

Benchmarking Workplace Rights

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Abstract

This thesis is the first comprehensive exercise in comparing UK labour protection standards with the requirements of the labour and employment rights treaties ratified by the government since 1945.

The early chapters of the thesis (1-4) set out a historical and philosophical understanding of the development of collective and individual labour rights in UK. The broad dichotomy of collective and individual rights is placed within the context of international standards set out in European (the European Union and the Council of Europe) and United Nations (including the International Labour Organisation) *fora*. In latter chapters (5-7), the thesis sets out in empirical detail the labour protections necessary to ensure UK compliance with the standards required by the most influential of these rights instruments across three 'benchmarking' chapters. These benchmarking chapters cover the fields of collective labour law, the ordinary terms and conditions of employment, and workplace equality. The empirical analysis in those chapters shows that full freedom of association has been denied, and continues to be denied working people in the UK on the artificial premise that individual rights enjoy a primacy over those which are exercised collectively.

This thesis concludes by reprising the principal steps necessary to secure such compliance, as well as the extent of UK breaches in relation to freedom of association, and by showing what could be done by a future government, within the limits of international and regional obligation, to extend and entrench protection for full freedom of association, and for the raft of individual employment rights that the government is bound to guarantee.

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BENCHMARKING WORKPLACE RIGHTS

Introduction

The Secretary of State for Business, Energy and Industrial Strategy, the modern title of the minister who in past years would have had charge of the Ministry of Labour, tells us that workers ‘enjoy a wide range of protections to pay and conditions, above and beyond the minimums provided by European law,’ and that he and his colleagues in government are ‘proud of this record,’ proud of ‘successfully balancing fairness and security for the majority of working people in the UK.’¹ But those are bold claims. How can he be sure of the compliance he boasts of? Moreover, there are numerous very comprehensive treaty obligations relating to labour protection as equally binding upon the government as those based on the EU treaties intended to secure the successful compromise between the interests of workers and employers to which the minister refers. Do UK standards surpass those demanded by those instruments?

This dissertation seeks to supply the answers to those questions. Taking inspiration from the work of Stuart Weir, David Beetham, Stuart Wilks-Heeg *et al*, which culminated with the benchmarking *Democratic Audit* of 2012,² and from KD Ewing’s less rigidly structured, more discursive and polemical *Britain and the ILO*, first published in 1989, and revised in 1994,³ it is the first comprehensive exercise in comparing UK labour protection standards with the requirements of the labour and employment rights treaties ratified by the government since 1945. The Cambridge Dictionary defines benchmarking as ‘[t]he act of measuring the quality of something by comparing it with something else of an accepted standard,’ and that has been the basis of my approach. The dictionary also describes benchmarking as the ‘use of something as a standard in order to improve your

¹From the foreword of *Good Work, A response to the Taylor Review of Modern Working Practices*, February 2018, by the Rt.Hon. Greg Clark MP.

² The UK Democratic Audit project was under the direction of Stuart Weir of the University of Essex during 1991 – 2008 and Stuart Wilks-Heeg during 2009-2014. See, for example, S.Weir and D. Beetham, *Political Power and Democratic Control in Britain*, 1999, and particularly, S. Wilks-Heeg, A.Blick and S. Crone, *How Democratic is the UK? The 2012 Audit*, Liverpool University www.democraticaudit.com/wp-content/uploads/2013/07/auditing-the-uk-democracy-the-framework.pdf. There is a 2018 audit: P. Dunleavy, a Park and R Taylor, *The UK’s Changing Democracy, The 2018 Democratic Audit*, (London LSE 2018).

³ 2nd Edition, London, IER, 1994.

own work, products or processes,’ and my intention is to make a contribution towards securing for British workers the requisite standards of protection – to improve, where necessary, labour and employment rights. I compare the key areas of labour law and practice in the UK with the international and regional standards enshrined in ‘law making treaties’ that have been accepted by the government as those necessary to maintain and advance industrial relations in the United Kingdom, ⁴ standards to which the government is bound to adhere.

This is not an exercise in comparative law. My interest other jurisdictions extends only as far as occasionally applying the decisions, rulings and conclusions which the supervisory bodies entrusted with the interpretation and application of the standards demanded have made in relation to other states bound by the instruments in question. Jean-Michel Servais acknowledged both the close relationship, and the distinction, between comparative law and benchmarking when, in the preface to his book *International Labour Law*,⁵ he stated:

‘international labour standards are invaluable benchmarks in comparative law. Indeed, when texts from several countries are compared, especially when those countries are dissimilar in nature, international labour standards are both useful instruments of analysis and excellent yardsticks for identifying common denominators. They even serve to gauge the degree to which a given body of law conforms to universally accepted general principles.’⁶

⁴ See EA Landy, *The Effectiveness of International Supervision: Thirty Years of ILO Experience*, (London, Stevens, 1966), p1. Landy cites JL Briery, who in *The Law of Nations* 6th edition (Oxford, Clarendon Press, 1963) so categorised ‘the class of treaties which....a large number of states have concluded for the purpose of declaring their understanding of what the law is on a particular subject, or of laying down a new general rule for future conduct, or for creating some international institution’ (p58).

⁵ (Netherlands, Kluwer, 4th Edition 2014).

⁶ *Ibid* p17. However, any survey of comparative law will reveal that international or regional standards, while often mentioned, are rarely used by academics. See, for example the numerous contributions to R Blainpain, *Comparative Labour Law and Industrial Relations in Industrialised Market Economies*, (Netherlands Kluwer 2010). In contrast – as will become apparent to the reader - comparative law, although rarely mentioned, is at the heart of the work of the ILO’s supervisory bodies, the European Committee of Social Rights and the UN Committee of Economic, Social and Cultural Rights. In the 21st Century the identification of accepted regional and international norms become central to the integrated approach adopted by the ECtHR with regard to the interpretation of article ECHR.

Servais' book is, however, essentially an account of the content of the 'up to date' ILO conventions, protocols and recommendations. Only very occasionally does he refer to the UN covenants, while regional instruments are beyond the scope of his work. My interest, in contrast, is in all instruments ratified by the UK, and the influence of those have not been ratified, along with the non-binding ILO recommendations (either adopted by the UK or not) which augment and guide the interpretation of the provisions of the instruments by which the UK is bound.

Servais states that the interpretations placed upon those instruments by the ILO Committee of Experts are 'not binding' upon member states, and describes the interpretations of 'the expert committees, usually made up of lawyers, whose weight comes from the moral and professional authority of their members,' as 'not, however, authoritative.'⁷ Very likely this accounts for the extreme scarcity of direct references to the interpretations of the CEACR, or to the findings of the Committee on Freedom of Association in his book. However, while, strictly speaking, only interpretations of the conventions and protocols endorsed by the International Court of Justice are binding upon governments, the work of the supervisory bodies has produced the bulk of what is recognised and referred to as the 'ILO jurisprudence,' and it has long been established that it is the role of the CEACR to make the authoritative determinations on the interpretations of the conventions.⁸ Only once in modern times has a referral to the ICJ been made.⁹

In adopting this approach Servais arguably gives tacit support to the arguments advanced since the 2012 International Labour Conference by the ILO employers' group to justify their gradual post Cold War conversion to a belief that the ILO jurisprudence does not confer a right to strike,¹⁰ as well as to the British government in its long standing apparent (if subdued and rarely directly

⁷ Servais 2014, op cit, para 147.

⁸ See the forthcoming book by J Vogt, J Bellace, L Compa, K Ewing, J Hendy, K Lorcher, T Novitz, *The Right to Strike in International Law* (Oxford, Hart Publishing, 2019) in relation to the role of the supervisory bodies (p23 et seq of the draft I 'formatted'): 'A Rebuttal: On the Question of Mandates...ILO Committee of Experts has a mandate to 'interpret' ILO Conventions, not the Constituents.' In that section of the book the authors make it very clear that: 'While it is true that only the ICJ may issue *binding* interpretations...the observations of the Committee of Experts must be viewed as authoritative if the system is to function, unless and until the ICJ rules to the contrary' (emphasis supplied). See also Chapter Three below and the comments of the ECtHR on the authority of the ILO and European Social Charter supervisory bodies in *RMT v UK* [2014].

⁹ Ibid, p16. On which see F Maupain, 'Is the ILO Effective in Upholding Workers' Rights? Reflections on the Myanmar Experience,' in P Alston (ed), *Labour Rights as Human Rights* (Oxford, OUP, 2005)

¹⁰ See ibid: 'The Ill-Founded Challenge to the Right to Strike in 2012,' p17 et seq.

expressed) belief that its own interpretations of the conventions, the European Social Charter and the UNICESCR can be favoured over those of the relevant supervisory bodies.¹¹ Servais fails to declare any interest, but it is notable, for example, that he devotes only five paragraphs of the 1140 odd paragraphs that comprise his book to collective bargaining, and only another seven in the short section devoted to ‘Strikes,’¹² and, that in the 2011 edition of his book, he referred to the ‘right to strike’ in the ILO jurisprudence only in the most grudging and guarded terms.¹³

It is not possible to have a neutral voice in analyses of labour law. There is always a conflict of interests between the workers and the employers, and any analysis of the subject matter of this thesis cannot claim to be wholly impartial. Labour rights are a political matter. Labour law exists for the purpose of imposing social justice and preserving peace,¹⁴ to mediate in this conflict, and my interest as a trade unionist is in ensuring that it upholds the rights of workers to act collectively to promote their interests. I therefore do not avoid what social scientists call ‘value issues’. Taking sides in such a research project is unavoidable,¹⁵ partiality must be declared, and, as a trade unionist, I make no apology for my ‘conscious partiality,’ or ‘partisan objectivity.’¹⁶ A prime example of an approach that declares it is on the side of workers is LJB Hayes’, *Stories of Care: A Labour of Law*.¹⁷

My intention, through the use of benchmarking, is to help secure the effective labour protections that the government is required by international law to provide, and, as a trade unionist, to affect disinterest and adherence to a

¹¹ See chapter three below.

¹² Paras 272-276 and 280-286 respectively. The ‘Strikes’ section begins: ‘In any society there are those who wish to pick a fight – no matter how or when – and those who don’t.’

¹³ Para 278. In the 2014 edition the paragraph has been rewritten (it is now 282) and the strike section extended from five to seven paragraphs. The section is less obviously sceptical about the right to strike.

¹⁴ See Brian Langille, ‘What is International Labor Law For?’ (2009) 3(1) *Law & Ethics of Human Rights*.

¹⁵ See Barry MacDonald ‘A Political Classification of the Evaluation Studies in Education’ in Martyn Hammersley (ed), *Social Research: Philosophy, Politics and Practice*, (London Sage 1993).

¹⁶ See Steve Tombs and David Whyte: ‘Unmasking the Crimes of the Powerful,’ (2002) 11 *Critical Criminology* 217, particularly pp229-233 ‘Beyond Value-Freedom, for Partisan Objectivity.’ See also the cautious endorsement of AW Gouldner in ‘The Sociologist as Partisan: Sociology and the Welfare State,’ (1968) 3(2) *The American Sociologist* 103.

¹⁷ (London, Palgrave Macmillan, 2017).

positivist quantitative research methodology would be pointless as well as dishonest.¹⁸

This is a vast and complex subject with few clearly defined external or internal boundaries, but there is one clear starting point, one obvious core to the subject, and that is the collective right to freedom of association. The ‘golden thread,’ which runs through labour and employment law, and through this dissertation, is the necessity for workers to enjoy the freedom to bargain collectively, and the obligation on government to protect, promote, and facilitate the exercise that freedom. My primary focus is therefore on the obligations incumbent upon the government to guarantee freedom of association – obligations which are grounded in the ILO jurisprudence. As will become apparent, all labour and employment protection, along with much else besides, ultimately depends upon workers being able to bargain collectively with their employer. Individual employment rights should provide minimum standards, providing a ‘safety net’ for workers who, for whatever reason, do not enjoy the protection of union membership, and ‘a floor’ on which collective bargaining may build.¹⁹

Consequently the entire ‘spectrum’ of rights and freedoms must be viewed from a collective standpoint.

This requires that considerable attention be paid to the restrictions on freedom of association which followed the post 1979 adoption by successive UK governments of so called ‘neoliberal’ policies which sought successfully to discourage and prevent workers from negotiating with employers on a collective basis.

Neoliberalism comes in many guises, but arguably common to all variations is an antipathy for collectivism, especially trade unionism, and an enthusiasm for promoting the rights of the individual, particular hallmarks of the British brand of neoliberalism outlined in subsequent chapters.²⁰

While so called ‘individualistic employment rights’ have sometimes – as I shall show- been deployed by governments to undermine freedom of

¹⁸ See Maria Mies, ‘Towards a Methodology for Feminist Research’ (‘A Political Classification...’ n.9 above).

¹⁹ As Lord Wedderburn so famously described the raft of individual rights conferred by the employment Protection Act 1975 (see chapter 2).

²⁰ See David Harvey, *A Brief History of Neoliberalism* (Oxford, OUP, 2005) p22-3; 59-63 on the characteristics of Thatcherism, and chapter 3 ‘The Neoliberal State,’ on the characteristics of neoliberalism more generally. On the latter see also Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* [Trans. Patrick Camiller] (London, Verso, 2014) pp26-31. See chapter two below for a general discussion of neoliberalism, and chapter four below for Barbara Havelková’s very valuable description of Czech neoliberalism.

association,²¹ legal rights perhaps better regarded as employers' rather than workers' rights, the vast majority of individual rights can either be seen to have been implemented into workers' contracts of employment as a result of collective bargaining, or to have been conferred by government (albeit after 1979 as part of the price of membership of the EU) as rights on which collective bargaining may build. These statutory rights may also be said to be a response to the exercise by workers of their freedom of association - the first of such rights, conferred in 1963 and 1965,²² were unequivocally intended reduce the incidence of strike action. They may be intended to promote and facilitate collective bargaining – as were a handful of the many individual rights introduced by the Employment Protection Act 1975.²³ Such is the relationship of the two broad categories of rights that the binary divide can often seem artificial and unsatisfactory, but more importantly, as I show in subsequent chapters, without protection for freedom of association the fabric of labour and employment rights protection, however the rights that comprise that fabric are categorised, will be compromised.

So my approach has been to first establish the nature of freedom of association, and of the supranational and domestic protections for that freedom rolled out in the post war era. In the first chapter I examine the justification for this demand for *full freedom of association*, and the individualistic arguments relied on to deny working people that freedom.

The law, and the nature of the obligation imposed by the various rights instruments considered, cannot be understood without close reference to political and economic history. Therefore, to support the arguments offered in the first chapter it was then necessary to show in chapter two that that conflict, compromise, and the abandonment of that compromise by the ruling classes, has been the established pattern in the UK over the last one hundred and fifty years, and that at the root of this conflict is the reluctance of the ruling classes to permit workers the freedom to bargain with them on equal, or near equal, terms. I show that only been for comparatively brief periods in the late 19th, and the very early and mid 20th Century, have workers in the United Kingdom enjoyed full freedom to organise, to communicate their collective demands to employers, to negotiate, and, if need be, to lawfully withdraw their labour in support of their demands, without disproportionate interference – full freedom of association. Shorter still

²¹See chapter two and chapter five on the legislation of the Thatcher, Major and Cameron governments.

²² Terms and Conditions of Employment Act 1963, and the Redundancies Act 1965.

²³See chapter two.

have been the intervals during which workers have been permitted freedom to take action to make their voice heard on matters beyond the terms and conditions of employment, and to influence government economic and social policy.

The historical and political overview of this continuing ‘tug of war’ serves as an introduction to, and as context for, the examination of rights conferred indirectly on workers by the various labour rights treaties examined in subsequent chapters.²⁴

In chapters three and four I describe the nature of the obligations imposed by the Council of Europe, United Nations, International Labour Organisation and European Union treaties, and examine the relationship of the UK with the bodies which monitor and supervise state compliance with those instruments. Those attitudes govern the approach taken in chapters five, six and seven in respect to the selection of the instruments from which the benchmarks are derived. Of course, different treaties embrace, or specialise in different aspects of employment relations, and the supervisory bodies gravitate towards particular matters as a result of the cases, complaints or reports received, thereby governing that choice, but there is also a ‘rights hierarchy’ to take into account.

While all treaty obligations require by international law the compliance of the government - *pacta sunt servanda* - and the ministerial code similarly binds individual ministers, in practice a scale of obligation has evolved over time. As in many instances I am effectively making a case for the charge of a breach of international law this hierarchy governs the instruments chosen to make that case; demands take precedence, while recommendations, advice and soft law, are only occasionally relevant,.

The immediacy of a particular obligation is dependent on the terms of the instrument, the interpretation of those terms by the particular supervisory body, and the consequences for governments which are found to be in breach of those terms. Much depends upon the attitude of the supervisory body, the means by which breaches are identified, the means by which compliance can be secured, the stridency of the demands for compliance issued by the supervisory body, and

²⁴The UK is a ‘monist’ state. Were it a ‘dualist’ state then workers would be able to rely directly on the rights conferred by the treaties in much the same way as EU Regulations are directly applicable and EU Directives, in certain circumstances, are ‘directly effective’ (see chapter 4).

the publicity such demands attract. Much also depends on the attitudes of other states to non-compliance - the loss of international prestige can be said to be a very severe sanction in itself.

For example, for the UK, in relation to freedom of association, despite the similar obligations in the texts of the European Convention on Human Rights (ECHR) and the United Nations International Convention on Civil and Political Rights (UNICCPR) the requirements of the latter have effectively been eclipsed by the former, and by the fundamental ILO Conventions Nos. 87 and 98 (C87 & C98),²⁵ as interpreted by the ILO Committee on Freedom of Association (CFA).²⁶ Trade unions can present complaints to the European Court of Human Rights at Strasbourg (ECtHR) and to the ILO Governing body (and on to the CFA), while the UN Human Rights Committee (the UK has not signed up to the UNICCPR complaints protocol) supervises a reporting cycle, and has taken little interest in the protection for freedom of association accorded British workers.

In contrast, the wide ranging employment and labour rights demands of the European Social Charter, supervised by the dogged, unfailingly diplomatic, European Committee on Social Rights (ECSR), and the UN International Covenant on Economic Social and Cultural Rights, supervised by the eponymous UN Committee (UN CttESCR),²⁷ have arguably transcended their limited powers of enforcement to 'punch above their weight,' to fill in much of the detail on the whole spectrum of labour and employment rights that the government is required to 'guarantee.'

The prestige of the European Social Charter's ECSR has been much enhanced by the respect accorded it (and the ILO supervisory bodies) in the 21st Century by the ECtHR, and by the European Commission (EU Commission) and the European Court of Justice (ECJ).²⁸ While on the periphery of this loop of mutual support, and consequently less invigorated by this 'integrated' approach to supranational labour obligation, the strident and confrontational UN Committee (established in 1985), through its vigorous supervision of the reporting cycle, and its insistence

²⁵Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87) and Right to Organise and Collective Bargaining Convention, 1949 (No.98).

²⁶See chapter 3.

²⁷*The International Covenant on Economic, Social and Cultural Rights, Commentary, Cases and Materials* by B Saul, D Kinley and J Mowbray was of a particular value in identifying the pertinent observations of the committee.

²⁸One of the three courts which comprise the Court of Justice of the European Union (CJEU).

that, after forty odd years, ‘progressive realisation’ has been superseded by a requirement that the UK implement the protections required by the Covenant into black letter law, is emerging as a major arbiter of labour and employment protection.

The old perception that the requirements of the civil and political rights instruments (ECHR and UNICCPR) demand immediate compliance, while the economic and civil instruments (European Social Charter and UNICESCR) set only aims of policy, has arguably become irrelevant with the passage of time. That distinction was never even initially true of the 1961 Charter, which sets out the non negotiable broad rights it requires states to protect in part I as ‘aims of policy,’ while the more specific aspects of those rights which states can choose either to pledge to protect immediately or leave as longer term aims are placed in Part II.²⁹

Now, 54 years after the Charter came into force, even those aims of policy in the Charter arguably must be seen, like the rights in the UN Covenant, to have crystallised into immediate requirements. As for the demands of the ILO instruments, as interpreted by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the CFA, the British government has never been in any real doubt about their mandatory nature.³⁰ When, in 2014 the Cameron government sought to claim at the ECtHR (the rulings of which have bound the government since the acceptance of Article 46 ‘compulsory jurisdiction’ in 1966) that the determinations of the two ILO supervisory bodies did not bind them, the court corrected it.

In chapters five, six and seven, I examine the substantive obligations these treaties impose on the UK Government - the ‘benchmarks’ which British labour protections must either match or surpass in order to accord with international law.

In chapter five I test the extent to which British workers are permitted the freedom of association supranational obligation demands.

²⁹See chapter 3.

³⁰See for instance the Churchill government’s attitude to C98 in the Thomson case and the Attlee government’s initial belief that, such was the legal obligation imposed by the ILO constitution that they were obliged to ratify C100 (chapter 3).

In chapter six, I examine the obligations incumbent upon the government to ensure safety at work, limits on working time, to guarantee workers paid holidays, fair wages, and protection on the termination of employment, and consider the adequacy of the existing protections.

In chapter seven I consider the protections afforded workers against arbitrary workplace discrimination, paying particular attention to domestic servitude, the rights afforded workers with family responsibilities and to the related safeguards for those on part time, zero hour or restricted hours, fixed term, and agency contracts against less favourable treatment than that enjoyed by workers engaged in conventional, 'typical' full time employment.

In chapter eight I draw my conclusions, and make proposals for addressing the shortfall between what is required by international law, and what is provided by UK law and practice.

Methodology

I approach this subject from a critical trade unionist perspective that will elucidate through a critique of neoliberalism a power shift from collective to individual rights. For this reason the benchmarking exercise was structured around the dualism of collective and individual rights. Whilst there is always a connection between the two, this critical trade union perspective informed both the selection of the international and regional rights instruments and the structuring of the dissertation.

Taking the hierarchy of rights instrument outlined above into account, the principal instruments I use for benchmarking are the ILO Conventions, the ECHR, UNICESCR, the European Social Charter, and the EU treaties and directives (augmented by what I argue is the interpretative EU Charter of Fundamental Rights).

Each of the chapters that report empirical findings of the 'benchmarking' exercise (chapters five, six and seven) follow the same basic format. The beginning of each chapter includes a précis of the UK's obligations under international law that is based upon my detailed reading of the instruments and their subsequent interpretation in case law and practice. Having established in previous chapters

that UK labour law obligation is based upon the sister Conventions Nos. 87 and 98, and taking into account the fragility of the protection for the *full* freedom of association demanded by those instruments in English law, particularly since the ‘enhancement’ of the procedural trips and hurdles imposed by the Trade Union Act 2016, the steps that had to be taken were obvious. The précis at the beginning of each chapter are listed below. The obligations related to ‘collective rights’ set out in chapter five are:

- 1) The Procedural Obstacles to Industrial Action [p.236]
- 2) Quorums and Majorities [p.243]
- 3) Essential Services [p.251]
- 4) Secondary Action and Political Strikes [p.259]
- 5) Picketing [p.267]
- 6) Liability for Engaging in Industrial Action [p.275]
- 7) The Right to Bargain Collectively [p.280]
- 8) The Right to Recognition [p.292]

Moving on to ‘individual’ rights in chapter six, occupational safety and health rights, with their strong collective element, were tackled first, followed by those matters traditionally left to collective negotiation but which, with the withdrawal of collective agreement coverage, and the increase in statutory intervention, are now more usually left either to state supervision, or to the individual worker to enforce by means of a tribunal claim. The précis are included at the following pages:

- 1) The Right to Health and Safety at Work [p.303]
- 2) Working Time [p.322]
- 3) Wages [p.343]
- 4) Rights on the Termination of Employment [p.359]

In chapter seven, on equal treatment in the workplace, the opening section gives an overview of supranational equality obligation before focusing on what I identify as the principal gaps in UK law and practice – the comparative absence of ‘positive discrimination’ initiatives, the failure to tackle domestic servitude, and arbitrary discrimination related to social origin, and political opinion. Subsequent sections cover largely family related ‘flexible working’ rights, starting with those specifically intended to address gender inequality, then moving on into rights for

workers on ‘atypical’ contracts less closely associated with the exploitation of workers with family responsibilities:

- 1) Equality [p.371]
- 2) Family Friendly Rights: Maternity, Paternity and Parental Leave, and Flexible Working Arrangements [p.395]
- 3) Rights for Workers with ‘Atypical’ Working Arrangements: Part Time, Zero Hours Contracts Fixed Term, and Agency Contracts [p.409].

The précis were drawn up from the analysis that follows. That analysis was led by the doctrinal and empirical work in chapters two and three. I applied the jurisprudence of the supervisory bodies to existing UK law and practice outlined in previous chapters, to determine what is required of the UK government, and at the end of each section I set out those requirements.

While cases, complaints, reports, determinations, rulings and decisions relating specifically to the United Kingdom are of primary importance value in determining the extent of UK compliance with these regional and international obligations, much of UK law and practice remains unchallenged. As a consequence considerable reliance has been placed upon the case law relating to other states, and on the various statements of interpretation and ‘general comments’ which comprises the wider jurisprudence of the supervisory bodies, and, in many instances it has been necessary to argue a case. Such is the nature of supra national supervision, however, that even where the situation in the UK has been specifically addressed, the question of whether the government is compliant or not remains open – and a case has to be made.

