK has been able to escape any meaningful sanction for persistent breaches of many of its obligations in international labour law. Heavily and repeatedly criticised by international agencies which supervise States' compliance with the treaties they have ratified, UK governments (Conservative, Labour, and Coalition) have simply shrugged off the adverse findings of these bodies. The media have, unsurprisingly, ignored this lawlessness so that abuse of workers' and trade union fundamental rights are never held up for scrutiny against the yardstick of international legality as are, very occasionally, other forms of international lawlessness.³⁵

conclusion

1.10 The new scheme of workplace laws which we propose will all measure up to the international minimum standards long ratified by the UK. We also anticipate that the new regime regulating working life proposed in this Manifesto will, of course, be integral to the new economic policy of the Shadow Chancellor of the Exchequer to create an efficient and competitive economy which ensures the success of the UK in the decades to come and in the global market. Central to that policy must be an active role for trade unions and a positive role for collective bargaining.

the four pillars of collective bargaining

2.1 Collective bargaining has a central and crucial role in the legal programme proposed in this Manifesto. It is now no longer in doubt that an efficient and productive economy is critically associated with strong workers' rights and high levels of collective bargaining coverage. The beneficial impact of high levels of coverage of collective bargaining on the economy have been the focus of much academic and NGO research over the last few years.³⁶ Papers by the IMF,³⁷ amongst others, refute the naïve neo-liberal dogma that unions constitute a distortion of a free labour market in which it is beneficial if wages are driven down to the lowest sustainable level so justifying removal or restriction of fundamental rights at work.³⁸

collective bargaining and workplace democracy

2.2 Employee 'voice' is now a hot academic topic.³⁹ There are many locations for such 'voice'. As well as voice at work, these include participation by worker representatives in the processes of government, with workers' interests in some countries being represented in government by a specialist department, such as a Ministry of Labour. Worker voice in government may be enhanced by processes such as 'social dialogue', in which trade unions participate to identify whether new laws are needed and what forms these laws will take. This is a process embedded in the EU Treaty, though since 2010 it has been inactive and in need of restoration.

2.3 It is well established that the involvement of workers in decision making by their employers (not just confined to their terms and conditions of employment) is highly beneficial to business.⁴⁰ But it is also a matter of principle that workers should have a say in the enterprises for which they work and to which many of them dedicate so much of their lives. Democracy should not stop at the gate to the workplace. Yet the reality is that for the overwhelming majority of the UK's 31 million workers, not only do they have no say in the business decisions which affect them,⁴¹ they have no say in the fixing of their own terms and conditions of employment.⁴² Terms and conditions in

the workplace are governed, by and large, by standard term contracts of employment over which the prospective worker has no say other than to accept or reject.

- 2.4** Management's 'right to manage' is now widely understood and applied to exclude input from the workers subject to it. The alarming extent of the blacklisting operations of the major British construction companies conducted over four decades is indicative of a managerial attitude in which the voice of the ordinary worker is neither heard nor respected.⁴³ In the few instances where consultation (not negotiation, it is to be noted) of the workforce is required by law, recent statutory changes have reduced the extent of the obligation (in the face of protest by the unions).⁴⁴
- 2.5** Workplace democracy can be achieved in several overlapping ways, there being different forums for 'worker voice' to be heard. We propose, first and foremost, the re-establishment of collective bargaining at sectoral (i.e. industry-wide) level.⁴⁵ From this sectoral base, establishment/enterprise/company level collective bargaining may also take place. Secondly, we propose changes to company law making workers stakeholders in their employer. These two elements are considered in Chapter Three, along with enhancing worker opportunities to have some input into industrial strategy and the planning of the economy just as, currently, big employers and their many lobbyists do.
- 2.6** Although not central to the discussion in this chapter, it ought also to be recognised that worker voice can be articulated in the political arena, and that here too steps are being taken to muffle it. These steps are to be seen most visibly in the provisions of the Trade Union Act 2016, which in due course will restrict the ability of unions to raise money for political parties and to campaign in the political arena in defence of members' interests. These provisions should be repealed and full political freedoms restored, along with other steps to extend to workers the right of democratic engagement.

collective bargaining and social justice

- 2.7** The Court of Justice of the European Union identifies the defining characteristic of the employment relationship as 'subservience'.⁴⁶ That inherent imbalance in power between the worker and the employer creates a conflict of interest.⁴⁷ Collective bargaining is a means of

achieving justice at the workplace between the conflicting interests of the employer and the workers. That inequality of power between the worker and the employer was the very basis for the collective bargaining introduced across the USA by the National Labor Relations Act 1935, the second preamble of which reads:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organised in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

2.8 The same point was made in 2015 by the Supreme Court of Canada which held that the relevant provision of the Canadian Constitution protecting freedom of association:⁴⁸

functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of s. 2(d) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals. The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way.

The re-establishment of collective bargaining is therefore of benefit to all workers in countering (at least to some extent) the unequal power of the employer over the worker.

2.9 A particular problem over recent decades has been that of increasing inequality of income and, in particular, of wages.⁴⁹ Economic inequality is now known to cause huge damage to individuals and to society (both rich and poor, curiously enough). ‘Inequality has also been shown to undermine economic growth’.⁵⁰ At a more human level, Wilkinson and Pickett have shown that in every scientifically measurable respect, even the rich suffer in a more unequal society – and the poor, of

course, suffer most.⁵¹ Growth in inequality and poverty are irrefutably associated with growth in crime, drug abuse, and anti-social behaviour, mental illness, and hopelessness. Disparity in income and wealth is mirrored by disparity in living standards,⁵² health,⁵³ life expectancy,⁵⁴ and a loss of social mobility.⁵⁵ These individual tragedies echo down the generations, creating huge burdens on the State as well as misery for its citizens. Inequality is bad for society and, in particular, for the economy.

2.10 Consequently, redressing inequality of income is vital for humanity as well as the economy. More equal societies are better societies. They are also more rational societies. Widespread collective bargaining is the most efficient means of raising wages and reducing inequality of income (regardless of the National Minimum Wage, 'Living Wage' and, of course, progressive taxation regimes).⁵⁶ Thus:

Collective bargaining has long been recognised as a key instrument for addressing inequality in general and wage inequality in particular... In practice countries where a large proportion of workers are covered by collective agreements tend to have lower wage inequality. This is because collective agreements lift wage floors and compress wage distributions...⁵⁷

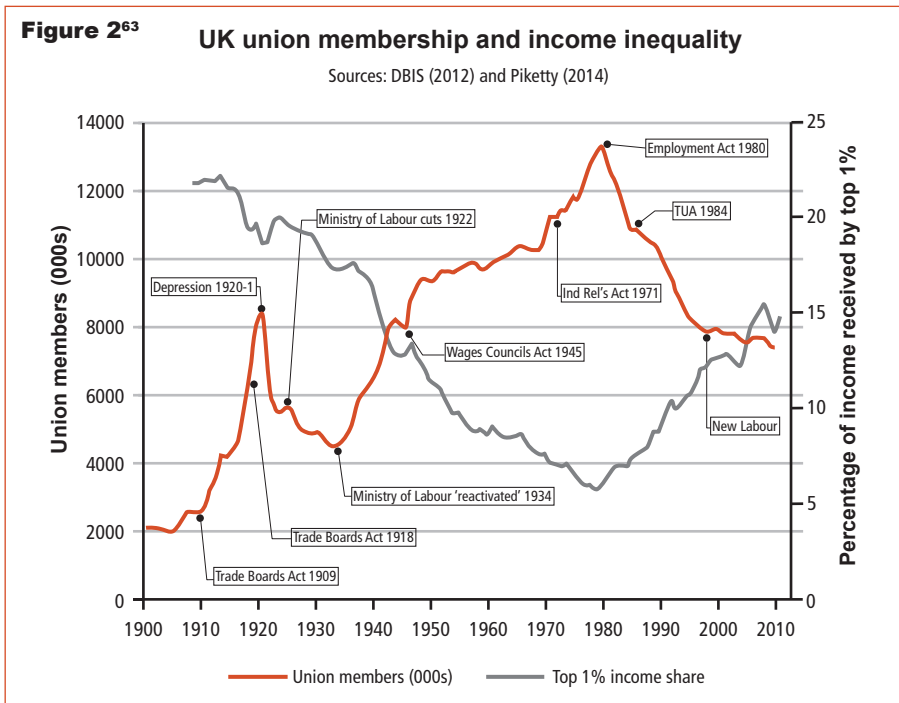
In particular, collective agreements at national, industry and multi-employer levels are more effective in reducing inequality than those at enterprise or workplace level.⁵⁸ Collective bargaining (and for the most part at national or industry wide level) was the technique nearly universally adopted in the 1930s⁵⁹ and, over the next 50 years, it worked well in the UK – and it still works well in many European countries.

2.11 It is no coincidence that strong and efficient economies such as in Germany, Sweden, Norway and Denmark have extensive sectoral collective bargaining coverage underpinned by strong trade union rights. As research for the ILO has found:

...income distribution is not primarily determined by technological progress, but rather depends on social institutions and on the structure of the financial system. Strengthening the welfare state, in particular changing union legislation to foster collective bargaining and financial regulation could help increase the wage share with little if any costs in terms of economic efficiency.⁶⁰

Collective bargaining is a key measure to reduce inequality of income

and wealth. Union membership is not always a proxy for collective bargaining coverage but in the UK it is a serviceable marker, especially since the Second World War. Figure 2 shows a remarkable correlation between inequality and trade union membership. Indeed, the shape of the graph for union membership very closely resembles that for the Gini coefficient recently mapped by the Institute of Fiscal Studies.⁶¹ As Dr Ewan McGaughey, the author of Figure 2 remarks: ‘correlation does not necessarily mean causation but the virtual mirror image makes the UK’s case clear: collective bargaining changed income inequality’.⁶² The differences would be even starker if the orange line in Figure 2 was to represent collective bargaining density (on which see Figure 1) rather than trade union membership density.



collective bargaining and economic policy

2.12 The consensus of economic thought today (including IMF researchers)⁶⁴ also shows that the destruction of collective bargaining is bad for the economy directly (as well as being a significant contributor to the growth of inequality which is indirectly bad for the economy). The removal of collective bargaining lowers wages as it is intended to do.

In so doing it creates a vicious cycle leading to reduced consumption, leading to a reduction in demand, leading to a reduction in production, leading to a reduction in employment, leading to higher unemployment, leading to increased dependence on welfare benefits and reduced State capacity through reduced tax revenue to meet that demand, leading to welfare cuts, leading to social unrest and crime, leading to an increase in police powers, and so on.

2.13 What is at issue here is an ideological conflict not just about the role of trade unions but also about the role of the State in regulating the economy to produce just outcomes. A progressive economic strategy will require a strong State presence in regulating wage determination and wage levels. A major problem in the UK economy is the fact that the real value of wages has diminished to 2007 levels and that the share of GDP apportioned between profits and wages ('wage share') is growing in favour of the former at the expense of the latter.⁶⁵ As in the 1930s, the most efficient lever available to the State to redress this balance and to raise wages is not the free market, nor a National Minimum Wage or Living Wage, but raising collective bargaining density to saturation levels. As Onaran and others for the University of Greenwich and the New Economics Foundation have shown:

Our analysis has underlined the negative effects that inhibiting union activities has on the economy. The evidence presented indicates that the long-term deterioration in collective voice in the UK and elsewhere in Europe has been counter-productive in terms of macroeconomic growth. Legal restrictions on the ability of trade union, where these bite sufficiently to reduce their bargaining capacity, are contrary to good economic policymaking where countries are in wage led growth regimes, and where labour's share of income has declined. Economic recovery and stable, equitable development needs a rise in the collective voice of labour.⁶⁶

2.14 In addition to raising wages and improving conditions as an instrument of a progressive economic policy, depending on the means chosen,⁶⁷ collective bargaining can have other secondary benefits. If collective bargaining is conducted at sectoral level on a multi-employer basis and made applicable to all employers in the sector in question, it will discourage businesses undercutting wages in order to secure a competitive advantage. This in turn will force competition to focus on efficiency, productivity, investment, research and development.⁶⁸ The achievement of higher labour standards and voice at work through

collective bargaining also tends to improve productivity by encouraging greater commitment to the job on the part of the worker.⁶⁹

2.15 Related to the foregoing advantages is the benefit of collective bargaining in overcoming one of the issues surrounding immigration and the importation (and sometimes trafficking) of cheap labour. If collectively agreed terms and conditions are set for an industry, there exists a fair wage for everyone; everyone would be entitled to be paid the industry rate; and there would be no commercial advantage in exploitation by trafficking. Migrant and posted workers would continue to make a welcome and important contribution to the British economy, and would do so entitled to the same terms and conditions of employment as everyone else. This would also ensure that the requirements for legitimate terms for selection of public procurement could be determined through collective bargaining, as the EU public procurement directives permit.⁷⁰

2.16 A progressive economic policy based on raising wages and improving conditions through high levels of collective bargaining coverage will end the spiralling vicious cycle. Higher wages allow people to spend more. This stimulates demand in the economy and hence economic activity.⁷¹ Increasing demand increases employment and decreases unemployment. It turns part-time jobs into full-time jobs. This in turn reduces State expenditure on subsidising low wages and income for the unemployed and allows reduction of national debt and investment in infrastructure so creating more jobs and further increasing demand. At the same time, the State benefits by greater tax receipts, providing opportunities for greater investment in public services. In this way the vicious cycle becomes a virtuous cycle.

collective bargaining and the rule of law

2.17 There is a yet further reason for re-establishing collective bargaining in the UK: international law. The right to collective bargaining, amongst other trade union rights, is protected by (amongst other treaties) ILO Conventions, the European Convention on Human Rights, the European Social Charter, and the Charter of Fundamental Rights of the European Union.⁷² These Treaty obligations and the jurisprudence of their supervisory bodies support the model for the restitution of collective bargaining in our proposals. Some of these treaties were ratified by Labour governments (such as ILO Conventions 87 and 98, the ECHR and the EU Charter), while the others were ratified by

the Conservative governments of Macmillan, Heath and Thatcher respectively (the European Social Charter, and ILO Conventions 135 and 151).

2.18 The United Kingdom has recently renewed its commitment to respect these binding obligations, for example as one of the parties to the EU-Korea free trade agreement and, more recently, the Comprehensive Economic Trade Agreement (CETA, between Canada and the EU) (agreed, subject to ‘legal scrubbing’, on 26 September 2014). The latter provides:

Each Party reaffirms its commitment to effectively implement in its laws and practices, in its whole territory, the fundamental ILO Conventions that Canada and the Member States of the European Union have ratified respectively. The Parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as priority and other Conventions that are classified as up to date by the ILO’ (Chap 24, Article 3).⁷³

2.19 It is important to recall that rights guaranteed by international treaties are not mere declarations of aspiration. They are legal obligations binding on ratifying States, while some provisions, because they have become part of customary international law, are binding even on States which have not ratified them. They are part of the fundamental principle of the *Rule of Law*, which imposes obligations on governments to act in accordance with the law. The ‘existing constitutional principle of the rule of law’ is recognised by the Constitutional Reform Act 2005, with one of our most celebrated modern judges writing that:

The existing principle of the rule of law requires compliance by the state with its obligations in international law, the law which, whether deriving from treaty or international custom and practice, governs the conduct of nations. I do not think this proposition is contentious.⁷⁴

2.20 Crucially for present purposes, the State has a duty imposed by ILO Convention 98 (1949) and by Article 6(2) of the European Social Charter 1961 to *promote* collective bargaining.⁷⁵ These obligations were reference points for the European Court of Human Rights in its landmark decision in *Demir and Baykara v Turkey*,⁷⁶ where it was held that the ECHR must be construed consistently with these international standards. In holding that Turkey was in breach of the Convention, Article 11, the Court did so on the ground that:

The absence of the legislation necessary to give effect to the provisions of the international labour conventions already ratified by Turkey, and the [domestic court's] judgment of 6 December 1995 based on that absence, with the resulting *de facto* annulment *ex tunc* of the collective agreement in question, constituted interference with the applicants' trade-union freedom as protected by Article 11 of the Convention.⁷⁷

2.21 The obligations to promote and protect collective bargaining are not confined to bargaining at enterprise level. The European practice (which applied widely in the UK for decades and in Ireland since 1936)⁷⁸ of imposing representative collective agreements on all the workers and employers in an industry whether or not each is a member of the negotiating parties (often referred to as *erga omnes*), is well recognised and protected in international law from the ILO to the EU.⁷⁹

conclusion

2.22 Collective bargaining has been cynically destroyed to a great extent in the UK since 1980. Restoration is required: to provide a means of workplace democracy, to bring some measure of balance to the otherwise disproportionate power of employers, to redress wage inequality, to prevent the exploitation of migrants, to raise wages, increase demand and reinvigorate the economy, and to fulfil the UK's binding legal obligations. That restoration must be founded on sector wide collective agreements; enterprise bargaining can be built on a base of industry-wide agreements but is not enough by itself. In the following chapter we explore how this might be done.

making collective bargaining work

- 3.1** At the heart of our proposals is the extension of collective bargaining. We believe that the balance of regulation should be changed and that a greater role should be given to collective bargaining rather than legislation. This would give workers through their unions a greater say in making and administering the rules that govern the workplace. It would also provide better, more flexible and more responsive regulation than legislation which sets only minimum standards, and which is often expensive and difficult to enforce. Making collective bargaining work for this purpose, however, will require the same level of commitment and imagination as was shown by governments in the 1930s (in Britain and elsewhere) when they too embraced collective bargaining as an essential tool of economic recovery.

a new government department

- 3.2** The first requirement is to re-establish a Ministry of Labour. This must be a government department headed by a Secretary of State with a full Cabinet presence. A Ministry of Labour was introduced in this country by statute in 1916, making a huge contribution to the war effort, to post-war reconstruction, to reconstruction after the Great Depression in the 1930s, to the Second World War effort, and to reconstruction after that war. But the Ministry was gradually transformed (becoming the Department of Employment in 1970) before its various functions were either discontinued or shunted off to other Ministries. The responsibilities of the Ministry of Labour are now split between the Department for Work and Pensions and the behemoth that is now the Department for Business, Innovation and Skills.
- 3.3** Today, it is absurd that the 31 million workers in this country do not have a dedicated seat at the Cabinet table. More than that, employers too, reliant as they must be on the supply of sufficient workers of the right skill-set available when and where required, need a government Department dedicated to labour planning.⁸⁰ In a survey of 91,000 employers, the UK Commission for Employment and Skills

found 146,200 job vacancies (22%) were unfilled in 2013 because of inadequate skills, rising from 91,400 (16%) two years earlier.⁸¹ Employers thus recruit from overseas, fuelling domestic tension and significantly denuding overseas economies of the services of skilled and qualified workers in whose training those States have heavily invested.

3.4 The re-establishment of the Ministry of Labour would make the important symbolic statement that the voices of 31 million working people (and the families dependent on them) will once again be represented in government and heard at the Cabinet table. The statute re-establishing the Ministry of Labour would impose on the Ministry clear policy-making and policy-implementing roles.⁸² It would have responsibility to:

- Promote employment, reduce unemployment and under-employment, and eliminate employment insecurity;
- Plan that the British labour force will, and ensuring that it has, the skills, qualifications, education, training, apprenticeships and flexibility required for the contemporary and future world;
- Supervise labour standards, monitor the scope of workers' rights, ensure that standards are improved and extended, and that there is proper and adequate labour inspection;
- Promote collective bargaining and have oversight of the country's industrial relations system (ACAS and the CAC would naturally fall under its jurisdiction);
- Participate with the Treasury in the creation of a National Economic Forum on which representatives of government, employers, unions and independent academics will sit and
- Monitor and ensure that the United Kingdom complies with its international labour obligations, including ILO Conventions.

3.5 So far as the responsibility of the Ministry of Labour to promote collective bargaining is concerned, this would require working as necessary with government agencies such as ACAS. The manner of promoting collective bargaining would be prescribed by statute, using a number of methods.⁸³ The overriding obligation would be to:

- Provide the framework for the involvement of trade unions and employers in the development of employment policy and labour standards;
- Establish multi-employer, sector-wide bargaining machinery to

negotiate terms and conditions of employment and other matters of mutual concern; and

- Encourage the development of procedures to resolve disputes of a collective and individual nature, without recourse to the courts.