In terms of the areas of the law examined in this manner, I have, of necessity, tended to focus on areas of non compliance. I could have written tens of thousands of words on minor inconsistencies between UK equality protections and the demands of the EU, but the UK is broadly compliant with the *acquis* in relation to anti-discrimination protections – and, as I show, broad compliance is all that the Commission requires.

With regret, I decided to exclude protections for migrant workers on the grounds that, important as they are, they are more to do with the law on immigration than labour or employment law. I have included a section in chapter seven on

domestic servitude, persuaded by the need to illustrate the importance of the EU in forcing governments to act to protect workers, and the effect of gaps in the *acquis*, as well as by the fact that victims are not necessarily migrants. I also sought to point out that this shameful phenomena, based as it is on isolation and exploitation (something of a metaphor what has occurred to workers more generally as union power and membership has declined in the UK), has to be addressed by collective state intervention in the form of a programme of labour inspection, bespoke legislation, and by the prohibition of discrimination related to social class or social origin.

I also 'drew the line at' consideration of the delineation the outer reaches of labour and employment law, and the closely related matter of 'bogus self employment,' subjects touched upon at the end of chapter seven. Although I have researched and written about these matters while working on this dissertation, and for previous projects, they are literally on the periphery of my brief. Consequently I provide what is little more than a reference to them in relation to the couriers who have sought recognition of 'worker' status, and the judicial review of the CAC *Deliveroo* trade union recognition case.

Questions of 'access to justice,' were set aside for similar reasons, although my research did result in the publication of a booklet for the Institute of Employment Rights – *Access to Justice: Exposing the Myths* in 2016.

Chapter One: FREEDOM OF ASSOCIATION

I turn first to the jurisprudential, philosophical and economic arguments which underpin the claims of working people to full freedom to bargain collectively, and the labour protection obligations in the international and regional rights instruments which must govern and guide UK Government's approach to industrial relations.

Particular attention is paid in this chapter to the supposed clash between the interests of the individual and the interests of the collective when workers combine, and the differing consequences of interpreting freedom of association as a right of both the individual and the collective, or as a wholly individual right.

The fundamental labour rights are the rights to organise, to bargain collectively and to strike. Through the exercise of these rights workers are able to begin to redress the imbalance in bargaining power between the individual worker and the employer and negotiate the terms and conditions of their employment. These are the foundations of justice in the workplace, and they are bound up with, and grounded in, the concept of freedom of association. Workers combine in order to bargain collectively. Only when permitted to take lawful industrial action were workers able to bargain effectively and protect their interests by securing genuine representation for the protection of those interests in Parliament.

The significance of freedom of association to collective labour, and the extent to which the term is seen as synonymous with the right of workers to organise and to bargain collectively is made plain by the wording of Article 11(1) of the European Convention on Human Rights and Article 22 (1) of the United Nations Covenant on Civil and Political Rights. Both combine, almost word for word, Articles 20 (1) and 23(4) of that most fundamental and influential of rights instruments, the 1948 United Nations Universal Declaration of Human Rights.

Article 20(1): 'Everyone has the right to freedom of peaceful assembly and association.'

Article 23(4): ‘Everyone has the right to form and to join trade unions for the protection of his interests.’³¹

The Article 11 and Article 22 guarantees are expressed in individualistic terms,³² and the rights protected are, uniquely among civil and political rights, exercisable only collectively. There is, of course, no reason why this should make them any the less vital. The right to freedom of association is as fundamental a human right as the right to life, or the right to a fair trial, arguably more so, because the exercise of that freedom secures those rights. Freedom of conscience and speech is of limited value without the full freedom of assembly and association which permits workers to bargain collectively.

Article 22 UNICCPR³³ explicitly incorporates the 1948 International Labour Organisation Convention No.87 on freedom of association and the right to organise as a ‘floor’ to the protection it confers.³⁴ Better known as the basis of the right to strike,³⁵ Convention 87 also guarantees the right to bargain collectively,³⁶ although since 1950 the more specific anti discrimination provisions of its 1949 sister instrument Convention 98 on the right to organise and bargain collectively have more usually been cited as the basis of the right to bargain collectively in the ILO jurisprudence.

Convention 87 played a similar although less overt role in ‘fleshing out’ Article 11 ECHR. The Council of Europe’s Committee of Experts on Human Rights, tasked

³¹Emphasis supplied.

³²As are the equivalent provisions of the UNICESCR, which are almost identical to the terms of the Article 11 ECHR, Article 22 UNICCPR, and of course, the UN Declaration. It is noticeable that the provisions of this instrument which go beyond its civil and political instrument to confer rights on trade unions do not include an express right to bargain collectively, only ‘The right to strike, provided that it is exercised in conformity with the laws of the particular country’ (Article 8(d)).

³³ As does Article 8 of the UNICCPR’s sister economic and social rights instrument the UNICESCR. Article 8 is essentially a more comprehensive version of Article 22 UNICCPR.

³⁴The ILO is an agency of the UN.

³⁵ See Articles 3, 10 and 11 of Convention 87. The ILO 1994 General Survey gives a good account of the evolution of the recognition by the Committee of Experts (CEACR), and the Committee on Freedom of Association (CFA), of the right to strike implicit in C87 as does Claire La Hovary in ‘Showdown at the ILO: A Historical Perspective on the Employers’ Group 2012 Challenge to the Right to Strike’, 42 *Industrial Law Journal*, December 2013.

³⁶Article 3 of Convention 87 “has always been considered by the Committee [established in 1951] to embrace the right of trade unions to engage in collective bargaining on behalf of its members.” So stated the Committee on Freedom of Association in 1981 on the withdrawal of the British Government from collective bargaining arrangements with civil servants (Case No.1038 211th Report, para 33). Cited by Breen Creighton in ‘The ILO and Freedom of Association in the United Kingdom’ in *Human Rights and Labour Law Essays for Paul O’Higgins* (Eds: Ewing, Gearty and Hepple) p8. Of course, an instrument which guarantees the right to strike must necessarily guarantee the right to bargain collectively – the former is an essential element of the latter.

with drafting Article 11, were directed by the Council of Ministers to consider the UN approach to the protection of freedom of association – ‘due attention should be paid to the progress which had been achieved in this matter by the competent organs of the United Nations.’³⁷

The Council of Europe’s Committee of Experts had to ensure that Article 11 conformed to what was then a single ‘draft International Covenant on Human Rights’ - the regional instrument could not confer less protection than the international instrument. There had to be consistency. The draft supplied for that purpose by the UN Secretariat General included essentially what became Article 22 UNCCPR in Article 19, and Article 19(3) stated: ‘National legislation shall neither prejudice, nor be applied in such a manner as to prejudice, the guarantees provided for in the International Convention on Freedom of Association and Protection of the Right to Organise, in so far as States parties to that convention are concerned.’³⁸

Thus the freedom ‘to form and to join trade unions for the protection of his interests’ guaranteed by Article 11 can be said to have always been intended to protect the freedom to bargain collectively and to strike.³⁹ Moreover, common sense dictates that workers combine to protect their interests by bargaining collectively, and, if need be, by withdrawing their labour. The forming and joining of trade unions cannot reasonably be separated from their purpose.

Yet, extraordinarily, largely as a consequence of the prominence of labour rights in the Council of Europe’s 1961 European Social Charter and the rights legacy of the English common law, the European Court of Human Rights were to do exactly that in what became known as the *Belgian Police Trilogy* of cases.

³⁷*European Commission of Human Rights Preparatory Work on Article 11 of the European Convention of Human Rights*, p.3 – from an ‘Information Document’ prepared by the Secretariat of the Commission Council of Europe, Strasbourg, 16 August, 1956(ECHRTraveux-Art11-DH(56)16-EN1693924.PDF).

³⁸*Ibid* p4. Articles 22(3) UNICCP and 8(2) UNICESCR are very similarly worded.

³⁹There is a sense that the use of Convention 87 as a floor of rights only where the state concerned had ratified the Convention lent an ‘economic and social’ aspect to a civil and political freedom – only when the state was ready (in Europe Germany and Italy were not, and on the international plane less developed states were not) could full freedom of association could be guaranteed. After 1998 the UN, the ILO, and after 2008, the ECtHR, held that whether Conventions 87 and 98 have been ratified or not member states are bound by their provisions.

The ECHR Belgian Police Trilogy

Until 1974 no breaches of Article 11 by a member state had been the subject of a complaint to the European Commission of Human Rights.⁴⁰ However, following a complaint by a union representing members of the Belgian police the Commission was obliged to consider the breadth of the protection afforded freedom of association. Unsurprisingly it interpreted Article 11 in the light of the relevant ILO Conventions and the European Social Charter,⁴¹ taking the view that that Article 11 protected the freedom (in fact the Commission arguably saw it as a right rather than as a right to the freedom) to bargain collectively and to strike – full freedom of association. Nevertheless, the Belgian government refused to compromise, and the Commission referred the case to the Court, along with two Swedish cases submitted to the Commission in 1975 which turned on similar facts.

Subsequently, in *National Union of Belgian Police v Belgium* [1975], the Strasbourg Court held that Article 11 did not require the government to consult with the union over employment matters. This was confirmed the following year in *Swedish Engine Drivers' Union v Sweden*, when the court held that Article 11 did not protect a right to bargain collectively. In *Schmidt and Dahlstrom v Sweden* the court ruled that Article 11 did not protect the right to freedom to strike.⁴²

The Strasbourg Court was by no means hostile to collective bargaining, yet it had held that the Convention protected only the individual right of workers to organise and 'to be heard.' The trade unionists were directed to the provisions of the European Social Charter, which, extraordinarily, were cited to support the view that Article 11 ECHR *did not* compel a State to engage in collective bargaining, nor, in the context of the *Belgian Police Case*, did it require a union to be consulted by the Belgian Ministry of Interior over employment matters.⁴³ It was stated that:

⁴⁰Until 1998 complaints were made to the Commission which ruled on admissibility and, if the case was considered admissible it issued a report on the application of the Convention with the intention of encouraging amicable settlement. The Commission was abolished in 1998.

⁴¹ Ed Bates, *The Evolution of the European Convention on Human Rights*, (Oxford, OUP, 2010), p302

⁴²Known as the *Belgian Police Trilogy*: *National Union of Belgian Police v Belgium* [1975] ECHR 27; *The Swedish Engine Drivers' Union v Sweden*, [1976] ECHR 2; *Schmidt and Dahlstrom v Sweden* [1976] ECHR 6.

⁴³ *Belgian Police Case (ibid)* para 38. This has been called 'negative textual inferentialism' or 'the ceiling effect' - the use of another legal instrument 'to limit the meaning, and thus the scope of protection given to a right in that institution's own instrument' (Craig Scott 'Reaching Beyond (Without Abandoning) The Category of 'Economic, Social and Cultural Rights' (1999) *European Human Rights Law Review* 582.

'The Court notes that while Article 11(1) presents trade union freedom as one form or a special aspect of freedom of association, the Article does not guarantee any particular treatment of trade unions...trade union matters are dealt with in detail in another convention also drawn up within the framework of the Council of Europe, namely the Social Charter of 18 October 1961. Article 6 (1) of the Charter binds the Contracting States: "to promote joint consultation between workers and employers." The prudence of the terms used shows that the Charter does not provide for a real right to consultation. Besides, Article 20 permits a ratifying State not to accept the undertaking in Article 6 (1). Thus it cannot be supposed that such a right derives by implication from Article 11 (1) of the 1950 Convention, which, incidentally would amount to admitting that the 1961 Charter took a retrograde step in this domain.'

The Court was evidently unaware of the influence of ILO Convention 87 on the drafting of Article 11, and its effective incorporation as a floor to the protection for freedom of association. It was seemingly blind to the fact that state respect for the freedom of workers to bargain collectively does not eclipse the need for the promotion of joint consultation, and collective bargaining mechanisms - the Charter requires states to undertake such promotion as a means of 'ensuring the effective exercise of the right to bargain collectively.'⁴⁴

Freedom of association had, in Lord Wedderburn's inelegant but nevertheless memorable phrase, been 'divided like a butchered Siamese twin' by the Strasbourg judges.⁴⁵

Despite the uncomplicated wording of Article 11 the Court had adhered to the legacy of a pernicious and flawed *human rights paradigm* derived from the English common law. The Strasbourg judges found themselves bedfellows with the likes of the libertarian 19th and early 20th Century British constitutional law scholar AV Dicey.

Dicey, whose work has been hugely influential in shaping the individualistic arguments on which the political representatives of capital were subsequently to

⁴⁴Article 6.

⁴⁵ Lord Wedderburn, 'Freedom of association or right to organise?' (1987) 18 *Industrial Relations Journal* 244.

rely as they abandoned the ‘post war compromise,’⁴⁶ took the view that the common law freedom for the individual to assemble and associate with others protected participation in politics and trade, but emphatically not what he saw as the *popular tyranny* of collective bargaining. Under the common law individuals have a right to liberty – they are free to associate and they are free to bargain. But, having exercised their right to combine workers, have no right to freedom to bargain collectively, and no right to force their employer to the bargaining table by withdrawing their labour.⁴⁷ However, by the denial of the collective aspect of freedom of association, workers are arguably stripped of their individual right to liberty.⁴⁸ Unable to bargain they are obliged to enter into wage slavery, reduced to the status of ‘one who is bringing his own hide to market and has nothing to expect but – a hiding.’⁴⁹

It is remarkable that as recently as 1996 a minority of judges at the ECtHR were relying on this obviously flawed paradigm, arguing that:

‘The Convention purports to lay down fundamental rights *of the individual* and to furnish the individual an effective protection against interferences.’ Accordingly, when weighing up the competing claims of an employer who refused to engage in collective bargaining, the union concerned, and the

⁴⁶ See, for example, Brian Langille’s individualistic interpretation of freedom of association in ‘The Freedom of Association Mess: How we got into it and How we Can Get Out of it’ (2009) 54 *McGill L.J.* 177, which was essentially an attempt to persuade the Canadian Supreme Court that there was no basis for a right to bargain collectively. See also Bogg and Ewing’s very convincing counter arguments in ‘A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada’ (2012) 33 *Comparative Labor Law & Policy Journal*, 379. This confrontation was closely related to the ‘employer’s rebellion’ at the ILO – see, for example, S Regenbogen, ‘The International Labour Organisation and Freedom of Association: Does Freedom of Association Include the Right to Strike?’ (2012) 16 *Canadian Labour and Employment Law Journal* 385.

⁴⁷ Other than by individually giving notice (rather than conspiring between themselves to each hand in their notice) and withdrawing their labour at the end of the contractual notice period – a tactic perhaps better known as ‘resigning’. Remarkably this is starting to be regarded in certain right wing circles as the future of *individualised* industrial action (see the Policy Exchange paper discussed in relation to the Trade Union Act 2016 in Chapter Two).

⁴⁸ ‘...labour exists in a zone of indistinction between formal right and economic force’ David Whyte, ‘Naked Labour: Putting Agamben to Work’, *The Australian Feminist Law Journal*, 2009, Vol 31 57, p60, see especially pp59-62.

⁴⁹ Marx, *Capital*, 1887, p119 (Wordsworth Classic Literature edition 1987). Marx noted that the capitalists of the 18th and 19th Century were not above working their employees to death: ‘Capital is reckless of the health or length of life of the labourer, unless under compulsion from society’ (p186). Marx wrote of ‘candidates for death in the London bakeries’, and cited an 1863 speech in the House of Commons: ‘The cotton trade has existed for 90 years...it has existed for three generations of the English race, and I believe I may safely say that during that period it has destroyed nine generations of factory operatives’ (p185).

nation as a whole, then - all other things being equal – the judges claimed that the individual freedom of the employer should prevail. This, they argued, reflects “the human rights ideal that the individual must in principle be free to act according to his convictions and, accordingly, be protected against having to go against those convictions as a result of constraining collective action by one or more trade unions...”⁵⁰

However, the tide was turning, and the court held otherwise, accepting, *inter alia*, the Swedish Government’s argument that the Swedish model of industrial relations - in excess of 90% of Swedish workers are party to collective agreements – was one of the key reasons for the state’s prosperity.

Extraordinarily, the two dissenting judges had been prepared to risk the loss of that prosperity for the sake of a human rights ideal designed to permit the bourgeoisie to exploit the workforce. The central pillar of Swedish industrial relations would, if the two judges had prevailed, have been undermined for the sake of one politically motivated restaurant owner who refused to pay his staff the ‘going rate’ for the job.⁵¹

The forgotten rights of the citizen

This sacrifice of the collective interest in favour of the individual interest was identified by Marx in his seminal 1843 essay *On the Jewish Question*. The damage wreaked as a consequence of the primacy afforded the individual in the industrialised nations was, of course, what set Marx on to the road to *Capital* and to the *Communist Party Manifesto*.

Marx focused on France, Pennsylvania and New Hampshire in North America,⁵² and on the rights instruments adopted in these new *political states* following the *Bourgeoisie* revolutions of the late 18th Century.⁵³ These instruments replaced the divine right of the monarch with what has been described of as ‘an equally

⁵⁰ *Gustafsson v Sweden* [1996] ECHR 20. Dissenting opinion of Judge Martens, joined by Judge Mather, para 8.

⁵¹ This was the issue which had triggered union intervention and the requirement that the restaurant owner bargain with the union, although, like most Article 11 cases, the case was a political ‘Trojan horse’ (see chapter 3).

⁵² ‘Democratic’ states which had escaped the clutches of a divinely appointed monarch.

⁵³ England underwent its own rather more gradual *Bourgeoisie Revolution* during 1648-1689 cumulating in the Bill of Rights.

absolute but non-theological formulation of inherent natural rights,⁵⁴ an adoption by the French and American mercantile classes of the individualistic English common law model to allow them to accumulate wealth with the minimum of interference from the state or their servants.⁵⁵ Thus, as in Britain, the individual was protected not only from the tyranny of the state, and the tyranny of the mob, but also against trade unionists seeking to bargain collectively with employers.

Marx recognised that in these states the base *material life* of the Bourgeoisie trading in civil society was wholly distinct from the collective *species life* of the politically emancipated citizen – ‘life in the political community, in which he considers himself a communal being,⁵⁶ and where the citizen is equal with his fellow citizen. The individual rights of man - human rights - conflicted with communal or political life. While there was an individual right to vote, to assemble and associate, the wider community was essentially cast as an oppressor, arguably a contradictory fiction which undermined an otherwise plausible approach:

‘None of the so-called rights of man...go beyond egotistic man, beyond man as a member of civil society – that is, an individual withdrawn into himself, into the confines of his private interests, and private caprice, and separated from the community. In the rights of man, he is far from being conceived as a species-being; on the contrary, species like itself, society, appears as a framework external to the individuals, *as a restriction of their original independence*. The sole bond holding them together is natural necessity,

⁵⁴From the *Enquiry into the Philosophical Basis of the Rights of Man: Memorandum and Questionnaire issued by the United Nations Educational, Scientific and Cultural Organisation* 1947 as part of the consultation in preparation for the drafting of the Universal Declaration of Human Rights (National Archive [‘TNA’] file HO 45/25465). See Marx and Engels’ more partial description of these early rights instruments in the highlighted sentence in footnote below.

⁵⁵Marx and Engels, *Manifesto of the Communist Party*, 1848, Chapter One: ‘The bourgeoisie, historically, has played a most revolutionary part. The Bourgeoisie, whenever it has got the upper hand... has left remaining no other nexus between man and man than naked self interest, than callous ‘cash payment’....in place of numberless infeasible chartered freedoms, has set up that naked single, unconscionable freedom – Free Trade. In one word, *for exploitation veiled by religious and political illusions, it has substituted naked, shameless, direct, brutal exploitation.*’ www.marxists.org/archive/marx/works/download/pdf/Manifesto.pdf

⁵⁶ Marx, *On the Jewish Question* 1844 (Proofed and corrected by Andy Blunden, Matthew Grant and Matthew Carmody in 2008 - 2009, and by Mark Harris in 2010), p6 (www.marxists.org/archive).

need and private interest, the preservation of their property and their egotistic selves.⁵⁷

While the separation of the individual and the community was artificial, the overweening self interest identified by Marx was nevertheless real enough, and evident in Dicey's hostile response to the collective legal rights that were conceded in the late 19th and early 20th Centuries, as the common law gave way to the needs of the newly enfranchised working classes.

Dicey believed that the high point of individual liberty had been reached in the final Palmerstone administration, a 'golden age' when

'the ideal Chancellor of the Exchequer was the man who, after providing for the absolutely necessary expenditure of the State, so framed his Budget as to leave the largest amount possible to 'fructify', as the expression then went, "in the pockets of the people."' ⁵⁸

Dicey objected to old age pensions, and to free elementary education, or rather he objected to the tax increases infringing his liberty - his right to property - which paid for those entitlements. State intervention in industrial relations appeared to infuriate him, and, hilariously, he considered the Coal Mines Regulation Act 1908 to be an interference with 'the right of a workman of full age to labour for any number of hours agreed upon between him and his employer.'⁵⁹ The concern of the libertarian for the supposed freedom of the working man was as wholly unconvincing then as it is today. Needless to say Dicey had a similar opinion of the Trade Boards Act 1909,⁶⁰ and the 'Acts fixing a Minimum Rate of Wages.'⁶¹

⁵⁷ Ibid, p13. This brings to mind Margaret Thatcher's claim that there is 'no such thing as society, only individuals and families.'

⁵⁸ AV Dicey, *Lectures on the Relation between Law and Public Opinion in England During the Nineteenth Century*, (London, Macmillan 1917), P. xxx

⁵⁹ '...socialism and protection have one feature in common: they both rest on the belief that the power of the State may be beneficially extended even though it conflicts with the contractual freedom of individual citizens.' (Ibid, p. Lxiv)

⁶⁰ He considered the National Insurance Act 1911 to, in principle, have conceded 'the *droit au travail* for the sake of which the socialists died behind the barricades of June 1848.'

⁶¹ Ibid, xxxviii – xxxix. By this Dicey presumably meant the legal minimum wages established by nine Trade Boards before the war intervened, in 'sweated' trades which relied heavily on women home workers. These included tailoring, paper and cardboard box making, chain making, lace and net manufacturing and mending, shirt making and tin box manufacture (see FJ Bayliss, *British Wages Councils*, (Oxford, Blackwell, 1962) pp9-12). Bayliss cited

Dicey was more hostile still to the Acts of Parliament which held the common law in abeyance to permit collective bargaining.⁶² Yet he was an enthusiastic advocate for free trade,⁶³ and he had acknowledged that master and servant did not meet in the market place on equal terms;

‘an individual artisan or labourer does not bargain on fair terms; he seems powerless against a wealthy manufacturer...The sale of labour...is felt to be unlike the sale of goods. A shopkeeper can keep back his wares until the market rises, whilst a factory hand, if he refuses low wages, runs the risk of pauperism or of starvation.’⁶⁴

One might then argue that he should have welcomed these minimalist ‘negative’ rights which excluded judicial interference and permitted a semblance of freedom of contract – restoring the worker’s *individual* liberty. But he did not. His belief in the primacy of the individual was, of course, inextricably intertwined with the protection of the economic interests of the ruling classes, interests he believed best served by a denial of the fundamental labour rights.⁶⁵ As Otto Kahn- Freund explained:

“Collectivism” (and that word was for Dicey synonymous with “socialism”) denoted not only State intervention, but also what he called “Preference for Collective Action.” All legislation designed to strengthen trade unionism was ‘collectivist’ in this sense, and, even if consisting in the withdrawal of State intervention, contrary to his conception of “individualism.”

Churchill’s statement to the Commons on the necessity for intervention ‘to foster organisation in trades which, by reason of the prevalence of exceptionally evil conditions, no organisation has yet taken root, and which in consequence, no parity of bargaining power can be said to exist’ (*Bayliss*, footnote p.9).

⁶² Dicey, *Ibid*, xlv-xiv. These were, of course, the Conspiracy and Protection of Property Act 1875 and the Trade Disputes Act 1906.

⁶³ *Ibid*, xxxii.

⁶⁴ *Ibid*, p188.

⁶⁵ Ivor Jennings had taken the view that Dicey’s concept of the rule of law was based largely on his political prejudices (Iv Jennings, *The Law and the Constitution*, 1959, p56). Where industrial relations were concerned Dicey was so far to the right of the political spectrum that he excused the ‘panic stricken High Tories’ their outstandingly oppressive Combinations Act of 1800 and considered the legal position that pertained between Combination of Workmen Act 1825 and the early 1870s to be a reasonable enough limit to the extent to which workers could be permitted to organise and bargain collectively.

“Individualism” and “collectivism” were clear opposites...The greater the power of the unions, the greater, under a democratic franchise, the pressure for state intervention.’⁶⁶

As it became subject to jurisprudential analysis, blatant partiality was rationalised on the grounds that the freedom of the individual is paramount, and that the individual requires protection from the ‘tyranny of the majority.’ A ‘guarantee’ of freedom of association for the individual by the state thus requires no more than the individual be permitted to bargain, and do business, and does not extend requiring that individuals be permitted to combine and bargain as a collective.

While arguments based on the ‘tyranny of the majority’ are plausible enough when we talk of the persecution of minorities by the state, in the context of labour relations they are spurious. This individualism has served merely to disguise the imposition of effective servitude on the majority by that small section of the population which seized control of the state’s wealth. Passed off, when justification became required, first as divine right, then, as the possession of wealth became less dependent upon belonging to the aristocracy, as an inherent natural privilege accorded in theory to all, but in practice only to individual members of the ruling classes.

The freedom of the worker to bargain individually was, and remains, largely illusory. Employers have generally considered it to be in their best interests, to, where possible, isolate workers by ensuring that discussion of remuneration is discouraged, and that any dissatisfaction with the terms and conditions of employment be dealt with on an individual basis behind closed doors. Moreover, if the individual is a worker, in a dependent employment relationship, and not a sub contractor in business on his or her own account, genuinely dealing with the employer as a client or customer, it is rare that any negotiation takes place.⁶⁷

⁶⁶O. Kahn-Freund, *Selected Writings*, 1978, p5, originally ‘Labour Law’ in M Ginsburg (ed)*Law and Opinion in England in the 20th Century*, 1959.

⁶⁷ For instance, W Brown, S Deakin, D Nash, and S Oxenbridge in ‘The Employment Contract: From Collective Procedures to Individual Rights’ (2000) 38 *British Journal of Industrial Relations* 611, examined the results of the 1998 Workplace Employee Relations Survey. They noted that since 1980 ‘despite a widespread rhetoric of “Individualisation,” in most organisations there has been a general trend towards greater standardisation of the employment contract [p619]...Substantive individualisation – the differentiation of contractual terms within the organisation – has not generally been realised’ [p627].

Arguably, other than under conditions of full employment, ‘individual negotiation’ will, in the overwhelming majority of cases, amount to little more than the employer telling the worker that he or she can choose to accept what is offered, or to look for employment elsewhere. That was the experience of aircrew employed by Ryanair and Virgin,⁶⁸ and unskilled and semi skilled workers with little or no ‘added value’ with which to bargain, are generally given still shorter shrift than airline pilots. Where numbers of workers perform the same, or broadly similar roles, treating workers differently for the purposes of remuneration is divisive, time consuming, likely to push wages up if genuinely encouraged, and unnecessary, in the sense that employers do not have to it. So they don’t do it.

It is also the case that in all but the smallest of businesses, the individual negotiation of remuneration, other than for a coterie of sales people, senior managers and directors who will be expected to press their cases for bonuses and salary increases, is wholly impractical. For example, in an open letter to his staff in 1966 recommending that they join ‘the appropriate trade union,’ the chairman of the British Railways Board – the collective bargaining arrangements of British Rail, and the watershed ECHR case of *Young James and Webster* [1981], will be returned to in subsequent chapters - confessed that:

‘the only way in which we can negotiate with individual members is through the agency of the Trade Union.’⁶⁹

Of course, the status of the employer as an individual is also almost always a fiction. The employer will, in the overwhelming majority of instances, be in reality, a collective of shareholders and directors ‘hiding’ behind the corporate veil and the device of legal personality, or a partnership, and so called ‘individual, or one to one’ bargaining almost invariably – if it occurs at all - undertaken between an individual worker and the representative of a collective of owners of capital.

⁶⁸In the face of employer resistance the Ryanair aircrew ultimately obliged their employer to recognise BALPA for the purposes of collective bargaining, and the Virgin aircrew formed their own union. Airline generally pilots have to find £140,000 to pay for training which has to undertaken within a 5 year period. Then they have to find a job. There is a shortage of pilots. Yet still Ryanair and Virgin did not want to engage in either (genuine) individual or collective bargaining (information supplied by BALPA member and Easyjet pilot William Middleton).

⁶⁹‘A Message from the Chairman,’ 15th September 1966, TNA AN 192/429.

Towards a reconciliation of labour and capital

Dicey's final diatribe against collectivism was published in 1917 – the year of the Soviet Bolshevik Revolutions. The First World War ended in November 1918, and within a matter of months the Treaty of Versailles had concluded the post war settlement. The preamble incorporated two propositions – effectively collective demands - which have since been cited as encapsulating the key reasons for the need for international and domestic Labour Law:⁷⁰

*'Whereas the League of Nations has for its object the establishment of universal peace and such a peace can only be established if it is based upon social Justice; and whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required...Whereas also the failure of any country to adopt humane conditions of labour is an obstacle in the way of other nations which to desire to improve the conditions in their countries.'*⁷¹

The treaty established the International Labour Organisation. The victorious 'Great Powers had acknowledged that it was necessary to regulate labour relations on an international scale. If Dicey's arguments had seemed anachronistic in 1913, by 1919 they appeared to belong to a different world. In the UK, following the report of the Whitley Committee in 1918 the Trade Boards that had, to Dicey's dismay, been established prior to the Great War were extended beyond the 'sweated' sectors into industries merely considered to be 'poorly organised' to boost the post war reconstruction of the economy,⁷² while Joint Industrial Councils – the name and the concept perhaps deliberately redolent of Bolshevism - comprised of employers' associations and trade unions, were established in sectors where trade unions had enjoyed more success.

⁷⁰ The emphasis is placed on the words cited by Brian Langille 2009, *op cit*, pp61-62. Langille made the uncontroversial observation that labour standards were required for social justice and for peace, and that international labour standards were required to prevent an international 'race to the bottom.'

⁷¹ From the preamble to Part XIII of the Treaty of Peace of Versailles (International Labour Office *Official Bulletin*, vol 1, April 1919 – August 1920).

⁷² Following the Trade Boards Act 1918

International relations and the Red Menace aside, society and industry were changing fast, and employment practices had to adapt. Production line technology had evolved rapidly during the war years, and the 1920s saw the emergence of what Gramsci termed 'Fordism',⁷³ with the relatively high wages paid to those mass producing consumer goods feeding back into a 'virtuous circle' of demand and supply – 'the principle of an articulation between process of production and mode of consumption,'⁷⁴ and 'the recognition by big business as well as the state of the legitimacy of responsible trade unionism and collective bargaining; and by responsible trade unions (or, at least, trade union leaders) of management's right to manage.'⁷⁵

The work of John Maynard Keynes confirmed that economic growth depended on this mutually reinforcing relationship, and in the US - a nation wedded to principles of economic *laissez faire* - as a response to the Great Depression of the late 1920s and early 1930s, widespread legislative interventions were made into labour relations in an attempt revive the moribund economy. Compulsory union recognition procedures and collective bargaining mechanisms were imposed in the face of opposition from the likes of the 'American Liberty League', and in case after case the US Supreme Court, struck out the legislation as unconstitutional. The supposed liberty of the individual, however, succumbed to political will, and the Supreme Court was ultimately compelled to accept these labour rights.

Events in the USA, and the success of the ILO helped emphasise the singular and *vital* nature of collective labour rights.⁷⁶ Labour rights were essentially the first

⁷³Antonio Gramsci, 'Americanism and Fordism' p 279 in *The Prison Notebooks* (London, Lawrence and Wishart, 1971). Gramsci, however, saw the high wages as temporary phenomena reflecting the arduous nature of the work 'which cannot fail before long to have serious consequences for the physical and psychic health of the workers.' He argued that when such work became seen as normal the wages would fall (pp 310-313).

⁷⁴M Aglietta *A Theory of Capitalist Regulation The US Experience*, 1976 [translated 1979] (London Verso 2015), p117 For a very comprehensive examination of Fordism, see chapters 1&2.

⁷⁵B Jessop in 'The Future of the Capitalist State' (2002), discussing *Atlantic Fordism* 'as a mode of economic regulation' and 'as a general pattern of social organisation' in the 'Keynsian Welfare National State', p57 -8.

⁷⁶The USA, although an enthusiastic supporter of the ILO has always however, been very reluctant to ratify its Conventions (see ME Imber, *The USA, ILO, UNESCO and IAEA* (Basingstoke, Macmillan, 1989) chapter four 'The Case of the International Labour Organisation'), or to commit itself to the provisions of even UN rights instruments (see S Grant, 'The United States and the international human rights treaty system: For export only?' - Chapter 14 in P Alston and J Crawford (Eds.) *The Future of UN Human Rights Treaty Monitoring* (Cambridge, CUP, 2000; pp3-5 of P Alston, 'Labour Rights as Human rights; The Not So Happy State of the Art' in Alston (ed) *Labour rights as Human Rights* (Oxford, OUP,2005). The remarkable 'New Deal' (or, more accurately, the series of 'New Deals') had little to do with the ILO.

human rights to have been recognised in an international instrument, and their *de facto* recognition in Roosevelt's *New Deal* was extraordinarily influential.⁷⁷ The USA was advertising the fact that collective bargaining promoted economic growth. They did not 'upset the equilibrium' of the capitalist market, but were an essential element of that market. The Americans had come to understand that capitalism 'is intrinsically a creator and a destroyer,' and 'can only achieve progress for society if sets of mediation mechanisms, forming a mode of regulation, establish coherence among the imbalances inherent in the capitalist system.'

These words encapsulate Michael Aglietta's 'regulation approach' to the analysis of labour relations – a theory of transition. The French economist argues that the provision of rights serves to provide stabilisation and restraint in a time of crisis: 'The cumulative effect of this coherence, once it has been achieved, is the establishment of a regime of growth.'⁷⁸

The regulation approach can be used to explain the provision of labour rights that so appalled Dicey, and the formation of the ILO in 1919. They were responses to crises triggered by the 'blind force' of capitalism, similar, but by no means identical to, the back swing of 'Polyani's pendulum.'⁷⁹

Dicey might well have seen them as 'clear opposites' but far from being irreconcilable, the interests of the employer and the collective demands of workforce - the 'contradictory and conflictual dynamic' on which the capitalist market depends - are better seen as mutually reinforcing.⁸⁰ Aglietta emphasises that

⁷⁷ It has, however, been argued that the impact of these early advances served to separate labour rights from the embrace of the post WWII human rights initiatives. Sarah Joseph, citing Bob Hepple at pp 21-23 in *Labour Laws and Global Trade* (Oxford, Hart Publishing, 2005), argued that 'The ILO...significantly predates most other international human rights machinery, which generally emerged after WWII. It is perhaps because international labour rights movements started earlier than other human rights movements that labour rights tend to have been separated, and arguably even marginalised, within the mainstream human rights bodies at the global level' (C Fenwick and T Novitz (Eds) *Human Rights at Work* (Oxford, Hart Publishing, 2010), Ch 11, 'UN Covenants and Labour Rights', p331).

⁷⁸ M Aglietta, 'Capitalism at the Turn of the Century: Regulation Theory and the Challenge of Social Change', *New Left Review* 1/232, November-December 1998, 41, pp 50-51

⁷⁹ See K. Polyanyi, *The Great Transformation*, (New York, Farrar & Rinehart, 1944). The regulation school do not regard the provision of labour rights to inevitable.

⁸⁰ See Jessop, 2002, *op.cit.*

‘agreements between organizations representing interests that are both mutually opposed and mutually dependent, has always been party to the creation of the major social mediation mechanisms...’

He described what he saw, disregarding neo-classical economic theory and the supposed integrity of the market,⁸¹ to recognise that the

‘reciprocal commitment of the individual and society,’⁸² gave ‘a collective purpose to the pursuit of interests, thereby legitimising both parts of the dichotomy between individual goals and membership of society...*the modes of regulation in the wage society are legitimate to the extent that they permit social progress.*’⁸³

In the UK political attempts to blunt the worst effects of unrestrained capitalism in the Depression were sectoral rather than enterprise level interventions. Between 1921 and 1931 no new Trade Boards were established,⁸⁴ but in 1931 ‘as the economy dragged itself out of the greatest depths of the Depression wage regulation came back into favour,’ and by 1939 one and a half million workers had minimum wages – and a minimum of one week paid holiday – set by the boards.⁸⁵

The Post War Fordist Consensus

Economic recovery in the industrialised nations was interrupted – although, in the US, arguably *secured* -- by the tragedy of the Second World War, but with victory in sight, and the emergence of the Soviet Union as a world ‘superpower’ having helped focus the attention of the owners of capital on the interests of the wider community, the ‘Great Powers’ set about building a new world order which was to deliver 30 years of unparalleled prosperity. The International Labour Organisation’s 1944 Treaty of Philadelphia reaffirmed the fundamental principles

⁸¹See ‘Introduction: The Need for a Theory of Capitalist Regulation, in Aglietta, 1976, *op.cit.* According to Aglietta neo-classical economic theory ‘reduces and excludes from its ambit economic phenomena identified from observation of real practices as ‘imperfections’ rather than as dialectically transforming its concepts by incorporating a more concrete content into them’ (p10).

⁸² Ibid, p87

⁸³ Ibid, p54

⁸⁴ FJ Bayliss, 1962, *op cit*, p25.

⁸⁵ Ibid, p43

laid down 25 years earlier, and that year the allied powers met at Bretton Woods for the United Nations Monetary and Financial Conference, determined to impose peace and stability on the post war world and to engineer a compromise between the interests of capital and labour.⁸⁶

The collective interest demanded consensus, and this was recognised across the political spectrum. 1944 to 1948 saw an unprecedented period of international co-operation. Mainstream politics in the western democracies shifted markedly to the left after the horrors of the war had hammered home the missed opportunities of the 1920s and 1930s. In Britain the Attlee government, having told the people in 1945 that their choice at the polls – ‘the fundamental issue which has to be settled’ - was between the Tory Party ‘standing for the protection of the rights of private economic interest, and the Labour Party, allied with the great Trade union and co-operative movements,’⁸⁷ passed the Wages Council Acts of 1945 and 1948 to build upon the foundations provided by pre war Trade Boards to promote collective bargaining. Once again it appeared to be understood that ‘lasting peace can be established only if it is based on social justice.’⁸⁸

It was this drive for reconciliation, both economic and ideological, which led to the successful negotiation of the hugely influential UN Universal Declaration in 1948, which gave labour rights equal prominence with other human rights, economic and social, as well as civil and political. As we have seen, in that same year the UN Human Rights Committee started on the long haul towards a UN Bill of Rights, and the ILO produced Convention 87, which was followed by Convention 98 in 1949.⁸⁹

⁸⁶ For near contemporary comprehensive coverage of the arguments behind the drive for a compromise see Robert A Dahl and Charles E Lindblom *Politics, Economy and Welfare: Planning and Politico – Economic Systems resolved into Basic Social Processes*, (Chicago, University of Chicago Press, 1953).

⁸⁷ Labour Party Manifesto 1945: *Let Us Face the Future: A Declaration of Labour Policy for the Consideration of the Nation*.

⁸⁸ From Article II of the Declaration of Philadelphia 1944: ‘Declaration concerning the aims and purposes of the international Labour Organisation.’

⁸⁹ As we shall see they tend to dominate any consideration of freedom of association in the context of labour relations. Freedom of association and the effective recognition of the right to collective bargaining are the first of the four core principles the ILO Declaration of 1998, which all ILO “members, even if they have not ratified the Conventions in question have an obligation arising from the very fact of membership to in the Organisation to respect, to promote and to realise...” (Para 2 ILO Declaration on fundamental Principles and Rights at Work).

These instruments appeared both to secure the position of labour rights as fundamental human rights, and to confirm their separate, special status. The pioneering British sociologist TH Marshall lent his support to this view at this pivotal time. In series of lectures delivered in 1949, and published as an essay in 1950, Marshall⁹⁰ characterised collective labour rights as a category of civil rights conferring ‘industrial citizenship.’⁹¹ He argued that political rights had cleared ‘the way for the growth of trade unionism by enabling workers to use their civil rights collectively’ to demand social rights.⁹²

For Marshall collective bargaining was the ‘extension of civil rights in the economic sphere...’⁹³ These civil rights became for the workers, an instrument for raising their social and economic status, that is to say, for establishing the claim that they, as citizens were entitled to certain social rights.⁹⁴

This concept of ‘industrial citizenship’,⁹⁵ moving citizenship from the civil and political into the sphere of economic and social rights via collective bargaining meshed admirably with the effective industrial democracy promoted by voluntarism, and with the British post war cross party and pan-European consensus on the value of collective bargaining.

Arguably, in 1950 this consensus enabled the representatives of the states of the Council of Europe negotiating the European Convention on Human Rights to agree on the conceptual and practical accommodation of individual liberty with the collective interest upon which post war British industrial relations was to depend for the next 30 years. The 1956 Council of Europe *Travaux Preparatoires* document on the drafting of Article 11 referred to above records the decision of the Conference of Senior Officials which secured the compromise necessary for the industrial relations systems starting to become prevalent in the UK and already long established in Denmark and Sweden:

⁹⁰TH Marshall, ‘Citizenship and Social Class’ (1950) in TH Marshall and Tom Bottomore, *Citizenship and Social Class*, (London, Pluto Press, 1992).

⁹¹Ibid, p8.

⁹²Ibid, p40. Essentially what Karl Polyanyi characterised as the counter movement to the emergence of the market economy. Polyani’s views were very influential in the immediate post war years.

⁹³Ibid,p26. The sentence concludes: ‘...without formal responsibility while the individual responsibility of the workers in relation to the contract is largely unenforceable.’

⁹⁴Ibid

⁹⁵See Guy Mundlak, ‘Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages’ (2007) 8(8)*Theoretical Inquiries in Law*.

‘On account of the difficulties raised by the ‘closed shop system’ in certain countries, the Conference in this connection considered that it was undesirable to introduce into the Convention a rule under which ‘no one may be compelled to belong to an association’ which features in [Article 20 (2)] the United Nations Universal Declaration.’⁹⁶

The same approach was taken by the UN Human Rights Committee, which rejected protecting a negative freedom of association:

‘It was recognized that this sentence, taken from Article 20 of the Universal Declaration, stressed an important aspect of freedom of association, but the opinion was expressed that its application might not always be in the interests of trade unions.’⁹⁷

The various ILO reporting bodies, and later, the European Social Charter’s Social Rights Committee, took a similar stance, holding that domestic arrangements for union membership agreements were strictly matters for individual states.⁹⁸

When this was challenged in 1980 by certain of the jurists on the European Commission of Human Rights, and then by six of the twenty one judges at the European Court of Human Rights who heard *Young, James and Webster v The UK* in 1981,⁹⁹ it appeared to be interpreted by the first Thatcher administration as a signal from Strasbourg that a wholesale attack on the British trade union movement would be permissible. I would argue that moment was the ‘beginning of the end’ for the post war reconciliation of labour and capital in the UK.¹⁰⁰

⁹⁶ Report 19 June 1950 by the Conference of Senior Officials (*op cit*) The decision is recorded the *The Collected Edition of the ‘Travaux Préparatoires’*, vol IV, p 262 (cited in *Young, James & Webster v UK*, 4 EHRR 38, at para 51).

⁹⁷ An ‘extract from the Annotation on draft Covenants, prepared by the Secretary General of the United Nations in 1955...’ from the 1956 European Commission on Human Rights document (n.17 above).

⁹⁸ See Chapter Three.

⁹⁹ [1981] ECHR 4.

¹⁰⁰ The UK strict closed shop was a rarity. One aspect of British industrial relations during 1945 – 1980 that cannot be over emphasized is that while union membership agreements flourished the overwhelming majority accommodated non-members, and the numbers of dismissals on account of UMA was miniscule (see Dunn and Gennard, *The Closed Shop in British Industry*, (London, Macmillan, 1984), pp124-137). Most UMAs in practice resulted in the ‘agency shops’ which the Heath government had permitted when it had outlawed the closed shop in 1971-1974. Even in strict closed shops the right to ‘opt out’ of the political fund arguably ensured that freedom of conscience and expression was not infringed.

The case followed three dismissals made in 1976 under the strict British Rail closed shop, and had initially been defended by the Callaghan government. The conduct of the case fell, of course, into the hands of the Tories following their 1979 election victory, and the Tories had passed the Employment Act in 1980, which had, *inter alia*, addressed the supposed ‘mischief’ the railway men had complained of. Non members with a principled objection to membership could not now be obliged to join a union as a condition of continued employment.

The case should have been settled in 1980 following the report by the European Commission of Human Rights.¹⁰¹ However, Young, James and Webster’s case was being ‘bankrolled’, and directed, by a right wing organization, the Freedom Association. Its leaders were in close contact with Thatcher’s ‘inner circle.’¹⁰²

The FA and the Tory ‘high command’ wanted to draw the court into ruling on whether Article 11 protected a right not to be obliged to join a union, and although six of the twenty one judges did take the view that there was a negative element to Article 11, the court did not consider it necessary to address the matter. It focused instead on the role of freedom of conscience and expression in the exercise of freedom of association to hold that workers *already employed* could not subsequently be obliged to join a particular trade union but must be *free to join and to form trade unions of their own choice*.¹⁰³

Three weeks after the judgment was handed down, Jim Prior, who had been Secretary of State for Employment since June 1979, a ‘One Nation Tory,’ was replaced by the rather less conciliatory Norman Tebbit. Prior had been a leading member of Heath’s cabinet throughout the Tory ministry of 1970-74,¹⁰⁴ and his appointment had to some extent reassured the unions that the government sought only limited labour law reform.

¹⁰¹Shortly before the court handed down its judgement libertarian economist Charles Hanson, who had been in contact with the upper echelons of the FA, stated that ‘It would be very surprising if the Court came to a decision which differed widely from that of the Commission’ (C Hanson, S Jackson, D Miller *The Closed Shop, A Comparative Study in Public Policy and Trade Union Security in Britain, the USA and West Germany*, (Aldershot, Gower, 1982), p101). In the event no one was surprised, except perhaps Messrs. Young, James and Webster when they found that they were obliged to pay the extra costs the FA had incurred on their behalf. After the case Webster had to sell his house (see his self published book, *When Britain Waived the Rules...and Sampled Anarchy: The Battle Won for Freedom Loving Britons*, 2000).

¹⁰²See chapter 3.

¹⁰³ Membership of a particular union as condition of employment was not held to be a breach of the Convention obligations.

¹⁰⁴ As Minister of Agriculture 1970-72 and thereafter as Lord President and Leader of the House of Commons.

Tebbit set to work overseeing the drafting of the Bill which became the Employment Act 1982, and which marked the start of the assault on collective bargaining which has characterised British industrial relations ever since.

A new era of individualism opened, and Diceyan arguments were dusted off and put to service. The ‘very lively solicitude for the non-unionist and his “liberty” to contract to serve for the lowest wages’,¹⁰⁵ became a staple justification for the withdrawal of collective bargaining arrangements and the imposition of the ‘individual contract of employment.’ The Thatcherites’ high priest of economics, FA Hayek provided the old arguments with a fresh veneer of academic respectability. Like Dicey, Hayek saw the middle years of the 19th Century as a ‘golden age’,¹⁰⁶ and saw collective bargaining as *tyranny*, claiming in 1984 that:

‘the unions are destroying the free market through their legalised use of coercion...workers...are deterred by the threat of violence from offering their labour on their own terms.’¹⁰⁷

In this chapter I have shown that the right for workers to enjoy full freedom of association is a fundamental human right for which effective recognition has been denied by the pernicious influence of the English common law.¹⁰⁸

Analysing the arguments of arch libertarian AV Dicey, and aspects of the work of the father of collectivism, Karl Marx, I have shown show that it was by effectively dividing freedom of association in two - by separating the right of the individual to organise from the collectively exercisable elements of that freedom - that the ruling classes in Britain were able to justify the denial of workers the liberty to bargain on equal terms with their masters. Subsequently enshrined in early rights instruments the primacy afforded the individual and the denial of the communal

¹⁰⁵ By DN Pritt and Richard Freeman *The Law Versus the Trade Unions*, (London, Lawrence and Wishart, 1958), p.34.

¹⁰⁶See FA Hayek, *1980s Unemployment and the Unions, the Distortion of Relative Prices by Monopoly in the Labour Market*, (London, Institute of Economic Affairs,1984), p 41. Hayek referred to the ‘second half of the 19th Century’ but he must have meant Dicey’s ‘golden age’ which ran from 1825 until 1869. Hayek’s less well informed analysis appears to have taken the Trade Disputes Act 1906 as the end of the ‘good old days’ (see chapter 2 for an account of the industrial relations milestones of the 19th Century).

¹⁰⁷*Ibid*, p55 & p61.

¹⁰⁸Rather than a ‘wide’ as opposed to a ‘narrow interpretation,’ emphasising that freedom of association in the context of industrial relations undoubtedly embraces the rights to bargain collectively and to strike.

interest came to establish a flawed *individualistic human rights paradigm* which continues to protect the perceived interests of capital.

I cited the experience of the reconciliation of labour and capital in the twentieth century to show that the fundamental labour rights are an essential element of the capitalist market, and that the interests of capital lie with compromise rather than confrontation.

In the next chapter I give an overview of the history of labour rights in the UK, necessary both to provide the context for the benchmarking exercise in later chapters, and to support my arguments on freedom of association offered in this chapter. I show the clash of the individual and the collective to be essentially no more than a simple denial by the ruling classes of freedom of association justified by spurious philosophical arguments of the primacy of individual rights, and a manipulation of the law. I show too that after the early years of the 19th Century, until the post World War Two reconciliation of labour and capital, the story was one of crisis and compromise, of the ruling classes reluctantly conceding to workers freedom of association before renegeing once more - and ultimately provoking another crisis.

That last compromise was based on cross party acknowledgement of the necessity for full freedom of association, a consensus grounded in treaty obligations entered into by both the major political parties, and by respect for the rule of law. That it was abandoned after 1979 by politicians reprising the old discredited arguments about the primacy of the individual, prepared and able to break international law (as I show in chapters two three and five) in order to undermine and attack freedom of association provides for workers the political ammunition to secure the fresh broad political consensus necessary to win back full freedom of association. It also guides us towards the means by which that freedom can best be protected after that freedom has been won back to make the withdrawal of full freedom of association as unthinkable to politicians in the 21st Century politicians as it was to those who held high office during 1945 – 1979.