3.6 The proposal for a National Economic Forum is a response to the defects of the ‘free market’, with outcomes produced by market forces (often manipulated) very different from the result desired by the democratic will of those affected.⁸⁴ It is also a response to the need for greater tripartite engagement in and ownership of major economic decisions and the direction of economic policy. In our view such engagement should take place in an open and transparent process, in a way which also meets democratic expectations of participation by those with a direct interest. In this context we draw attention to the UK’s obligations under ILO Convention 122 (the Employment Policy Convention, 1964) to promote social dialogue:

In the application of this Convention, representatives of the persons affected by the measures to be taken, and in particular representatives of employers and workers, shall be consulted concerning employment policies, with a view to taking fully into account their experience and views and securing their full co-operation in formulating and enlisting support for such policies.

a new approach to collective bargaining

3.7 In *Reconstruction after the Crisis; a Manifesto for Collective Bargaining* the editors set out the dramatic collapse in the coverage of collective bargaining in the UK. Figure 1 above presents this in an updated and more complete form. The highlights are startling, with a gradual but inexorable decline from 82% coverage in 1980 to 23% in 2011 and probably 20% today. It will be noted that the decline continued despite 13 years of Labour government and despite the trade union recognition legislation introduced by the Employment Relations Act 1999.

3.8 In our view a successful collective bargaining strategy is crucial to the survival and eventual growth of trade unionism. Yet it is clear that the strategy for the development of collective bargaining introduced by the Blair government has failed, and that a radical alternative is urgently required. To this end we would simply note that the British model of enterprise based collective bargaining operates in other English speaking countries (including the United States and Canada,

where it has operated since the 1930s and 1940s respectively), and that in none of these countries does this model of collective bargaining secure collective bargaining coverage in excess of 35% of the workforce.

- 3.9** There are several explanations as to why the Anglo-American model of collective bargaining is flawed and why it produces low levels of collective bargaining density. It places a premium on trade unions organising workplace by workplace, with a very heavy toll on union resources. It provides multiple opportunities for employers to contest the union's presence, these relating to levels of support claimed by the union and the scope of the bargaining unit. And it sometimes involves the employer hiring specialist 'labour consultants' to pressure the workforce into rejecting the union, sometimes resulting in bitter campaigns for recognition.
- 3.10** However, the Anglo-American way is not the only way of doing collective bargaining. The developed world is split between those countries such as the US and the UK where collective bargaining takes place mainly at enterprise level, if at all; and those countries where collective bargaining takes place at sectoral level on a multi employer basis.⁸⁵ This latter practice is typically to be found in the other EU member states and is associated with much higher levels of collective bargaining density, the European average being 61% in 2013. This model is, however, under major threat in many EU countries, as a result of a number of recent European Commission inspired initiatives, including austerity, new economic governance arrangements adopted in 2010,⁸⁶ and free trade.
- 3.11** The model of collective bargaining practised in Britain until the 1980s was not dissimilar to arrangements in other European countries, though as suggested these arrangements in some countries have either been 'reformed' (as in Greece), or are now under intense pressure, with trade unions in some countries strongly resisting European Commission demands to 'decentralise' bargaining arrangements (as in Italy and France). Nevertheless sector-wide bargaining secured for British workers levels of coverage of collective agreements in excess of 80% in the late 1970s and levels of equality of income not seen before or since. It is a model which must be rebuilt for the four reasons we explore in Chapter Two as well as to restore the role and legitimacy of trade unions in a modern democratic society.

a new legal framework

3.12 At the sectoral level it will be necessary to establish machinery for the development of sector wide standards. In the past this was done by Joint Industrial Councils (JICs), which were formed by government policy from 1918 onwards in accordance with the Whitley Reports. In some industries where it was not possible to establish JICs, tripartite Wages Councils in industries with insufficient organisation of employers or trade unions were set up.⁸⁷ JICs have largely collapsed in the private sector and have dramatically declined in the public sector. Pay Review Bodies have substituted for wage bargaining. Wages Councils were abolished by the Conservatives in 1993, with the exception of the Agricultural Wages Board which was destroyed by the Coalition government in 2013.

3.13 Our proposal is that ultimately every worker and every employer of workers in this country should be covered by a collective agreement concluded at the sectoral level. With this in mind legislation should provide for the Ministry of Labour, after consultation, to establish Sectoral Employment Commissions (SECs) with responsibility to promote collective bargaining and to regulate minimum terms and conditions of employment within specific industrial sectors of the economy. The JICs which still exist would be converted into SECs, which, depending on the sector, would be bilateral or tripartite in composition, with equal numbers of representatives of employers on the one hand and workers on the other, and with a lesser number of representatives of the Ministry of Labour where such representation is necessary to break deadlocks.⁸⁸

3.14 Sectoral Employment Commissions would negotiate Sectoral Collective Agreements (SCAs) and have responsibility for the following matters:

- Setting minimum terms and conditions of employment and mechanisms for the resolution of disputes, collective and individual;
- Ensuring the most secure employment consistent with the need for flexibility;
- Ensuring minimum (and pro rata) conditions for part-time workers;
- Ensuring equal pay for equal work and the development of equal opportunities policies and strategies;⁸⁹
- Developing health and safety standards for the sector as a whole;

- Ensuring appropriate training (including apprenticeships) of sufficient numbers of people employed or to be employed in the sector;
- Providing, regulating and protecting pensions for those employed in the sector;
- Ensuring that international laws binding on the UK and relevant to the sector were applied in practice;

3.15 The terms of any Sectoral Collective Agreement would apply automatically as mandatory terms to govern the employment relationship of any worker employed by any employer in the sector to which the agreement relates, unless in relation to a specific term, the SEC specifically provided to the contrary.⁹⁰ The terms would be legally enforceable against a defaulting party by an employer, an individual worker or by a trade union with a member in the sector. The terms set by the Sectoral Collective Agreements would be minimum standards only. It would be possible for establishment level collective agreements or an agreement between an employer and worker(s) to specify an improvement on the sectoral minimum in any respect.

3.16 All government contractors in the appropriate sectors would of course be required to comply with all the industry terms, as would all suppliers and end users of agency workers. Disputes would arise with some employers who were not parties to the SCA arguing that they were not bound by its terms because they did not fall within the sector in question. Although this is clearly likely to happen, such disputes did not appear to arise very often under sector-wide arrangements in the past. Such problems should, however, be anticipated, and the CAC charged with the duty of resolving any disputes of this nature.

workplace recognition and worker representation

3.17 The kind of collective bargaining envisaged in this paper is at two levels: sectoral (across an industry), and enterprise (across a group of companies, or across a single company, or at a single workplace). The two fit together: sectoral collective agreements set a floor on which enterprise bargaining takes place. They are reinforced by the principles of ‘inderogability’ and ‘favourability’. This means that a more local level agreement is not permitted to set worse terms than a higher level agreement, and no contract of employment can set worse terms than the best terms in an applicable collective agreement.⁹¹ It also means that in the event of a conflict between a sectoral and

an enterprise agreement, the worker would be entitled to the most favourable provisions.

- 3.18** The OECD has noted that sector wide bargaining is likely to reduce employer resistance to a trade union presence in the workplace.⁹² This is partly because pay negotiations at sector level take much of the reason for opposing trade unions out of the employer's calculation, while the presence of the trade union will be necessary to make the procedures established at sectoral level operate effectively in the enterprise. We nevertheless accept that there will be a continuing need for legislation to give trade unions a right to recognition at the workplace where there continues to be employer resistance. In our view a trade union (or more than one union acting jointly) should be entitled to exclusive recognition by an employer for the purposes of collective bargaining on behalf of a specified bargaining unit demonstrating 10% membership and evidence of majority support verified by the CAC.
- 3.19** Under the proposed recognition scheme, there would usually be no need for a ballot,⁹³ recognition being mandatory on the demonstration of majority support (which may include but would not be confined to a demonstration of majority membership). The determination of the bargaining unit (not necessarily confined to a single employer or group of associated employers) and the subject matter of the collective bargaining would be determined exclusively by the CAC after hearing the employer and the trade union concerned. On the application of either party the collective bargaining machinery would be reviewed by the CAC and, in the absence of a satisfactory mechanism for resolution of a dispute as to whether a party was bargaining in good faith, the CAC would have the power to impose speedy, impartial, independent and binding arbitration to deal with all matters then in dispute.
- 3.20** Where the 10% threshold is not met there should be a statutory right of every trade union to recognition by an employer to bargain on behalf of its members or member. Further, the existing statutory right to be accompanied should be overhauled so that every worker has the right to be represented by his or her trade union on all matters relating to his or her employment, either individually or collectively. Trade union officials will need to be allowed access to workplaces in advance of voluntary or statutory recognition and prior to a statutory recognition application, so that they have some opportunity to gain the threshold support necessary, and so that workers can make an

informed choice about workplace representation through a trade union.

3.21 The measures proposed here would draw the sting from a lot of the trade union resistance strategies currently used by employers. Nevertheless we believe that steps should be taken to deal with the menace of so called ‘labour consultants’, sometimes referred to pejoratively as ‘union busters’, who appear from time to time in recognition disputes. This might best be addressed by a licensing system operated by the Ministry of Labour, once a satisfactory definition of a ‘labour consultant’ (which could include solicitors and other professionals) was agreed upon. A licence would be a requirement of doing business in this country, the licence being conditional on the ‘labour consultant’ fully complying with international human rights obligations, including the duty to promote collective bargaining.

conclusion

3.22 There are several different locations of worker ‘voice’ (on which see para 2.2 above). By focussing on collective bargaining in this chapter we do not seek to diminish the importance of these other ‘locations’. These include corporate governance about which there has been much complacency and too much focus on the interests of shareholders, to the exclusion of all others.⁹⁴ This needs to be addressed, so that in addition to the foregoing provisions on collective bargaining, worker voice needs to be enhanced by accompanying changes to company law whereby:

- Directors’ obligations include a duty to enhance and protect the interests of workers, a duty of at least equal intensity as that owed to shareholders.⁹⁵
- Every board must have worker directors with the same rights as the other directors. Such worker directors should be appointed by recognised trade unions (or, in the absence of representative unions, elected worker representatives), with a primary responsibility to the constituents they are appointed to represent.⁹⁶
- Workers through their trade union (or, in the absence of which, other approved representatives) should have a minimum percentage of the vote in general meetings of the company, again with a primary responsibility to the constituents they are elected or appointed to represent.⁹⁷

improving statutory protection

- 4.1** The main proposal of this Manifesto is that the weight of regulation should be shifted from legislation to collective bargaining. This not only gives workers a greater say through their trade unions in playing a part in making the rules by which they are bound; it also has the benefit of making rules easier to enforce, through the procedures set out in collective bargaining, avoiding the need for expensive and lengthy litigation. This does not mean, however, that there is no role for legislation to underpin the collective bargaining process, or that there is no need for legislation protecting workers' rights. Such rights would continue to operate as minimum standards on which collective bargaining would build, across a wide range of areas.⁹⁸

wages

- 4.2** The regulation of wages is complex, requiring a consideration of the National Minimum Wage, the role of the State in supplementing wages through tax credits, equal pay legislation, and wage setting through collective bargaining. Collective bargaining should be restored as the main method for regulating wages. The Sectoral Employment Commissions proposed in Chapter Three will have the responsibility to set wages for the sector in question, and collective bargaining at enterprise level will build on the sectoral minimum, by rewarding productivity and profitability and taking into account the specific circumstances of the enterprise. Enterprise based bargaining would also be important in determining ancillary matters relating to wages if they are not provided for in the Sectoral Collective Agreement and for elaborating ancillary matters only dealt with in general terms in the SCA.
- 4.3** This is not to deny, however, that there would continue to be a role for other institutions in wage determination. In the first place, there is the question of the balance between pay and tax credits, with the recent controversy about the so-called national living wage which paradoxically appears to leave some people worse off despite the increase in the basic wage rate.⁹⁹ The decision to push

responsibility for income from the State exclusively to employers was one taken unilaterally by the Chancellor of the Exchequer. In our view such decisions should be taken only on the advice of the National Economic Forum proposed in Chapter Three above, decisions in which trade unions would participate as equal partners with business and government.

4.4 Questions would, of course, arise about the role of bodies such as the Low Pay Commission and the National Minimum Wage in a system of comprehensive collective bargaining. In our view it is important that the Low Pay Commission remains, though we think it should be renamed as the ‘Living Wage Commission’: the object is to eliminate rather than entrench low pay. Otherwise:

- Even under comprehensive collective bargaining, the National Minimum Wage would be a benchmark for sectoral bargaining (both in terms of the basic rates and the ancillary matters referred to above), while it would be over-optimistic to believe that universal collective bargaining arrangements could be developed overnight, or indeed that there will never be gaps in the coverage.
- In addition, workers must be provided with sufficient information at the point of payment so that they can verify that they have been paid correctly and in particular in compliance with the National Minimum Wage. Regulations to this effect could be made immediately under the National Minimum Wage Act 1998, and would play a crucial part in enhancing wage transparency for the most vulnerable.¹⁰⁰

4.5 Nor is this to suggest that collective bargaining will displace the need for equal pay legislation. A greater effort needs to be made to deal with pay inequity and the gender pay gap, which remain serious concerns despite over 40 years of equal pay legislation. Together with several of the anti – discrimination and equal opportunities measures proposed below, we believe that the restoration of collective bargaining on pay would go a long way to supplement equal pay legislation and address the gender pay gap. Indeed, evidence suggests a correlation between (i) lower pay inequity, and (ii) pay determined at a higher level than the enterprise, (iii) where the discretion of management is reduced.¹⁰¹

4.6 But it would be unduly optimistic to believe that collective bargaining will alone address what has been an intractable problem, or that steps do not need to be taken to eliminate the risk of discriminatory pay outcomes in collective bargaining. We propose as a result that

collective agreements which perpetuate pay inequity, or which fail to make sufficient progress towards pay equity, should be referable to the CAC. 'Pay inequity' should be understood to refer to unfair pay disparities related to sex or other protected characteristics. Where there is no appropriate collective agreement, it should be possible to refer an employer's pay structure to the CAC on the ground that it perpetuates pay inequity, or fails to make sufficient progress towards pay equity;

working time

- 4.7** On working time, the issue here is now not only the problem of some workers being required to work excessive hours, but of other workers being provided with insufficient working hours. The problem of zero hours contracts in particular has major implications for workers' income security, and as recent studies have revealed is often associated with other abuses in the workplace. The Coalition government purported to address this question in the Small Business, Enterprise and Employment Act 2015, s 153, an utterly inadequate response to a practice which continues to flourish. Indeed the Coalition's wholly unenforceable ban on employers prohibiting those on zero hours contracts from working for anyone else could make matters even worse, in the absence of additional protections.
- 4.8** Although there is no easy solution, nevertheless an early priority must be to address the problem of zero hours contracts, as part of the general regulatory framework on working time. Leadership has been shown in Ian Mearns MP's 2014 private member's bill (see below), the recent proposals in Ireland developed by the University of Limerick,¹⁰² and the even more recent New Zealand legislation,¹⁰³ which provides that every contract of employment should stipulate the minimum number of hours the worker is required to work each week, while making it unlawful to penalise the worker in any way for declining to work more hours. It is from these and similar initiatives that a solution can be found.
- 4.9** There are thus a number of ways by which the spreading virus of zero hours contracts could be stopped and reversed. In 2014, the Institute of Employment Rights proposed a simple amendment to working time law that would provide as follows:
- All workers must be engaged on 'defined hours contracts', which set out the minimum number of hours that the worker in question will be required to work each week or month;

- A 'defined hours contract' must prescribe the permitted percentage (up to a statutory maximum of 10-20%) of the defined hours that workers can be on call, with anyone on call entitled to be paid a retainer while on call.¹⁰⁴

A critical question here would be to define what is meant by a 'worker' – a simple yet complex question to which we return in Chapter Five.

4.10 A variation on the foregoing IER proposal is provided in Ian Mearns' Zero Hours Contract Bill 2014. This provides that:

There shall be a duty on employers who have continuously employed a zero hours contract worker for a period of 12 weeks to offer the zero hours contract worker fixed and regular working hours contract from the date commencing 12 weeks from his or her first engagement with his or her employer.¹⁰⁵

This important and detailed Bill also makes provision for information about minimum working hours to be provided to workers, proposes a duty on employers to give reasonable notice of assignments (and their cancellation), and entitles workers to request a move to fixed and regular employment before the mandatory novation of the contract after 12 weeks.

4.11 As the University of Limerick study pointed out, however, it would be a mistake to conclude that this is a problem that can be resolved only by legislation. While it is necessary to have a statutory framework as a starting point, the nature of the problem is such that the legislation is likely to be necessarily complex, giving rise to multiple small value claims and many workers may be discouraged from pursuing each all the way to an employment tribunal. These concerns were anticipated by the authors of the University of Limerick study, and we endorse their recommendation that any future legislation on zero hours contracts should permit 'employer organisations and trade unions which conclude a sectoral collective agreement [to] opt out of the legislative [recommendations], and that they can develop regulations customised to their sector'.¹⁰⁶

equality at work

4.12 The Equality Act 2010 needs to be revised. The current protected characteristics should be extended to cover 'caste' and 'socio-economic status', while 'marriage and civil partnership' should be replaced by the category 'family status';¹⁰⁷ and gender reassignment

should be replaced with a broader protected characteristic designed to apply to discrimination in respect of failure to conform to traditional expectations of gender identity. In addition:

- The provisions relating to discrimination on grounds of religion or belief should be amended to ensure that individuals do not have the right to discriminate against others (including on grounds of others' religion or belief).
- The definition of disability (Britain has 11.6 million disabled people)¹⁰⁸ should be amended to ensure that the prohibition of disability discrimination is fully compatible with the social model of disability.¹⁰⁹

4.13 Moving from the scope of the law to its substance, the Disability Discrimination Act and the Disability Rights Commission should be restored;¹¹⁰ the public sector equality duty to 'have due regard' to the need to eliminate discrimination must be strengthened;¹¹¹ and the UN Convention on the Rights of Persons with Disabilities fully implemented.¹¹² There should be greater scope for positive action to ameliorate disadvantage and reduce inequality, including, (i) a defence of justification for (otherwise) directly discriminatory measures taken to reduce historic, entrenched or systemic disadvantage, and (ii) consideration being given to the circumstances under which employers and others might properly be required by law to take such measures. Discrimination on the basis of combined protected characteristics ('multiple discrimination') should be regulated.

4.14 Turning to workers with family responsibilities,¹¹³ maternity pay should be increased to provide full pay for the first six months of maternity leave (whether taken by the birth mother or shared with another), the cost to be recoverable from the State by the employer. Paternity leave should be for a minimum one month on full pay, with parents entitled to take parental leave on a flexible basis, including by reducing their working hours. In addition:

- Career breaks for workers of up to five years for the purposes of providing care to children aged up to 18 and/or to other dependents ought to be underpinned by a right to return to work, on giving notice, subject to an impracticability defence; and
- Provision must be made for flexible working (which does not necessarily mean part-time working) to permit, amongst other things, job shares, late starts, early finishes, term time working and working from home.

4.15 Moving finally to better monitoring and enforcement, all employers should be under a statutory duty to monitor the composition of their workforce in terms of disability, race and gender; and to carry out regular pay equity audits in co-operation with the workplace equality officers (see below), with mandatory guidance regulating the approach to such audits. Employers should be required by legislation to create in each workplace an equal opportunities forum where equality and discrimination issues are discussed with trade union representatives. This would be in addition to a duty to provide for the election or nomination of equality officers from recognised or representative trade unions, in the absence of which from the workforce. Employers should be placed under a duty to create a workplace free of harassment, and liability (where appropriate) for third-party harassment should be restored.

4.16 So far as enforcement is concerned, the following steps should be taken:

- The pre-claim questionnaire procedure in discrimination cases should be restored, its abolition having simply increased the difficulties faced by claimants; and
- Employment tribunals should be re-empowered to make general recommendations in discrimination claims, going beyond the individual claimant.¹¹⁴

In addition, the mechanism of contract compliance should be utilised as fully as possible, consistently with EU law,¹¹⁵ to require public contractors to apply the highest standards in order to eliminate discrimination, promote equality of opportunity, and develop the principle of fair participation at work regardless of disability, race, gender and other protected characteristics.

health and safety at work

4.17 Cases of work-related injuries, ill health and death continue to occur unacceptably frequently and to impose enormous costs, financially, physically and emotionally, on those directly and indirectly affected. They also continue adversely to affect taxpayers and society more generally as a result of the health and welfare expenditures that flow from them. These costs have significant adverse operational impacts on employing organisations and generate substantial insurance and litigation costs.¹¹⁶

4.18 Revision of the regulatory regime requires, as a minimum, the creation of a framework of statutory duties which extends health and safety protection to those in the various forms of non-standard employment by:

- Reforming the general duty imposed by the Health and Safety at Work Act 1974, s 2 so that obligations are imposed on ‘persons conducting a business or an undertaking’ (PCBU), rather than ‘employers’;
- Extending this new duty so that it applies not only to employees, but to workers ‘engaged, or caused to be engaged’, by such persons and to those ‘whose activities in carrying out work are influenced or directed’ by them.