Chapter Two: The development of labour rights in the United Kingdom

Since the Fourteenth Century the ruling classes, the owners of capital, the employers – epithets that can be used interchangeably - have used the law to prevent workers from bargaining effectively.

‘Laws against combinations’ passed by Parliament, and enforced in concert with the common law by magistrates and judges concerned to defend themselves against the demands of their servants, ensured until the second half of the 19th Century that workers attempting to negotiate with their employer were likely to be punished.

The Ordinance of Labourers 1349,¹⁰⁹ passed after plague had killed a large proportion of the population,¹¹⁰ made Justices of the Peace responsible for ensuring that wages did not rise beyond the sums employers had been prepared to pay when labour had been less scarce. Unburdened by any need to disguise their partiality, the ruling classes were careful to ensure that it was the workers, rather than their masters, who were liable to sanction if they were found to have been paid what were considered to have been excessive wages.

The Freeman’s Act of 1425,¹¹¹ was similarly unequivocal about denying freedom of association and assembly. That Act made it a felony, punishable by death, ‘to cause congregations or chapters of Freemasons to congregate or assemble.’ Employers enjoyed a monopoly of power. They wanted to deny skilled working men the bargaining power to demand improved wages and working conditions, so they threatened to kill them if they did.

Over subsequent centuries successive statutes were passed variously prohibiting combinations, and setting the terms of employment for labourers and skilled

¹⁰⁹ See the instrument at www.britannia.com/history/docs/history/docs/laborer.html

¹¹⁰ The Black Death is estimated to have killed between one half and one third of the population of London during 1348-49. Parliament was prorogued in January 1349 because of the danger (see *Black Death*, by Mike Ibeji, BBC History, 2011).

¹¹¹ 3 Hen.6th, cap.1.

workers. Often very complex and comprehensive, the immediate value of these laws to employers tended to diminish over time, becoming impliedly part repealed by fresh legislation, and rendered increasingly obsolete by societal and industrial developments.¹¹² Nevertheless, as they fell into desuetude these statutes would, I argue, have ‘fed into’ the common law, helping the judiciary to shape less prescriptive but more general, more enduring, and more effective, common law protection for the interests of the ruling classes, the guiding principal of which could be said to be that *workers must not be permitted to bargain collectively*.

The common law offences of conspiracy and unlawful assembly, used against trade unionists as recently as the 1970s, betray the fact that the law was designed by the few to keep control of the masses. Trade unionist Des Warren, one of the ‘Shrewsbury Two,’ on being sentenced in 1973 to three years imprisonment for unlawful assembly, affray, and conspiracy to intimidate, declared himself from the dock to have been a victim of a ‘conspiracy of the ruling classes.’¹¹³ Warren had made a shrewd assessment of the calculated nature of the manipulation of the law by employers.

All a conviction for unlawful assembly required was for it to be found that more than two people were gathered with a common purpose in circumstances where a reasonable person might believe that the gathering was likely to result in a breach of the peace. Any agreement to do anything deemed by the justices to be in restraint of trade was sufficient to secure a conviction of criminal conspiracy.¹¹⁴

Yet employers were free to associate, to bargain, and to do business without interference, and similarly liable only in theory to prosecution for combining, they were able in practice to agree amongst themselves the wages they were prepared to pay. After all:

¹¹² See JV Orth, *Combination and Conspiracy: A Legal History of Trade Unionism, 1721-1906*, (Oxford, OUP, 1991), p4. See A Bogg, KD Ewing and A Moretta in ‘The Persistence of Criminal Law and Police in Collective Labour Relations’ in A Bogg, J Collins M. Freedland J Herring (eds) *Criminality at Work* (Oxford, OUP, 2019) [forthcoming].

¹¹³ See *The Picket and the Law*, Chris Ralph, 1977, p15.

¹¹⁴ See JV Orth 1991, *op cit*, Chapter Three: ‘Conspiracy: Criminal Law.’

‘Who would charge them other than the workers, and how could they find the money to launch the prosecution except by combining, and for that they would be themselves be charged and sentenced?’¹¹⁵

The right to bargain was thus exercisable only by the individual. The individual worker was, of course, theoretically entitled to bargain over the terms and conditions of employment, provided that any deal struck did not exceed any cap on wages imposed by statute or by the justices. However, to do so not only invited detriment or dismissal, for few employers would have wished to encourage workers to feel that they could ask for more money with impunity, it invited the accusation that the individual was attempting to negotiate on behalf of an unlawful combination of workers.

The French Revolution, however, made the potential consequences of the exploitation of the working classes plain to the British ruling classes, and the crisis across the channel in the late 18th and early 19th Centuries was followed by rioting in industrial cities, and the rise of the Chartist movement and the formation of trade unions.¹¹⁶ The first stirrings of political compromise were the consequence, and George White, a clerk of committees in the Commons, in a pamphlet issued with the Combination of Workmen Repeal Bill in 1824¹¹⁷, introduced to the House by Peter Moore, Member of Parliament for Coventry, described the problem the legislation sought to address:

‘The magistrates acting, as they believed, in unison with the views of the legislature, to check and keep down wages and combinations, have regarded in almost every instance every attempt on the part of the artisan to ameliorate his situation, or support his station in society, as a species of sedition and resistance of the government.’

¹¹⁵ Francis Place’s evidence to the Committee on Artisans and Machinery in 1824, quoted by Pritt and Freeman, 1958, *op cit.* p32.

¹¹⁶ See JV Orth 1991, *op cit*, Chapter Four: ‘Combination: 1799-1824.’

¹¹⁷ Hansard indicates that the pamphlet had been first issued in 1823, when the Bill was introduced, but the pamphlet I have seen was dated 1824 – very likely a revised version - when the Bill passed into law. The Bill has generally been credited as the work of Joseph Hume MP.

Yet the employers continued to deny workers freedom of association, and even in the second half of the 19th Century it was unexceptional for workers who sought to bargain collectively to be convicted of criminal conspiracy,¹¹⁸ and the 'Master and Servant' laws continued to be invoked against those who dared take industrial action.

Ewing reports that: 'In the years 1858-75 there was an average of 10,000 prosecutions per annum in England and Wales,'¹¹⁹ brought against individual workers for breach of contract. Very many of these cases will have been brought by employers against workers taking strike action without having given sufficient notice of what was recognised by the law only as a resignation. Workers who breached the contract of employment were liable to criminal sanctions, while employers who reneged on their side of the bargain faced only the theoretical prospect of civil action.¹²⁰

The immunity to legal liability afforded to members and directors by the Limited Liabilities Act 1855 and the Joint Stock Companies Act 1856,¹²¹ made it still more apparent that very many employers were not individuals at all, but were themselves acting in combination behind the 'corporate veil' as shareholders, well remunerated senior managers, and directors, and the injustice of penalising those workers who sought to bargain collectively must have been obvious to all but the most blinkered or biased.

Small wonder then that the 1850s saw the start of an adjustment in the attitude of the ruling classes towards trade unionism.

A subtle campaign 'of reasoned and well informed advocacy backed by unchallengeable personal respectability,' was conducted during the 1850s and 1860s, by leading trade unionists, and this was said to have led to general public acceptance of the need to permit workers the opportunity to engage in collective

¹¹⁸ See Pritt and Freeman, 1958, *op cit*, pp 38-43. The authors describe two cases relating to a very unremarkable strike in a tin plate works in Wolverhampton, resulting in convictions for conspiracy for the union officials and other activists and the conviction of a number of employees for conspiracy to intimidate: *Reg v Duffield and Others* [1851] (5 Cox's Criminal Cases, p. 404), and *Reg v Rowlands and Others* [1851] (5 Cox's Criminal Cases, p436).

¹¹⁹ K.D. Ewing, *Trade Unions, The Labour Party and the Law: A Study of the Trade Union Act 1913*, (Edinburgh, Edinburgh University Press, 1982), p4.

¹²⁰ See Bogg, Ewing and Moretta in A Bogg, J Collins M. Freedland J Herring (eds) 2019, *op cit*.

¹²¹ See Peter Muchlinski, 'Limited liability and multinational enterprises: a case for reform?' (2010) 34 *Cambridge Journal of Economics* 915, pp 916-917 for the Acts of 1855 and 1856.

bargaining.¹²² Parliament was petitioned, and trade unions lent their support to sympathetic prospective Members of Parliament.

Workers, allied with sympathetic Members of Parliament, were now pitched against reactionary opposition at Westminster, and in the press. Their most determined opponents, however, were to be found in the ranks of the judiciary. Answerable to only the Lord Chancellor, steeped in the traditions of the common law, and consequently almost to a man convinced that their role was to protect individual members of the ruling classes from the collective tyranny of trade unionism, the judiciary continued to do what it could to stop the working classes from taking advantage of their potential collective economic power.

The intended effect of the Molestation of Workmen Act 1859, an attempt by Parliament to permit peaceful picketing, was blunted by hostile judicial interpretation,¹²³ but the Master and Servant Act 1867, passed by a minority Tory government over which Benjamin Disraeli had considerable influence (he became prime minister for the first time in 1868) successfully obliged the judges to substitute fines for terms of imprisonment as penalties for workers convicted of breach of contract.¹²⁴

The 'breakthrough' was arguably driven by the Representation of the People Act 1867, which provided working men with the power to change the law. Male householders were given the Borough franchise.¹²⁵ The electorate was essentially doubled, from approximately one million to two million,¹²⁶ and the Representation of the People Act 1884, extending 'a uniform household franchise

¹²² See *A Giant's Strength*, (London, Inns of Court Conservative and Unionist Society, 1958), a Tory polemic arguing for restraint to be placed on freedom of association. Geoffrey Howe is usually, and mistakenly, credited as the chief author of the pamphlet (which was a powerful influence on the Industrial Relations Act 1971), but I have it on good authority that the main author was the future head of the short lived National Industrial Relations Court and Master of the Rolls, John Donaldson.

¹²³ See Lord Wedderburn, *The Worker and The Law*, (Harmondsworth, Penguin, 1986) pp518-19.

¹²⁴ See Ewing 1982, *op cit*. Chapter One 'The Emergence of the Labour Party' provides a good account of these often poorly documented years.

¹²⁵ The property qualification did not exclude those who were renting. 'Lodgers' who paid in excess of £10 a year were also enfranchised.

¹²⁶ See Robert Wilkinson, *The Representation of the People Act 1867*, (London, 1868) (Reprint: Oxford, Andecite Press, 2017).

at elections to all counties and boroughs throughout the United Kingdom,' added approximately two million more.¹²⁷

Economic power goes hand in glove with political power, and arguably the extension of the franchise meant that the working classes had to be permitted to bargain collectively. One could not be ceded without the other, and the restrictions on freedom of association fell away within a comparatively short time.¹²⁸

A Royal Commission had been appointed in 1867 to examine and report on trade union activities, and the recommendations of the Minority Report of the Royal Commission led to the Trade Union Act 1871,¹²⁹ passed by a Liberal Government headed by William Gladstone, which recognised trade unions as *individual* legal entities.¹³⁰ It seems that it had been thought that this would make it impossible to present the actions of members, officers or officials as criminal conspiracies, but further legislation was required to stay the hand of the judges, and the Conspiracy and Protection of Property Act 1875, passed by a Tory government led by Disraeli, explicitly ensured that it was no longer possible for a civil wrong to provide the basis of charge of criminal conspiracy. By Section 3:

'An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.'

¹³¹The 1867 Act had extinguished criminal liability for breach of contract,

¹²⁷ W. Cunningham Glen, *The Representation of the People Act, 1884*, (London, 1885) (Reprint: Victoria, Leopold Classic Library, 2015) p1 & pp 6-7. For an overview of franchise reform in the development of the trade unions see Ewing 982, *op cit*, pp7-11.

¹²⁷ Members were no longer held to be in restraint of trade by virtue of their membership, nor were all agreements entered into by a union void because the purposes of the union were held to be in restraint of trade. See Pritt & Freeman 1958, *op cit*, pp 47-50.

¹²⁸ Wedderburn however argued that in Britain 'the extension of the franchise in 1867 and 1884 long before the birth of a political wing to the labour movement' meant that 'the movement itself never espoused the ideological programme common among European movements where political organisation matched or ante-dated the industrial' ('Labour Law and Labour Relations in Britain' (1972) 10 *British Journal of Industrial Relations*, 272.

¹³⁰ Unions had been recognised as unincorporated associations.

¹³¹ The Criminal Law Amendment Act 1871 had come into force on the same day as the Trade Union Act, ostensibly to relax common law restrictions on strikes and picketing, but in *R v Bunn and Others* [1872] (12 Cox's Criminal Cases, p. 316), strikers were imprisoned for a 'criminal conspiracy to coerce the employers to carry on their business contrary to their will' (cited in Pritt & Freeman, 1958, *op cit*).

and the 1871 and 1875 Acts lifted the remaining threat of criminal liability for those engaging in peaceful industrial action.¹³²

Nevertheless, the legality of industrial action continued to be challenged, and employers and the judiciary continued to undermine the attempts of tradesmen to bargain collectively. The law of tort, and civil conspiracy, became the principal legal tools relied upon by employers and the judiciary to curb their power.

During the 1890s, certain senior judges started to make their antipathy to the collective power now wielded by their social inferiors very obvious indeed in a series of cases which appeared almost to invite further legislative intervention. Lord Halsbury, the Lord Chancellor, made very little effort to hide his distaste for the trade union movement, and the freedom to take industrial action workers had enjoyed in the years after the 1875 Act.

The House of Lords, in *Mogul Steamship Co. V McGregor Gow & Co* [1892]¹³³, had been thought to have set a protective precedent for the unions when it held that the injury inflicted on the plaintiff company by the defendant firms had been merely incidental to a lawful bid to extend and protect their own trading, rather than a tortious conspiracy to cause commercial injury. Although Halsbury had delivered the judgment in that case, he did not consider that the same could be said to hold true of trade unionists taking action to defend their interests.

In *Allen v Flood* [1895 -1898]¹³⁴, a case heard by the House of Lords in 1895, and, largely at Halsbury's insistence, once again in 1897, Halsbury employed tactics which were essentially an abuse of process in a failed attempt to maneuver the House into finding a trade union official liable in damages for tortious interference.¹³⁵ Despite the Lord Chancellor's best efforts the Lords, however, ruled that, like the Cartel in the *Mogul Steamship* case, Mr Allen's threat to call a strike if certain non-members were not dismissed was a justified attempt to

¹³² S4 did however reserve penal provisions for actions likely to disrupt the supply of gas or water. See also below on emergency powers.

¹³³ AC 25.

¹³⁴ AC 1.

¹³⁵ An excellent account of Halsbury's manoeuvrings can be found in pp 39-54 'The Belfast Butchers: *Quinn v Leathem* after a Hundred Years' By James McIlroy, Chapter Three of KD Ewing (ed), *The Right to Strike: from the Trade Disputes Act 1906 to a Trade Union Freedom Bill 2006*, (Liverpool, IER, 2006).

further the interests of his members. The case is a classic example of a union lawfully enforcing solidarity. The workers sought to enforce a 'closed shop' against the wishes of the employer and a minority of non unionists, a situation guaranteed to provoke the ire of disciples of the common law anxious to defend the interests of the employer.

Lord Halsbury returned to the fray as the century turned, and two very famous cases, *Quinn v Leatham*,¹³⁶ and *Taff Vale Railway Co v ASRS*,¹³⁷ were heard by the House of Lords in 1901.

In the first of these, another classic 'solidarity' case, this time involving the threat of secondary or sympathy action, members and officials of the Belfast Journeymen Butchers' and Assistants' Association, in seeking to persuade an employer, Mr Leatham, to dismiss those in his workforce who were not members of the union, had threatened an important customer with a strike unless he stopped trading with Leatham. The Lords, by a narrow majority, ruled that the actions of the Belfast butchers amounted to a civil 'conspiracy to injure', overturning the precedent set by the *Mogul Steamship* case, and confirmed in *Allen v Flood*. Halsbury was one of the four Law Lords who upheld the decision of the High Court, and of the Irish Court of Appeal, to award damages against the members and officials of the union.¹³⁸

In the *Taff Vale* case officials of the Associated Society of Railway Servants were found to have induced the rail company's employees to breach their contracts. On this occasion, Lord MacNaughten and Lord Halsbury carried all of their colleagues with them, and the Lords held that the union was vicariously liable for the actions of the officials, leaving the union's funds vulnerable to a very large claim for damages - £23,000.

Since the 1871 Act had been passed it had not been thought possible to recover damages from a union, an unincorporated association, and the rulings were a crushing blow. Unless Parliament was prepared to change the law unions would,

¹³⁶ AC 497.

¹³⁷ AC 426.

¹³⁸ On these events see McIlroy in KD Ewing (ed) 2005, op cit, pp33-39.

in most circumstances, be unable to take industrial action without risking financial disaster.¹³⁹ However, during the *Quinn v Leatham* and *Taff Vale* litigation the unions had established the Labour Representation Committee to represent the interests of their interests in Parliament. The LRC was the Labour Party in all but name. The numbers of trade union members affiliated to the LRC rose from 353,070 in 1901 to close to 1 million in 1904.¹⁴⁰ The pressure for change was building, and the Lords appeared almost to be inviting a political intervention, although the Tory dominated coalition Government headed by Arthur Balfour declined to legislate.

Subsequently presented with the opportunity to make a dignified retreat from what was becoming a very obviously untenable position, the Law Lords instead chose to press on with an attack on the trade unions that had little public or political support. In *South Wales Miners' Federation v Glamorgan Coal Co* [1905]¹⁴¹, they held the Miners' Federation liable for the damages sought by the mine owners. The arguments that had served to protect the cartel in the Mogul Steamship case were again rejected, and it was confirmed that "in the context of both conspiracy and inducing breach of contract it was to prove impossible for trade unionists to provide a lawful excuse or justification for their conduct: they stood naked and unprotected at the alter of the common law."¹⁴²

Those three decisions were widely condemned. There was an election at the end of that year, and the display of overt law making by unelected yet unashamedly politically motivated judges – the tyranny of the judiciary - provoked a hostile response. During the 1905 campaign '...very many Liberal candidates and even a few Tories, had given express pledges at the election to submit legislation to reverse the *Taff Vale* decision.'¹⁴³

The new Liberal government, elected in December 1905, passed the Trades Disputes Act 1906, removing civil liability both for conspiracy and inducing breach

¹³⁹ See Graeme Lockwood 'Taff Vale and the Trade Disputes Act 1906,' Chapter Three in KD Ewing (ed) *op cit*, 2005.

¹⁴⁰ KD Ewing, 1982, *op cit*, p15.

¹⁴¹ AC 39.

¹⁴² Collins, Ewing and McColgan, *Labour Law Text and Materials* (Oxford, Hart Publishing, 2005), p870.

¹⁴³ Pritt & Freeman, 1958, *op cit* p.62. Pritt had been an 18 year old Tory in 1905.

of contract for workers in the course of a trade dispute, and conferring near complete tortious immunity for trade unions. Unions could no longer be held to be vicariously liable for the torts of their members or officials.¹⁴⁴ The judges had been resolutely slapped down.¹⁴⁵

Section 1 of the Act provided that:

‘An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable.’

This paragraph, modeled on section 3 of the 1875 Act,¹⁴⁶ appeared to remove any potential liability for civil conspiracy in a trade dispute. The new Act specifically addressed the torts employed in recent cases and sought to inhibit future judicial creativity. Under section 3 of the 1906 Act, inducing “some other person to break a contract of employment,” or interfering ‘with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills,’ could not be causes for action if undertaken in contemplation or furtherance of a trade dispute.

The effectiveness of these provisions, of course, depended on the definition of a trade dispute, and the Act provided a satisfactorily wide definition. A trade dispute was said to be one “between employers and workmen or between workmen and workmen, which is connected with the employment or non-employment, or the terms of employment, or with the conditions of labour, of any person.”¹⁴⁷ Solidarity, sympathy or secondary action can therefore be said to have specifically been protected by the new Act – unsurprising given the circumstances of *Allen v Flood* and *Quinn v Leathem* – and was arguably seen by Parliament as the essence of trade unionism. In the absence of formal collective

¹⁴⁴ S4 Trade disputes Act 1906.

¹⁴⁵ On the Act generally see John Saville, ‘The Trades Disputes Act of 1906,’ Chapter Four in KD Ewing (ed) *op cit*, 2005.

¹⁴⁶ The two sections in the two Acts fed into each other. S1 amended the 1875 Act to provide the second paragraph of Section 3.

¹⁴⁷ Trade Disputes Act 1906 S 5(3).

bargaining systems enforced by legal rights and duties, organizing, or combining, requires recalcitrant colleagues to be persuaded to join the union, and employers to be persuaded to hire workers on the condition that they join the union. Solidarity was crucial to effective collective bargaining, and the power to call on trade unionists working for other employers to threaten or engage in industrial action in support was similarly essential.

However, as carefully drafted as these provisions of the 1906 Act were, they did not bring an end to legal action against workers taking industrial action. No positive right to strike had been conferred. Instead a circumscribed freedom to strike had been permitted by suspending certain legal rights that had previously been used to make industrial action impossible. If action fell outside of the limits within which this 'statutory immunity' applied then the position was much as it had been following the *Quinn v Leathem* and *Taff Valley* cases.¹⁴⁸

Injunctions, sought in the courts by employers to restrain members and officials,¹⁴⁹ now became the new legal weapons brought to bear against the trade unions. The unions themselves enjoyed almost complete immunity, and there was little point in an employer pursuing a claim against their own workforce.¹⁵⁰ An injunction can be obtained within hours, without any necessity for a subsequent claim for damages, and it will stop any industrial action in its tracks. To breach the terms of an injunction is to commit a criminal offence, and to this day most cases which feature a consideration whether the statutory immunities apply are applications for interim relief. The courts, in effect, pre-judge the outcome of a hypothetical claim for damages,¹⁵¹ although only very rarely in recent years have the economic torts themselves been considered.¹⁵² The laws against strikes laid down since 1979 are now the focus of these cases, and the parties, and the courts, almost invariably confine themselves to merely considering whether the

¹⁴⁸ Although S4 of the Act gave the unions – as opposed to their members and officials – almost complete legal immunity, so whether or not the immunities applied, the union, and the union's funds were safeguarded.

¹⁵⁰ The effect on industrial relations would have been catastrophic, recruitment made near impossible, and damages and costs would not, in practice, have been recoverable unless the union chose to indemnify those sued.

¹⁵¹ On injunctions generally see ACL Davies, *Employment Law* (Harlow, Pearson, 2015) pp490-492.

¹⁵² As stated by Professor Michael Ford QC at King's College London conference 'The Constitution of Social Democracy' 14 September 2018.

immunities apply or not - because employers rely on the procedural 'trips and hurdles' to lawful industrial action when they seek an injunction.¹⁵³

Criminal liability for industrial action was not, however, wholly extinguished by the legislation passed during 1867-1906, and for most of the period between 1906 and 1951 judicial antipathy to trade unionism can arguably be said to have been eclipsed by Parliamentary sanction of withdrawals of the freedom to take lawful industrial action, justified by national emergency,¹⁵⁴ and by the threat to the ruling classes posed by Bolshevism.

Much of the freedom to bargain seemingly secured in 1906 was withdrawn after just seven years when the Munitions of War Act 1915 imposed 'compulsory arbitration' to handle disputes in industries considered vital to the war effort. 'Munitions work' was given a very wide interpretation, and workers found themselves sent to prison for breach of contract or fined for offences like 'not working diligently during ordinary working hours,' and 'refusing to obey a lawful order,' after hearings at specially convened Munitions Tribunals.

Although such prosecutions were far from everyday occurrences, and strikes took place, even in munitions factories, the legislation and its occasional invocation arguably merely serving to discourage industrial action, it nevertheless stayed the hands of workers, giving employers the "freedom to indulge in all sorts of provocations on which at other times they would not venture."¹⁵⁵

The Munitions Acts were repealed in 1919.¹⁵⁶ As we saw in the previous chapter, the ILO was established in that year, and there were hopes that labour relations were entering a new era. However, the Emergency Powers Act followed in 1920, giving Parliament very wide powers when a 'state of emergency' had been declared to make regulations, breaches of which could be permitted to attract

¹⁵³ It is also the case that when an injunction is granted by the High Court, even if it is subsequently discharged by a higher court, the time lapse, during which industrial action is impossible, is such that the effectiveness of that action has been severely compromised.

¹⁵⁴ On this period see pp69-88 Pritt & Freeman, 1958, *op cit* p.62.

¹⁵⁵ On the situation in WWI, see chapter 1 of DN Pritt, *Law Class and Society, Book One; Employers Workers and Trade Unions*, 1970. See p65 for imprisonment for breach of contract, the license given employers, and p66 for the offences of not working diligently and not obeying orders. Pritt defended workers at these tribunals and at the Munitions Tribunal Appeal Tribunal.

¹⁵⁶ 'Acts' - the level of prohibition had been scaled down by the Munitions Act 1917.

prison sentences, to ensure that the supply of food, water, fuel, light or were not disrupted.¹⁵⁷

Although the application 1906 Act was unaffected,¹⁵⁸ and the Act explicitly forbade “compulsory military service or industrial conscription,” it sent the message to trade unionists that the military would ‘step into the breach’ to replace workers who took industrial action which interfered with “the essentials of life.”¹⁵⁹ Very likely the Act served to deter unions from testing the limits of the immunities, and arguably it can be seen as both a replacement for the Munitions Acts, and as a response to the recent Bolshevik Workers’ Revolution in Russia.

In the newly established Soviet Union the working classes had gone rather further than merely obliging their masters to permit them the freedom to bargain with on a collective basis. Such was the alarm of the Lloyd George’s Liberal Government that armed forces were dispatched to Russia where they fought the Bolsheviks in an unsuccessful counter revolutionary war during 1918 - 1920.¹⁶⁰

The primary inter war adjustment was, however, the Trade Disputes and Trades Unions Act 1927, passed by Parliament following the General Strike of 1926. Employers had been given a taste of the collective power wielded by workers, and the Act, introduced by Stanley Baldwin’s second Tory administration,¹⁶¹ prohibited industrial action taken by or against third parties in support of a primary trade or political dispute. Those who instigated such secondary or solidarity actions were liable to substantial fines, or to terms of imprisonment, an unequivocal withdrawal of much of the freedom conferred by the 1906 Act.¹⁶²

Although the Labour Party, assisted by the near universal suffrage ceded by the Representation of the People Act 1918,¹⁶³ had become a major political force, its support having surpassed that of the Liberals, there were only two Labour administrations in office between the wars, the brief minority Ramsay Macdonald

¹⁵⁷ See s.4 of the 1875 Act.

¹⁵⁸ “...no such regulation shall make it an offence for any person or persons to take part in a strike, or peacefully persuade any person or other person or persons to take part in a strike.” (s2. Emergency Powers Act).

¹⁵⁹ Section 1(1) Emergency Powers Act.

¹⁶⁰ See, for example, C Kinvig, *Churchill’s Crusade: The British Invasion of Russia 1918-1920*, (London, Hambledon Continuum, 2006).

¹⁶¹ Baldwin’s Tories were in office during 1922-24, and 1924-29.

¹⁶² Although the 1927 Act was declared at the time to have been ‘declaratory’ (see Bogg, Ewing, Moretta in A Bogg, J Collins M. Freedland J Herring (eds) 2019, *op cit*).

¹⁶³ Males over 21 and women over 30 were given the vote and there was no longer any property qualification.

administrations of 1924, and 1929. During 1929 the economy hit its lowest ebb – the Great Depression was at its worst - and the weakness of the Labour Government meant that even if it had wished to permit workers the opportunity to reprise the General Strike it could not have repealed the 1927 Act before it was replaced by a ‘National Government’ cross party coalition also under Macdonald. After 1935 this Coalition continued under Conservative leadership. In 1940 Churchill took over as premier, and the Labour leader Clement Attlee, as gifted an administrator as Churchill was an orator, became deputy prime minister.

The war saw the discrete approach in cases of civil conspiracy brought against working people following the *Mogul Steamships* case (p35 above) abandoned by the House of Lords in *Crofter Hand Woven Harris Tweed Co. Ltd v Veitch*,¹⁶⁴ the case in which Lord Wright famously stated that:

‘The right of workmen to strike is an essential element in the principle of collective bargaining...’

Like the lawful bid to extend and protect their own trading made by the cartel in *Mogul*, the ‘blacking’ by T&GWU dockers on the Isle of Lewis of imports of cheap yarn,¹⁶⁵ was held not to be a tortious conspiracy to cause commercial injury. The economic harm inflicted was incidental to the predominant aim of the trade unionists to oblige the firm to stick to minimum prices and safeguard the wages of members engaged in the manufacture of Harris Tweed.

Presciently Wright stated that rather than two groups with conflicting interests:

‘...employers and workmen have a common interest in the prosperity of their industry, though the interest of one side may be in profits and the other in wages... a wider and truer view is that there is a community of interest.’¹⁶⁶

This reflected the cross party and cross class consensus discussed in the previous chapter – the ‘tug of war’ had to stop.

¹⁶⁴[1942] AC 435. See Douglas Brodie’s chapter ‘The Scottish Case: Crofter Hand Woven Harris Tweed v Veitch’ in KD Ewing (ed), 2006, *op cit*.

¹⁶⁵On the instruction of union officials – Veitch was the Scottish Area Secretary of the T&GWU.

¹⁶⁶Wright’s words were cited in Wedderburn, 1972, *op cit*, p277.

The Post War Compromise

As we saw in chapter one, the key adjustment followed the catastrophic crisis that was World War Two. For the first time a socialist government had a working majority, and a fresh compromise was hammered out under the direction of Clement Attlee's cabinet. The Trade Disputes and Trades Unions Act 1927 was repealed, and the first of the Wages Councils Acts was passed, further strengthening sectoral bargaining.¹⁶⁷ With the adoption by Parliament of the Fair Wages Resolution, obliging firms contracting with public authorities to adhere to minimum terms and conditions of employment, and come to collective agreement with their employees,¹⁶⁸ a minimalist mechanism facilitating free voluntary collective bargaining might be said to have been put in place during 1946.¹⁶⁹

However, the wartime Order 1305, which had imposed compulsory arbitration in 1940 under the Emergency Regulations, remained in force, and while the statutory immunities were in place, they were largely eclipsed by the criminal liability imposed by '1305' on those who took industrial action that had not been sanctioned by the Ministry of Labour. Strikes were lawful only if the particular dispute had been reported to the Ministry, and the Ministry *had not*, after three weeks had elapsed, referred the dispute to arbitration.¹⁷⁰

Yet the Attlee government's greatest achievement in terms of labour law was arguably its key role in revitalising the ILO, drafting the ILO's new constitution and

¹⁶⁷ Wage Councils replaced the Trade Boards, massively expanding sectoral coverage: See Chapter Four 'Final Expansion 1940 to 1948,' in FJ Bayliss 1962, *op cit*.

¹⁶⁸ See Kahn-Freund 'Legal Framework', in *Industrial Relations in Great Britain, Its History, Law and Institutions* by A Flanders and HA Clegg (eds), (Oxford, Blackwell, 1954) 75-83 on Fair Wage clauses: 'One of the main features distinguishing the present Resolution from that of 1909 is that it openly proclaims the duty to observe collective agreements' (p77). On this duty see Chapter 17, 'Clause 4 and Trade Union Protection' in B. Bercusson, *Fair Wages Resolutions* (London, Mansell, 1978).

¹⁶⁹ While this could be said to be voluntarism, whether or not this amounted to collective *laissez faire* or not is debatable. See KD Ewing, 'The State and Industrial Relations: Collective Laissez Faire Revisited,' (1998) 5 *Historical Studies in Industrial Relations* 1.

¹⁷⁰ The Emergency Powers (Defence) Conditions of Employment and National Arbitration Order 1305. I have researched the often misunderstood Order 1305 extensively at the National Archives drawing my information from, among other National Archive files, LAB 43/157 & LAB 10/994, as well as from the cabinet records. However, for a definitive overview of the nature and effects of the Order see Nina Fishman 'A Vital Element in British Industrial Relations': A Reassessment of Order 1305, 1940-51, (1999) 1 *Historical Studies in Industrial Relations* 43.

the fundamental Conventions, No.87 on Freedom of Association and the Right to Organise, and No.98, the Right to Organise and Collective Bargaining Convention.

This is not the paradox it might appear. Continued retention of 1305 was supported by the TUC, and the order cannot therefore realistically be said to have restricted freedom of association. Arguably, after the war the order can best be seen not as a law against strikes, but the statutory basis of the compulsory arbitration mechanism. The Attlee administrations governed in collaboration with the trade unions, and 1305 was retained on the proviso that the TUC could at any time take a collective decision to require the government to rescind it. The matter was regularly put to vote at Congress.¹⁷¹ The Attlee Government was unquestionably the political wing of the trade union movement, and the Government and the TUC were in partnership to a degree which would arguably have been alien even to the Wilson and Callaghan Governments.¹⁷²

While individual unions very rarely risked taking action in breach of the order, unofficial action became increasingly common as 'austerity Britain' continued into the late 1940s and early 1950s. The cabinet brought only two prosecutions invoking the penal provisions of the order, in October 1950 and in April 1951.

¹⁷³These were ill judged responses to the increasing number of unofficial challenges to the 'wages freeze,' and reflected the impatience of the cabinet with the failure of the unions to control their members, as well as the baseless belief by some members of the cabinet that unofficial actions were being orchestrated

¹⁷¹ See, for example DN Pritt's account of the resolution to withdraw Order 1305 put to Congress in 1950 in his very critical book on *The Labour Government 1945-1951* (London, Lawrence and Wishart, 1963), p365-366. The resolution was defeated by 5,166,000 to 2,423,000, an example of how close the unions considered themselves to be to the government.

¹⁷² Indeed, the rash of unofficial strikes in the late 1940s and early 1950s were arguably largely due to the fact that the rank and file considered that their union leaders were too close to the government and were more inclined to further the interests of the government than their members. For example, while the dockers sought the terms of their Dockers' Charter, Jim Phillips, in *The Great Alliance: Economic Recovery and the Problems of Power*, (London, Pluto Press, 1994) tells us that: 'Among Labour's strongest supporters, the TGWU felt that industrial disruption threatened the the immense economic and social benefits which the government had brought to its members...Meanwhile beyond the docks, Attlee and his Ministers, supported by the TUC General Council were increasingly occupied by central problems of domestic – and European – economic recovery' (p27 and p49).

¹⁷³On the prosecutions see Nina Fishman 1999, *op cit*, pp57-71.

from behind the Iron Curtain.¹⁷⁴ The trials generated considerable publicity, arguably further eroding the support in the country which had delivered the narrow working majority the Government had to rely on since the February 1950 General election.

Order 1305 was rescinded in the summer of 1951, replaced by Industrial Disputes Order 1376, which imposed compulsory arbitration without the backing of penal provisions. Thereafter, until 1958 when the order was revoked, either party could refer the dispute to an Industrial Disputes Tribunal. The decision of the tribunal was then incorporated into the contract of employment, which meant that in practice only workers could enforce the decision. The unions, however, almost always abided by the ruling of the Tribunal,¹⁷⁵ 1376 also, of course, having the effect of obliging recalcitrant employers to bargain with their workers.¹⁷⁶

Workers enjoyed full freedom of association. Every worker had the benefit of collective bargaining to some degree, with workers able to take lawful industrial action in the pursuit of improved terms and conditions of employment, even if such action could be perceived of as having a broader, perhaps tangentially political aim, and whether or not the immediately affected employer could be said to be a party to the dispute. Individual contractual rights were negotiated through voluntary collective bargaining. In poorly organised sectors minimum terms and conditions negotiated by tri-partite Wages Councils had to be respected, and in industries with relatively good collective agreement coverage, establishment level bargaining was frequently augmented by voluntarily established Joint Industrial Councils,¹⁷⁷ the members of which were required to

¹⁷⁴ See Phillips 1994, *op cit*, Chapter Four, 'Communist Conspiracies? The Allegations and the Reality.' See also Chapter Four 'Surveillance Targets' in the forthcoming KD Ewing, J Mahoney and A Moretta *MI5, Cold War and the Rule of Law* (Oxford, OUP, 2019).

¹⁷⁵ See Pritt, 1970, *op cit*, p.96, and Pritt and Freeman, *op cit*, 1958, p105.

¹⁷⁶ See Pritt (*ibid*) and also A Flanders 'Collective Bargaining' in Flanders and Clegg 1954, *op cit*, p288. Flanders saw 1376 and Fair Wages Clauses supporting 'if only in a piecemeal fashion' the terms and conditions determined by JICs. See Bercusson 1978, *op cit*, pp242-249 on the succession of Orders and the replacement of 1376 with s8 of the Terms and Conditions of Employment Act 1959.

¹⁷⁷ The wholly voluntary JICs were recommended by the Whitley Committee in 1918 as vehicles of 'industrial self government' (see paras 6 & 77 of the Donovan Report and Wedderburn 1986, *op cit*, pp271-272). They can arguably be said to be very much creatures of periods of full employment and full freedom of association arguably intended by employers to prevent inter firm competition to attract recruits and the creation of 'wage spirals,' and,

respect similar sectoral minima. Employers who refused to bargain collectively with their staff either had to comply with Wage Council standards, or were obliged by market forces (or by Order 1305/1376 compulsory arbitration or Fair Wages clauses) to keep pace with Joint Industrial Council minima.¹⁷⁸

Paradoxically, the post war compromise can be said to have been secured by the attitudes of subsequent Tory administrations. The Tories won the October 1951 election. The Churchill, Eden, Macmillan and Douglas-Home Governments that followed the Attlee government respected its achievements and also respected the rule of law: Conventions 87 and 98 would not permit them to roll back full freedom of association, and denunciation was inconceivable, even if the domestic political situation, and the strength of the socialist vote, had allowed it - the United Kingdom could not be seen to renege on treaty obligations, even lawfully.

The Tories had been forced to acknowledge the value of trade unions to a liberal democracy. To have denied workers full freedom of association, or to have attempted to dismantle the welfare state at a time when the Soviet Union was making great strides in science and in living standards, would have made Communism, the indisputable *bête noir* of the ruling classes, still more attractive, as well as driving many of those who might otherwise have voted Conservative to support the Labour Party. It was arguably by compromising with socialism that the Tories were able to remain in power for the following 13 years, and the seal was set on the post war consensus when the Macmillan government in 1962 signed the European Social Charter further binding subsequent governments to protecting and promoting the right of workers to bargain collectively.¹⁷⁹

after 1945, mechanisms by which employers were able to ensure that they were not subject to compulsory Wages Council minima.

¹⁷⁸ An excellent overview of this period is given in A Campbell, N Fishman and J McIlroy 'The Post - War Compromise: Mapping Industrial Politics, 1945-64' in the book they edited, *The Post War Compromise: British Trade Unions and Industrial Politics 1945-64*. (Monmouth, Merlin Press, 1999). They argue that during 1945-51: 'Measured against the economic background, Labour's achievements were major and enduring' (p75).

¹⁷⁹ See Chapter Three, 'The Search for Conciliation 1945-1964' in P. Dorey, *The Conservative Party and the Trade Unions* (London, Routledge, 1995).

In 1945 there had been an estimated 7.9 million trade union members, 9.3 million in 1950, 9.8 million in 1960, 10.1 million in 1966, and 11.2 million in 1970.¹⁸⁰

The failed compromise

Despite the increasing numbers of union members, by the mid 1960s voluntarism was perceived to be faltering, and a fresh crisis loomed. Both the major political parties acknowledged that a new adjustment required.

Very high levels of unofficial industrial action were perceived of as fuelling wage inflation. The first statutory individual rights had been introduced to rein in the incidence of strike action;¹⁸¹ in 1963 the Contracts of Employment Act introduced the right to statement of the written particulars of employment, and to notice prior to dismissal, and the Redundancies Act 1965 introduced statutory payments to soften the blow of a termination.

Productivity and growth were considered to be poor in comparison with states like Germany, Japan and the USA. Whether this amounted to a financial crisis is debatable, although at the time that is how it was perceived by the politicians. In the introduction to the Tory industrial relations policy document, *Fair Deal at Work*, published in April 1968 Edward Heath cited ‘the difficulty of reconciling the concepts of full employment and free collective bargaining, the menace of rising prices and the inflationary scramble that ensues,’ as the barriers to what he described as ‘economic breakthrough.’¹⁸² *Fair Deal at Work* was effectively a rejection of voluntarism, and although it was by no means a rejection of the post war compromise - the Tories remained committed to the promotion of collective bargaining - the report claimed that it advocated ‘not a “trade union policy,” but a new approach to industrial relations as a whole.’¹⁸³

¹⁸⁰ Estimates drawn variously from Price and Gain, ‘Union Growth Revisited: 1948-1974 in Perspective’ *British Journal of Industrial Relations*, vol XIV (3) November 1976,, the Report of the Royal Commission on Trade Unions and Employers’ Associations 1965-1968 (1968) Cmnd 3623 (‘Donovan’) and the National Archive website.

¹⁸¹ See, for example, ATaylor, ‘The Conservative Party and the Trade Unions,’ p152 in McIlroy, Fishman, and Campbell (eds) 1999, *op cit*.

¹⁸² *Fair Deal at Work, The Conservative approach to modern industrial relations*, Conservative Political Centre, April 1968, p5.

¹⁸³ *Ibid*, p9.

At the same time the courts were once again on the offensive. The judiciary had abandoned the largely non interventionist stance evinced in the landmark Court of Appeal case *Thomson v Deakin* [1952],¹⁸⁴ and labour injunctions were being increasingly granted by the courts.¹⁸⁵ In *Rookes v Barnard* [1964], *Stratford V Lindley* [1965], and *Torquay Hotels v Cousins* [1969],¹⁸⁶ the higher courts had conferred fresh tortious liability, 'side stepping' the statutory immunities, permitting the judges to grant the employers injunctions to halt official industrial action which would previously have been seen as lawful. Although the Wilson Government had passed the Trade Disputes Act 1965 to extend the immunities to cover the new tort of threatening to take industrial action identified in *Rookes* and *Stratford*, Denning in *Torquay Hotels* had held that there had been tortious 'interference in a commercial contract', and had upheld an injunction to halt action which would not have breached that contract. Further legislation was required.¹⁸⁷

During the same period a Royal Commission on Trade Unions and Employers' Associations, better known as the Donovan Committee, had been gathering evidence on the problems of post war industrial relations and on possible solutions. The Donovan Report was published in June 1968,¹⁸⁸ two months after *Fair Deal at Work*. The Labour government published its response to Donovan, the white paper *In Place of Strife*, in January 1969.¹⁸⁹ The three documents had much in common.

However, it was for the Labour Government to adjust the post war compromise, and in its 1969 Industrial Relations Bill it attempted to introduce the more structured, interventionist industrial relations system proposed in the White Paper, with compulsory recognition, registration and strike procedures overseen

¹⁸⁴ See chapter three

¹⁸⁵ Wedderburn saw the judiciary as having 'applied the common law in a spirit of 'non intervention' from the early 1920s. In the 1952 Thomson case 'the Court of Appeal went to great lengths so to manipulate the legal technicalities as to avoid intervention,' but *Rookes v Barnard* was the 'The first major explosion marking a sharp departure from the old policies...In the 1960s the 'labour injunction' came back into its own in England and Scotland' ('Labour Law and Labour Relations in Britain', *British Journal of Industrial Relations*, 1972, p279 -80).

¹⁸⁶ AC 1129 [HL]; AC 269 [HL]; 2 Ch 106(CA).

¹⁸⁷ On these cases see Wedderburn 1986, op cit, pp564-567 and 590-595.

¹⁸⁸ 'Donovan' 1968, op cit. Chairman: The Rt. Hon. Lord Donovan.

¹⁸⁹ Cmnd. 3888.

by a tri-partite Industrial Board, advised by a Commission on Industrial Relations. The Commission would also advise workers, trade unions and employers and oversee conciliation talks. Unofficial strike leaders were to be liable in some circumstances to fines, and 'cooling off' periods could be imposed withdrawing the immunities for up to 28 days when strikes likely to be injurious to the national interest had been called in breach of procedure or without giving a reasonable opportunity for conciliation. In some circumstances unions would be required to ballot members for any subsequent action to be lawful.

The proposals were, however, rejected by the unions; the political and industrial wings of the labour movement had clashed, and the politicians had backed down. The Bill was abandoned in June 1969.

A year later Labour were defeated at the polls, and the new Tory Government took up the cudgel of industrial relations reform. Under the premiership of Edward Heath the Tories implemented much of what had been aired in *Fair Deal at Work* as the Industrial Relations Act 1971.

Although the received wisdom is that the 1971 Act was a legislative disaster,¹⁹⁰ much of it was compatible with the Donovan recommendations, and with Labour's abortive Industrial Relations Bill. There was arguably a lot in the Act to commend.

Voluntarism was supplanted by collective legal rights, by rights that could be relied upon by employers and trade unions, and by a right of the individual worker not to be unfairly dismissed, which included a right not to be dismissed on grounds of membership or non membership of a trade union, the first legal protection for members. This, of course, made strict closed shops – subject to certain very restricted exceptions - unworkable, although agency shop agreements delivering very high levels of membership were expressly permitted by the Act.

Collective agreements were presumed to be enforceable, and the legal status of unions changed to permit them to sue and be sued in both tort and contract. A

¹⁹⁰ See, for example, A. Taylor p165, and A Thorpe 'The Labour and the Trade Unions', p141, in in McIlroy, Fishman, and Campbell (eds) 1999, *op cit*.

specialist labour court, the National Industrial Relations Court was established to handle labour injunctions and complaints brought by employers and trade unions about the use of 'Unfair Industrial Practices,' where the disputes were considered to be of national significance, with provincial Industrial Courts handling the more parochial or easily determined cases. The NIRC also heard appeals from the Industrial Courts and from the Industrial Tribunals which handled individual claims for redundancy payments and claims brought to enforce the newly created right not to be unfairly dismissed.¹⁹¹

The Tories had contemplated reintroducing Order 1376 (which with the change in legal status would have meant unions were as bound as the employers had been by arbitration rulings during 1951- 1958),¹⁹² but had instead given the Minister of Employment the power to establish a Board of Inquiry in disputes of national importance. Acting on the findings of the Board the Minister then had the option of referring the dispute to the NIRC for arbitration. While the ruling would not be compulsory, if it was not accepted, then, following applications by the Minister, and an Order from the court, the union could be required to respect a 60 day 'cooling off' period when industrial action deemed to have the potential to endanger the national interest was stayed, to allow a ballot of the members.

Wedderburn saw these measures as having been included in defiance of Donovan in order to pander to 'middle class opinion,'¹⁹³ and he was more dismissive still of what he regarded as the clumsy application of 'doctrines of *individual* rights, often without regard to the shop floor problems of collective bargaining...found throughout the statute.'

Agency shops could be overturned following the demand of one employee for a ballot,¹⁹⁴ but the very fact of the agency or union shop offended him - the 'agency shop is not a compromise solution; it is a victory for the individual over the majority since it takes for granted as paramount the right to *disassociate*.'¹⁹⁵

¹⁹¹ See RW Rideout's contemporaneous overview, 'The Industrial Relations Act 1971,' (1971) 34 *The Modern Law Review* 655.

¹⁹² See pp37-38 of *Fair Deal at Work, op cit*, 1968.

¹⁹³ Wedderburn, 1972, *op cit*, p275.

¹⁹⁴ *Ibid*, p.282, emphasis supplied.

¹⁹⁵ *Ibid*, p.283, emphasis supplied.

Section 65 conferred on the individual the right to challenge a refusal of trade union membership, and any allegedly 'unfair or unreasonable' disciplinary action, as 'unfair industrial practices.' Section 5 gave the individual worker right not to be obliged to join a union. Wedderburn saw s.5 as a manifestation of 'extreme individualism' aimed at limiting 'the countervailing power of organised workpeople,'¹⁹⁶ and compared the protection for non-unionists, and the prohibition of secondary action with the position in US 'right to work states.'¹⁹⁷

A recognition procedure, overseen by the Commission on Industrial Relations Commission (established by the Wilson Government in 1969), permitted applications for recognition to be made by 'groups of employees' to the Ministry, which could then make an application to the Industrial Court. If the application was referred to the Commission by the court, and the Commission was satisfied that "recognition as sole bargaining agent for that bargaining unit would be in accordance with the general wishes of the employees," then the CIR would recommend that the Industrial Court make an order defining the bargaining unit and "specifying the employer or employers and the trade union or joint negotiating panel," as well as the matters to be the subject of collective negotiation, and the duration of the order. A ballot to determine majority support could be requested by the court or the Commission should either the employer or the grouping of workers make an application for such a ballot following a recommendation.¹⁹⁸

Strongly influenced by the US approach, particularly in relation to 'unfair industrial practices,' but also tempered by the collectivist German and Scandinavian mechanisms, the new regime brought the UK closer to more formal, structured, north European models.¹⁹⁹ Of course, the UK joined the EEC on 1st January 1973.

In political terms the Act was a massive miscalculation. The Tories had arguably restricted freedom of association far more than had been necessary to impose its new bargaining structure, and crucially, while it had conceded some points as the Bill made its way through Parliament, principally in response to the

¹⁹⁶ Ibid, p288.

¹⁹⁷ Ibid, p.289.

¹⁹⁸ This is very simplified interpretation of sections 44-50 of the 1971 Act.

¹⁹⁹ See *Fair Deal at Work* 1968, *op cit*, 'Law in other countries,' and 'Benefits of comprehensive legislation,' pp16-17.

representations of employers, it had resolutely refused to compromise with the labour movement.²⁰⁰

The Act came into force in two stages, and after February 1972 there was no longer near 'blanket' immunity in tort for trade unions, and no immunity for secondary action, or for unofficial strike action. The 1906 Act had been repealed. Only unions which had their financial and democratic probity investigated and approved by the Chief Registrar could be registered as a union and enjoy immunity within the now narrower bounds of what could be defined as a trade dispute.

There had been widespread protests against the Bill, and after the Act had been passed there were protest strikes, and a campaign of non-co-operation instigated at the TUC by the Associated Union of Engineering Workers served to undermine the new regime. Faced with open defiance the judiciary, and the government, backed down.