In addition to expanding the duty of care by PCBUs to workers and others, there is a need to reinforce these changes by imposing duties on PCBUs to those working for different levels of sub-contractors by:

- Imposing a duty on those at the head of supply chains in sectors where this seems appropriate in view of the way in which purchasing power affects the management of health and safety in supplier organisations;
- Imposing requirements on PCBUs to consult workers in supplier companies who carry out work for the PCBU business or undertaking who are, or may be, directly affected by a health and safety at work matter.

4.19 Turning to stronger measures of prevention and enforcement, there is a need for legislation to enhance the right of workers to participate in health and safety matters, including:

- In the absence of a recognised trade union, an appropriate trade union should have the right to appoint health and safety representatives even though the union is not recognised by the employer for any other purpose;
- A recognised or appropriate trade union should have rights of access to workplaces in which it has members and to undertake inspections where there are reasonable grounds to suspect that there may be non-compliance with health and safety laws;
- Trade union officials and/or safety representatives should be empowered to issue provisional improvement notices and to stop work they deem to be dangerous; and
- Trade unions should have the power to initiate private prosecutions

in respect of suspected health and safety offences, the costs in doing so recoverable from the State or the employer.

4.20 So far as enforcement is concerned, it is necessary also to adopt a more rigorous regime to identify and enforce cases of non-compliance with health and safety requirements by:

- Substantially increasing the number of skilled inspectors and the funding of the HSE, which has been starved of adequate funding for too long;
- Considerably increasing the number of inspections carried out by HSE and local authority inspectors, including those undertaken on a random, rather than on (an alleged) 'risk-based' basis;
- Greater use of the enforcement powers available to inspectors, including prosecutions on indictment;
- New powers enabling inspectors to intervene to ensure compliance with health and safety related requirements by those at the head of supply chains; and
- A much greater inspection focus on ensuring organisations have adequate arrangements in place to protect those engaged on various forms of non-standard forms of employment.

4.21 Finally, there is a need to undo the damage inflicted by the Conservative led governments since 2010. The most obvious example is the need to restore civil liability for breach of health and safety regulations, reversing the recent amendment to the Health and Safety at Work Act 1974, s 47.¹¹⁷ There was no evidence to justify the change, merely a 'perception' of a compensation culture.¹¹⁸ This is in addition to the longstanding need to address the concerns of victims, and in particular the need for income and employment security for those who become ill or injured – particularly in the context of an aging workforce. What is proposed here is the specification of a minimum sick pay entitlement and a framework of obligations on employers relating to the provision of return to work support.

conclusion

4.22 The foregoing are examples of where regulatory legislation needs radically to improve, even in a system in which more responsibility is devolved to trade unions and employers to develop workplace regulation through collective bargaining. These improved statutory

standards would underpin the collective bargaining process and help to raise standards and increase protection more generally. This by no means exhausts the areas (such as unfair dismissal) ripe for re-assessment, some aspects of these other areas of concern being addressed in the following chapter.

making rights work

5.1 A major preoccupation of many British workers is the precariousness of their employment. Partly this is to do with the economic situation of the UK in the world, a situation which requires a new economic strategy which our proposals are designed to complement. But precariousness is also significantly influenced by the legal form, content and enforceability of the employment relationship. These are issues our proposals address directly. We take the view that labour rights should be **universal**, which means simply that they should apply to all workers. We also take the view that labour law should be **effective**, which means that labour rights should clearly benefit the workers for whom they are intended. The restoration of collective bargaining will go a long way to achieve these ends but statutory measures are also required.

precarious workers

5.2 There is a wide range of statutory protections for workers, which have built up over a number of years, some of which are considered in Chapter Four above. These rights have generally been drafted with standard form employment relationships in mind, and often bear little relationship to the lives and experiences of many of those who ought to be protected yet find themselves excluded. Workers in these categories referred to above face two problems in enforcing rights. The first is their **employment status**; the other is the qualifying period of **continuous employment**, which applies in the case of some rights (such as unfair dismissal).

5.3 It is uncontroversial that the employment relationship is a reflection of uneven power relations. In principle, labour law recognises and to a certain extent seeks to redress this imbalance. However, in practice, the impact even of unambiguous statutory rights is often dissipated by (i) weak judicial interpretations, (ii) lack of adequate State enforcement, (iii) the prohibitive cost of private enforcement, (iv) the absence of collective rights, (v) inadequate representation in the workplace, (vi) the vulnerability of individual workers through threat

of job loss in a context of high unemployment, and (vii) poor quality alternative employment.

- 5.4** Yet these weaknesses in the country's economic and labour law regimes appear to have stimulated employers' initiatives to take advantage by devising an array of 'non-standard' or 'atypical' employment relationships to avoid respecting the rights which still remain attached to the traditional form of employment under a contract of employment.¹¹⁹ Thus it is that so-called self-employment has dramatically increased in the UK, faster than anywhere else in Europe. It is now estimated that there are 4.6 million self-employed workers amongst Britain's 31 million workers.¹²⁰ To this may be added a growing number of workers who are employed by an agency and supplied to an end-user, and probably 3 million 'zero-hours' workers.¹²¹
- 5.5** There are also those 'gig workers' such as Uber drivers whose relationship to the real employer is no more than a permission to access some electronic connections for which they must pay. These workers provide all the capital equipment of their trade. This is in addition to those on so called 'umbrella contracts' who, on analysis (and sometimes unknown to themselves), find they are employed by a company of which they are the sole owner (or perhaps with one or two other workers), and which has a commercial contract with the business for whom they work, the latter having none of the obligations inherent in a contract of employment (such as accounting for tax and national insurance, liability for holiday, sick, or maternity pay, or for bearing many health and safety obligations).
- 5.6** Changes to the law are necessary in order to strengthen the employment relationship, define it more clearly, and promote legal certainty. If all employment rights should apply generally to all workers, the term 'worker' needs to be more widely defined as explained more fully below, and the rules on continuity of service should be more flexible than is currently the case. So far as the latter are concerned, the flexibility of working arrangements needs to be reflected in a law that was drafted in the 1960s when working conditions were very different from today, the law having been scarcely adjusted since.

ensuring universality

- 5.7** Most employment legislation currently applies to employees (eg. unfair dismissal and redundancy) or employees and workers (eg.

National Minimum Wage and working time). A typical definition of these terms is as follows:

- (1) In this Act ‘employee’ means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
- (2) In this Act ‘contract of employment’ means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
- (3) In this Act ‘worker’ (except in the phrases ‘agency worker’ and ‘home worker’) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
 - (a) a contract of employment; or
 - (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.¹²²

5.8 This definition gives rise to serious problems of scope, with many non-standard forms of employment being excluded for one of a variety of reasons. In order to address this problem there is a need for greater legislative clarity about the application of employment rights, having regard to ILO Recommendation 198 (The Employment Relationship Recommendation, 2006). A starting point for the discussion about a new legal definition of ‘worker’ is to be found in Ian Mearns’ Zero Hours Contract Bill 2014. This provides that a ‘worker is a person who is employed’, and provides further that:

a person is employed for the purposes of this Act if he or she is engaged by another to provide labour and is not genuinely operating a business on his or her own account.¹²³

An important feature of this definition is that it is irrelevant whether the worker is engaged under a contract whether of service or services. This is a critical problem for many workers in non-standard employment relationships who are often unable to prove the existence of a contract of service because of an absence of ‘mutuality of obligation’.¹²⁴

5.9 But although important, the latter is not enough. Consistently with ILO Recommendation 198, additional measures are necessary. For instance:

- There should be a presumption that, for the purposes of employment legislation, everyone is a worker within the above definition, with the onus on the employer to rebut the presumption;
- The law on temporary agency work should establish the principle of joint liability between agency and end user, and encourage users to hire staff directly;
- Some particularly insecure forms of employment should be subject to quotas and particular protections established by Sectoral Collective Agreements concluded by the two sides of industry; and
- Some engagements will need to be deemed to be employment – such as the worker induced to work under an umbrella contract with her own company which has contracted commercially with the end user, and such as the gig arrangement in which the beneficiary of the business purports not to employ any worker.

It should be pointed out that so far as agency workers are concerned, the terms of a Sectoral Collective Agreement would apply to all workers in the sector, regardless of their legal status, the identity of the beneficiary of their labour or the country of origin of the workers; there would be no ‘Swedish derogation’.

5.10 So far as the problem of continuous employment is concerned, this is obviously an issue for workers on short term assignments, but also for workers on zero hours contracts who may be on the books for years but because of the nature of their engagement are unable to build up sufficient continuous service even to be entitled to a written statement of terms and conditions of employment (to which there is an entitlement after eight weeks’ service).¹²⁵ In principle, employment rights should be universal, which means that they should be applicable to everyone from day one. If, however, it is thought that a probation period is necessary to access any particular rights, it will also be necessary to attend to the current rules relating to continuity of employment.¹²⁶

5.11 Again, Ian Mearns’ Zero Hours Contract Bill 2014 provides a valuable template, by proposing an amendment to the Employment Rights Act 1996, s 212 of which could be adapted to include the following:

- (5) In the case of an employee who is engaged by an employer ...,

any week in which work is performed shall count in computing the worker's period of employment.

- (6) In the case of an employee who is engaged by an employer ..., any week in which work is not provided by the employer shall be treated as a week falling within subsection (3)(c).¹²⁷

Section 212(3)(c) referred to above provides that continuity of service is not broken where the employee is 'absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose'.

ensuring effectiveness

5.12 The current system for enforcing labour rights in the UK is failing to deliver effective rights in practice, even for those who are not excluded from coverage for the reasons given above.

- One reason is that almost all labour rights are nowadays enforced exclusively by individual claimants bringing claims in the employment tribunals.
- Another reason is that the introduction of prohibitively high fees in the employment tribunals has greatly undermined the practical ability of individuals to uphold their rights.

5.13 Even the current government has recognised the need for better enforcement, having proposed a new offence of 'aggravated breach of labour market regulation' (with penalties to include imprisonment). Although this appears to have been dropped,¹²⁸ other initiatives include a Director of Labour Market Enforcement ('to produce an annual labour market enforcement strategy and set priorities for the enforcement bodies across the whole of the labour market – including direct employment and labour providers – and across the whole spectrum of non-compliance').¹²⁹ The enforcement bodies subject to the supervision and coordination of the new Director include the HMRC when dealing with National Minimum Wage enforcement and a transformed Gangmasters' Licensing Authority (renamed the Gangmasters and Labour Abuse Authority) whose mission will be to prevent, detect and investigate worker exploitation across all labour sectors. It will be given police-style enforcement powers in England and Wales to help it tackle all forms of exploitation in all sectors.¹³⁰

5.14 These steps do not go far enough, nor do they fully recognise the

role of trade unions in the enforcement of standards. At best this is only the first step towards a fully-fledged Labour Inspectorate (based in the proposed Ministry of Labour), as required by ILO Convention 81 (Labour Inspection Convention, 1947) (which was ratified by the UK in 1949, and which remains 'in force').¹³¹ The Labour Inspectorate should have proper resources and powers to secure the enforcement of labour rights generally (including by inspections, investigating complaints, issuing enforcement notices, and if necessary bringing claims or prosecutions itself). A statutory process, independent of government control, should determine the Labour Inspectorate's budget, to ensure that the obligations envisaged in ILO Convention 81 are fully complied with.¹³²

5.15 New methods of enforcing labour rights should be introduced, based on the type of claim and proper empirical research of the best regime, to supplement (but not replace) enforcement by individuals. These should include the power of the Labour Inspectorate, with other State bodies and trade unions (and certain specialist NGOs), to initiate legal proceedings on behalf of workers. This would build upon the model of the National Minimum Wage Act 1998, by which a successful claim results in an order that sums due to workers are to be paid to them. The Labour Inspectorate would obviously have the right of entry to employers' premises, as would trade union officials responsible for enforcing labour standards, and Labour Inspectors should have the power in appropriate cases to require an employer to cease and desist from taking action prejudicial to a worker.

5.16 But in addition to the above, more responsibility should be placed on employers pro-actively to identify and address breaches of labour standards (including compulsory equal pay audits and job evaluation schemes to address pay inequity,¹³³ and compulsory audits to identify whether the minimum wage,¹³⁴ and working time rules are being met). Otherwise, there is a need for:

- Enhanced requirements on employers to publish information – such as full details of the pay levels, pay inequities and the gender pay gap, on the model in the Equality Act 2010, s 78,¹³⁵ backed by proper powers of enforcement;
- A requirement that annual, external company audits address and verify that an employer has complied with key labour standards which apply across the workforce, such as payment of the National Minimum Wage and working time; and

- An obligation on large companies to ensure that their contractors comply with their legal obligations (in much the same way as multinationals often do with global supply chains, and as proposed for government outsourcing).

employment tribunals

5.17 The recent Tory-led governments have gutted the employment tribunal system, altering the composition, procedures and powers of the tribunals, while imposing a fee regime to restrict access to justice. These changes need to be reversed, as the right of workers (like everyone else) to a fair trial for the determination of their civil rights and obligations, in accordance with the European Convention on Human Rights, Article 6, requires. In our view the reversal of these measures needs to take place in the context of wider changes to the administration of justice in relation to employment rights and trade union law, in which the employment tribunals, the CAC and the Certification Officer respectively will be part of the first tier of an autonomous Labour Court system with exclusive jurisdiction to deal with all employment and labour related matters.

5.18 So far as the employment tribunals are concerned, these should return to a tri-partite constitution, involving representatives of employers and workers,¹³⁶ which was, until recently, a fundamental and much valued feature of tribunal adjudication. In terms of tribunal procedure, new mechanisms should be established by which the Labour Inspectorate, trade unions (and some NGOs) could bring claims on behalf of workers, even in the absence of an individual claimant (in the case of what appear to be systemic breaches of labour standards, or trade union based discrimination). But whoever is the author of a claim, the swingeing fees for bringing claims in the ET introduced by the Coalition government when Vince Cable was Business Secretary should be abolished as soon as possible. They have predictably failed their ostensible purpose of deterring weak claims, and instead simply deny access to justice especially to those of limited means.

5.19 Moreover, potential claimants should have access to some form of free legal advice and representation, the precise form of which may differ depending on the type of claim. A claim having been made, mandatory pre-hearing conciliation (also introduced by the Coalition government) should cease to be compulsory. Instead, the services of ACAS should be available to those employees or employers who

choose to use it. In the past such a voluntary model was successful in achieving a high level of agreed settlements; the current model operates, in contrast, as a further barrier to access to the tribunal. Once in a hearing, the tribunal should be given enhanced inquisitorial powers, with a greater duty to identify and investigate legal and factual issues themselves, rather than simply depend on the parties to identify issues and present evidence.

5.20 So far as the jurisdiction of the tribunals is concerned, we believe that the tribunals should have the power to deal with all contractual and statutory claims, subject to the right of applicants in contractual cases (for matters arising during or after the employment) to choose the ordinary courts if they prefer.¹³⁷ The powers of the tribunals must include the power to grant restraining orders equivalent in form to injunctions, for example to prevent the unilateral variation of contract or unfair or unlawful dismissals. The law must also be changed so that damages for loss caused by breach of the contract of employment reflect the true measure of loss (subject to mitigation) as for other species of breach of contract claims.¹³⁸ The only exception would be that claims by the employer against the employee would not be permitted to exceed in damages the amount of the wages the employee earned (or would have earned) had he or she not breached the contract.¹³⁹ The cap on unfair dismissal compensation should be removed.

5.21 Finally, the system for enforcing tribunal awards should be radically overhauled. The evidence shows that, at present, only about half of claimants who are successful in fact receive payment of their award.¹⁴⁰ The new system for penalties in the Employment Tribunals Act 1996¹⁴¹ will not lead to claimants receiving their money. Enforcement should be a process initiated at the claimant's request by the tribunal (without the need to pay a further fee, as at present); the resources of the enforcement body should be improved; penalties should remain for employers who do not pay; and employers should not be able to hide behind the corporate veil to avoid enforcement – liability should extend personally to those in control of small companies, and to controlling enterprises in corporate groups. Failure to comply with a tribunal award should be regarded as an aggravated breach of labour market regulation,¹⁴² and attract criminal penalties (including imprisonment).

conclusion

5.22 Much of the focus of British labour law has been on the right of the worker to secure a remedy after an unlawful act has taken place – for example to bring a claim for unfair dismissal. However, thought needs to be given to more radical dispute resolution solutions. For example:

- With greater coverage of collective agreements through SECs, it ought to be possible to develop effective collectively agreed dispute resolution procedures, which could incorporate stronger, independent and more effective remedies to deal with grievances and disputes without the need for recourse to the law;
- Where recourse to the law is necessary, in addition to the procedures described above, it ought to be possible for a worker given notice of dismissal to refer the matter immediately to a senior labour inspector, who after an expedited hearing should have the power to annul the dismissal and order the reinstatement of the worker (if the dismissal has already taken place).

In these latter types of case it would be open to either party to seek a review of the inspector's decision by an employment tribunal.

securing freedom of association

- 6.1** The right to bargain collectively was dealt with in Chapter Three above. Nevertheless, more needs to be said about the collective dimension of labour law, in particular freedom of association – which encompasses the right to collective bargaining and other human rights. Collective bargaining needs strong trade unions if it is to operate effectively, and these trade unions need to have sufficient powers and resources to enable them to perform the role which collective bargaining requires. It is of great importance that the freedom of workers to form and join trade unions is protected by law (international and domestic), along with the right of trade unions to act on behalf of their members in particular and workers generally.

international protection

- 6.2** The principle of freedom of association is set out in a number of ILO Conventions ratified by the United Kingdom, including Convention 87 (The Freedom of Association and Protection of the Right to Organise Convention, 1948) and Convention 98 (The Right to Organise and Collective Bargaining Convention, 1949). The UK was the first State to ratify Convention 87, the terms of which include:

Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Article 3

1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

6.3 Convention 98 is designed to prevent acts of anti-union discrimination by employers. Specifically, Article 1 protects workers from discrimination at the point of hiring as well during the employment relationship, with Article 3 imposing a duty on the State to have in place machinery to ensure that these rights are respected. Importantly, Convention 98 imposes an additional duty on States to take steps to promote collective bargaining, Article 4 providing that:

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Other ILO conventions on freedom of association deal with the protection of workers' representatives, the right to organise in the public service, and the promotion of collective bargaining more widely.

6.4 Also important is the European Convention on Human Rights (ECHR) 1950 which has a limited direct effect in UK law by reason of the Human Rights Act 1998. Under ECHR, Article 11, '*everyone* has the right to freedom of peaceful assembly and to *freedom of association* with others, including the right to form and to *join trade unions for the protection of his interests*'.¹⁴³ In other words, everyone (whether formally designated an 'employee', a 'worker' or an 'independent contractor') is entitled to act in solidarity with others to improve or defend their interests and, in particular, the conditions under which they work. In modern conditions where various contractual arrangements, such as agency work, zero hours contracts, different forms of franchising, or self-employment, are used to prevent access to statutory entitlements, it is vital that the law relating to trade unions accords with the fundamental human right freely to associate by allowing workers however categorised to join unions and enjoy the rights that flow from membership such as the right to strike and to bargain collectively.

6.5 The right to assemble and to associate freely with others (whether in a trade union or another association) should only be limited in accordance with the strict terms of the proviso set out in Article 11(2). This provides (emphasis supplied) that:

No restrictions shall be placed on the exercise of these rights

other than such as are prescribed by law and are *necessary in a democratic society* in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others...’

This latter provision means that the rights set out in Article 11(1) are not absolute. States are allowed a ‘margin of appreciation’ (that is, a degree of discretion) in the protection or restriction of such rights; but this remains subject to the overriding need to protect the essence of the right, so that any restrictions must be limited to the reasons set out in Article 11(2), and also proportionate to those ends.

- 6.6** The European Court of Human Rights (ECtHR) has established that Article 11(1) embraces an obligation on States to protect the right to collective bargaining and the right to strike.¹⁴⁴ The right to bargain collectively has been recognised to be an essential element of freedom of association,¹⁴⁵ while the right to strike has been regarded as the most powerful instrument to protect occupational interests of trade union members.¹⁴⁶ Once again, it is to be remembered that these are fundamental entitlements of everyone, subject only to the limited exceptions set out in Article 11(2). In interpreting Article 11, the European Court of Human Rights is strongly influenced by the requirements of ILO Conventions 87 and 98 (as well as the European Social Charter, which in Articles 5 and 6 also contains express protection for freedom of association).

trade union autonomy

- 6.7** ILO Convention 87 and ECHR, Article 11 protect the autonomy of independent trade unions to draw up their own rules and decide on their own activities. This is a fundamental feature of freedom of association so long as the exercise of the right does not breach the fundamental rights of someone else.¹⁴⁷ It also has a number of important consequences for the role of the State in the internal affairs of trade unions. It is true that the principle of freedom of association does not mean that there can be no regulation of trade union government. In our view, however, the existing legislation (even before the Trade Union Act 2016, on which see paras 6.17 - 6.21 below) goes too far and is too intrusive.
- 6.8** The principle of trade union autonomy is relevant to the way trade unions are governed, to the way they promote their objects, and to the

right to enforce the terms of their own rules. So far as the first of these considerations is concerned, it is clearly relevant to have regard to the role of trade unions proposed in this Manifesto, and in particular to their much expanded role in collective bargaining. If trade unions are to be seen as instruments of workplace democracy and as part of the democratising agenda more generally, it is hard to resist the argument that trade unions should themselves be democratic organisations, accountable to their members. The question, however, is one of balancing the role of the State against the rights of members to self-government. Of course, it goes without saying that the right of unions to autonomy does not give them the right to breach the fundamental human rights of others. But that is a long way from permitting national law to regulate the internal affairs of trade unions.

- 6.9** With this in mind, we believe that it is legitimate in the context of an economy in which trade unions are more closely involved in decision-making at different levels, that there should be an obligation that trade unions should be organised according to democratic and accountable principles. To this end we believe that the Trade Union and Labour Relations (Consolidation) Act 1992, ss 46-61 should be replaced with measures which require senior officers and executive committees to continue to be directly elected at regular intervals by secret ballot.¹⁴⁸ It would then be for trade unions to adopt their own rules to give proper effect to these principles, the rules in question to be approved by the Certification Officer for compliance with the statutory principles. In this way a better balance would be struck between trade union democracy on the one hand and trade union autonomy on the other.
- 6.10** Trade unions would thus be free to determine the frequency and timing of elections, as well as the location and method of voting. Complaints about non-compliance with the procedures would be dealt with as breaches of trade union rules rather than a breach of statutory obligations and would be processed accordingly by way of complaint to the Certification Officer (as a division of the proposed Labour Court) if it is felt appropriate that the latter's judicial role should survive. The role of the State is thus to set standards which trade unions are expected to meet and principles with which they are expected to comply, rather than to prescribe in detail the means by which these standards are to be met and principles observed. We believe that the same approach should be adopted for certain trade union powers. It has been the model for trade union political objects for over a hundred years, and ought also to be the model for industrial action ballots.

6.11 So, the existing law relating to industrial action ballots should be replaced by legislation which imposes a duty on a trade union to adopt rules, approved by the Certification Officer, on ballots before industrial action. The Certification Officer would certify that the industrial action rules comply with the minimum standards prescribed by legislation, a matter to which we return in paragraph 7.16 below. Any breach of these rules would be actionable at the suit of any member of the trade union, though not by any employer or third party. Such outsiders would have no standing to enforce trade union rules. Finally, the existing restrictions on trade union disciplinary powers should be revoked so that unions are re-empowered to discipline those who breach union rules (just as is any other association which has disciplinary rules), provided any such initiative is taken lawfully and fairly under the rules of the union concerned, and in accordance with the principles of natural justice.¹⁴⁹

employer interference

6.12 As we have seen the threat to freedom of association is presented not only by the State. There is also the threat posed by employers, a threat addressed by ILO Convention 98 and by the ECHR, Article 11(1). In recent years the ECtHR has made it clear that governments have a duty to take steps to protect trade unions and trade unionists from threats by employers. This has taken several forms, the Court recognising that trade union members should not be penalised by virtue of their trade union membership, and that trade union officials in the workplace should not be victimised because of their trade union activities. In relation to the latter, the Court has said that:

A trade union that does not have the possibility of expressing its ideas freely in this connection would indeed be deprived of an essential means of action. Consequently, for the purpose of guaranteeing the meaningful and effective nature of trade-union rights, the national authorities must ensure that disproportionate penalties do not dissuade trade-union representatives from seeking to express and defend their members' interests.¹⁵⁰

6.13 Yet although there is now detailed protection for trade union members and trade union officials, recent developments have exposed two gaps that need to be filled. The first relates to blacklisting in the construction industry,¹⁵¹ which has a long and pernicious pedigree in the UK.¹⁵² The history of the Consulting Association, the blacklisting organisation established by major construction companies to blacklist trade union

activists in the construction sector in order to prevent them obtaining work, has its origins in 1917; but its most active phase was from 1993 to its closure after the raid by the Information Commissioner's Office in 2009.¹⁵³ This history shows that blacklisting remains a contemporary disease which has not been eradicated.

- 6.14** Of more immediate concern is that the litigation following the ICO raid in 2009, has shown continuing weaknesses in legislation which need to be addressed. The Employment Relations Act 1999 (Blacklists) Regulations 2010 should be amended to ensure that it is always illegitimate to refuse to hire workers on grounds of past trade union activity, whether that is as a hirer of someone purported to be an independent contractor, or as a hirer of agency labour, or as the end-user of labour supplied by another entity in a chain. This means a worker of any kind or status, including agency workers.¹⁵⁴ It goes without saying that the Data Protection Act 1998 needs to be strengthened and made effective retrospectively with this pernicious practice in mind, and in our view blacklisting should be regarded as an aggravated breach of labour market regulation, and attract criminal penalties (including imprisonment).
- 6.15** The other issue that has erupted on numerous occasions in recent years is the victimisation of trade union officials in the workplace – whether shop stewards or safety representatives. This is a constant concern, brought into sharp relief in 2010 by London Underground Ltd's sacking of Eamonn Lynch and Arwyn Thomas, both RMT representatives. These dismissals led to legitimate industrial action by RMT to secure the reinstatement of their members, and to employment tribunal proceedings in which their dismissals were found to be unfair, in circumstances that led to excoriating criticism of LUL management. The Trade Union Act 2016 (and in particular the 40% approval threshold) will make it much more difficult for unions to take such action in the future and make it much harder for workers who place themselves in positions of great vulnerability to secure reinstatement.
- 6.16** In addressing this problem it is important to have full regard to ILO Recommendation 143 (The Workers' Representative Recommendation, 1971), which provides that workers' representatives in the undertaking 'should enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation

in union activities'. It is specifically recommended that there should be 'a requirement of consultation with, an advisory opinion from, or agreement of an independent body, public or private, or a joint body, before the dismissal of a workers' representative becomes final'. In our view, it should not be lawful to dismiss a workplace representative except for good cause, requiring the prior approval of a senior labour inspector, whose decision would be subject to review at the instance of the aggrieved party by an employment tribunal.¹⁵⁵

responding to the Trade Union Act 2016

6.17 It is now clear that the Trade Union Act 2016 violates ILO Convention 87 for multiple reasons, while concerns have been raised about its compatibility with the European Convention on Human Rights. We would hope that the Act will be repealed in its entirety in due course, and that repeal will be used as a springboard for better protection for trade unions and their members in a number of key areas addressed in this chapter. Some of the provisions of the Bill relevant to the present discussion were strongly diluted (the check off),¹⁵⁶ or modified (attacks on trade union facilities in the public sector, and restrictions on political freedom), in order to secure the passage of the Bill. In the case of the last of these measures, however, the amendments simply delay the inevitable impact of the changes, while the new powers of trade union surveillance by the Certification Officer remain largely intact.

6.18 In repealing the provisions of the Trade Union Act 2016 addressed to trade union facilities, legislation should reaffirm the right of a worker who is an official of a representative or a recognised independent trade union to have the right to take reasonable time off work with pay in order to enable the worker to carry out his or her trade union responsibilities, whether concerning individual or collective employment matters. This will be a residual right in the sense that the regulation of facility time will usually derive from the relevant collective agreements. However, collective agreements and legislation will need to take account of ILO Recommendation 143, which provides that:

12. Workers' representatives in the undertaking should be granted access to all workplaces in the undertaking, where such access is necessary to enable them to carry out their representation functions.

13. Workers' representatives should be granted, without undue delay, access to the management of the undertaking and to management representatives empowered to take decisions, as may be necessary for the proper exercise of their functions.

6.19 The question of access is not confined to the needs of workplace representatives. In addition, a trade union should be allowed reasonable access to the workplace for recruitment purposes, to speak to members and to conduct elections and ballots. This may be physical access or access through webpages, emails or other computer systems, to the extent that this does not unduly impede the production of goods or delivery of services by the employer. This will usually be provided for in collective agreements at sectoral level but enterprise level agreements will specify a reasonable access schedule, which should be agreed against a minimum legally enforceable default position defined in statute where not established by collective agreement. Reasonable access to the workplace should also be permitted for a trade union representative to attend on individual members who require assistance in disputes with their employer. The right to 'accompaniment' in grievance and disciplinary procedures should be converted to a full right of representation.¹⁵⁷

6.20 Turning to the check off, we believe that the reason why the government launched its attack on the practice is simply to undermine the financial security of public sector trade unions.¹⁵⁸ Indeed, in view of the inability of the government to provide a plausible rationale for this initiative, no other explanation is possible, and it seems likely that one reason why the government aborted the latter plan is that the *de facto* prohibition of collective bargaining on this matter would clearly violate ILO Convention 98 and the ECHR, Article 11. While it is important that this proposal has been dropped from the Trade Union Act 2016, we believe that the Conservatives have provided an opportunity for a Labour government to introduce a statutory obligation on employers to extend check off facilities to recognised or representative trade unions at the request of the latter. This would be in addition to the existing rights of trade unions to time off for their officials, the disclosure of information, and consultation about redundancies (which should be restored to 90 days).

6.21 In Chapter Seven we refer to some of the other provisions of the Trade Union Act 2016 dealing with freedom of association and the right to strike. Returning to the question of trade union autonomy

considered above, the other outstanding issue highlighted by the Trade Union Act 2016 relates to the role of the Certification Officer. In our view, this role should revert to the identification of those trade unions which have genuine independence from employers so that they can be afforded treatment different to other associations which are dependent on employer funding or approval. For the avoidance of doubt, only independent trade unions should have the ability to access the workplace, engage in collective bargaining and enjoy other statutory benefits (such as the right to demand check-off facilities). Beyond that the function of the Certification Officer should be to provide model rules on the various aspects identified above and to certify compliance with them and to adjudicate disputes between members and their unions where the issue is whether the union has complied with its own rulebook. There should be no question of investigating complaints or suspicions raised by third parties, nor should the Certification Officer have the power to investigate or hold hearings where he himself initiates the allegation.

conclusion

6.22 In these ways, we propose that steps should be taken in the interests of freedom of association to restore to trade unions and their members the right to autonomy over their constitutions and rules, as international law requires. Trade union autonomy is a fundamental component of a modern democratic society. We also propose measures to strengthen the rights of trade union members and trade union representatives from acts of anti-union discrimination, as well as steps to improve the organisational and financial security of trade unions.¹⁵⁹ In repealing the Trade Union Act 2016, we have an opportunity to turn its provisions – as proposed and as enacted – on their heads to the advantage of trade unions with obligations on employers in place of restrictions on trade unions.

enhancing the right to strike

7.1 We begin this chapter with three quotations:

- ‘The right of workmen to strike is an essential element in the principle of collective bargaining’;
- ‘Although the common law recognises no right to strike, there are various international instruments that do: see for example Article 6 of the Council of Europe’s Social Charter and ILO Conventions 98 and 151. Furthermore, the ECHR has in a number of cases confirmed that the right to strike is conferred as an element of the right to freedom of association conferred by Article 11(1) of the European Convention on Human Rights which in turn is given effect by the Human Rights Act’;
- ‘It should come as no surprise that the suppression of legal strike action will be seen as substantially interfering with meaningful collective bargaining. That is because it has long been recognized that the ability to collectively withdraw services for the purpose of negotiating the terms and conditions of employment — in other words, to strike — is an essential component of the process through which workers pursue collective workplace goals’.

a new starting point

7.2 These are not views expressed by radical trade unionists or even progressive labour lawyers. They are the views of cautious judges: Lord Wright (in a wartime judgment of the House of Lords in 1942),¹⁶⁰ Lord Justice Elias (in the Court of Appeal in 2011),¹⁶¹ and Justice Abella (in the Supreme Court of Canada in 2015).¹⁶² They echo the views of the General Secretary of the TUC who recently insisted persuasively upon the ‘democratic right to decide together to stop work, as a last resort when an employer won’t negotiate’.¹⁶³

7.3 As Lord Justice Elias recognised, in the second of these quotations, not only does the common law fail to recognise the right to strike, it also renders the right to strike unlawful by various means. Thus the common law holds that those organising industrial action typically

commit a tort (such as inducing breach of contract of employment), and that those taking part typically break their contracts when doing so. Since 1906, the British solution has been to carve out, for those 'acting in contemplation or furtherance of a trade dispute', a limited (and increasingly conditional) protection from common law liability, while leaving the initial liabilities intact.

- 7.4** Thus the British model completely inverts the concept of the right to strike recognised by international law. The British position is that industrial action is unlawful unless it is covered by the statutory protection, though Lord Justice Elias made it clear that it is no longer appropriate to start with the presumption in favour of the employer that industrial action is always unlawful unless it can be demonstrated by the union to be protected by the immunity. Nevertheless, in relation to the right to strike, legality operates as an exception to illegality, a situation that would not be acceptable were it to apply to any other human right.
- 7.5** For example, no one (particularly media owners) would accept the proposition that anything published in a newspaper was illegal unless authorised by statutory exceptions to such illegality. It should be no more acceptable in relation to the right to strike. The time has come to change the default legislative position on the right to strike in line with international obligations,¹⁶⁴ so that a right to strike is established in domestic law, which will apply unless there are any lawful restrictions to the contrary.¹⁶⁵ The existing common law torts used to attack industrial action must give way to the right to strike, and they should be abolished if necessary.
- 7.6** In proposing that British law should move out of the Dark Ages and follow the structure of international treaties by changing the default position on the right to strike, we would point out that this would still leave the United Kingdom some distance behind those countries where the right to strike is protected not only by international law but also by constitutional obligation, whether directly or indirectly. This is true of a wide range of countries, from Germany to Spain, Italy to Sweden, and France to Finland.¹⁶⁶ A statutory right, although not a constitutional guarantee, would nevertheless be an important step forward.

scope of the right to strike

- 7.7** In accordance with the ECHR, Article 11 (and the other international treaties to which the UK is party), it should be lawful for everyone to be able to take collective action with others in defence of their social and economic interests in the workplace, and for their trade unions to organise such action. This may take the form of the complete withdrawal of labour in the form of a ‘strike’, or action ‘short of a strike’, such as a work to rule or go slow. Consistently with ILO jurisprudence, legal protection ought not to be confined to action wholly or mainly about terms and conditions of employment, there being no justification for denying to workers in a democracy the right to withdraw their labour as an instrument of political protest in defence of their interests.
- 7.8** Not surprisingly, the ILO has unequivocally condemned the UK’s ban on secondary action. So too has the European Committee of Social Rights (ECSR). These latter condemnations are conveniently set out in the European Court of Human Rights judgment in *RMT v UK*.¹⁶⁷ Remarkably, the Court in *RMT* came to the conclusion that though the UK ‘finds itself at the most restrictive end of a spectrum of national regulatory approaches on this point and is out of line with a discernible international trend calling for a less restrictive approach’,¹⁶⁸ the ‘negative assessments made by the relevant monitoring bodies of the ILO and European Social Charter are not of such persuasive weight’,¹⁶⁹ as to take the ban on secondary action out of the margin of discretion which it permitted to the UK in that case. The logic of the Court has been heavily condemned.¹⁷⁰
- 7.9** As the ILO Committees and the ECSR have made clear, it must be permissible for trade unions to take or to call for industrial action in support of any other workers in dispute (including industrial action involving another employer) where the primary action is lawful.¹⁷¹ The latter Committee returned to this issue after the decision of the ECtHR in the *RMT* case, unimpressed by the decision of the latter. Reinforcing its earlier position, the ECSR said that:

The Committee notes that Article 6§4 of the Charter is more specific than Article 11 of the Convention. It therefore considers that while the rights at stake may overlap, the obligations on the State under the Charter extend further in their protection of the right to strike, which includes the right to participate in secondary action... the Committee reiterates its finding that the restriction established in Section 244 of the Trade Union

and Labour Relations (Consolidation) Act 1992 (TULRCA), which limits lawful collective action to disputes between workers and their employer, constitutes an interference with the right of workers guaranteed in Article 6§4 of the 1961 Charter. As regards the arguments put forward by the Government with respect to Article 31 of the 1961 Charter, the Committee holds that the maintenance of such restriction is not proportionate to the aim of protecting the rights and freedoms of others or the public interest in a democratic society.¹⁷²

7.10 We agree that ‘sympathy action’ is legal in most other countries and that ‘it should also be legal here.’¹⁷³ The starting point should be a presumption that solidarity action is lawful, partly for reasons articulated by the ILO and the ESCR, these reasons being related to changing ‘work models and their impact on the ability of trade unions to represent the interests of their members’.¹⁷⁴ In our view, it must be made lawful for unions to support their own members as well as members in other unions who are in dispute. The whole point of trade unionism is not only collective strength, but mutual support in times of trouble. To ignore that is to ignore the very nature of freedom of association, since the ties of solidarity are between members of the association and extend to those whom the association supports, irrespective of the identity of those by whom they are in turn employed. This is the whole ethos of the trade union movement.

7.11 Related to the foregoing, there is a need also to re-examine the rules relating to picketing, including secondary picketing, again with an eye on international human rights obligations (including the right to freedom of assembly in the ECHR, Article 11(1)). Those taking industrial action should obviously be able to picket outside their place of work but also any place where the business of the employer (or associated employer in the broad sense) is carried on. They should have the right to engage in peaceful protest there and elsewhere so as to inform (and seek support from) others about the industrial dispute and their claims. This entitlement follows from the right to freedom of assembly in ECHR, Article 11(1), and should not be subjected to restrictions going beyond Article 11(2), which is set out in para 6.5 above.¹⁷⁵

procedural limitations

7.12 As matters currently stand, the limited immunity from legal liability for industrial action is heavily constrained by procedural obligations,

including detailed notice and ballot requirements. These procedures – which provide (and were intended to provide) a fertile ground for litigation by imaginative lawyers on behalf of employers – are made even more onerous by the Trade Union Act 2016. However, we also believe that the procedural restrictions introduced earlier by the Thatcher and Major governments should be repealed rather than tinkered with as they were by the Blair and Brown governments. There is a need to start again, having regard to obligations under international law referred to above.

7.13 So far as the notice requirements are concerned, the ECSR has for several years raised questions about the obligation to give notice of an intention to hold a ballot. In the words of the latter Committee most recently in 2014:

the requirement to give notice to an employer of a ballot on industrial action is excessive, since in any case unions must issue an additional strike notice before taking action. Given that no change has occurred with respect to the relevant legal framework, the Committee considers that the requirement to give notice to an employer of a ballot on industrial action, in addition to the strike notice that must be issued before taking action, remains not in conformity with Article 6§4 of the Charter.¹⁷⁶

It goes without saying that the duty to give notice of an intention to ballot consequently should be repealed.

7.14 The existing statutory duty to give notice of an intention to take industrial action (post-ballot) should also be repealed. There is no reason to justify the detailed requirements of identifying the numbers of workers, the categories of workers and identifying their workplaces and the numbers of workers in each workplace. A simple notice giving no less than 3 days warning would be ample. Ballots do not take place in secret. The employer will be well aware of the demands made by the union and that, negotiations having so far failed, a ballot is to take place. The employer will know that if the majority vote in favour, industrial action is likely to follow unless there are further concessions. As soon as the union makes its demand, the employer has the opportunity to start making contingency plans for an imminent dispute.

7.15 So far as the statutory duty to hold a ballot before industrial action is concerned, this too raises questions of freedom of association.