The dramatic events of 1972-3 are detailed in Michael Moran's 1977 book on the 1971 Act *The Politics of Industrial Relations*. Moran argued that if only the Government had consulted with the unions over the Act, had engaged at least to some extent in the by then customary 'negotiation and compromise' then

'the final Act would still have been denounced by the TUC, but there is good reason to suppose that after the initial protests it would have become an accepted part of the industrial relations scene.'²⁰¹

I would argue that the crucial matter was the withdrawal of immunity for secondary or sympathy action. Solidarity is the very essence of trade unionism; secondary action is crucial to trade union recognition, and to the promotion of collective bargaining, and statutory recognition procedures (although the untested 1971 procedures were arguably vastly superior to New Labour's 1999 procedures) are not an effective substitute for the threat of sympathy action. Had the Tories made a show of consulting with the unions, and subsequently amended the Bill to permit secondary action, then very likely there would have

²⁰⁰ See below, but see also P Dorey 1995, *op cit*, pp100-102 who indicates that early in 1972 Heath 'whilst ruling out any possibility of repealing the Act' claimed to be open to discussing it with unions and employers.

²⁰¹ (London, Macmillan,1977), p89. Moran devoted chapter five to 'The Politics of Consultation.' See also Taylor, in McIlroy, Fishman, and Campbell (eds) 1999, *op cit*, p156-157 on the lack of consultation.

been no 1974 election. There would have been an end to voluntarism. Industrial relations in the UK would have entered a new era, a fresh compromise having been reached. In retrospect the Heath government had arguably largely proffered an acceptable compromise between the collective and the individual interest.

Moran was puzzled by the Government's uncompromising attitude, and by its insistence on sticking so closely to a two and a half year old policy document despite opposition from both the CBI and the TUC – 'a totally un-Tory aberration,' wholly at odds with its post war pragmatism.²⁰² However, he did detect the influence of what he called 'market liberalism' on the party, and indeed, this can arguably be seen as the first tilt at the trade unions by the neoliberals in the Tory party.

Two of the principal architects of both *Fair Deal at Work* and the Bill were Geoffrey Howe, and Keith Joseph. A third, Robert Carr, took over as Tory employment spokesman from Joseph in 1967, and was Secretary of State for Employment during 1970-1972. Carr was very far from a 'One Nation' Tory. In 1972 he was appointed Home Secretary, and he oversaw the infamous prosecution of the Shrewsbury pickets, when, in the last case in which workers engaged in a trade dispute were convicted of criminal conspiracy, 23 building workers were convicted of affray, unlawful assembly and conspiracy to intimidate. Taking advantage of a drafting mistake in section seven of the Conspiracy and Protection of Property Act 1875, the judge sentenced Eric 'Ricky' Tomlinson to two years imprisonment, and Des Warren to three years, merely for visiting various building sites in the company of the police to peacefully persuade workers to withdraw their labour.²⁰³

It fell to the Labour Party to respond to the debacle of 1972 – 1973, and after the Tories had narrowly lost the February 1974 election, and had been unable to form a Government, voluntarism was restored by the minority Labour administration's Trade Union and Labour Relations Act of 1974.

²⁰² Moran 1977, *op cit*, p89.

²⁰³ See Ralph, 1977, *op cit*, pp 13-17. The Law Commission's comments on the drafting error are reported on p16. The police travelled with the pickets on the same bus.

The interventionist policies proposed in *In Place of Strife* had been abandoned, and replaced with the so called 'Social Contract,' essentially the agreement that the two sides of labour movement had arrived at in June 1969. The Government, in return for the 'solemn and binding' pledge made by the unions to tackle unofficial industrial action and for support for the Government's prices and incomes policy, forbear from legislative intrusions into industrial relations other than to expand and consolidate trade union power.²⁰⁴

After the Government had secured a narrow working majority in the October 1974 election, it passed the Employment Protection Act 1975, which introduced a raft of individual rights, a floor on which the unions could build, a handful of individual rights intended to promote and facilitate collective bargaining,²⁰⁵ and a number of collective rights intended to do the same, notably by requiring employers to provide information on their policies and the aims of those policies, to make negotiation less blindly adversarial.

The consultation requirements of the Collective Redundancies Directive 1975,²⁰⁶ and fresh recognition procedures augmented the individual provisions of the Act, and the following year the Trade Union and Labour Relations Act 1976 the swing back towards collectivism continued when 'closed shop' provisions were tightened to permit the imposition of UMAs which did not permit political conscientious objectors to 'opt out.'²⁰⁷ The right for workers not to be dismissed on grounds of trade union membership was not 'balanced' by a right not to be dismissed for non membership, and this, incidentally, resulted in the amendment by British Rail of its UMA, the dismissals of the closed shop martyrs, Young, James and Webster,²⁰⁸ and the beginning of the case which helped usher in the new age of individualism which was to dawn just three years later.

²⁰⁴ On the Social Contract, see A. Thorpe, 1999, *op cit*, pp142-145.

²⁰⁵ See Wedderburn's reference to a 'floor of rights,' and to 'building a collective 'right to associate' out of bricks of the bricks of certain 'individual' employment rights, 'on p169 of 'The Employment Protection Act 1975. Collective Aspects' (1976) 39 *The Modern Law Review* 169.

²⁰⁶ Directive 75/129/EEC

²⁰⁷ On which see chapter four 'The Trade Union and Labour Relations Acts 1974 and 1976,' in C Hanson, S Jackson and D Miller, *The Closed Shop: A Comparative Study in Public Policy and Trade Union Security in Britain, the USA and West Germany*, (Aldershot, Gower Publishing, 1982).

²⁰⁸ See chapters one and three.

The Labour government was also instrumental in improving equality protections, albeit by making the existing approach to the exercise of the new rights more individualistic. The Race Relations Act 1968 had prohibited racial discrimination in the workplace, but cases were handled by not by industrial tribunals,²⁰⁹ but heard 'where appropriate, by suitable industrial machinery approved by the Secretary of State for Employment,'²¹⁰ usually in the workplace. Conciliation and recommendation, rather than compensation, were the aims of these quasi judicial interventions, which depended to a considerable extent on the participation of trade unions. While there is a dearth of information on these workplace outcomes, it is notable that cases that had not been handled with 'collective input,' having been referred back to the Race Relations Board by the Secretary of State due to an absence of 'suitable voluntary machinery,' rarely resulted in a finding of unlawful discrimination.²¹¹ It is notable too that many of the problems of the post 1968 regime were said by Anthony Lester and Geoffery Bindman (writing in 1972), to be 'inherent in a system of enforcement which depends so heavily upon the making of individual complaints.'²¹²

By the mid 1970s, the post 1968 procedures had become 'commonly regarded as wholly inadequate' and inappropriate for use in tackling sex discrimination:²¹³ 'In view of the inadequacy of the enforcement procedures under the [1968] Race Relations Act it is neither surprising nor inappropriate that the Sex Discrimination Act should adopt a radically different approach to enforcement.'²¹⁴

A White Paper on racial discrimination was published in September 1975,²¹⁵ presenting evidence that 'despite the Race Relations Acts, substantial discrimination continues to occur at work.' The government proposed that cases

²⁰⁹ In 1968 tribunals heard only redundancy cases. After 1971 claims made by workers following dismissals made on allegedly discriminatory grounds were, of course, heard at tribunal as unfair dismissal cases. On 'suitable voluntary machinery,' see A Lester and G Bindman, *Race and Law*, (London, Longman, 1972), p295.

²¹⁰ White Paper *Racial Discrimination*, 1975, Cmnd. 6234, para 29.

²¹¹ 'Opinions of unlawful discrimination were formed in nearly 9% of employment cases [in 1970-71 when the RRB dealt with 580 cases referred back to them]. In the previous years the figure was 6.4%' (Lester and Bindman 1972, *op cit*, p302).

²¹² *Ibid*, p 304.

²¹³ WB Creighton 'Enforcing the Sex Discrimination Act,' (1976) 5 ILJ 42, at p42. On the inadequacies of the RRA 1968 in relation to employment see Lester and Bindman 1972, *op cit*, pp 302-6, and paras 28-47 ('Existing Legislation') of *Racial Discrimination 1975*, *op cit*.

²¹⁴ Creighton 1976, *op cit*.

²¹⁵ *Racial Discrimination 1975*, *op cit*, para 29.

of discrimination on the grounds of race, nationality and colour, be brought by the individual and heard at tribunal,²¹⁶ and subsequently industrial tribunals became the forum both for complaints relating to racial and sexual discrimination in the workplace.

After the new RRA had been passed it was noted that it had been ‘framed where possible in the same manner’ as the SDA,²¹⁷ with new provisions to deal with the particular difficulties of proof, so that:²¹⁸

‘The onus will be on the individual claimant to establish the prime facts of discrimination and to pursue a complaint of discrimination to an industrial tribunal.’²¹⁹

With it by now necessary to implement the Equal Pay Directive of 1975, and with the Equal Treatment Directive of 1976 then in the process of being finalised, it was argued that ‘it is insufficient for the law to deal with only overt discrimination. It should also prohibit practices which are fair in a formal sense but discriminatory in their operation and effect.’²²⁰ Thus the concept of indirect discrimination,²²¹ along with the power for tribunals to award compensation for injury to feelings, were implemented into both the Sex Discrimination Act 1975 and the Race Relations Act 1976.

The Abandonment of the Post War Compromise

When the Tories returned to office in 1979, this time led by Margaret Thatcher,²²² with Howe and Joseph arguably her closest and most influential allies in cabinet, they adopted a ‘step by step,’ war of attrition on freedom of association. As was

²¹⁶ Ibid, paras 81-93, ‘The Enforcement of the Legislation.’

²¹⁷ David Newall, ‘Recent Legislation; Discrimination; Race Relations Act 1976,’ (1977) 6 *ILJ* 101 See also *Racial Discrimination* 1975, *op cit*, para 82.

²¹⁸ *Ibid*, para 89. Hepple had raised the matter in his 1968 book, *Race and the Law in Britain*. The post SDA and RRA 1976 position was discussed by L. Lustgarten in ‘Problems of Proof in Employment Discrimination, (1977) 6 *ILJ* 212.

²¹⁹ Newall, 1977, *op cit*.

²²⁰ *Racial Discrimination*, 1975, *op cit*, para 35. Newall 1977, *op cit*, had said that one of ‘mounting criticisms’ of the 1968 Act had been that while it had ‘curbed positive discrimination’ it had not had an effect on ‘negative discrimination.’

²²¹ *Ibid*, para 89. In accord with this initiative the intention of the respondent became far less relevant as the case law and legislation on discrimination evolved.

²²² Thatcher had replaced Heath as leader in 1975.

the case with the Heath government there was no consultation with the trade unions, but Thatcher's New Tories were more cautious – and far more radical.²²³

The theories of FA Hayek's Mont Pelerin Society, 'neoliberal' economists who regarded themselves as the heirs of the classical liberal economists of the 18th and 19th Centuries, had started to take root in the UK with the founding in 1955 of the Institute for Economic Affairs (IEA). Hayek and his colleagues, like Dicey, championed the cause of the individual over the collective. Contrary to the Keynesian theories which delivered so much for Europe in the immediate post war years, they believed that an absence of state economic intervention, state ownership, and undistorted free markets, unaffected by the influence of trade unions - which they saw only as groupings of individual 'economic actors' privileged by immunities not extended to others - would deliver prosperity.²²⁴

As the post war compromise appeared to falter in the late 1960s and early 1970s various right wing think tanks and pressure groups took the opportunity to lobby and convert political leaders receptive to neoliberal ideas,²²⁵ and a number of Tory MPs, informally known as the 'Selsdon Group,' took an interest.²²⁶ A pivotal event was the establishment in 1974 of The Centre for Policy Studies by Keith Joseph, and Alfred Sherman in the wake of the February 1974 election. The CPS was the result of Joseph's conversion to Hayekian theory when he had worked with the Institute of Economic Affairs in the early 1970s – one of the names considered for the new 'think tank' was the 'Hayek Foundation.'²²⁷ The CPS cost around £150,000 a year to run (the equivalent of £1.5 million today), money provided by 'private donors.'²²⁸ Joseph appointed Margaret Thatcher vice chair of

²²³ It must not be forgotten that the first Thatcher administration was, until the 1982 Falklands War, unpopular within the party and with the electorate. The Thatcherites had to tread carefully. James Prior's 'old school' Tories were ready to move in to replace Thatcher and her inner circle should things go wrong (See Alan Clark, *The Tories* [London, W&N, 1998 paperback edition 1999] p 472- 476).

²²⁴ See MB Steger and RK Roy, *Neoliberalism: A Very Short Introduction* (Oxford, OUP, 2010), pp 1-21.

²²⁵ See David Miller, 'How Neoliberalism Got Where It Is: Elite Planning, Corporate Lobbying and the Release of the Free Market' in K Birch and V Mykhnenko (eds), *The Rise and Fall of Neoliberalism: The Collapse of an Economic Order?* (London, Zed Books, 2013). Miller lists the Economic League; Aims of Industry; the Institute for the Study of Conflict; the Freedom Association, the Adam Smith Institute and the Social Affairs Unit as among the organisations responsible for promoting neoliberal policies in the UK during the 1960s and 1970s.

²²⁶ See Dorey 1995, *op cit*, p103.

²²⁷ Margaret Thatcher Foundation, 'Thatcher, Hayek and Friedman', www.margaretthatcherfoundation.org/archive/Hayek.asp

²²⁸ See Brendan Montague, 'How the Neoliberal Dream became the Reality of Thatcherism' www.desmog.co.uk, 2014. Montague suggests that the big tobacco companies made substantial contributions.

the CPS, and it was in that role that she ‘renewed’ her reading of Hayek,²²⁹ was introduced to the leading lights of the IEA, and was ‘converted’ to monetarism.²³⁰ However, the anonymous author of the well informed, if uncritical, *Thatcher, Hayek and Friedman* to be found in the Margaret Thatcher Foundation archive holds that she ‘was not in plain fact a Hayekian, and certainly never a slavish follower of any thinker.’²³¹ But, as Stuart Hall has put it, ‘[n]eoliberalism is not one thing. It evolves and diversifies.’²³² The new cult was Thatcherism, and the question she asked of those around her was whether or not they were ‘one of us’ – whether or not they were ‘a believer.’²³³

In the UK I would argue that Thatcherism initially had the features both of a theoretical project, of the imposition an ideology, as well as those of a scheme to restore the fortunes of the ruling classes. Keith Joseph was, for example, unquestionably an ideologue, while few would dispute that it is unlikely that many of the very wealthy private donors who supported (and continue to support) the CPS will have been motivated by ideological considerations.

David Harvey in *A Brief History of Neoliberalism*,²³⁴ cites the data based analysis of Gérard Duménil and Dominique Lévy and their conclusion that “neoliberalism was from the very beginning a project to achieve the restoration of class power.”²³⁵ However, of the British experience Harvey writes that ‘the whole programme, particularly in her [Thatcher’s] first administration was far more ideologically driven (thanks to Keith Joseph) than was ever the case in the US.’²³⁶

²²⁹ Hugo Young, in *One of Us: A Biography of Margaret Thatcher*, (London, Macmillan,1989), noted that Sherman was of the opinion that Thatcher had not read any Hayek before 1974 (p22 Pan edition, 1990).

²³⁰ See Margaret Thatcher Foundation, ‘Thatcher, Hayek and Friedman’, www.margaretthatcherfoundation.org/archive/Hayek.asp

²³¹ Ibid

²³² p16, ‘The Neoliberal Revolution’ in Sally Davison and Katherine Harris (Eds) *The Neo-Liberal Crisis*, (London, Lawrence and Wishart, 2015). Hall argued that ‘neoliberalism’s principal target in the UK has been the reformist social democratic welfare state.’ However the unions had to be dealt with first.

²³³ Hence the title of Hugo Young’s biography.

²³⁴ (Oxford, OUP,2005).

²³⁵ Harvey 2005, *op cit*, p16. Duménil and Lévy, *Capital Resurgent: Roots of the Neoliberal Revolution* [trans. D Jeffers] (Cambridge Mass, Harvard University Press 2004). To back the argument that neoliberalism can best be characterised as the restoration of the power and money lost by the ruling classes Harvey also cites: ‘The Economics of US Imperialism at the Turn of the 21st Century,’(2004)11 *Review of International Political Economy* 657; ‘Neoliberal Dynamics, Towards a New Phase?’ in K van der Pijl, L Assassi and D Wigans (eds), *Global regulation: Managing Crises after the Imperial Turn* (New York, Palgrave Macmillan, 2004) 41-63; and ‘Neoliberal Income Trends: Wealth, Class and Ownership in the USA’ (2004) 30 *New Left Review* 105.

²³⁶ Harvey 2005, *op cit*, p62

German economist Wolfgang Streeck argues that neoliberalism was one of the means by which the crisis of capitalism of the late '60s and 1970s, as economic growth slowed, was 'kicked down the road,' with the capital accumulation model of the post war era artificially and temporarily revived by privatisation and deregulation.²³⁷ However, Streeck also endorses Tali Kristal's view of neoliberalism as 'an attempt to restore the capitalist class's share of income to its pre World War Two levels,'²³⁸ through, among other means, the 'erosion of rights to job security, the division of labour markets into core and periphery areas with different degrees of protection, the authorisation of low pay employment, the acceptance of high structural unemployment, the privatisation of public services and a cutback of public employment, and if possible the elimination of trade unions from the wage formation process.'²³⁹

Early proposals for Thatcher's industrial relations policy, and neoliberal thought on the role of the unions and on collective bargaining, were revealed in Norman Strauss and John Hoskyns' 'Stepping Stones' briefing presented to the Tory leader in November 1977.²⁴⁰ Strauss was a marketing expert who had worked at Unilever, and Hoskyns was a multi-millionaire described by Hugo Young as 'an archetypal Thatcherite,' whose own ideas 'gave great prominence to an assault on trade union power.' Apparently Hoskyns had volunteered his services to Joseph to 'gather the multiple strands of political thinking and weld them together into a coherent plan of action.' Thatcher was said to have been 'tremendously excited by what she read...it put into words many of the subterranean impulses of hard-right Conservatism...'²⁴¹ It was arguably no less than the blueprint for British neoliberalism imposed during 1979-1997.

The paper makes it apparent that Thatcher's inner circle were planning to expedite the shift in the UK economy from manufacturing to the provision of services,²⁴² and were considering the implementation of a raft of complementary

²³⁷ Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism*, London & New York, 2014.

²³⁸ T Kristal, 'Good Times, Bad Times: Postwar Labor's Share' (2010) 75 *American Sociological Review* 729. Streeck cites Kristal in his explanation of a chart showing the 'Evolution of income inequality: Gini coefficients, seven countries,' between 1985 and 2005. The Gini coefficient indicates the degree to which income distribution is unequal, and the UK and USA are seen to lead the field, followed by Italy, France, Japan, and Germany, with Sweden having the least inequality (Streeck [ibid]p30, note 55 and figure 1.3).

²³⁹ Streeck, *ibid*, p29

²⁴⁰ Margaret Thatcher Foundation Archive, THCR 2/6/1/248.

²⁴¹ Young, 1989, *op cit*, p113-115

²⁴² A Hayekian ambition, knowledge of which, and support for, like much else in the document (including the perception of free collective bargaining as a *bad thing*), the authors assume. The UK economy had been shifting

‘standard’ neoliberal policies, including a privatisation programme, substantial cuts in government spending, income and corporation tax, and increased indirect taxation. The authors’ primary concern, however, was the perceived need to bring about ‘a radical change in the union movement’s political and economic role.’²⁴³ It was not merely that it was understood that the trade unions would oppose the imposition of these policies. These ‘New Tories’ not only did not share the views of their post war Conservative forebears that collective bargaining was an essential element in a liberal democracy, the paper makes it very clear that Thatcher’s inner circle had long believed that ‘collective bargaining is totally destructive.’²⁴⁴

British trade unionism was antithetical to Thatcherite neoliberalism,²⁴⁵ and the economic obstacles presented by collectivised labour were overlaid by the political obstacles presented by the close relationship of the Labour Party and the trade unions. The Tories had, of course, first to persuade ‘floating voters’, and voters who habitually voted Labour, particularly trade union members, to support Tory policies,²⁴⁶ in order to get them into office with an overall majority. Thereafter they had to dissuade trade unionists from taking significant industrial action against their neoliberal policies and Strauss and Hoskyns recognised that ‘neoliberalism would have to fundamentally restructure the collective subjectivity of the trade union movement.’²⁴⁷

The ‘crushing’ of the unions was not, however, considered.²⁴⁸ Instead they argued that ‘somehow the trades union role must be changed to one of positive partnership,’²⁴⁹ through a ‘union behaviour change strategy.’²⁵⁰ The union

from a manufacturing ‘base’ towards services since 1955 (see Chris Howell, *Trade Unions and the State: The Construction of Industrial Relations Institutions in Britain 1890-2000* (Princeton, Princeton University Press, 2005, pp96-7 & 138).

²⁴³ Section 2.3

²⁴⁴ Section 6.2.2 ‘in the long run.’

²⁴⁵ See Robert Knox ‘Law, neoliberalism and the constitution of political subjectivity: The case of organised labour’ in Honor Brabazon, *Neoliberal Legality, Understanding the Role of Law in the Neoliberal Project* (Abingdon, Routledge, 2017): ‘...the unions represented a form of organization intrinsically opposed to neoliberalism’ (p105).

²⁴⁶ Although it was not mentioned in the paper, opinion polls in during the Heath government had indicated that numbers of trade union members supported proposals to rein in trade union power (see Moran 1977, op cit, p 154-5).

²⁴⁷ Knox 2017, op cit, p.102.

²⁴⁸ This may well have been due to their evident ignorance of what trade unions do, and of trade union law, rather than a belief that such a step would be politically impossible – or any concern for civil liberties.

²⁴⁹ Section 4.3.1

leadership was to be discredited in the eyes of members to change the climate of opinion,²⁵¹ and members were to be persuaded to abandon their class loyalty to the labour movement.²⁵² The ‘special link’ between the unions, the Labour Party and working class voters had both to be exploited for electoral gain and subsequently broken.²⁵³ Members were to be encouraged to ‘use their votes to tell their leaders to read up their economics and stick to their job of looking after their members interests. If they want to go into politics let them stand as Labour or Communist Party candidates.’²⁵⁴

Yet, all this had ‘to be done in such a way that union members in particular have their existing values and attitudes modified rather than challenged, and thus strengthened.’²⁵⁵ It was stressed that the electorate ‘must be reassured’ that the Tories ‘are not ideologues,’²⁵⁶ and that a vote for the Conservatives is not a vote for ‘revolution or jungle laissez faire.’²⁵⁷

Tory politicians and their allies in the press used the marketing strategies and tactics outlined in their paper to discredit union leaders and question the value of membership during from 1977 onwards.²⁵⁸ So called ‘closed shop martyrs,’ the furore over the use of secondary ‘boycotting’ action by the printing union SLADE to secure new members and persuade employers to sign up to union membership agreements,²⁵⁹ and, in particular, the ‘winter of discontent,’²⁶⁰ provided much

²⁵⁰ See ‘Appendix- The Union Problem.’ Proposals were included for, if necessary, neutralising troublesome union leaders by giving them ‘a role in a reformed second chamber, or a guaranteed legislated, non-majority role on the board of a company, or a shareholding role for union members, or a controlling role in a local authority etc. Alternatively we can bring union leaders into a reformed House of Commons. They are, after all, some of the very few leaders of today that have had industrial experience...There will be no loss of face involved on either side.’

²⁵¹ See ‘Appendix- The Union Problem.’

²⁵² See Section 4.2.3.2 and Section 6.2. ‘Drag every skeleton out of the union cupboard’ (Section 4.2)

²⁵³ Section 6.2 and ‘Appendix- The Union Problem.’

²⁵⁴ Section 6.2.2. Knox, 2017, *op cit*: ‘As Marxists have noted, one of capitalism’s defining tendencies is the formal separation between politics and economics’ (p.101).

²⁵⁵ Section 6.2.3

²⁵⁶ Section 6.2.2

²⁵⁷ Section 6.2.3. The paragraph finishes ‘...simply to overcome an entrenched apparatus which has resolutely refused to allow Britain to follow the policies which have been so enormously successful in other countries. (This could be linked too, to the real significance of the Left wing efforts to keep the country out of the Common Market, out of the capitalists’ club).’

²⁵⁸ Section 4.3 to the conclusion (section 6.5) are essentially about the Tory ‘communication strategy.’

²⁵⁹ On SLADE, see chapter five.

²⁶⁰ Given this early use of ‘spin’ and marketing techniques it is striking that in retrospect the events of 1978-79 have been seen by some to have been exaggerated by politicians and the media— see Dave Lyddon ‘Striking Facts about the “Winter of Discontent”’ (2015) 36 *Historical Studies in Industrial Relations* 205.

useful material for Tory propagandists to use against the unions and the Labour party.