Despite being introduced by the Thatcher government, there are many who argue that there is a strong democratic case in favour of what is now the well-established practice of pre-strike ballots. However, these democratic arguments also support the right of the union to determine in what circumstances, amongst which members and by what means the ballot should be conducted. Freedom of association means that within a general framework of democratic expectation, trade union members must be free to decide when and how their union may organise and support industrial action, and the conditions to be satisfied before doing so.

7.16 Freedom of association also means that trade unions would be required to comply with these democratically determined rules and procedures, and could be restrained at the suit of their members for failing to do so. As mentioned above, to this end the role of the State should be to insist that trade unions have in place rules determined by their members, setting out the procedural requirements for industrial action, providing for the circumstances in which a ballot is to be held and the means by which it is to be conducted. The circumstances of unions differ so greatly that it seems unlikely that model rules could be drafted, as in the case of political objects. Nevertheless, the Certification Officer could be required to certify that union industrial action rules conform to basic statutory principles so as to secure a fair, free, and secret ballot, supervised by an independent scrutineer. As explained in paragraph 6.11 above, these rules would be enforceable only at the suit of the trade union's members and not by a third party.

consequences of industrial action

7.17 In addition to the foregoing, it follows that if there is a right to strike, lawful industrial action should not be regarded as a breach of the contract of employment or service, but as a temporary suspension only. The action should not therefore be regarded as grounds for dismissal without some other form of culpable behaviour, such as violence or damage to property. Workers taking industrial action will, of course, forgo wages but, as mentioned above, deductions from wages or claims for damages by employers will not be permitted to exceed that which the worker would have earned had he or she worked normally on each day in question. Those participating in lawful collective action must be reinstated at the end of the strike, if it is their wish to be reinstated. The restrictions on agencies supplying strike-breakers should be retained.

7.18 The above proposals for a right to strike should minimise the prospect of injunctions by employers to restrain industrial action. The only circumstances where an injunction would be possible would be where the union had organised industrial action deemed unlawful for exceptional reasons, provided the restriction and the granting of the injunction satisfied the provisions of ECHR, Article 11(2). Should such exceptions to the right to strike be created, it ought not to be possible to restrain legally contested industrial action on the flimsy grounds now provided by the law. In future any such injunction should be available on the ground only that the employer could satisfy the proposed Labour Court that on the apparent facts the action of the union was unlawful.

7.19 One area where such a reform would apply would be in relation to EU law following the *Viking* and *Laval* cases.¹⁷⁷ It is necessary to take steps in domestic law to protect unions from injunctions based on the *Viking* and *Laval* principles. The new threshold for the granting of injunctions proposed in the previous paragraph would be a helpful step in this direction. This threshold should be stated expressly to apply ‘notwithstanding any EU law to the contrary’. But legislation should nevertheless specifically protect trade unions from liability in damages awarded on the basis of the principles in *Viking* and *Laval*, and similar principles which may be derived from Free Trade Agreements such as TTIP, CETA and TISA (which may, if agreed by the EU or bilaterally, continue to bind future governments of the UK). Here we fully endorse the insight of the ILO Committee of Experts in the context of the BALPA dispute in 2010 where an element of this need for revision was captured by the observation that:

Finally, the Committee notes the Government’s statement that the impact of the ECJ judgments is limited as it would only concern cases where freedom of establishment and free movement of services between Member States are at issue, whereas the vast majority of trade disputes in the United Kingdom are purely domestic and do not raise any cross-border issues. The Committee would observe in this regard that, in the current context of globalization, such cases are likely to be ever more common, particularly with respect to certain sectors of employment, like the airline sector, and thus the impact upon the possibility of the workers in these sectors of being able to meaningfully negotiate with their employers on matters affecting the terms and conditions of employment may indeed be devastating. The Committee thus considers that the doctrine

that is being articulated in these ECJ judgments is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention.¹⁷⁸

7.20 Related to the foregoing is the possible liability of trade unions in damages for action that goes beyond lawful industrial action, picketing or protest. With a new right to strike abolishing the tortious basis of financial liability (and the possible disapplication of the torts on which liability is based), the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992, s 20 (limiting damages against the trade union) should be retained for cases where for some reason the right to strike was exceeded by a trade union.¹⁷⁹ If restrictions are to be introduced on the right to strike for purposes not yet clear, a decision would have to be taken about whether there should be financial liability where these restrictions are exceeded, and if so why.

7.21 Finally, in the event of a strike in essential services (as defined by the ILO to mean services ‘the interruption of which would endanger the life, personal safety or health of the whole or part of the population’), trade unions will have the responsible role of seeking to conclude ‘minimum service agreements’. These are likely to be achieved by the collective agreements proposed here, but where they are not or where local circumstances require particular detail, ACAS should have the jurisdiction to broker such agreements. For workers who may be prohibited from taking strike action such as the police (the ban on strike action in the prison service should be removed), there must be access, as the ILO specifies, to binding, independent and impartial arbitration carrying the confidence of both sides and available at short notice. We see no virtue in the balloting thresholds in the Trade Union Act 2016.

conclusion

7.22 There are thus two general issues relating to the right to strike that need to be addressed. The first relates to how the law is expressed, which needs to be recast for the 21st century rather than in its current 19th century form. The other is the substance of the law, which needs to be revised to take account of the changing nature of employment and employers.

conclusion

8.1 This is a Manifesto for raising labour standards and improving working conditions for all workers. It is a Manifesto for changing the way in which working conditions are regulated, by moving the responsibility for regulation from legislation to collective bargaining. This will be beneficial for the British economy as well as for Britain's 31 million workers. The Manifesto requires reversal of the trend of the last 35 years which has seen collective bargaining (once the preferred method of regulation) being displaced by legislation as the main regulatory tool. As a result we have an unnecessarily legalistic, inefficient and immensely complex system of rules, contained in an ever-growing statute book too heavily dependent on lawyers, tribunals, judges and courts for their enforcement.

restoring collective bargaining

8.2 The current approach to employment regulation is unsustainable. There is too much law, informed by an ostensible belief that every problem must have a legal solution (or none at all). Although voluminous in content and covering a wide range of issues, legislation - as a means of regulation - can only set minimum standards with which every employer can comply, large or small, productive or chaotic. Very often regulation is barely a step above deregulation or non-regulation, and very often those who most need the protection of the law are either deliberately excluded by Parliament, denied access by sham employment arrangements contrived by their employers, or simply give up in the face of cost and complexity.

8.3 Some of the rights on the statute book are unenforceable, and many disputes should and could be resolved at the workplace (with third party intervention if required). Reliance on lawyers and tribunals to assert rights and resolve disputes is expensive and a drain on union (and employer) resources, in the former's case deflecting energies from core trade union activity. This is not to say that there is no role for legislation to protect workers' rights or litigation to defend them, but it is to say that the balance has been tilted too heavily in these

directions and that a measure of equilibrium needs to be restored. This can only be done by re-establishing the role of collective bargaining as the principal form of standard-setting and dispute resolution, with legislation and litigation performing a secondary rather than a primary role, as is currently too often the case.

8.4 The obvious problem about relying on collective bargaining as a method of regulating working conditions is the currently relatively low level of collective bargaining activity, which is at its lowest since before the First World War. There are several explanations for this decline, the most significant of which is the withdrawal of meaningful State support (in the form of legal, administrative and policy measures) from 1980 onwards, a withdrawal of support which was continued by the New Labour governments of Blair and Brown. The principal recommendation of this Manifesto that the balance of regulation should be switched from legislation to collective bargaining is contingent on strong State support for the latter and for trade unions (and employers' associations), upon whose shoulders will lie a heavy responsibility for delivery.

8.5 Collective bargaining cannot thrive without active State support. But State support for collective bargaining will be forthcoming only if collective bargaining is central to macroeconomic policy, which we assume it will be under a progressive Labour government. Collective bargaining was purposefully promoted by governments throughout the world from the 1930s to the 1970s not on a whim, but as part of a global consensus that there was a need to raise wages, equalise incomes and stimulate demand in a cycle of virtuous economic activity. That consensus is captured most explicitly in the preamble to the US National Labor Relations Act of 1935,¹⁸⁰ and embraced also by the ILO's Declaration of Philadelphia of 1944. Both of these instruments are still in force.

implications for labour law

8.6 The implication of this core proposal for labour law is that it will require a much stronger focus on laws and procedures designed to promote collective bargaining and to build the machinery within which bargaining can take place. When the State intervened after the First World War and then again after the Great Depression, the chosen method of institution building was by administrative coercion. By this means the Ministry of Labour used its political muscle to persuade

employers and trade unions to establish Joint Industrial Councils to set terms and conditions of employment on a multi-employer, sector-wide basis, with steps also being taken to encourage employers who were not party to these agreements to comply with their terms.¹⁸¹

- 8.7** In the modern era after 35 years of neo-liberal encouragement of aggressive capitalism, reliance on the administrative power of the State alone is unlikely to be effective. Any future strategy of the kind proposed here will require a variety of legislative tools (including establishing the procedures and determining the legal effects of agreements made under these procedures). But having made the effort to build and extend these procedures, the rewards would be considerable. Comprehensive sector wide collective agreements create the opportunity to provide solutions to many of the unnecessary problems that blight British labour law, including: transfer of undertakings, agency workers, and posted workers. They would also resolve the problems that blight working lives and which labour law currently appears powerless to improve: low pay, inequality of income and job insecurity. Under the Manifesto, every worker employed in the sector in question would be entitled to the standards provided for in the Sectoral Collective Agreements. They would boost demand, reduce welfare payments, increase tax take and promote efficiency and investment.
- 8.8** As explained above, however, this is not to say that there would be no role for legislation to guarantee minimum standards to underpin collective bargaining and to deal with gaps in the coverage of collective agreements. It would be unrealistic to expect collective bargaining and collective agreements to cover 100% of the labour force, when 86% is the best we have achieved in the past.¹⁸² But existing legislation must be universal in scope if it is to protect the people for whom it is designed and if it is to prevent abuse by employers. And it must be more effective in application if rights are to be meaningful, suggesting the need for easier, cheaper and quicker access to enforcement bodies and a more effective range of remedies (properly enforced) in the event of breach of the legislation.
- 8.9** Finally, in crafting a future for labour law and a change from the recent past, what we have in mind is a total break from the policies pursued by governments of both parties to varying degrees since 1979. This also requires a re-engagement with international labour law and international human rights standards, which should be

embraced and supported as the friend of a willing government rather than despised and avoided by a hostile government, as is currently the case. International standards are a floor not a ceiling, and as such should guide what needs to be a fundamental re-assessment of the law relating to freedom of association and the right to strike. The State needs to stop attacking trade unions, while offering more creative solutions to unacceptable practices such as blacklisting and victimisation.

conclusion

8.10 The problems addressed in this Manifesto could hardly be more acute, and the need to address the present pitiful state of industrial relations could hardly be more compelling. The foregoing is an alternative to the current arrangements in which collective bargaining is ebbing away, and workers are left to the mercy of minimal minimum standards, enforceable only in tribunals they are unable to access. The Manifesto offers an alternative to current arrangements that provide inadequate protection to trade union members, give insufficient support for trade union organisation, and impose excessive burdens on trade union activity. Employers should welcome a labour law platform that rewards competition by innovation, investment and efficiency rather than by reducing working class incomes. We offer the proposals in this paper as a basis for discussion for a better future – a future which more effectively empowers and protects workers and their organisations, in the interests of us all.

principal recommendations

- 1** A new government department – a Ministry of Labour – should be established to represent the interests of workers in government. The Ministry should be led by a Secretary of State with a seat in the Cabinet (para 3.2).
- 2** It should be a primary responsibility of the Ministry of Labour to promote collective bargaining and do so on a multi-employer sectoral basis, working with ACAS for this purpose (paras 3.4, 3.5).
- 3** Sectoral collective bargaining should be promoted through Sectoral Employment Commissions, which would operate through Sectoral Collective Agreements, which in turn would apply to all workers in the sector in question (paras 3.13-3.15).
- 4** Sectoral collective bargaining should be complemented by enterprise based bargaining between an employer or a group of employers on the one hand and a trade union or trade unions on the other (para 3.17).
- 5** Where there are overlapping sectoral and enterprise agreements, the principle of favourability will apply so that the worker is entitled to the most favourable terms and conditions (para 3.17).
- 6** In order to promote enterprise based collective bargaining, the statutory recognition procedure should be revised so that a union is entitled to recognition if it can show 10% membership and evidence of majority support (para 3.18).
- 7** Every worker should be entitled to be represented by a trade union collectively or individually on all matters relating to employment, and the statutory right to be accompanied by a trade union official should be amended accordingly (para 3.20).

- 8** The balance of regulating terms and conditions of employment should in these ways return from the current focus on legislation to a greater focus on collective bargaining, with the clear aim of raising collective bargaining density (para 4.1).
- 9** There would nevertheless continue to be a role for regulatory legislation to underpin collective bargaining on a range of matters such as pay, working time (including zero hours contracts), discrimination, equality, and health and safety at work (paras 4.2 – 4.21).
- 10** Existing statutory standards should be comprehensively reviewed, and the Low Pay Commission should be renamed the Living Wage Commission: the object is to eliminate rather than entrench low pay (para 4.4).
- 11** Existing statutory standards should be universal in scope and effective in application. The legal definition of a worker should be greatly expanded and the Tory led changes (including fees) to the employment tribunals reversed (paras 5.7 – 5.21).
- 12** Steps should be taken to resolve more disputes without recourse to the law, under collectively agreed procedures, or summarily by labour inspectors with powers to cancel dismissal notices and order reinstatement (para 5.22).
- 13** The law on freedom of association should be changed to strike a better balance between trade union autonomy and trade union democracy. Trade union elections should be conducted in accordance with trade union rules and procedures (paras 6.6 – 6.11).
- 14** More effective legislation should be introduced to stamp out blacklisting, which should be regarded as an aggravated breach of labour market regulation, and attract criminal penalties (including imprisonment) (paras 6.12 – 6.16).
- 15** It should not be lawful to dismiss a workplace representative except for good cause, requiring the prior approval of a senior labour inspector, whose decision would be subject to review at the instance of the aggrieved party by an employment tribunal (para 6.16).

- 16** Recognised or representative trade unions should have the right to check off facilities on request, and the reserve powers of ministers relating to facilities introduced by the Trade Union Act 2016 should be repealed (para 6.20).
- 17** The role of the Certification Officer should revert to the jurisdiction at the time the Trade Union Act 2016 was introduced. The investigatory powers introduced by the Trade Union Act 2016 should be removed (pars 6.17 – 6.20).
- 18** The Certification Officer should be required to certify that union industrial action rules conform to basic statutory principles so as to secure a fair, free, and secret ballot, supervised by an independent scrutineer (para 6.21).
- 19** It should be lawful for everyone to be able to take collective action with others in defence of their social and economic interests in the workplace, and for their trade unions to organise such action (para 7.7).
- 20** It must be permissible for trade unions to take or to call for industrial action in support of any other workers in dispute (including industrial action involving another employer) where the primary action is lawful (para 7.10).
- 21** Those participating in lawful collective action must be reinstated at the end of the strike, if it is their wish to be reinstated. The restrictions on agencies supplying strike-breakers should be retained (para 7.17).
- 22** An injunction should be available on the ground only that the employer could satisfy the court that on the apparent facts the action of the union was unlawful. This should be stated expressly to apply ‘notwithstanding any EU law to the contrary’ (paras 7.18 – 7.19).
- 23** There should be no legal distinction drawn between public and private sector disputes. Where appropriate it will continue to be possible for unions voluntarily to conclude minimum service agreements in essential services (para 7.21).

- 24** A Labour Court should be established, with specialist judges. The ET, CAC and CO should be the first tier of an autonomous Labour Court system with exclusive jurisdiction to deal with all employment and labour related matters (paras 5.17, 6.10, 7.18).

- 25** The Trade Union Act 2016 should be repealed in its entirety, immediately (paras 6.17, 7.14).

endnotes

- 1 Professor Lord Wedderburn QC, FBA, 'Preface' to Lord Wedderburn, *Labour Law and Freedom* (1992).
- 2 31.42 million in work as at January 2016, of whom 22.94 million worked full-time and 8.48 million part-time: ONS, *UK Labour Market: March 2016* (ONS, 16 March 2016).
- 3 In a quarterly survey in 2011, only 67% of British workers were satisfied with their current employer (ie some 10 million were not), a lower score than France (68%), Germany (68%), Australia (70%), Belgium (73%), New Zealand (73%), USA (74%), Netherlands (74%), Canada (77%). In the last 11 quarterly surveys, polling approximately 18,000 workers, Britain's employees have been the least satisfied workers nine times. In terms of job fulfilment the UK does even worse at 62% expressing job satisfaction. (Randstad UK plc, *Fulfilment at Work* (2014) In the UK 15.2 million days were lost due to stress, depression and anxiety (categories which exclude serious mental health problems such as manic depression and schizophrenia): ONS, *Sickness Absence in the Labour Market, February 2014*. Note the rise in suicide rates and self-harm caused by the 2008 crash: D Gunnell, J Donovan, M Barnes, R Davies, K Hawton, N Kapur, W Hollingworth, C Metcalfe, *The 2008 Global Financial Crisis: Effects on Mental Health and Suicide* (Policy Report 3/2015, University of Bristol, 2015).
- 4 Around one in three UK workers say they are affected by workplace bullying: <http://www.bbc.co.uk/news/business-33993526>; see also ACAS Policy Discussion paper *Seeking Better Solutions: Tackling Bullying and Ill-treatment in Britain's Workplaces* (November 2015): <http://www.acas.org.uk/media/pdf/e/b/Seeking-better-solutions-tackling-bullying-and-ill-treatment-in-Britains-workplaces.pdf>.
- 5 Unlike several States in Europe, there is no 'dual channel' for democratic participation; there is no provision for worker directors or works councils. For the 80% of British workers who do not have the benefit of collective bargaining, there is no way of making their voice heard save in the almost non-existent but legally specified situations in which a right to consultation arises. It is true that many employers have a (voluntary) grievance procedure but no-one who has any experience of raising grievances could suggest that this was a mechanism for workplace democracy.
- 6 UK workers have the longest usual working week of any country in Europe at 42.5 hours: J Cabrita and S Boehmer, *Working Time Developments in the 21st Century: Work Duration and its Regulation in the EU* (European Foundation for the Improvement of Living and Working Conditions, 2016), at pp 54, 56, 58. The gap between the usual working hours for men and for women is much greater in the UK than anywhere else in Europe at 3.2 hours per week. 'The most striking finding is that, for both the whole economy and for the different sectors included here, the usual weekly working time is, on average, shorter in countries with a working time regime where collective agreements, especially sectoral ones, play an important role.' (ibid, p 55). In 2015, some 5.1 million employees put in an extra 7.7 hours (on average) per week in unpaid overtime worth some £35.1 billion to their employers: P Sellers, 'Unpaid Overtime Can't be a Blank Cheque', *Touchstoneblog.org.uk*, TUC, 26 February 2016. Since 2010 the number of people working in excess of 48 hours has risen by 15% to 3,417,000 (TUC, September 2015 at <https://www.tuc.org.uk/international-issues/europe/workplace-issues/work-life-balance/15-cent-increase-people-working-more>).
- 7 UK workers will share the oldest official retirement age of any country in Europe

at 68 with Ireland and the Czech Republic, compared to an average of 65.5 across the developed world: OECD, *Pensions at a Glance 2015, OECD and G20 Indicators*, (2015).

- 8 At 38% of salary (including both State and private pensions) compared to Netherlands at 90%+ and 80%+ in Italy and Spain: OECD, *ibid*.
- 9 The ILO has reported that of 24 countries surveyed, the UK had the 5th highest level of mismatch of education level for occupation, with 28.9% of its workforce in jobs not suited to their education level. Of this group, 13.9% had a lower than average education level for their occupation: ILO, *Skills Mismatch in Europe* (2014) (http://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/publication/wcms_315623.pdf).
- 10 In 2014, on an output per worker basis, productivity in the UK was 19% lower than the average for the rest of the G7, the widest productivity gap since records began in 1991. Per hour worked, UK productivity is 45% lower than the Netherlands, 36% lower than Germany, 34% lower than Belgium, 31% lower than France, 30% lower than Ireland and the USA, 10% lower than Italy and 5% lower than Spain. UK productivity is just a fraction higher than it was in 2007 whilst other countries have increased their productivity: ONS, *International Comparisons of Productivity, 2014 – Final Estimates*, 18 February 2016; and see J Dromey, 'Introduction' in J Dromey (ed), *Involvement and Productivity – The Missing Piece of the Puzzle* (IPA, 2016), pp 1-2.
- 11 16th position out of 16 European countries surveyed in R Ray and J Schmitt, 'No-Vacation Nation USA – A Comparison of Leave and Holiday in OECD Countries', European Economic and Employment Policy Brief, No. 3 (2007); and see <http://www.independent.co.uk/news/business/news/uk-paid-leave-holiday-entitlement-compares-to-eu-countries-in-europe-in-charts-a6881456.html>.
- 12 16.8% of the UK population were in poverty in 2014, the 12th highest rate in the EU; between 2011 and 2014 a staggering 32.5% of the UK population experienced poverty at least once: ONS, *Persistent Poverty in the UK and EY: 2014*, ONS, 16 May 2016.

The population of the UK in 2014 was 64,596,800 million (<http://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates>). This means that 10,852,000 people were in poverty in that year.

- 13 21% of employees (5.5 million people) were low paid in Great Britain in April 2014 and this proportion has changed little over 20 years: A Corlett, L Gardiner, *Low Pay Britain 2015* (Resolution Foundation, 2015), p 18. No less than 22% of employees (5.7 million) earned less than the Living Wage and 5% (1.4 million) were on the Minimum Wage, *ibid*, p 19. The Living Wage Commission found that: 'While overall poverty rates are falling... the nature of poverty is changing dramatically. For the first time, there are now more people in working poverty than out-of-work poverty. 6.7 million of the 13 million people in poverty in the UK are in a family where someone works. That is 52% of the total!' (The Living Wage Commission, Working for Poverty (2014): http://livingwagecommission.org.uk/wp-content/uploads/2014/02/Living-Wage-Commission-Report-v2_f-1.pdf). The reversion since the late 1970s to a Speenhamland system of public subsidy for low wages and its disastrous effects are well described in F Wilkinson, 'The Theory and Practice of Wage Subsidisation: Some Historical Reflections', in F Bennet and D Hirsch, *Tax Credit and Issues for the Future of In Work Support* (Joseph Rowntree Foundation, 2001).
- 14 The gender difference in average pay for work of equal value is bad enough at 9.4%. But the gender pay gap (caused by occupational segregation, part-time working and caring responsibilities) is no less than 19.2% across all ages and 27.3% for those between 50 and 59: House of Commons Women and Equalities Committee, *Gender Pay Gap*, HC 584 (2015-16).
- 15 It now stands at 183:1 in the UK: High Pay Centre, *Executive Pay Continues to Climb at Expense of Ordinary Workers* (2015). The High Pay Centre has found a negligible link between incentive payments to executives and returns to shareholders (High Pay Centre, *No Routine Riches: Reforms to Performance Related Pay* (2015)). Inequality of wealth and income is not unique to

- the UK (Oxfam, *An Economy for the 1%: How Privilege and Power in the Economy Drive Extreme inequality and How This Can be Stopped*, Oxfam, 18 January 2016), but it is certainly striking in the UK (C Belfield, J Cribb, A Hood, R Joyce, *Living Standards, Poverty and Inequality in the UK: 2015* (Institute of Fiscal Studies, 2015)). And inequality affects all spheres of life from health and life expectancy to the rate of teenage pregnancy (Britain has the highest rate of teenage pregnancy in Western Europe: Family Planning Association, *Teenage Pregnancy Factsheet*, August 2010) and educational attainment (OECD, *Education at a Glance 2015: OECD Indicators*, 2015, OECD, 2015). Social mobility is at a standstill if not in reverse (J Goldthorpe, *Social Class Mobility in Modern Britain: Changing Structure, Constant Process* (Lecture to British Academy, 15 March 2016).
- 16 At 14.5%, just below the EU average of 16.5% (OECD *Employment Outlook*, 2015). The UK has 3,275,000 full-time and 1,357 part-time, ie a total of 4,632,000 self-employed workers in December 2015: ONS, *LFS Self-Employment, 16 March 2016*. Of these 51% earned less than 2/3 full-time workers' median earnings: A Corlett, L Gardiner, *Low Pay Britain 2015* (Resolution Foundation, 2015), p 21. False self-employment is on the rise across Europe: A Thörnquist, 'False Self-Employment and Other Precarious Forms of Employment in the 'Grey Area' of the Labour Market', (2015) 31 *International Journal of Comparative Labour Law and Industrial Relations* 411.
 - 17 And some of the least regulated agency workers in the OECD: OECD, 'Protecting Jobs, Enhancing Flexibility: A New Look at Employment Protection Legislation', in OECD, *Employment Outlook 2013* (2013), p 92.
 - 18 See OECD, *Employment Outlook 2015* (2015), p 281, Table J.
 - 19 ONS (*Contracts that do not Guarantee a Minimum Number of Hours: March 2016*) reports that 801,000 workers thought they were on zero hours contracts whereas employers recorded 1.7 million zero hours contracts where the worker actually worked during the fortnight surveyed and a further, staggering, 2.0 million contracts where the worker carried out no work during the fortnight. The employer count is more likely to be correct although it must be discounted for workers holding more than one contract.
 - 20 The UK has the 4th highest proportion of part-time workers behind the Netherlands, Austria and Germany. Source: Eurostat ([lfsa_eppga](#)); see also http://www.keepeek.com/Digital-Asset-Management/oecd/employment/oecd-employment-outlook-2015_empl_outlook-2015-en#page2, p 279, Table H. The numbers of part time workers wanting full time work increased from 8.5% in 2005 to nearly 19% in 2014 see Eurostat data March 2016 [[lfsa_eppgai](#)]. See also OECD, *Employment Outlook 2015* (2015), p 280, Table I.
 - 21 131 million days were lost to sickness absence in the UK in 2013: ONS, *Sickness Absence in the Labour Market, February 2014*.
 - 22 European Parliament, 'Maternity and paternity leave in the EU', infographic, December 2014.
 - 23 Writing in the *Senior President of Tribunals' Annual Report*, February 2016, Mr Justice Langstaff, the President of the EAT referring to the fall in ET claims between January 2012 to June 2015 said: 'Fees are new; fees have an obvious potential to change the behaviour of litigants; and what appears to be a 'cliff-face drop' in the number of applications became apparent so shortly after the introduction of fees as to suggest an actual temporal, and probably causal, connection'. See also A Moretta, *Access to Justice: Exposing the Myths* (Institute of Employment Rights, 2016).
 - 24 The total number of HSE staff in post fell from 4,019 in 2004 to 2,621 in 2014. Over the same period, the number of Local Authority Health and Safety Inspectors fell from 1,140 to just 800. Similarly, funding to the HSE was slashed from £209 million in 2004/05 to £154 million in 2013/14, in real terms, a cut of approaching 50%. See S Tombs, *Social Protection After the Crisis. Regulation Without Enforcement* (2016). Even the government has now accepted the imperative for some additional inspectors for certain forms of exploitation: Home Office, *Tackling Exploitation in the Labour Market: Government Response* (Home Office, January 2016).

- 25 Tony Blair, in an article he wrote in *The Times*, 31 March 1997 on the eve of the Labour landslide election.
- 26 L Fulton, *Worker Representation in Europe* (Labour Research Department and ETUI 2013).
- 27 The 23% estimated for 2011 by B van Wanrooy, et al in *Employment Relations in the Shadow of Recession* (cited below), at p 79 is in slight tension with the 16.9% coverage of wage bargaining extracted from the ICTWSS data (see below) by the European Foundation for the Improvement of Living and Working Conditions, *Developments in Collectively Agreed Pay 2013* (2014), p 45: http://www.eurofound.europa.eu/sites/default/files/ef_files/docs/eiro/tn1404020s/tn1404020s.pdf.
- 28 Board of Trade, *Report on Collective Agreements between Employers and Workpeople in the United Kingdom*, Cmd 5366, 1910. See R Charles, *The Development of Industrial Relations in Britain 1911-1939* (1973).
- 29 L Fulton, above. For a discussion see K D Ewing and J Hendy, *Reconstruction after the Crisis: A Manifesto for Collective Bargaining* (Institute of Employment Rights, 2013), at pp 2, 34-39.
- 30 This graph represents the estimation of the editors (revised from the graph in their *Manifesto for Collective Bargaining*, *ibid*, at p 4) of the percentage of workers who had one or more terms of employment founded on a collective agreement at any level and includes those covered by Wages Councils. The historical records are incomplete, irregular, use different definitions and are in any event uncertain. Estimates are therefore unavoidable. Ours are based on a consideration of the following materials: S Milner, 'The Coverage of Collective Pay-setting Institutions in Britain, 1895- 1990' (1995) 33 BJIR 69; N Millward, A Bryson and J Forth, *All Change at Work? British Employment Relations, as Portrayed by the Workplace Industrial Relations Surveys Series* (2000); K Brook 'Trade Union Membership: an Analysis of Data from the Autumn 2001 Labour Force Survey', (2002) 110 *Labour Market Trends* No 7, p 343; P Davies and M Freedland, *The Evolving Structure of Collective Bargaining in Europe 1990-2004; National Report on the UK* (2004); European Commission and University of Florence; H Grainger *Trade Union Membership 2005* (DTI, 2006); B Kersley, C Alpin, J Forth, A Bryson, H Bewley, G Dix and S Oxenbridge, *Inside the Workplace: Findings from the 2004 Workplace Employment Relations Survey* (2006); B van Wanrooy, H Bewley, A Bryson, J Forth, S Freeth, L Stokes, S Wood, *Employment Relations in the Shadow of Recession; Findings from the 2011 Workplace Employment Relations Study* (2013); J Visser, *Data Base on Institutional Characteristics of Trade Unions, Wage Setting, State Intervention and Social Pacts, 1960-2014* (ICTWSS) (Amsterdam Institute for Advanced Labour Studies, University of Amsterdam, October 2015).
- 31 Eurofound, *Recent Developments in the Distribution of Wages in Europe* (Publications Office of the European Union, Luxembourg, 2015), p 35.
- 32 *Ibid*, p 45. In a global context, the world is revealed to be a place of gross inequality where the 62 richest individuals have the same total wealth as the poorest half of the global population (3.6 billion people). The former's income rose 44% in five years from 2010-2015 while during the same period the wealth of the poorest half dropped by 41%: Oxfam, *An Economy for the 1%: How privilege and power in the economy drive extreme inequality and how this can be stopped*, Oxfam, 18 January 2016. The Credit Suisse 2015 *Global Wealth Report* found the poorest half of humanity own 1% of global wealth whereas the richest 1% of people own 50.4% of global wealth.
- 33 ILO, *Global Wage Report 2014/15: Wages and Income Inequality* (2015), p 19, citing W Salverda, B Nolan and T Smeeding, 'Introduction' in [same authors] (eds), *The Oxford Handbook of Economic Inequality* (2009) p 5.
- 34 As E McGaughey points out (in relation to the rise and fall of union membership and inequality but the point is equally apposite to the employment relationship more generally): 'The evidence shows, not merely that the law is a more significant factor among those socio-economic factors: the law determines the relevance of all factors absolutely'. E McGaughey, *Do Corporations Increase Inequality?* (30 November 2015), at: <http://piketty.pse.ens>.

- <fr/files/McGaughey2015.pdf>, at p 32; and E McGaughey, 'All in 'It' Together: Worker Wages Without Worker Votes' (2016) 27 *King's Law Journal* 1, p 8.
- 35 For example, international tax avoidance and evasion revealed in the 'Panama Papers', the invasion of Iraq, international rendition of prisoners, unauthorised electronic surveillance, etc.
- 36 See paragraphs 2.12.
- 37 E Dabla-Norris, K Kochhar, N Suphaphiphat, F Ricka, E Tsounta, *Causes and Consequences of Income Inequality: A Global Perspective* (IMF Staff Discussion Note, June 2015); F Jaumotte and C Osorio Buitron, *Inequality and Labor Market Institutions* (IMF Staff Discussion Note, July 2015). The latter (at p 27) 'found strong evidence that the erosion of labor market institutions in the advanced economies examined is associated with an increase of income inequality'. See also F Jaumotte and C Osorio Buitron, *Revisiting the Drivers of Inequality: The Role of Labour Market Institutions* (VOX, CEPR's Policy Portal, 2015).
- 38 A good example of this thinking is in the paper which served as the principal blueprint for the Trade Union Act 2016: E Holmes, A Lilico, T Flanagan, *Modernising Industrial Relations* (Policy Exchange Research Note, September 2010), which identified (at pp 17-18) only three situations in which it might be desirable to permit (by law) an individual worker to take strike action: where there are significant costs to employer or employee in absorbing a new worker into the employee's position; where employees have limited choice of employer; and where the law offers limited employment rights. In a free and efficiently functioning labour market by contrast, it seems there is no tenable basis to permit workers to strike!
- 39 A Bogg and T Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (2014). The foundational analysis is A O Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States* (1970); (for earlier sources see B E Kaufman, 'Employee Voice before Hirschman: its Early History, Conceptualization, and Practice' in A Wilkinson, J Donaghey, A Dundon, R B. Freeman, *A Handbook of Research on Employee Voice* (2014); more recently: P J Gollan and G Patmore, *Perspectives of Legal Regulation and Employment Relations at the Workplace: Limits and Challenges for Employee Voice*' (2013) 55 *Journal of Industrial Relations* 488; E McGaughey, 'Behavioural Economics and Labour Law', LSE Legal Studies Working Paper No 20/2014.
- 40 R Freeman and J Medoff, *What Do Unions Do?* (1984); S Deakin and F Wilkinson, 'Labour Law and Economic Theory: A Reappraisal' in H Collins, P Davies and R Rideout (eds), *The Legal Regulation of the Employment Relation* (2000); ACAS, *Information and Consultation at Work: From Challenges to Good Practice*, ACAS Research Paper 03/03; G Davidov, 'Collective Bargaining Laws: Purpose and Scope', (2004) 20 *International Journal of Comparative Labour Law and Industrial R* 81; S Deakin and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution*, (2005); Department for Business, Innovation and Skills, *Engaging for Success: Enhancing Performance through Employee Engagement* (2009, URN 09/175) ('MacLeod Report'); P Davies, 'Efficiency Arguments for the Collective Representation of Workers', in A Bogg, C Costello, ACL Davies and J Prassl (eds), *The Autonomy of Labour Law* (2015); K Hoque and N Bacon, *Workplace Representation in the British Public Sector: Evidence from the 2011 Workplace Employment Relations Survey* (Warwick Papers in Industrial Relations No 101, 2015); J Dromey (ed), *Involvement and Productivity – The Missing Piece of the Puzzle?*, above.
- 41 Such as the opening or closing of workplaces or the expansion or contraction of production or services. Still less do they have a say on the terms and conditions of others, for example the remuneration packages of senior managers. And few firms harness or encourage through adequate reward or encouragement the ingenuity or knowledge of their workers to solve production problems or to improve efficiency.
- 42 Nor do workers have any say over the minimal hourly rates fixed in the National Minimum Wage or the Living Wage.
- 43 D Smith and P Chamberlain, *Blacklisted; The*

Secret War Between Big Business and Union Activists (2015).

- 44 For example, the time limits for consultation on measures to avoid collective redundancy have been reduced and the CJEU has restricted the application of the obligation: *USDAAW v WW Realisation 1 Ltd* (C-80/14) [2015] ICR 675.
- 45 It is appreciated that sectoral bargaining poses problems for unions in that the site of negotiations is removed from the workplace of the worker and his or her influence (not merely on the negotiations but on the negotiators on his or her behalf) is diminished in proportion to the greater size of the bargaining unit. There are dangers of bureaucracy replacing direct participation. Yet without sectoral bargaining, as we have seen in the UK and in Europe, establishment level bargaining also declines. The need for sectoral collective bargaining is becoming appreciated in the USA too: see D Rolf, 'Toward a 21st-Century Labor Movement', *The American Prospect*, 18 April 2016, <http://prospect.org/article/toward-21st-century-labor-movement>.
- 46 *Allonby v Accrington and Rossendale College* (Case C-256/01) [2004] ICR 1328, para 68; reiterated, in different ECR contexts, in *Danosca* (C-232/09) [2010] ECR I-11405, para 39 and in *Holterman Ferho Exploitatie BV v Spies Von Büllsheim* (C-47/14) [2016] IRLR 140, para 41.
- 47 Work is usually a collective endeavour. Even those who work in splendid isolation usually require others to fulfil their endeavours (the freelance, the composer, the playwright, etc). In the usual scenario, the employer requires the workforce to operate as a well-oiled team with each member exercising his or her individual judgment, skill and autonomy to that collective end. In contrast, in extracting the greatest surplus value from the collective operation, subject to the avoidance of disproportionate transaction costs in wage setting, the employer prefers to deal with each worker separately so as to maximise the former's power over the latter. The worker, on the other hand, can maximise his or her power by acting collectively to capture as much surplus value as they are able from the work they perform. Where such solidarity is achieved the resultant process is collective bargaining.

- 48 *Saskatchewan v Attorney-General of Canada* 2015 SCC 4, [2015] 1 SCR 245. A fuller quotation reads: [3] *The conclusion that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations is supported by history, by jurisprudence, and by Canada's international obligations. As Otto Kahn-Freund and Bob Hepple recognized: 'The power to withdraw their labour is for the workers what for management is its power to shut down production, to switch it to different purposes, to transfer it to different places. A legal system which suppresses that freedom to strike puts the workers at the mercy of their employers. This — in all its simplicity — is the essence of the matter.'* (*Laws Against Strikes* (1972), at p 8). *The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. It seems to me to be the time to give this conclusion constitutional benediction. ...* [53] *In [an earlier Supreme Court decision], this Court recognized that the Charter [part of the Canadian Constitution] values of "[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy" supported protecting the right to a meaningful process of collective bargaining within the scope of s. 2(d) [of the Charter]. And, most recently, drawing on these same values, in [another Supreme Court case] it confirmed that protection for a meaningful process of collective bargaining requires that employees have the ability to pursue their goals and that, at its core, s. 2(d) aims to protect the individual from "state-enforced isolation in the pursuit of his or her ends". . . . The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society. [54] The right to strike is essential to realizing these values and objectives through a collective bargaining process because it permits workers to withdraw their labour in*

concert when collective bargaining reaches an impasse. Through a strike, workers come together to participate directly in the process of determining their wages, working conditions and the rules that will govern their working lives. The ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives. [55] Striking — the “powerhouse” of collective bargaining — also promotes equality in the bargaining process: England, at p 188. This Court has long recognized the deep inequalities that structure the relationship between employers and employees, and the vulnerability of employees in this context. In the Alberta Reference [case], Dickson C.J. observed that: ‘[t]he role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers.’ And this Court affirmed in the Mounted Police [case] that: ‘S 2(d) functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of s 2(d) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.’ The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way. . . [the] process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals.

49 S Lansley, *The Cost of Inequality: Why Economic Equality is Essential for Recovery* (CLASS, 2011); L Mishel, *The Decline of Collective Bargaining and the Erosion of Middle Class Incomes in Michigan* (Economic Policy Institute, Briefing Paper No 347,

24 September 2012); S Lansley, *Rising Inequality and Financial Crisis: Why Greater Equality is Essential for Recovery* (CLASS, 2012), at pp 4-5 points out the link between growth in inequality and economic crisis: ‘... historical evidence provides strong evidence of a link from equality to instability. The two most damaging recessions of the last century – the Great Depression of the 1930s and the Great Crash of 2008 – were both preceded by sharp rises in inequality’. See also J E Stiglitz, *The Price of Inequality* (2013); L Mishel, J Schmitt, H Shierholz, ‘Wage Inequality: A Story of Policy Choices’ (2014)(3) 23 *New Labor Forum* 26; F Bourguignon, *The Globalization of Inequality* (2015); A B Atkinson, *Inequality: What Can be Done?* (2015).

50 ILO, *Global Wage Report 2014/15: Wages and Income Inequality* (2015), at p 19, citing J D Ostry, A Berg, C Tsangarides, *Redistribution, Inequality and Growth*, IMF Discussion Note SDN/14/02 (2014); OECD, *In it Together: Why Less Inequality Benefits All* (2015); ILO, IMF, OECD, World Bank, *Income Inequality and Labour Income Share in G20 Countries: Trends, Impacts and Causes* (2015), at p 4. J Ostry, P Loungani, D Furceri, *Neoliberalism: Oversold?* 53(2) *Finance and Development* 53 (2) IMF 2016, pp 38-41.