Strauss and Hoskyns had argued that the Tories should fight the election on the specific mandate of ‘root and branch’ trade union reform. However, in the 1979 Tory manifesto, Mrs. Thatcher (in the introduction) claimed that their policies were ‘based not on dogma,’ and no such bold declaration was made. Instead, picketing was to be restricted to the worker’s own place of work,²⁶¹ and the imposition of closed shop union membership agreements were to require a ballot and the sanction of ‘an overwhelming majority of the workers involved.’ Arbitrary exclusion or expulsion from a union was to become challengeable at tribunal, with ‘ample compensation’ given those who refuse to join a union and lose their job as a consequence. However, careful reading reveals the admission that the Tories might be obliged to make further adjustments, an ‘immediate review’ of the statutory immunities,²⁶² along with ‘an enquiry into the activities of the SLADE union,’ were promised, and significantly the Tories stated that: ‘Labour claim that industrial relations cannot be improved by changing the law. We disagree.’²⁶³

In the event, class loyalties to trade unionism and to the Labour Party were arguably most effectively challenged by changing the law. The restrictions on the freedom to take industrial action, and the consequent restriction of the representative and regulatory roles of trade unions,²⁶⁴ imposed neoliberal ‘rationality’ on individuals and collectivised labour, ‘reconstituting the political

²⁶¹ Although it is notable that in the Miners’ Strike the police (they had benefited from pay rises of up to 45% in May 1979) and the magistrates invoked the criminal law to prevent and stop secondary picketing which was prohibited only by civil law (see Bogg, Ewing and Moretta in Bogg, Collins Freedland & Herring (eds), 2019 *op cit.*).

²⁶² Which resulted in the January 1981 Green paper *Trade Union Immunities* (Cmnd. 8128) presented to Parliament by James Prior, a paper to be noted for its eminently reasonable, almost disinterested approach. At one point it recalls that it has been suggested that the then present regime was over complex and as a consequence provided too much scope for judicial intervention (para 100), and one chapter airs proposals for ‘An Alternative System of Positive Rights.’

²⁶³ 1979 Conservative Party Manifesto. See Knox 2017, *op cit*, pp109-114 on the effectiveness of changing the law to shape political subjectivity.

²⁶⁴ See Knox 2017, *op cit*, pp100-101. See also KD Ewing ‘The Function of Trade Unions’ (2005) 34 *ILJ* 1. Ewing identified service and individual workplace representative functions (which are broadly compatible with at least New Labour’s particular brand of neoliberalism). The functions Ewing identified which are essentially incompatible with British neoliberalism are the collective representation function – collective bargaining in the workplace – and regulatory function, sectoral collective bargaining, and governmental and public administration regulatory functions, promoting the economic and social interests of members, and, incidentally, the interests of the members’ social classes. The freedom for unions to exercise these functions were, of course, drastically curtailed during 1979-93.

subjectivity of organised labour into a form that was compliant with neoliberalism.’²⁶⁵

Membership became much less attractive when unions were less able to provide effective employment protection that they had previously, and the ‘symbiotic’ relationship between the Labour Party and the unions was disrupted by both the propaganda campaign and by restrictions on freedom of association.²⁶⁶ The Labour Party and the trade unions were distanced from each other, upsetting that symbiosis and weakening both.

With union power very much reduced the concept of the Labour Party as the political wing of the labour movement was supplanted by that of a New Labour party with neoliberal policies which were not *overtly* hostile to organised labour, with a more distant relationship with the trade unions. Although New Labour continued to receive funding from the trade union movement the party could no longer rely on industrial muscle for support, and, in turn, the unions could only depend on New Labour to maintain the post Thatcherite *status quo*. Thus unions became ‘Hayekian subjects.’²⁶⁷ Strauss and Hoskyns had told Thatcher that the ‘trades union role must be changed to one of positive partnership,’²⁶⁸ and that phrase, redolent as it is of New Labour, is perhaps one that Blair and Brown might themselves have chosen to characterise the relationship of their party with the unions.

An incremental approach to legislating had arguably been a necessity. The announcement of the intention to mount a concerted attack on trade unionism in the 1979 manifesto, or an immediate ‘one hit’ clamp down on freedom of association in 1980 would have reinforced class loyalty and resistance.²⁶⁹ As Knox put it, history had shown that a general ban on trade union activity had encouraged radical trade unionism, while ‘carving out a sphere of ‘legitimate’

²⁶⁵ Knox 2017, *op cit*, p94

²⁶⁶ ‘Symbiotic’ is Knox’s term - ‘the Labour Party enabled collective bargaining to take place, and in exchange received funding, party activists and was – to some degree – able to rely on industrial support for its policies. Accordingly the political balance was a delicate one, with neither definitively having the upper hand’ (ibid, p101).

²⁶⁷ Ibid, p107.

²⁶⁸ See above.

²⁶⁹ Very many Tories, including Thatcher were unhappy with the 1980 Employment Act (and with Prior), considering it to be too weak (see Dorey, 1995, *op cit*, pp158-164).

economic-corporate union activity has been much more effective at blunting the collective subjectivity represented by trade unions in the neoliberal period.²⁷⁰

But it was slow, incremental process, arguably helped along to a very considerable extent by the Falklands War, as well as by much more minor (but perhaps often overstated) factors, like the sale of council houses, and by encouraging workers to buy shares in newly privatised public utilities. Prior to the Falklands war, Thatcher, according to Alan Clark, who became one of her junior ministers of employment, opinion polls 'showed that she was more unpopular than any previous prime minister. Scarcely one person in her cabinet had a good word to say of her.'²⁷¹ However, in the general election held almost a year to the day after Port Stanley had been recaptured, the ideological battle with floating voters and with those who habitually voted Labour, but might be persuaded to vote Tory, had apparently been won.²⁷² The Tories secured a genuine 'landslide' victory.

While the Tories of 1970 – 1974 had sought an adjustment of the post war compromise, Thatcher's inner circle celebrated the rights of the individual, loathed collectivism, and wished to abandon that compromise. They sought, as far as was possible, to withdraw the opportunity for workers to bargain collectively. Workers were again to be isolated for the purposes of determining the terms and conditions of employment. The new Tory approach however, the 1984 – 85 Miners' Strike aside, failed to provoke the reaction that the 1971 Act had generated.

The economic theories of Friedman and Hayek provided the philosophical veneer of Thatcherism. Macroeconomic policy was based largely on Friedman's monetarist theories, but Hayek, who had been in contact with the upper echelons of the Tory party since 1974, was a powerful influence on the Tory attacks on the unions. Hayek pressed his case for legislative action against organised labour as a first step towards a fundamental transformation of the economy in informal

²⁷⁰ Knox 2017, *op cit*, pp106-7.

²⁷¹ A Clark, *The Tories, Conservatives and the Nation State 1922-1997* (London, Weidenfeld and Nicolson, 1998), pages 472 and 476.

²⁷² See Harvey 2005, *op cit*. pages 79 and 86 on the Falklands War as the turning point in the fortunes of the Thatcherites, and p 60-61 on the sale of Council Houses and the Public Utilities.

meetings with influential Tories, and in a series of articles and letters in *The Times*, and *The Economist*. Hayek believed he had identified the statutory immunities conferred on the unions by the Trade Disputes Act 1906 as ‘the chief source of Britain’s economic decline...That fatal mistake must be undone if Britain is to recover. No movement can pull the country out of the mire unless it obtains at the elections an explicit mandate to revoke the unique privileges which the trade unions have enjoyed too long.’²⁷³

In 1979 Hayek had suggested to Thatcher that a decision to revoke the statutory immunities was ‘one of such decisive importance as to justify the now constitutional recourse to a referendum.’²⁷⁴ According to Hayek, the unions, with their ‘special and unique privileges’²⁷⁵ distorted the market. For the Tories, the unions were an obstacle to reform. They were, however - as we have established - dealt with on a step by step basis. Whether, however, there was any serious planning behind the legislative steps, or whether the Tories simply attacked anything that smacked of collectivism when the opportunity arose is open to question,²⁷⁶ although arguably, looking back on events, the latter view seems the more likely.

The 1975 statutory recognition procedure, and the CAC’s schedule 11 powers to impose changes on employment contract (the Employment Protection Act 1975 had replaced the 1959 Terms and Conditions of Employment Act procedure by which an application to the Secretary of State could see the standard collectively agreed terms of employment in a sector not covered by a Works Council be imposed on an individual employer) were repealed in 1980.²⁷⁷ The first attacks on

²⁷³ The Times 21st July 1977. Hayek wrote a series of letters and articles in the paper emphasising this argument.

²⁷⁴ Letter to Thatcher 28th August 1979. ‘Now constitutional’ refers to the 1975 EEC referendum. Hayek MSS (Hoover Institution) Box 101(Margaret Thatcher Foundation Archive).

²⁷⁵ *Ibid*, Letter from Hayek to William Rees-Mogg Editor of The Times 14 July 1977.

²⁷⁶ For example, Peter Dorey in the *Conservative Party and the Trade Unions* (London, Longman, 1995) argued that it was only in hindsight that the Tory attacks on trade unionism were regarded as a ‘coherent strategy meticulously prepared and implemented,’ and that, in reality, it was pragmatically ‘developed in a rather *ad hoc* manner.’ Yet in ‘Weakening the Trade Unions, One Step at a Time: The Thatcher Governments’ Strategy for the Reform of Trade Union Law 1979-1984’ (2016) 37 *HSIR* 169, he suggests that Thatcher’s inner circle planned a ‘succession of statutes, with each new measure widening and deepening the curbs of its predecessor...such an approach would avoid the fatal error of the 1971 Industrial Relations Act’ (p174).

²⁷⁷ See Bercusson 1978, *op cit*, Chapter 20, ‘The New Fair Wages Policy: Schedule 11 to the Employment Protection Act 1975.’

the ‘closed shop’ were made in the Employment Acts of 1980 and 1982, broad protection against dismissal for non-membership was restored, with exceptions carved out where a ‘union membership agreement’ was in place, but balloting requirements with thresholds which made new agreements difficult, if not quite impossible to conclude were imposed.²⁷⁸ After the 1982 Act all existing UMAs had to be approved by a ballot if for a dismissal for non membership to be upheld as fair by a tribunal.²⁷⁹

The closed shop was essentially *attacked* by conferring *individualistic* statutory rights on workers to challenge exclusion and expulsion from a union at tribunal, (previously such cases had been the provenance of the TUC Independent Review Committee),²⁸⁰ and to challenge dismissals for non membership under the terms of improperly imposed UMAs. Subsequently solidarity was further undermined by more individualistic rights not to be ‘unjustly’ disciplined, or excluded or expelled from a union,²⁸¹ the *coup de grace* being administered to the post entry closed shop by conferring the right for workers not to be dismissed under any circumstances for non membership of a trade union.²⁸² Individual rights have always been treated with some suspicion by trade unionists as instruments with the potential to usurp unions, (a matter related to, but separate from, the ‘traditional’ wariness of judicial interference in industrial relations), but individualistic employment rights are arguably invariably antithetical to the collective interest. We saw, for example, Wedderburn’s hostility to the

²⁷⁸ See chapter 8, ‘The Closed Shop in 1980s: Conclusions and Prospects’ in S Dunn and J Gennard, *The Closed Shop in British Industry* (London, Macmillan, 1984).

²⁷⁹ Any dismissal made for non membership which might previously have been potentially fair as made under a valid UMA would be automatically unfair if the UMA had not been approved by a ballot within 5 years of the dismissal.

²⁸⁰ A change which can in itself be seen as an instance of individual legal rights undermining organised labour. Arbitrary expulsions could be challenged via the common law, alleging a breach of the union’s rules or a breach of the principles of natural justice (see P Elias and KD Ewing *Trade Union Democracy; Members’ Rights and the Law* (London, Mansell, 1987), chapters four and six), but until the statutory right to tribunal claim was conferred workers were understandably rarely inclined to litigate over such matters. Excluded workers had more of a problem than expelled workers because membership is seen by the law as a privilege rather than a right, and non members can seldom be said to have a contractual relationship with the union. However, theoretically at least, tortious remedies are available at common law, and cases like *Nagle v Fielding* [1966] 2 QB 633 and *Edwards v SOGAT* [1964] Ch.354, established a limited principle of ‘a right to work’ (ibid, chapter three).

²⁸¹ Which became s174 TULR(C)A 1992, subsequently tempered by New Labour following *ASLEF v UK* [2007] ECHR 184 when ASLEF expelled a BNP activist : see KD Ewing, ‘The Implications of the ASLEF Case’ (2007) 36 *ILJ* 425 and KD Ewing, ‘Employment Act 2008: Implementing the ASLEF Decision –A Victory for the BNP?’ (2009) *ILJ* 50 (see also Chapters Three and Five below).

²⁸² See Chapter Five.

individualistic aspects of the Industrial relations act 1971, but we have also seen his emphatic endorsement of many raft of individual rights conferred by Wilson's post October 1974 administration in the Employment Protection Act 1975 as 'a floor' on which collective bargaining would build – these were individual rights, statutory rights specifically tailored to support to trade unions. They were not individualistic rights.²⁸³

Individual rights which do not adequately accommodate collective 'input' will arguably almost invariably tend to undermine collective bargaining and promote the influence of managerial prerogative over the setting of the terms and conditions of employment.²⁸⁴ A prime example is the erosion of the collective elements of the Equal Pay Act. In addition to the individual 'tribunal route,' overtly discriminatory collective agreements could, by s3, be referred to the Industrial Court/CAC by unions, employers or the Secretary of State. The result was (largely without it being necessary to make such referrals) that there was a rapid increase in womens' wages after the Act came into force in 1975.²⁸⁵ Unfortunately, in 1979, the CAC's wings were severely clipped by the High Court,²⁸⁶ effectively putting an end to its work amending collective agreements.²⁸⁷ While the Callaghan government would very likely have legislated to restore the role of the CAC, there was little chance of the Thatcher government intervening, and seven years later, in accord with the seeming Tory policy of 'scattering'

²⁸³ On that distinction see Alan Bogg, "'Individualism" and "Collectivism" in Collective Labour Law,' (2017) 46 *ILJ* 72, p77. Bogg effectively points out that individualistic rights need not be wholly antithetical to the collective interest – 'the right to exit a trade union provides a strong foundation for the trade union to assert its autonomy against state regulation.' He cites Kahn-Freund's view that the individualism of the common law was, at a time when workers enjoyed full freedom of association [Kahn-Freund was writing in 1959], 'an almost necessary corollary of the growing policy of non-intervention...and especially with the operation of 100% union and closed shop practices' (p80 citing *Labour Law* (London, Stevens & Sons, 1978), p.37).

²⁸⁴ See LJB Hayes, 'Women's Voice' and Equal Pay: Judicial regard for the Gendering of Collective Bargaining,' in *Voices at Work*, Bogg and Novitz (eds) Oxford OUP 2014 , p35. See also M O'Sullivan, T Turner, M Kennedy and J Wallace, 'Is Individual Employment Law Displacing the Role of Trade Unions?' (2015) 44 *ILJ* 222, which essentially comes to the unsurprising conclusion that when a state (Ireland in this case) has weak collective structures workers will increasingly resort to individual statutory rights, while in a state with strong collective structures (Sweden), '[m]ost disputes are handled directly through bilateral negotiations between the union and the employer until the dispute reaches the Labour Court as a court of last resort' (p244).

²⁸⁵ '...more significantly, in fact, than it had done at any other time before; and more significantly than it has done since,' A McColgan, *Just Wages for Women*, (Oxford, Clarendon Press, 1997) p92 (see the table on that page). On the importance of the collective mechanism to that process, see pp 108-9.

²⁸⁶ *In R v CAC, ex.p Hy-Mac Ltd*, [1979] IRLR 461. See Hayes 2014, *op cit*, pp 39-40, on the judicial hostility evinced at judicial review towards the collective interest when CAC decisions were 'appealed' by employers.

²⁸⁷ McColgan 1997, *op cit*, pp 110-112. She reports that from 1976-79 the CAC had ruled on around 50 equal pay cases, while none at all were heard during 1981-1986, with one last 'two fingered salute' made when the CAC ruled on its last collective agreement in 1987 shortly before its S3 powers were withdrawn (p111).

individual rights with the potential to undermine the collective interest, and, wherever possible, withdrawing or restricting collective rights and mechanisms which engaged the unions,²⁸⁸ the second Thatcher government repealed the S.3 referral mechanisms.²⁸⁹

The absence of a collective element to the EPA (the restrictions on freedom of association since 1979 had, of course, further limited the ability of the unions to impose equality) ultimately had very damaging (if unenvisaged) results for workers and for trade unions. The individual rights subsequently became individualistic rights serving to further undermine trade unions, with members bringing discrimination claims against their own union following collective agreement with employers intended to tackle instances of pay inequality, and unions themselves increasingly obliged to deal with instances of unequal pay through the courts.²⁹⁰

While some individualising initiatives, like those introduced to attack the closed shop were carefully targeted, others, like the repeal of s3, were arguably akin to a spanner randomly thrown into the collective bargaining machinery in the hope of causing a malfunction. The rights accorded individual members to call their unions to account over various matters by TULRA 1993, were, for example, hostile individualising initiatives which proved completely ineffective – ‘spanners’ thrown by the Major government which were ejected by the machinery (see chapter five).

These tactics can be seen as a discrete element of the broader phenomena, often referred to as individualisation, which saw, during 1979-1993, trade unions, weakened by the restrictions on freedom of association, increasingly

²⁸⁸ Howell, 2005, *op cit*, comes close to acknowledging this ‘scattergun’ individualisation policy on p146 when he refers to the the Tory practice of applying layers of legislative ‘cement.’

²⁸⁹ The repeal of s3 was, of course, initially relatively inconsequential, because referrals had almost ceased (see McColgan 1997, *op cit*, p112).

²⁹⁰ See Hayes 2014, *op cit*, pp42-45: Hayes explains that after lawyers had been permitted to use ‘no win no fee’ arrangements (arguably a direct consequence of the withdrawal of legal aid one of the pillars of the post 1945 ‘settlement’), they found multiple individual public sector equal pay claims very lucrative. While unions preferred to negotiate with employers to resolve instances of unequal pay with an eye to the long term collective gain for their members, the lawyers were interested only in securing as much money for themselves, and for the individual client, through EPA claims – whatever the consequences. The lawyers occasionally turned their attentions to allegedly discriminatory terms in collective agreements reached by the unions, and there was a chaotic clash of interests as the individual and collective approaches, and the EPA and sex discrimination law failed to ‘mesh,’ leading to trade unions increasingly resorting to equal pay tribunal claims, and to calls for a single equality act.

derecognised by employers, permitting supposedly ‘individual’ standard contracts to be unilaterally imposed. Even where a union was still purportedly recognised, managerial prerogative was largely given way to over matters like recruitment, overtime, the delineation of workers’ responsibilities and the introduction of new technology with, often at best, negotiation being supplanted by consultation.²⁹¹

To return, however, to the particular measures taken by the first Thatcher administration, significant early steps in this process were the restriction of lawful secondary industrial action to that taken against immediate suppliers or customers of the employer party to the dispute (s 17 of the 1980 Act), as the definition of a trade dispute was narrowed, and, although perhaps seen more as a symbolic rather than practical measure at the time,²⁹² the blanket ban on the tortious liability of the unions, was again lifted, this time by the Employment Act 1982.²⁹³ Questions on the reach of the immunities now went beyond theoretical questions of liability raised in cases about applications for injunctions intended to restrain union officials. Now, if the immunities did not apply, it was conceivable that that an employer could recover damage to compensate for any loss.

Individual rights were also adjusted to disadvantage the worker. The qualifying period for unfair dismissal was increased from six months to one year, and, while the burden of proof in unfair dismissal cases was shifted to favour the respondent, and the level of awards reduced,²⁹⁴ unlawful dismissals made to

²⁹¹ See Brown, Deakin, Nash, and Oxenbridge 2000, *op cit*, which compared the position indicated by the results of the 1998 Workplace Employee Relations Survey with the position in previous years, in particular that set out by Workplace Industrial Relations Survey 1980.

²⁹² The focus on the injunction in previous decades had perhaps convinced many that claims for damages would not be pursued post 1982.

²⁹³ Repealing s14 of the Trade Union and Labour Relations Act 1974. Liability for trade unions for injunctions and damages is now dependent largely on what action has been ‘authorised or endorsed’ by officers, officials or committees (sections 20 and 21 TULRCA 1992). What would have at one time been regarded as unofficial action can now be seen to be ‘authorised or endorsed’ when just one official takes part (See *Gate Gourmet v TGWU*). [2005] IRLR 881 (QB)). Unions seeking to avoid liability may find themselves forced to ‘repudiate’ industrial action (See s 21(3) TULRCA 1992).

²⁹⁴ The burden of establishing fairness was eased (s.6 EA 1980) The qualification period was increased to two years for firms 20 or less employees (s8 EA 1980); reductions in awards (s9 and s10 EA1980)

enforce closed shop agreements attracted punitive ‘enhanced’ compensatory awards enforceable against both employer and the union involved.²⁹⁵

During this first term a number of cases had been heard in the higher courts turning on questions of whether secondary or ‘solidarity’ action, and disputes about broader political issues, were ‘trade disputes’. Lord Denning, Master of the Rolls, champion of individual freedom, and an implacable enemy of trade unionism, had returned to the fray in three cases: *NWL Ltd v Woods* [1979], *Express Newspapers v Macshane* [1979], and *Duport Steels v Sirs* [1980].²⁹⁶

In all of these cases the Court of Appeal found against the unions, holding that the disputes at issue were not trade disputes, despite the very clear legislation pointing to the contrary.²⁹⁷ Although these decisions were subsequently reversed by the House of Lords, they provided very timely and effective support for legislative action by the new Conservative government to narrow the definition of a trade dispute.²⁹⁸ 100 years on, the Court of Appeal had chosen a key moment to reprise the politically motivated refusal of the judges to acknowledge the plain and ordinary meaning of the legislation with which Parliament had sought to permit workers freedom of association.

If an employer was able to show that it had good cause to argue that the immunities were not likely to afford protection in any, largely theoretical, subsequent claim for damages, and that the ‘balance of convenience’²⁹⁹ lay with the employer – that is that the employer would suffer greater hardship if an injunction was not granted than the union would if it were not granted - then the

²⁹⁵ S4 EA 1980 gave grounds for tribunal claim for unreasonable exclusion or expulsion from a trade union and s5 provided for punitive awards to compensate the worker for his or her loss.

²⁹⁶ 3 All ER 614; 1 All ER 614; 1 All ER 259.

²⁹⁷ See Wedderburn 1986, *op cit*, pp568-570.

²⁹⁸ Two famous cases in the same period concerned industrial action brought for political reasons, and can be seen as a narrowing of what could be considered as connected with a trade dispute: *BBC v Hearn* [1977] ICR 686 (CA) and *Express Newspapers Ltd v Keys* [1980] IRLR 247 (QBD). The injunction applied for in the Express case was granted. In the former case the injunction was not granted at first instance, but the appeal was presided over by Lord Denning, and was subsequently granted.

²⁹⁹ *American Cyanamid Co.(No.1) v Ethicon Ltd* [1975] AC 396 (HL). Even where it appeared likely that the proposed industrial action appeared to be covered by the immunities the House of Lords has acknowledged that public interest considerations might well tip the balance in favour of an injunction.

employer would be granted an injunction. These *ex parte* interlocutory applications were weighted heavily in favour of the employer, an advantage compounded, paradoxically, prior to the Employment Act 1982, by the blanket immunity conferred by S14 of TULRA 1974. This immunity had meant that any damages awarded in any subsequent claim could only be sought against the applicant's employees, and union officials, not the union, and consequently there was no likelihood of the applicant being compensated adequately for any loss suffered as a direct result of the industrial action even if it were found that there had not been a trade dispute within the meaning then afforded to the term in TULRA 1974. As a consequence injunctions were less likely to be granted after the 1982 Act had come into force.

Not only did the 1982 Act repeal s13(2) and (3) and s 14 of the 1974 Act, to radically reduce the reach of the immunities, but it further narrowed the definition of a trade dispute. As we have seen in relation to secondary action, a number of cases in the late 1970s and the early 1980s challenged the definition of a trade dispute. Then, the parties to the dispute could, on one side be either workers or a union, and on the other any employer, or other workers or other unions. The dispute had merely to be 'connected with' one or other of the aspects of the employment relationship listed in the Act. The post 1982 provisions are to be found now in TULRCA 1992 S244 (1). Protected acts must now be made in contemplation or furtherance of '... a dispute between workers and their employer'³⁰⁰ which *relates wholly or mainly*' to the listed employment matters. The 1982 Act also provided that disputes over an employer's use of non-union labour were no longer deemed to be trade disputes, and prevented workers taking industrial action to coerce an employer trading with their own employer to recognise a union.³⁰¹

³⁰⁰ This caused particular difficulties where the actual employer was a separate entity from the notional employer – action against the holding company fell outside the definition of a trade dispute, which restricted action to the subsidiary company. See *Dimbleby and Sons Ltd v NUJ* [1984] 1 WLR.

³⁰¹ Sections 12-14 Employment Act 1982.

Following the 1983 election, balloting was made a pre-requisite for the protection of the immunities by the Trade Unions Act 1984.³⁰² Each member 'who it is reasonable at the time of the ballot for the union to believe will be' induced to take part' in the industrial action were required to be given entitlement to vote. Ballots were to be conducted in secret, on paper, and with straight forward questions on whether the employee favoured taking strike action, or industrial action short of a strike, with 'yes or no' answers.³⁰³

Originally enforceable only by the employer (in connection, of course, with the use of the injunction to stop industrial action), the right to hold a union to these procedural requirements was extended to individual members in 1988, and Part 1 of the Employment Act 1988 was drafted so as to be clearly seen to be giving rights to individual union members against the union. Schedule 1 to the Act detailed the appointment and powers of a Commissioner for the Rights of Trade Union Members.