51 R Wilkinson, *Unhealthy Societies: The Afflictions of Inequality* (1996), R Wilkinson, *The Impact of Inequality: How to Make Sick Societies Healthier* (2005), R Wilkinson and K Pickett, *The Spirit Level: Why Greater Equality Makes Societies Stronger* (2010); and S Lansley, *Rising Inequality and Financial Crises: Why Greater Equality is Essential for Recovery*, above; Oxfam, *The Cost of Inequality: How Wealth and Income Extremes Hurt us All* (Oxfam Media Briefing, 2013); Oxfam, *Working for the Few; Political Capture and Economic Inequality* (2014).

52 See the depressing: C Belfield, J Cribb, A Hood, R Joyce, *Living Standards, Poverty and Inequality in the UK: 2015* (Institute for Fiscal Studies, Joseph Rowntree Foundation, July 2015).

53 A Reeves *et al*, ‘Austere or not? UK Coalition Government Budgets and Health Inequalities’ (2013) 106 *JRSM* 432.

54 H Aldridge, P Kenway, T McInnes and A Parekh, above, at p 76; Office for National Statistics, *Life Expectancy at Birth and*

at Age 65 by Local Areas in the United Kingdom, 2004-6 to 2008-10 (2011) shows that life expectancy was no less than 13½ years greater for men born in Kensington and Chelsea compared to those born in Glasgow. The gap between the highest and lowest life expectancy grew by 1 year for men and 1.7 years for women in the four year gap studied. The latest figures confirm that life expectancy has increased between 2007-2011 but that the life expectancy gap between social classes of men has persisted (82.5 years for social class 1 and 76.6 years for social class 7) and that there has been a slight widening of the gap for women: ONS, *Trend in Life Expectancy at Birth and at Age 65 by Socio-Economic Position Based on National Statistics Socio-Economic Classification, England and Wales, 1982-1986 to 2007-2011*, 21 October 2015. Infant deaths are more than twice as common amongst those from 'routine and manual occupations' than those from 'higher managerial, administrative and professional occupations' (5.3 per thousand compared to 2.1 per thousand: Office for National Statistics, *Statistical Bulletin: Childhood Mortality in England and Wales: 2014*, 19 April 2016, <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/bulletins/childhoodmortalityinenglandandwales/2014>, table 1. A long-term decline in mortality was reversed by the adoption of the policies of austerity for men since 2010 and for women since 2011: R Loopstra, M McKee, SV Katireddi, D Taylor-Robinson, B Barr, D Stuckler, 'Austerity and Old-Age Mortality in England: A Longitudinal Cross-Local Area Analysis, 2007-2013' (2016) 109(3) JRSM 109.

55 www.economist.com/node/21564417.

56 S Machin, 'The Decline of Labour Market Institutions and the Rise in Wage Inequality in Britain' (1997) 41 *European Economic Review* 647; A Blackett and C Sheppard, 'Collective Bargaining and Equality: Making Connections' (2003) 142 *International Labour Review* 419; D Card, T Lemieux and W Craig Riddell, 'Unions and Wage Inequality', (2004) 25 *Journal of Labor Research* 519; D Checchi, J Visser and H van de Werfhorst, 'Inequality and Union Membership: the Influence of Relative

Earnings and Inequality Attitudes' (2010) 48 *BJIR* 84; B Western and J Rosenfeld, 'Unions, Norms and the Rise in US Wage Inequality' (2011) 76 *American Sociological Review* 513; S Hayter and B Weinberg, 'Mind the Gap: Collective Bargaining and Wage Inequality', in S Hayter (ed), *The Role of Collective Bargaining in the Global Economy* (2011); see generally J Berg (ed), *Labour Markets, Institutions and Inequality* (2015); and in particular, in that volume S Hayter, 'Unions and Collective Bargaining'.

57 ILO, *Global Wage Report 2014/15: Wages and Income Inequality* (2015), pp 59-60, citing J Visser and D Checchi, 'Inequality and the Labor Market: Unions' in Salverda, Nolan and Smeeding (eds), *The Oxford Handbook of Economic Inequality*, above, p 230.

58 ILO, *Global Wage Report 2014/15: Wages and Income Inequality* (2015), p 60. 'There is consistent evidence...that overall earnings dispersion is lower where union membership is higher and collective bargaining more encompassing and/or more centralised/co-ordinated: OECD 'Wage-Setting Institutions and Outcomes', in OECD, *Employment Outlook* (2014), p 160 (and see 166).

59 Sector wide collective bargaining blossomed in the 1930s (though as far back as 1919, the Weimar Constitution, Article 165 had made provision for workers and employees to regulate wages and working conditions at enterprise, district and national levels). It was seen, in Europe, North America, and Australia, as a central component of the strategy of economic recovery from the Great Crash of 1929 and the Depression which followed in the 1930s. In the UK the government's decision to implement the Whitley Reports of 1917-18 had a remarkable immediate impact, with some 5 million workers being brought into some kind of joint wage regulation (either JICs or trade boards) between 1917 and 1921. But in the period of austerity from 1921 until the aftermath of the Great Depression, the system was allowed to decay and of the original 73 JICs, only 47 remained in existence by 1926 (A figure which slipped to 20 by 1939, even though the latter were said to be 'by far the largest and most important': A Fox, *History and Heritage*:

The Social Origins of the British Industrial Relations System (1985), p 297). But from 1934 the Ministry of Labour assumed a pro-active role proclaiming that: 'It has been the policy of the Department to take every opportunity of stimulating the establishment of joint voluntary machinery or of strengthening that already in existence (Ministry of Labour, *Annual Report 1934*, Cmd 4861 (1935), p 74). In 1937 the Ministry reported that 'In some industries the scope of existing machinery was extended, while in others, where no constitutional machinery existed, discussions took place under the auspices of the Department for the purpose of formulating proposals for the joint regulation of wages and working conditions' (Ministry of Labour, *Annual Report 1937*, Cmd 5717 (1938), p 63). During World War II, the collective bargaining system was heavily relied upon to enhance Britain's war effort with a legal mechanism (compulsory binding arbitration) to enforce collective agreements in an industry or locality against non-parties, so preventing undercutting (the Conditions of Employment and National Arbitration Order 1305 of 1940 which imposed the duty 'upon all employers ... to observe recognised terms and conditions of employment' (or terms and conditions not less favourable). In the United States the National Industrial Recovery Act of 1933 made provision for a form of sector wide regulation of the US economy through 'industry codes' in which it was anticipated labor unions would play a part in negotiating. Although there were 546 such codes (which dealt with prices as well as wages), the NIRA was declared unconstitutional in 1934 – see A J Badger, *FDR: The First Hundred Days*, 2008; KD Ewing, 'The European Union and Collective Bargaining,' (2016) 117 *Theory and Struggle* 16. The 1933 Act was replaced by the much less effective National Labor Relations Act of 1935. In 1936 France's Popular Front government established the right to bargain collectively in the Matignon Accords which settled the general strike of that year. In Ireland the Conditions of Employment Act 1936, provided by s 50, (in relation to wages payable for particular forms of 'industrial work') for the registration of collective agreements on wages made between employers and unions, for the universal

application of such registered agreements and for their enforcement in the particular industry once the terms of the agreement had been registered and published in the Official Journal, Iris Oifigiúil. In Sweden the Saltsjöben Agreement, signed in 1938, cemented the consensus approach to collective bargaining and industrial dispute resolution which remains the bedrock of the Nordic model and has preserved Sweden from the worst of the economic crisis of the last few years.

- 60 E Stockhammer, *Why Have Wage Shares Fallen?* (ILO, 2012), p 43.
- 61 C Belfield, J Cribb, A Hood, R Joyce, *Living Standards, Poverty and Inequality in the UK: 2015* (Institute of Fiscal Studies (supported by Joseph Rowntree Foundation), July 2015, (<http://www.ifs.org.uk/uploads/publications/comms/R107.pdf>), p 32, figure 3.4).
- 62 E McGaughey, *Do Corporations Increase Inequality?* (30 November 2015), available at: <http://piketty.pse.ens.fr/files/McGaughey2015.pdf>, at p 21. As he puts it: '...inequality grew most clearly where people were deprived of a meaningful voice at work. In the UK and US where collective bargaining remained the 'single channel' for workplace voice, the effects were more pronounced than Germany, where workers had binding votes for workers on boards and works councils.' (ibid, p 48).
- 63 Ibid, pp 20-21. We are grateful for permission to reproduce this. McGaughey's UK graph closely resembles a graph showing unions and (un)shared prosperity in the USA (1918-2008) produced by R Eisenbrey and C Gordon, *As Unions Decline, Inequality Rises* (Economic Policy Institute, 2012), <http://www.epi.org/publication/unions-decline-inequality-rises/>, reproduced in R Wilkinson and K Pickett, *The Importance of the Labour Movement in Reducing Inequality* (CLASS Thinkpiece, July 2014), p 6. These are consistent with a graph in a different format showing that, in an international comparison, countries with stronger trade unions are less unequal (data for 16 OECD countries 1966-1994) by B Gustafsson and M Johansson, 'In Search of Smoking Guns: What Makes Income Inequality Vary Over Time in Different Countries?' (1999) 64 *American Sociological Review*

585, also reproduced in R Wilkinson and K Pickett, *ibid*, p 6. Graphs to similar effect but different format show the strong link between union density and top earners' income shares: F Jaumotte and C Osorio Buitron, *Revisiting the Drivers of Inequality: The Role of Labour Market Institutions* (VOX, CEPR's Policy Portal, 2015).

64 See paragraph 2.1 above.

65 In the UK and in the world at large, the labour share has diminished significantly over the last 30 years: OECD: *OECD Employment Outlook 2012* (2012), chap 3. According to research by the New Economic Foundation, *Working for the Economy. The Economic Case for Trade Unions* (2015), p 5, wage share in the UK reached its peak in 1975 at 76.2% and had decreased by 8.9% in 2014, to 67.3%: http://b.3cdn.net/nefoundation/dc86334962e1f9a027_gfm6bex7d.pdf.

66 Ö Onaran, A Guschanski, J Meadway and A Martin, *Working for the Economy: The Economic Case for Trade Unions* (University of Greenwich, New Economics Foundation, 2015), p 33.

67 Primarily by distributing more of the surplus value of work as wages rather than profit.

68 S Deakin, J Michie and F Wilkinson, *Inflation, Employment, Wage-Bargaining and the Law* (Institute of Employment Rights, 1992); F Wilkinson, 'Equality, Efficiency and Economic Progress: The Case for Universally Applied Equitable Standards for Wages and Conditions of Work', in W Sengenberger and D Campbell (eds), *Creating Economic Opportunities: The Role of Labour Standards in Industrial Restructuring*, (International Institute for Labour Studies, 1994); S Deakin and F Wilkinson, 'Rights vs Efficiency? The Economic Case for Transnational Labour Standards' (1994) *ILJ* 289; S Deakin and F Wilkinson, *Labour Standards – Essential to Economic and Social Progress* (Institute of Employment Rights, 1996); S Sachdev and F Wilkinson, *Low Pay, The Working of the Labour Market and the Role of the Minimum Wage* (Institute of Employment Rights, 1998); S Deakin and F Wilkinson, 'Labour Law and Economic Theory: A Reappraisal', in Collins, Davies, and Rideout, above; T Aidt and Z Tzannatos, *Unions and Collective Bargaining: Economic Effects in a Global Environment*, World Bank, 2002), wrote that

'high rates of unionization lead to greater income equality, lower unemployment and inflation, higher productivity and speedier adjustments to economic shocks'. B E Kaufman, *What Unions Do: Insights from Economic Theory*, (2004) 25(3), *Journal of Labor Research* 351; note the review of literature in T Aidt and Z Tzannatos, 'Trade unions, Collective Bargaining and Macroeconomic Performance: A Review' (2008) 39 *Industrial Relations Journal* 258; S McGuinness, E Kelly and P O'Connell, *The Impact of Wage Bargaining Regime on Firm-Level Competitiveness and Wage Inequality: The Case of Ireland* (ESRI, Working Paper No 266, 2008); F Traxler and B Brandl, *The Economic Effects of Collective Bargaining Coverage: A Cross-National Analysis* (ILO, 2009); F Traxler and B Brandl, 'The Economic Impact of Collective Bargaining Coverage', in S Hayter (ed), *The Role of Collective Bargaining in the Global Economy* (ILO, 2011); D Cunniah et al, 'Towards a Sustainable Recovery: the Case for Age-Led Policies (2011) 3 *International Journal of Labour Research*'; F Traxler and B Brandl, 'Collective Bargaining, Inter-Sectoral Heterogeneity and Competitiveness: A Cross-National Comparison of Macroeconomic Performance' (2012) 50 *BJIR* 73. A strengthening of collective bargaining together with other labour market institutions is advocated by D Coats, *From the Poor Law to Welfare to Work, What Have We Learned From a Century of Anti-Poverty Policies?* (The Smith Institute, 2012); and by S Lansley and H Reed, *How to Boost the Wage Share* (Touchstone Pamphlet No13, 2012). To state the converse: 'In heavily monopolised economies, demand will not automatically keep pace with production. This will particularly be so if the bargaining power of labour decreases, and this is precisely what happened in the decade after 2000': J Foster (2012) 64 *Communist Review* 2 at p 5; or '... higher pay is also needed in sectors of the UK economy that can afford it. As we have seen, this is a particular problem in the UK, where given the scale of the decline in private sector collective bargaining coverage, there is now relatively little upward pressure on many firms in the large service sectors that account for the bulk of low pay': C Cowdery et al, *Gaining from*

- Growth, the Final Report of the Commission on Living Standards* (Resolution Foundation, 2012), at p 95. See also: Ö Onaran and G Galanis, *Is Aggregate Demand Wage-Led or Profit-Led?* (ILO, 2012; G Vernon and M Rogers, 'Where do Unions add Value? Predominant Organizing Principle, Union Strength and Manufacturing Productivity Growth in the OECD' (2013) 51 *BJIR* 1; S Deakin, C Fenwick and P Sarkar, 'Labour Law and Inclusive Development: The Economic Effects of Industrial Relations Laws in Middle-Income Countries', in M Schmiegelow (ed), *Institutional Competition between Common Law and Civil Law: Theory and Policy* (2014); S Deakin, J Malmberg and P Sarkar, 'How do Labour Laws Affect Unemployment and the Labour Share of National Income? The Experience of Six OECD countries, 1970-2010' (2014) 153 *International Labour Review* 1; D Cooper and L Mishel, *The Erosion of Collective Bargaining Has Widened the Gap Between Productivity and Pay* (Economics Policy Institute Paper 143, 2015): <http://portside.org/2015-01-10/erosion-collective-bargaining-has-widened-gap-between-productivity-and-pay>; Ö Onaran, A Guschanski, J Meadway and A Martin, *Working for the Economy: The Economic Case for Trade Unions* (University of Greenwich, New Economics Foundation, London, 2015); S Deakin, 'The Contribution of Labour Law to Economic Development and Growth' (Presentation to 21st Congress of the International Society for Labour and Social Security Law, Cape Town, 21 September 2015).
- 69 G Davidov, 'Collective Bargaining Laws: Purpose and Scope' (2004) 20 *International Journal of Comparative Labour Law and Industrial Relations*, 81; F Fakhfakh, V Pérotin and A Robinson, 'Workplace Change and Productivity: Does Employee Voice Make a Difference?', in S Hayter (ed), *The Role of Collective Bargaining in the Global Economy* (above); M Lawrence and C McNeill, *Fair Shares: Shifting the Balance of Power in the Workplace to Boost Productivity and Pay* (IPPR, 2014). As Janet Wilkinson points out: 'boosting trade union recognition and collective bargaining coverage would make an important contribution to tackling the UK's poor record on productivity.' ('Trade Unions and Productivity' in Dromey (ed), above, p 29).
- 70 The Public Contracts Directive 2014, Article 18(2) includes a general obligation on member states to ensure the enforcement of social and environmental obligations through public procurement. It states: 'Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by the Union law, national law, collective agreements or by the international environmental social and labour provisions listed in Annex X'. Annex X refers to a number of international conventions including several ILO Conventions. There is also a specific obligation in Article 69(3) to reject tenders which on examination are found to be abnormally low because of non-compliance with such obligations. Article 71 includes provisions designed to deal with sub-contractors' non-compliance with their social and environmental obligations (although limited and largely dependent on member states establishing national rules). See *RegioPost GmbH & Co v Stadt Landau in der Pfalz* (C-115/14), 17 November 2015.
- 71 IMF, *World Economic Outlook: Spillovers and Cycles in the Global Economy*, (2007); ILO, *Global Wage Report 2008/9 – Minimum Wages and Collective bargaining: Towards Policy Coherence* (2008).
- 72 ILO Convention 98 (1949), European Convention on Human Rights (1950), Article 11 European Social Charter (1961), Article 6, and Charter of Fundamental Rights of the European Union (2000), Article 27. It is implicit in Article 8 of the International Covenant on Economic, Social and Cultural Rights, and Article 23 of the International Covenant on Civil and Political Rights (both 1966).
- 73 This is almost identical to wording in the Korea-EU free trade agreement (effective by way of an EU Council Decision of 14 May 2011) at Chapter 13, Article 13.4, para 3. Both agreements also contain near identical versions of the following: 'Each Party shall ensure that its labour law and practices embody and provide protection for the fundamental principles and rights at work, and reaffirm its commitment to

respecting, promoting and realising such principles and rights in accordance with its obligations as member of the ILO and its commitments under the ILO Declaration on Fundamental Principles and Rights at work and its Follow-up, adopted by the International Labour Conference at its 86th session in 1998: (a) freedom of association and the effective recognition of the right to collective bargaining... 2. Each Party shall ensure that its labour law and practices promote the following objectives included in the Decent Work Agenda, and in accordance with the 2008 ILO Declaration on Social Justice for a Fair Globalisation, and other international commitments.’ (CETA Chap 24, Article 3; the Korea agreement equivalent is at Article 13.4, paras 2 and 3). The very recently published draft of the EU-Vietnam free trade agreement is virtually the same. These Free Trade Agreements (FTAs) are objectionable in almost every respect except their recitation of ILO principles; unenforceable though these latter are under FTAs, in particular the Investor-to-State Dispute Settlement schemes (and the newer Investor Court Scheme) which give no standing to trade unions, citizens or even States to sue the corporations which are the beneficiaries of the SDAs.

- 74 Lord Bingham, ‘The Rule of Law’ (2007) 66 CLJ 67. See also T Bingham, *The Rule of Law* (2011). The Council of Europe, Report on the Rule of Law – Adopted by the Venice Commission at its 86th plenary session (25-26 March, 2011) at para 36 came to a similar conclusion that the proposition that the ‘law must be followed’, and ‘applies not only to individuals, but also to authorities, public and private’. For a discussion of the Rule of Law in European labour law see KD Ewing and J Hendy, ‘The Eclipse of the Rule of law: Trade Union Rights and the EU’, (2015) *Rev Derecho Social y Empresa* 80.
- 75 The ILO’s Collective Bargaining Convention 154 (1981) also contains the duty to promote collective bargaining, though the UK has not ratified it. The European Court of Human Rights regards the right to collective bargaining as an ‘essential element’ though Article 11 does not require States to promote collective bargaining: *Unite v UK*, application No. 65397/13, 26 May 2016.
- 76 (2009) 48 EHRR 54.

- 77 Ibid, para 157.
- 78 Conditions of Employment Act 1936, s 50.
- 79 ILO Convention 94 (Labour Clauses (Public Contracts) Convention, 1949) expressly permits public contracts to specify that the workers concerned shall enjoy hours, and other conditions not less favourable than those established for work of the same character in the trade or industry in the district where the work is carried on. Directive 96/71 on the posting of workers in the EU (defective as it is in the light of the CJEU judgments in *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* (C-341/05) [2008] IRLR 160 and *Ruffert v Land Niedersachsen* (C-346/06) [2008] ECR I-1289) applies to *erga omnes* collective agreements, so long as they are universally applicable to the industry in question in the members State: Article 3(8).
- 80 Katja Hall, the CBI’s deputy director-general, has said ‘it’s a concern that the UK’s growing skills gap is now seen as the number one workforce threat to the long-term health of its economy.’ (*Guardian*, 22 December 2014 at: <http://www.theguardian.com/business/2014/dec/22/new-jobs-pay-rises-uk-workers-skills>).
- 81 BBC News, 30 January 2014 at <http://www.bbc.co.uk/news/education-25945413>.
- 82 A restructuring of government would be required and the transfer of relevant responsibilities from the Departments with responsibilities for Work and Pensions; Business, Innovation and Skills; and Education respectively.
- 83 These proposals go a little beyond those of the TUC in TUC, *The Road to Recovery* (Touchstone, 2010); our proposals are the complete antithesis of those proposed by way of reform to the French Labour Code in the Combrexelle Report of 2015.
- 84 Such forums are familiar features of wartime economic planning but there is no lesser need for inclusive planning in times of peace than in war.
- 85 Note the spread in levels of collective bargaining in J Visser, S Hayter, R Gammarano, *Trends in Collective Bargaining Coverage: Stability, Erosion or Decline*, Labour Relations and Collective Bargaining (Issue Brief No 1, ILO, 2015) pp 6-7.
- 86 So for example, the European Commission

- Report, *Labour Market Developments in Europe*, (EC, 2012) states that the new economic and political instruments of control should result in a 'reduction in the wage-setting power of trade unions' (p 104). The principal techniques of change brought about by this policy have been: (i) abolition of national minimum wage fixing agreements; (ii) limiting the duration of the effect of collective agreements (to, e.g., 1 year in Spain and 3 months in Greece); (iii) increasing scope for derogating from sector wide agreements, (iv) restricting the extension of collective agreements to other employers (by removing the compulsion for all employers in the industry to pay the agreed rates); and (v) extending 'collective bargaining' arrangements to non-union groupings in breach of ILO Convention 98. In consequence '...the reforms have resulted in a dramatic decline in collective bargaining coverage, a breakdown of collective bargaining, a strong downward pressure on wages leading to deflationary tendencies, downward wage competition and an overall reduction in the wage-setting power of trade unions' (I Schömann, 'Reforms of Collective Labour Law in Time of Crisis: Towards a New Landscape for Industrial Relations in the European Union?', in D Brodie, N Busby and R Zahn (eds), *The Future Regulation of Work, New Concepts, New Paradigms* (2016), at p 152). Collective bargaining coverage decline across Europe has not been uniform but is striking, especially where sector wide bargaining has been destroyed in favour of enterprise level bargaining. Thus in Portugal 172 sector level agreements in 2008 reduced to 36 by 2012; coverage fell from 1.9 million to 225,000 workers in same period. In Romania 98% of workers were covered by collective agreements in May 2011 but only 36% by the end of 2012.
- 87 The editors briefly describe this history in their *Manifesto for Collective Bargaining*, above, at pp 24-28.
- 88 Employers' representatives would be nominated by representative employers' associations or other bodies, and workers' representatives would be nominated by trade unions in the sector in question.
- 89 Including the objective of eradicating the gender pay gap.
- 90 This is necessary to counter the antipathy of the common law to collective agreements as shown in cases such as *Malone v British Airways plc* [2010] EWCA Civ 1225; [2011] ICR 125. On the Hayekian attitude of the common law see M T Moore, 'Reconstituting Labour Market Freedom: Corporate Governance and Collective Worker Counterbalance' (2014) 43 ILJ 398.
- 91 As in the French Labour Codes, Article L 132-13. As to 'inderogability' see Lord Wedderburn, 'Collective bargaining at the European Level: the Inderogability Problem', in *Labour Law and Freedom*, above, p 212.
- 92 OECD, *Economic Outlook* (1994).
- 93 Though the CAC could order one if circumstances so dictated.
- 94 And see Lord Wedderburn, *the Future of Company Law: Fat Cats, Corporate Governance and Workers* Institute of Employment Rights, (2004), and the commentary thereon in W Njoya, 'The Problem of Income Inequality: Lord Wedderburn on Fat Cats, Corporate Governance and Workers' (2015) 44 ILJ 394.
- 95 As opposed to the current company law obligation in the UK which is merely 'to have regard' to the interests of the employees (not workers) in fulfilling the directors' duty under Companies Act 2006, s 172, to act in a way that they consider in good faith will promote the success of the company for the benefits of its members (shareholders). See E Ndzi, 'Directors' Duties and Employee Interest: The Case of Zero Hour Contracts' (2016) 37 *Comp Law* 135.
- 96 We omit detailed proposals such as to numbers, proportions and possible exemptions for very small enterprises, and as to representation on parent, holding, subsidiary and other related entities.
- 97 As suggested by E McGaughey, in 'Votes at Work will Raise Productivity: Behavioural Evidence' in Dromey (ed), above, p 24. Again we leave for later consideration the detail of the proportions, exemptions and application to related entities.
- 98 Recent research has shown that there is no 'straightforward negative relationship between regulatory stringency and productivity growth': M Brookes, P James and M Rizov, 'Employment Regulation and Productivity: Is there a Case for

Deregulation?', (2016) *Economic and Industrial Democracy* 1.

- 99 The fact that some employers have threatened to reduce hours so as to prevent an increased hourly rate pushing up the wage bill illustrates the inadequacy of a 'minimum wage' or a 'living wage'. This is because they do not in fact set 'wages' but only an hourly rate. This consideration prompts further thought about the possibility of a 'citizen's minimum income', a proposal apparently to be adopted in Switzerland. Unfortunately that is beyond the scope of this Manifesto but see: M Torry, *101 Reasons for a Citizen's Income* (2015).
- 100 Unison, Submission to the 58th Session of the Committee on Economic, Social and Cultural Rights (April 2016), esp para 43.
- 101 See A McColgan, *Just Wages for Women* (Oxford, 1997).
- 102 M O'Sullivan, T Turner, J McMahon, L Ryan, J Lavelle, C Murphy, M O'Brien and P Gunnigle, *A Study on the Prevalence of Zero Hours Contracts among Irish Employers and their Impact on Employees* (Department of Jobs, Enterprise and Innovation, Dublin, 2015).
- 103 Employment Standards Legislation Act 2016 inserts new provisions into the Employment Relations Act 2000 requiring an employer to ensure that an employee's agreed hours of work are included in the employee's employment agreement. The Act also defines an availability provision and provides that such a provision is unenforceable against an employee who is entitled to refuse to perform work required under such a provision unless the employee's employment agreement provides for the payment of compensation for the employee making himself or herself available to perform work if required. An employee is not to be treated adversely if an employee, in relation to an availability provision, refuses and is entitled to refuse work. Similar provision is made in respect of shifts. A provision in an employment agreement prohibiting an employee from performing work for another employer is unenforceable except to the extent that there is a genuine reason based on reasonable grounds and the reason is stated in the agreement.
- 104 K D Ewing, 'Zero Hours Contracts: Some Policy Proposals', IER Blog, 13 August 2013: <http://www.ier.org.uk/blog/zero-hour-contracts-some-policy-proposals>.
- 105 Zero Hours Contract Bill 2014, cl 6. See H C Debs, 21 November 2014, col 603 et seq.
- 106 O'Sullivan et al, above, p xiv.
- 107 Currently protected by the Equality Act 2010 are age, disability, gender reassignment, pregnancy and maternity, race (including colour, nationality, national and ethnic origins), marriage and civil partnership, religion or belief, sex and sexual orientation.
- 108 In 2011/12, figures from the Office for Disability Issues show there were 11.6 million disabled people in Great Britain, of whom 5.7 million were adults of working age, 5.1 million over state pension age and 0.8 million of whom were children: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/321594/disability-prevalence.pdf.
- 109 See House of Lords Select Committee on the Equality Act 2010 and Disability, *The Equality Act 2010: The Impact on Disabled People*, HL Paper 117 (2015-16), paras 51-54.
- 110 As recommended by the majority of those who gave evidence to the House of Lords Select Committee, *ibid*, paras 45-50.
- 111 *Ibid*, paras 93-107.
- 112 The UK ratified the Convention in 2009. See *ibid*, paras 77-85.
- 113 An area of much hidden discrimination, see Equality and Human Rights Commission, *Managing Pregnancy and Maternity in the Workplace* (2016).
- 114 See now Equality Act 2010, s 124(3), as amended in 2015.
- 115 See note 70 above.
- 116 In addition to what follows we draw attention to the important work undertaken by the Hazards Campaign, and in particular to the Hazards Campaign Charter: <http://www.hazardscampaign.org.uk/archive/charter/ch0.htm>.
- 117 The amendment was in Enterprise and Regulatory Reform Act 2013, s 69.
- 118 See HSE, *Impact Assessment, Strict Liability in Health and Safety Litigation*, 11 June 2012, <http://www.parliament.uk/documents/impact-assessments/>

- IA12-027D.pdf.
- 119 The seminal treatment of these and related concerns is M Freedland and N Kountouris, *The Legal Construction of Personal Work Relations* (2012).
- 120 See note 16, above.
- 121 See note 19, above.
- 122 National Minimum Wage Act 1998, s 54. See also Employment Rights Act 1996, s 230.
- 123 Zero Hours Contract Bill 2014, cl 11.
- 124 As in *Carmichael v National Power plc* [1999] ICR 1226. Mutual obligations is sometimes referred to as the 'work/wage bargain' - *Stringfellow Restaurants Ltd v Quashie* [2013] IRLR 99, CA, at para 33.
- 125 *Carmichael v National Power plc*, ibid.
- 126 On which see Zero Hours Contract Bill 2014.
- 127 For these purposes an employee was defined in accordance with para 5.8.
- 128 See BIS and Home Office, *Tackling Exploitation in the Labour Market – Government Response* (2016), para 8; now Immigration Bill 2016.
- 129 Ibid, para 6.
- 130 Ibid, para 16. See now Immigration Bill 2016, cl 11.
- 131 Save for Part II, dealing with commercial workplaces.
- 132 It is for consideration whether the Labour Inspectorate would be additional to the inspectorate which enforces health and safety standards (the HSE), or whether the former would absorb the latter.
- 133 The current requirements for an audit are restricted to where a tribunal finds a breach of equal pay law - an intervention which is too late or which never applies: see the Equal Pay (Equal Pay Audits) Regulations 2014, SI 2014 No 2559.
- 134 HMRC identified no less than 58,000 workers as being owed arrears of National Minimum Wage in 2015-16, up from 26,000 in 2014-15: National Audit Office, *PR 31/16*, 11 May 2016.
- 135 Currently the subject of consultation, following the Small Business, Employment and Enterprise Act 2015, s 147.
- 136 The latter nominated by the TUC, as was originally the case in relation to employment tribunals.
- 137 Removing the restrictions on the value of contractual claims which tribunals can hear, currently in the Extension of Jurisdiction Order 1994 and removing too the limit on the period of recovery of underpaid wages under Employment Rights Act 1996, s 23 – note the current two-year limit in s 23(4A), introduced in 2014, after no consultation with unions or organisations representing workers, to protect businesses against holiday pay claims but applying to all wages claims.
- 138 Thus reversing the effect of *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58; [2012] 2 AC 22.
- 139 Save where the breach caused the making of a profit by the employee in which case the cap would be the amount of profit.
- 140 See Department for Business Innovation and Skills, *Payment of Tribunal Awards: 2013 Study* (IFF Research, 2013).
- 141 Introduced by Small Business, Enterprise and Employment Act 2015, s 150.
- 142 Compare Small Business, Employment and Enterprise Act 2015, s 120.
- 143 Emphasis supplied. The right to freedom of association and membership of a trade union for the protection of one's interests are also protected by the Universal Declaration of Human Rights 1948, Articles 20 and 23; International Covenant on Economic, Social and Cultural Rights 1966, Article 8; International Covenant on Civil and Political Rights 1966, Article 22; ILO Convention 87; European Social Charter 1961 (rev'd 1996), Article 5; Charter of Fundamental Rights of the European Union 2000, Article 12. Some of these and related Treaties elaborate the rights further such as by protecting the right to strike expressly as in ICESCR, Article 8(1) (d), ESC, Article 6(4), and CFREU, Article 28; or by protecting collective bargaining rights expressly as in ILO Conventions 98 and 151, ESC, Article 6(2), CFREU, Article 28. Where the protection of such rights is not express it is implicit. All these provisions have been ratified by the UK.
- 144 Likewise, the other Treaties referred to in the preceding note.
- 145 *Demir and Baykara v Turkey* (2009) 48 EHRR 54, para 154. Note, however, the appeasement of the UK in respect of the

duty to promote collective bargaining in *Unite v UK*, see note 75.

146 *Hrvatski Liječnicki Sindikat v Croatia* App No 36701/09 (27 November 2014), paras 56, 59.

147 Thus in *ASLEF v UK* (2007) 45 EHRR 34, the ECtHR held that a union was entitled to exclude fascists under its rules – so long as that did not impose a disproportionate penalty on the person excluded, such as loss of his livelihood.

148 The obligation proposed would not apply to positions other than those to which the Trade Union and Labour Relations (Consolidation) Act 1992 currently applies.

149 It is to be recalled that with the abolition of the closed shop no union in the UK has the power to exclude a member from his or her livelihood. The range of penalties therefore are confined to the usual union sanctions, all of which can be avoided by resignation.

150 *Palomo Sanchez v Spain*, App No 28955/06 (2012) 54 EHRR 24, para 56.

151 See D Smith and P Chamberlain, *Blacklisted*, above.

152 S and B Webb noted it in the 1870s in their *The History of Trade Unionism* (1920 ed (first published 1894)), p 284. It was in issue in *Jenkinson v Nield* (1892) 8 TLR 540, and *Bulcock v St Anne's Master Builders' Federation* (1902) 19 TLR 27, in the tailoring and construction industries respectively; in both cases it was held that, provided the predominant motive of employers operating the blacklist was to protect their own interests, then the operation of the blacklist was lawful.

153 The Independent Police Complaints Commission wrote a letter dated 19 June 2013 to a firm of solicitors acting for blacklisted workers recording that a Chief Constable had been appointed by the Home Secretary to lead an investigation by a police team into aspects of police involvement in blacklisting workers. The letter stated that the police team had: 'identified that the Consulting Association was an organisation that had developed from a number of other organisations dating back to 1917. The scoping also identified that all Special Branches were involved in providing information about potential employees who were suspected of being involved

in subversive activity'. Up to 1993 the blacklisting activity subsequently conducted by the Consulting Association was carried on by an association of construction employers latterly known as the "Services Group", under the auspices of the Economic League: House of Commons Scottish Affairs Committee, *Blacklisting in Employment: Interim Report*, HC 1071 (2012 - 13), paras 9-10.

154 See Chapter Five above.

155 See para 5.22 above.

156 The Parliamentary retreat on this issue was matched by an important High Court victory barring Whitehall from unilaterally removing check off provisions in the Civil Service which were held to be a contractual right enforceable by the union: *Cavanagh, Williams and PCS v S of S for Work and Pensions* [2016] EWHC 1136 (QB).

157 Employment Relations Act 1999, s 10.

158 A proposal inserted in the Trade Union Bill but diluted under irresistible pressure in the House of Lords.

159 In effect inverting the purposes of the Trade Union Act 2016.

160 *Crofter Hand Woven Harris Tweed v Veitch* [1942] AC 43, at p 463.

161 *National Union of Rail, Maritime and Transport Workers v Serco Ltd (t/a Serco Docklands)* [2011] ICR 848, at para 8.

162 *Saskatchewan Federation of Labour v Saskatchewan*, above, at para 46. To the foregoing we might have added the South African Constitutional Court to similar effect: 'Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action.' (*In re Certification of the Constitution of South Africa* 1996 (4) SA 744, at para 66).

163 F O'Grady, 'The Future of Trade Unions' *Centre Write* (November, 2015), written as part of the TUC's campaign against the Trade Union Bill.

164 We have already identified the international treaties, ratified by the UK, guaranteeing the right to strike (subject only to the

- permissible restrictions) and reflected in their respective jurisprudence. The leading ECtHR decisions upholding the right to strike are to be found in *National Union of Rail, Maritime and Transport Workers v United Kingdom* (2015) 60 EHRR 10, at para 84.
- 165 As noted above, the most prominent catalogue of permissible restrictions on the right to strike is found in ECHR, Article 11(2), above at para 6.5.
- 166 The ILO Committee of Experts gave the following examples of States recognising the right to strike: Albania, Algeria, Angola, Argentina, Armenia, Azerbaijan, Belarus, Benin, Plurinational State of Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Central African Republic, Chad, Chile, Colombia, Congo, Czech Republic, Democratic Republic of the Congo, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Djibouti, Dominican Republic, Ecuador, El Salvador, Estonia, Ethiopia, France, Georgia, Greece, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Italy, Kazakhstan, Kenya, Republic of Korea, Kyrgyzstan, Latvia, Lithuania, Luxembourg, The former Yugoslav Republic of Macedonia, Madagascar, Republic of the Maldives, Mali, Mauritania, Mexico, Republic of Moldova, Montenegro, Morocco, Mozambique, Nicaragua, Niger, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, Rwanda, San Marino, Sao Tome and Principe, Senegal, Serbia, Seychelles, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Suriname, Timor-Leste, Togo, Turkey, Ukraine, United States, Uruguay and Bolivarian Republic of Venezuela: ILO Committee of Experts, *General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalisation, 2008* (2012).
- 167 *National Union of Rail, Maritime and Transport Workers v United Kingdom*, above, at paras 30-37.
- 168 *Ibid*, para 98.
- 169 *Ibid*.
- 170 See A Bogg and KD Ewing, 'The Implications of the *RMT* Case' (2014) 43 *ILJ* 221.
- 171 Consideration will need to be given to transnational labour law both across the EU (with the problem limitations of *Viking* and *Laval* – see below) and more broadly by reason of the globalisation of the market in labour and trade. In turn the utterly defective chapters on labour rights in the Free Trade Agreements (such as TTIP, CETA, EU-Korea, EU-Viet Nam) will need to be addressed. Note the important A Ojedaviles, *Transnational Labour Law* (2015).
- 172 European Committee of Social Rights, Conclusions XX-3 (United Kingdom). In fact, the right to strike under the Charter is narrower than that under the ECHR! The former guarantees the right to strike only for the purposes of collective bargaining whereas the latter permits the right to strike to be exercised in defence of any economic or social interests of the workers. See F Dorssemont, 'The Right to Take Collective action in the Council of Europe: A Tale of One City and Two Instruments and Two Bodies' (2016) 27 *KLJ* 67. It is hard to see how the deference invariably shown to the ECSR by the ECtHR could permit the latter to uphold the central holding in *RMT* should a future challenge to the ban on secondary action arise again in the ECtHR in the future.
- 173 Jeremy Corbyn, *Financial Times*, 17 January 2016. For similar views expressed by a previous Labour leader see Official Report, Standing Committee D, 22 February 1990, cols 171-8: 'The abolition of sympathy action is unreasonable, unjustified and way out of line with anything that happens anywhere else' (Tony Blair).
- 174 In particular, privatisation and outsourcing have caused work colleagues to find themselves employed by different employers even when working for the same ultimate enterprise.
- 175 The highly controversial provisions of the Trade Union Act 2016 on picketing supervisors should have no place in relation to picketing, wherever it takes place.
- 176 European Committee of Social Rights, Conclusions XX-3 (United Kingdom).
- 177 *International Transport Workers' Federation v Viking Line ABP* (C-438/05) [2008] ICR 741; *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* (C-341/05) [2008] IRLR 160. See also Case C-346/06, *Rüffert v Land Niedersachsen* [2008] ECR I-1989; Case C-319/06, *Commission v*

Luxembourg [2008] ECR I-4323; and Case C-271/08, *Commission v Germany* [2011] All ER (EC) 912. Both the ILO Committee of Experts and the ECSR have found these decisions of the CJEU to be incompatible with ILO Conventions 87 and 98.

178 ILO Committee of Experts, Observation (United Kingdom) – Adopted 2009, Published 99th ILC Session (2010) (*Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)*).

179 The section limits damages against a trade union (in relation to industrial action) to a sum commensurate with the size of the trade union, that is, the ability of the workers' organisation collectively to compensate without destroying its capacity to act as a representative of workers in the future.

180 See para 2.7 above.

181 For an account of this process, see K D Ewing, 'The State and Industrial Relations: "Collective Laissez-Faire" Revisited' (1998) 5 *Historical Studies in Industrial Relations* 1.

182 Ministry of Labour, Annual Report 1946. And see Figure 1, at para 1.4 above.

About the Institute

The Institute of Employment Rights seeks to develop an alternative approach to labour law and industrial relations and makes a constructive contribution to the debate on the future of trade union freedoms.

We provide the research, ideas and detailed legal arguments to support working people and their unions by calling upon the wealth of experience and knowledge of our unique network of academics, lawyers and trade unionists.

The Institute is not a campaigning organisation, nor do we simply respond to the policies of the government. Our aim is to provide and promote ideas. We seek not to produce a 'consensus' view but to develop new thoughts, new ideas and a new approach to meet the demands of our times.

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