The Act extended the balloting provisions to require the union to ballot each of the workplaces affected, and provide the employer with the number, and categories of employees to be balloted at each workplace. Unions were stopped from using funds to indemnify trade unionists fined for unlawful conduct, and a right for members to inspect the union's accounts was conferred. Union membership could no longer be enforced by action against the employer, and the unfair dismissal exceptions for UMAs were removed, employers were prohibited from enforcing trade union membership. Post entry 'closed shops' became unworkable.³⁰⁴

The assault on mechanisms to enforce solidarity was completed by the section 3 individual right of members not to be 'unjustifiably disciplined' – action against a member for not taking or supporting industrial action was the first of the grounds listed.

The 1990 Employment Act made pre-entry closed shops unlawful, and further tightened the balloting and strike procedure rules. Secondary action was unequivocally prohibited, and all unofficial action became extremely hazardous.

³⁰² Part I introduced balloting for certain positions within a union, and Part III balloting for the maintenance of a political fund.

³⁰³ Section 11 Trade Union Act 1984.

³⁰⁴ Sections 10 and 11 Employment Act 1998.

An employee taking such action was 'denied the right to complain of unfair dismissal,' and any workers taking official action in support of those dismissed for unofficial action could also be dismissed with impunity.³⁰⁵

However, after a decade during which the trade unions had been stripped of power, and the 'wild cat' unofficial strikes which had been seen as so troublesome in the late 1960s and 1970s long virtually eliminated, it now appeared that it had not been collective bargaining which had been fuelling inflation.

One time junior minister for employment, Thatcher loyalist Alan Clark, recorded in his diary in May 1990, as the Tories started to consider ousting Thatcher, that he and two of his colleagues had discussed what they could 'do to succor the Lady? Do we even want to? We were stuck with the same inflation rate as when we came into power in 1979.'³⁰⁶

Thatcher was obliged to resign in November 1990. John Major had the misfortune to take over the leadership of the Tory party, and the premiership, as the neo-liberal revolution, and the 'Lawson Boom' crashed the economy into deep recession.³⁰⁷

Almost as troubling for the new Prime Minister, the European Community member states were concluding the radical Social Policy Agreement of 1991, and the Commission and the ECJ were catching up with UK failures to implement workplace anti discrimination protections adequately. Two particular traits of the libertarian right, a reluctance to be seen to be legislating in response to supra national obligation, and a disdain for employment protection, combined to cause the Tories chronic embarrassment.

The 1991 Social Policy Agreement was the basis of the 'Social Protocol' which was appended to the 1993 Maastricht Treaty. Better known as the 'Social Chapter,' this was a raft of proposals for employment protection directives which, instead

³⁰⁵ Sections 1-3 on 'Access to employment'; s4 on 'Secondary action,' and s9 on 'Dismissal of those taking part in unofficial action.'

³⁰⁶ Alan Clark, *Diaries*, (London, Weidenfeld & Nicholson, 1993), entry for 1 May 1990. His colleagues were Ian Gow and Jonathan Aitken.

³⁰⁷ See David Cobham, 'The Lawson boom: excessive depreciation versus financial liberalisation' (1997) 4 *Financial History Review* 69.

of unanimous support, would require only a qualified majority in the Council of Ministers to secure their adoption.³⁰⁸ This manifestation of the new 'Social Europe' was the subject of the famous UK 'opt out' which was incorporated into the Protocol,³⁰⁹ which, as Neil Kinnock, then Leader of the Opposition, put it, betrayed Tory ambitions to reduce the UK the status of 'an off-shore sweatshop.'

Despite the 'opt out,' the Major administrations were to prove much less adept at the political sleight of hand which had allowed the Thatcher governments to maintain a facade of ferocious anti-Europeanism while implementing socially progressive directives into domestic legislation, and legislating in response to decisions of the ECJ.³¹¹

The watershed ECJ ruling in *Defrenne* [1976] had seen gender equality acknowledged as a fundamental principle of EEC law,³¹² one that is 'directly effective,' narrowing the scope for the Government and domestic courts to tailor the application of Article 119 of the Treaty of Rome prohibiting gender discrimination, and the 1975 and 1976 discrimination directives to the UK. As a consequence the government was obliged to rectify the right to equal pay for equal work in UK legislation to guarantee for workers the wider entitlement to equal pay for work of equal value.

Since *Defrenne* workers had, in theory at least, been able to rely on Article 119, as interpreted by the directives, in UK courts against both public authorities and private parties since the judgment had been handed down, so the dilution of the terms of the EU protections would eventually have ended up being the subject of a referral to the Luxembourg Court, even if the Commission had not brought infringement proceedings. Yet instead of simply changing the law following the initial approaches made by the Commission under the terms of the infringement

³⁰⁸ See, Julia Lourie, Business & Transport Section, House of Commons Library: *The Social Chapter, Research Paper 97/102*, 2 September 1997.

³⁰⁹ Ibid

³¹⁰ Ibid.

³¹¹ See, for example, Clark, 1998, *op cit*. In the chapter on the accession of Major, 'The Beginning of the End,' Clark is very critical Major's handling of Maastricht - 'The Maastricht time bomb detonates' (p499) - and he notes that in other areas Major's government managed to look as 'harsh' as Thatcher's 'though markedly less competent' (p507).

³¹² ECJ C- 43/75, ECR 455.

procedure, the first Thatcher government elected instead to defend the inadequate implementation of the directive at the ECJ.

The predictable defeat in 1982 was the first helping of a diet of progressive gender equality rulings force fed the UK government by Luxembourg, the brunt of which were borne by John Major. Any list of these cases which, in a period when the Maastricht Treaty and the European Regulatory Mechanism crisis had inflamed Tory 'Euroscepticism,'³¹³ exacerbating divisions over Europe within the Conservative Party, would have to include the following key decisions:

Dekker [1990],³¹⁴ in which it was ruled that unfavourable treatment because of pregnancy amounts to direct sex discrimination without any necessity for a comparator, obliging UK courts and tribunals to cease comparing pregnant and nursing mothers absent from work with equivalent male employees on sick leave.

Danfoss [1989],³¹⁵ which initiated a line of cases which saw the ECJ ease the implicit evidential burden of claimants in discrimination cases by requiring only that they present a *prima facie* case of discrimination. The onus then shifts to the employer to show that the behavior alleged was not discriminatory. The

³¹³ For example, shortly after the Equal Opportunities Commission had referred the UK government to the European Commission with a view to triggering infringement proceedings for failure to implement adequately European equality legislation, and the TUC had done the same in respect of the abolition of the Wages Councils (see 'Equality watchdog seeks EC decision', *The Times*, 24 September 1993). Clare Short as Shadow Minister for Women subsequently told the Commons that the government 'refuses to make the changes that are needed in our sex discrimination and equal pay laws...When forced by the European Union they do so grudgingly and with bad grace' (Hansard, 10 March 1994, vol 239,col 426-7). She cited 'equal pay for work of equal value' as an example, and noted 'the jeers and cat calls from hon. Members on the Tory benches' when it was announced that the failure of the government to fully implement European equality legislation was to be the subject of debate (col 423). During the debate Bernard Jenkin asked her 'does she think that it would be democratic if her policies were imposed on us by court rulings and arbitrary judgments of the European Court?'(col 431). Iain Duncan Smith (making much of what he saw as the impact on 'British competitiveness') commented that the recent ruling on indirect discrimination resulting and part time employment (*R v Secretary of State for Employment, ex parte Equal Opportunities Commission* [1994]1 AER) had been imposed 'through the back door by means of a ruling based on European law...the decision was based wholly on the European treaties and directives, not on any British legislation....avoiding our social chapter opt out' (col 475). Short asked Duncan-Smith whether he wanted the UK to leave the EU (col 476), and Jenkin, until reined in by the speaker, then went on to complain about loss of sovereignty and the 'outrage and uproar' it should provoke (col 481- 482). A Labour MP subsequently commented that 'I think that we have just heard a speech in favour of sexual discrimination' (col 484-5).

³¹⁴ ECJ C-177/88, ECR 3941.

³¹⁵ ECJ C-109/88, ECR 3199.

principles established were consolidated in a 1997 Directive,³¹⁶ S136 Equality Act 2010 implements the procedure into domestic law, and the primary domestic authority for the application of the procedure is the Court of Appeal case *Ayodele v City Link* [2017].³¹⁷ This so called ‘reversed burden of proof,’ as it has become widely, if inaccurately, known in the UK, is also required by the European Social Charter: In a 2008 statement of interpretation the ECSR held that in cases of discrimination engaging ‘matters covered by the Charter, the burden of proof should not rest with the complainant, but should be the subject of an appropriate adjustment,’ while in the 2008 Digest of Decisions the term used is ‘shifted.’³¹⁸ In an earlier statement of interpretation it was held that ‘An alleviation of the burden of proof in cases of alleged gender discrimination is also required,’ with claimants required only to ‘establish...facts from which discrimination may be presumed’ before ‘the respondent is required to prove that the apparent discrimination is due to objective factors unrelated to discrimination based on sex...’³¹⁹

Similarly, in *Enderby v Frenchay Health authority and Secretary of State for Health* [1993]³²⁰ the ECJ held that in multiple pay claims where a *prima facie* case of a significant disparity of pay for work of equal value between one male dominated group and a female dominated group is made out then it is for the employer to show that there are objective and proportionate ‘genuine material factors’ for that disparity.³²¹ That the disparities arose as a result of separate long standing,

³¹⁶ Directive 97/80/EC on the shift in the burden of proof in sex discrimination cases (now incorporated into Recast Directive 2006/54/EC by Article 19) was incorporated into Directive 2000/43/EC prohibiting discrimination on grounds of race or ethnic origin (Article 8) and Directive 2000/78/EC prohibiting discrimination on grounds of religion or belief, age or sexual orientation (by Article 10). It had long been the case in UK courts and tribunals that an inference that discrimination had taken place could be drawn if the claimant had shown that the circumstances were such that less favourable treatment on grounds of unlawful discrimination was indicated (see *Chattopadhyay v Headmaster of Holloway School* [1982] ICR 132), but the European legislation shifted the weight of the burden further towards the respondent. See David Renton, *Struck Out, Why Employment Tribunals Fail Workers and What Can be Done*, (London, Pluto Press, 2012, pp73-83).

³¹⁷ EWCA Civ 1913

³¹⁸ Conclusions XIX-1 2008, and *Digest of the Case Law of the European Committee of Social Rights*, p139. The Digest refers to Conclusions XVII-1 2004, Romania.

³¹⁹ Conclusions XII-5 1994-1995, statement of Interpretation of Article 1-2 and 4-3 and Article 1 of the Additional Protocol. While this more explicit explanation of the obligations relating to the burden of proof was ostensibly related to Article 1 of the AP in the statement, it does appear to apply to the provisions of the 1961 Charter too.

³²⁰ ECJ-127/92, ECR I-5535

³²¹ Section 69 of the Equality Act gives the legislative detail, while *Asda v Brierly* [2017] EWCA civ 566 provides the up to date domestic precedent for the handling of such cases.

‘entrenched’ collectively negotiated pay structures rather than a specific PCP previously regarded by the UK courts as non discriminatory was irrelevant – such structures may well be serving to hide discrimination.³²²

In *Marshall v Southampton and South West Hampshire Area Health Authority (No.2)* [1993],³²³ the court ruled that the cap on the equal pay award Mrs. Marshall and her colleagues had won (relying on the directly effective Article 119) was unlawful. The Government was obliged to remove the cap. It was established that limiting awards in discrimination cases was unlawful *per se*, and the following year, 1994, the Tories removed the cap on race discrimination claims.

The so called ‘reversed burden of proof,’ and the removal of the discrimination cap, along with the Working Time Directive (forced on the Major government by the EU as a health and safety initiative but implemented by New Labour), continue to be held out by many on the right of the political spectrum as the principal ‘wrongs’ inflicted on the UK by the EU. Indeed, they might plausibly be said to have sowed the seed of the particular variety of ‘euro scepticism’ that ultimately blossomed into the EU Referendum of 2016.³²⁴

Major was, however, arguably more overtly an anti-collectivist than his predecessor. The Trade Union Reform and Employment Rights Act 1993, introduced as a Bill shortly after Major’s surprise win in the 1992 election, was an unexpected, and unequivocal attack on the unions. As if to compensate for the

³²² See Hayes, 2014, *op cit*, p42 & 48, and McColgan, 1997, *op cit* p150-51.

³²³ ECJ C-271/91, ECR I-4367.

³²⁴ Resistance to the EU played well within the party and with the party’s core supporters in the country. Opposition to the WTD (Tory Party policy in the form of the social chapter opt out, and the government’s insistence that it was a social measure), and dissatisfaction with the shift in the burden of proof in discrimination cases, and with the occasional award of very large sums to claimants in discrimination cases, was not only voiced by Eurosceptical Tories but by many Europhiles too – and by the Tory press. The imposition of the WTD had been a serious humiliation for the Tories, and professing a distaste for EU employment law arguably permitted the Tory leadership to please both the nationalist and business wings of the Tory party, but in the long term this ‘Aunt Sally’ arguably fueled euroscepticism at Westminster and in the country. For example, in the Commons debate on what became the ‘Burden of Proof’ Directive 97/80/EC (Hansard, 9 May 1994, cols 99-122), the Secretary of State for Employment made much of having avoided the WTD (it was another two years before the ECJ were to rule that the UK was bound by the directive), and the government were implacable in their opposition to the directive being debated, and implacable too in ignoring opposition reminders that it had previously assured the Commission that UK law did indeed require a shift of the burden of proof in discrimination cases and was thus already compliant. With regard to the anti discrimination directive, *The Guardian*, 19 May 2000 ran a ‘special report’ on the Tories in opposition: ‘Tories oppose anti-racism directive.’ The ‘controversial’ supposed reversal of the burden of proof in the directive was said by Tory MEPs to undermine a principle which had ‘formed one of the foundations of UK law for centuries’. *The Daily Telegraph* on the same day ran an article with the title ‘Firms forced to prove that they are not racist.’

improved employment rights in Part II (TUPE, redundancy consultation, maternity, protection for Health and Safety representatives, and an extension of the right to a statement of employment particulars for all working over 8 hours a week) forced upon a reluctant government by Brussels, the remaining provisions appear to comprise of either an attack on the pre 1980 order, or of further restrictions on the freedom of trade unions.

The last of the Wages Councils were abolished.³²⁵ The duties of ACAS were recast, and the duty to promote collective bargaining abandoned. Fees could now be charged for those in receipt of help from the Service. Financial assistance for union balloting was withdrawn, along with the obligation for employers to allow unions to use their premises for balloting purposes was removed. 'Rights in relation to union membership' – restrictions on union autonomy imposed as individual rights not to be excluded or expelled, or unjustifiably disciplined were expanded, and numerous, and complex additional procedural requirements added to the already onerous union balloting provisions for both internal elections, and for industrial action.

The Act extended considerably the role of the 'scrutineer.' A minimum of seven day's notice, to be given to the employer, of the intention to hold a ballot was now required. Postal ballots became mandatory, and a copy of the ballot paper had to be given to the employer in advance of the ballot,³²⁶ and the names of those workers to be balloted.³²⁷ Notice of the result had to be communicated 'as soon as reasonably practicable' to members and employer. Notice of any proposed industrial action had to be communicated to the employer identifying 'the affected employees,' along with other numerous details. Failure to furnish any of these details accurately, in the correct form and at the correct time, would almost invariably invalidate the ballot and the statutory immunities would not apply to any subsequent industrial action. As a consequence injunctions to prevent industrial action became considerably easier for employers to obtain.

In 1997 the replacement of the Tories by the incoming 'New Labour' administration heralded a thirteen year period when the legislative attacks of 1980 - 1993 were, to the disappointment of very many in the Labour Movement

³²⁵ With exception of the Agricultural Wages Board.

³²⁶ To be given to the employer no later than 3 days prior to the ballot.

³²⁷ Following *Blackpool and Fylde College v NATFHE* [1994] ICR 648 the law was amended so as not to reveal the identities of those who were to be balloted.

merely stayed, rather than reversed. The individual contract of employment was, as it turned out, as important to New Labour as it was to the Tories, and it fell to the union recognition procedures promised by Blair to the trade unions in return for their support,³²⁸ proposals for a minimum wage, and to the swathe of largely individual rights which were to be incorporated into domestic law following the abandonment of John Major's EU Social Protocol 'opt out,' and the reinstatement of the right for the workers at GCHQ to form and join trade unions to provide what passed for 'clear blue water' between New Labour and Tory industrial relations policy.³²⁹ With the 'dirty work' having been already been done by the Thatcher and Major administrations, all that New Labour had to do was to fail to reverse the anti trade union legislation of the previous 18 years in order to be complicit in the Tory assault on freedom of association. UK industrial relations entered a period of comparative stasis, what was arguably at best, a post neoliberal revolution plateau. Collectivism was still *infra dig*.

'Partnership' was the then current 'buzzword,' and writing in 2002, Tonia Novitz, cautioned that

'the 'partnership' that New Labour seeks to encourage within the employment relationship is fundamentally individualistic. The 'partners' would seem to be the individual employer and the individual worker. This is not a relationship that necessarily involves trade unions.'³³⁰

After the 1997 election manifesto promises were honoured in the form of the Human Rights Act 1998 and the Employment Relations Act 1999. However, the ECtHR, had at that time relatively little to say on labour rights, other than to rule that Article 11 did not protect the right to the freedom to bargain collectively or to strike,³³¹ and moreover, the UK courts had previously appeared to give relatively little weight to the Convention rights despite being required 'to

³²⁸ To be found in Schedule 1 A of the Employment Relations Act 1999.

³²⁹ See Howell, 2005, *op cit*, pp174-184.

³³⁰ Tonia Novitz, 'A Revised Role for Trade Unions as Designed by New Labour: 'The Representation Pyramid and 'Partnership', *Journal of Law and Society*, vol. 29 (3) 2002, 487, p.492. Novitz characterised New Labour's concept of partnership as 'individualistic, proceduralistic and unitaristic' (p495).

³³¹ K.D. Ewing, *The Human Rights Act and Labour Law* (1998) 27 *ILJ* 275, p 292.

have regard for the Convention in deciding any question to which it may be relevant.’³³²

Nevertheless, section 2 HRA requires UK courts to ‘take into account’ Strasbourg judgments, opinions and decisions where questions about the Convention rights are raised and s 3(1) states: ‘So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.’ If that is not possible then, by section 4, courts are given the option of making a declaration of incompatibility, which the government is at liberty to ignore.

This has served as a conduit of sorts for the Strasbourg jurisprudence and ultimately sections 2 and 3 saw the wide post 2008 concept of freedom of association (see chapters one, three and four) leading the domestic courts to eventually accept that there is limited right to strike in UK law right.³³³ The principal effects of the HRA have, however, arguably been to influence the law in relation to discrimination and privacy at work through the ECHR rights to conscience, expression, and religion, to private and family life, and to influence what might be said to be procedural aspects of individual employment law, through the influence of Article 6 ECHR.

Sections 6 and 7 HRA confine the direct application of the Act to the public sector, and it was not until *X v Y* and *Pay*,³³⁴ unfair dismissal cases brought in 2004 by workers who had been employed in the public sector, that the judiciary started to acknowledge that an interference with an applicant’s Convention rights could influence the consideration of the question of the fairness of a dismissal to make ‘harsh but fair’ dismissals harder to justify, and to see Article 6 as engaged in internal disciplinary proceedings.³³⁵

³³² Justice Griffiths in *Express Newspapers v Keys* [1980] IRLR 247. The case saw the paper seeking an injunction against a ‘day of action,’ and after considering Article 11, and Lord Denning’s dismissal of it in *UK Association of Professional Engineers v Acas* [1978] ICR 303, as no more than a restatement of a basic principle of English law, an injunction was granted.

³³³ See below

³³⁴ *X v Y* [2004] IRLR 625 CA and *Pay v Lancashire Probation Service* [2004] IRLR 129 EAT. See V Mantouvalou, ‘Human rights and Unfair Dismissal: Private Acts in Public Spaces’ 71 *Modern Law Review* 912; V Mantouvalou and H Collins, ‘Private Life and Dismissal: *Pay v UK* Application No 32792/05, [2009] IRLR (ECtHR)’ (2009) 38 *ILJ* 133.

³³⁵ See *Kuklarni v Milton Keynes hospital Trust* [2009] 109 BMLR 133 and *R.(on the application of G) v School Governors* [2011] UKSC 30.

While the HRA (which didn't come into force until 2000) was something of a 'slow burner', ERA 1999 provided the Schedule A1 recognition procedures,³³⁶ replacing the 1975 procedures the first Thatcher administration had abolished in 1980, and gave union representatives, in certain circumstances, access to company facilities, and, by s10, workers an entitlement to be 'accompanied'³³⁷ by an officer or official of an unrecognised trade union at a disciplinary or grievance hearing, a right which was seen as a means of entry for the unions into the many, often small, non-unionised service industry firms that had appeared over the previous 20 years.³³⁸

Protection from dismissal for participating in official industrial action was provided,³³⁹ inserted into the TULRCA 1992 as S238A, providing, initially, an 8 week protected period, later extended to 12 weeks by the Employment Relations Act 2004.³⁴⁰ TULRA 1974,³⁴¹ the Act that provided the first legislative protection for participants in industrial action, had allowed an employer to dismiss all of a striking workforce, individual workers having the right to bring a claim for unfair dismissal only if it could be shown that there had been selective dismissals or selective re-engagement. This 'all or nothing' approach was relaxed for employers by the Employment Act 1982,³⁴² which had permitted re-engagement after 3 months without triggering the right for dismissed workers to make a complaint of unfair dismissal. Between 1974 and 1990 there had been no distinction made between official and unofficial action. The Employment Act 1990, as we have

³³⁶ See chapter 5.

³³⁷ As opposed to 'represented.' The right was rather undermined by a maximum sanction of 2 weeks' wages, a claim that has to be brought by the employee. Nevertheless, despite the apparent efforts of the New Labour drafting team to render it 'business friendly', this right has been relied on many thousands of times by individual members in workplaces where unions are unrecognised, and many employers appear to allow visiting union officials to argue the employee's case.

³³⁸ See Novitz 2002, *op cit*, p 488 & 494-495, and KD Ewing, 'Trade Union Recognition – A Framework for Discussion' (1990), 19 *ILJ* 209 p212. Novitz observed that '...the failure of the employer to allow a union representative to be present will not overturn the employer's decision on the grievance or reverse any disciplinary measures taken...the rationale for the introduction of this provision would appear to be a reduction of conflict rather than the protection of the workers' interests.' See also T Novitz & P Skidmore *Fairness at Work: A critical analysis of the ERA 1999, and its Treatment of Collective Rights*, (Oxford, Hart Publishing, 2001) p 168.

³³⁹ The common law, of course, permits summary dismissal for industrial action.

³⁴⁰ Following a series of Conclusions by the European Social Charter's European Committee of Social Rights holding 8 weeks to be insufficient.

³⁴¹ Schedule 1, paragraph 8.

³⁴² Section 9.

seen, had withdrawn the right for those dismissed during unofficial action to claim for unfair dismissal, a situation unrelieved by New Labour, the 1999 provisions restricting protection to employees induced to commit an act protected by the statutory immunities.³⁴³

There was an increase the unfair dismissal compensatory award cap from £12,000 to £50,000. In retrospect this step can be seen to have signaled New Labour's commitment substituting individual employment rights for collective representation, rather than to reflect any particular sympathy for the financial plight of those who had been arbitrarily dismissed. In opposition the party had contemplated the introduction of potentially unlimited awards. The Minimum Wage Act, condemned by the Major government as an unaffordable luxury, likely to cost jobs – was passed that same year, and the Public Interest Disclosure Act 1998, an anti-discrimination measure protecting work place 'whistle blowers,' also broke new ground.

The first of the EU 'Social Chapter' legislation, the Maternity and Parental Leave Regulations were implemented in 1999,³⁴⁴ and the Part Time Workers Regulations were introduced in 2000. The Fixed Term Workers Regulations followed in 2002.

Following the 2001 election the second Blair administration improved the provision of maternity leave, introduced Scandinavian style paternity and adoption leave, and the right to request flexible working timetabling were the central provisions of the Employment Act 2002. Similarly, in 2006, the Work and Families Act, passed in the wake of the 2005 election, extended maternity and paternity rights, and introducing the right for those caring for the disabled and the elderly to request flexible working arrangements. These are examined in detail in chapter seven.

³⁴³ For the remarkable events surrounding the unreported 2001 case of *Davis v Friction Dynamics* which saw an entire workforce sacked, see Bryan Davies, *The right to strike: Has the law moved on since the Friction Dynamics dispute?* (2012) at www.ier.org.uk

³⁴⁴ The Working Time Regulations, passed in 1998, were perhaps the first in European terms, but for the UK, with the 1991 'opt out', the Major government's resistance to the imposition of the WTD as an OSH initiative, and New Labour's 1997 policy commitment to the 'Social Chapter' as the defining episodes, this was the first of the SPA directives implemented for the UK. The Parental Leave Regulations were updated in 2002.

The Information and Consultation of Employees Regulations of 2004 were a grudging implementation of the Information and Consultation Directive of 2002. New Labour had opposed the Directive almost from the start and the regulations were severely compromised. These feature in chapter four.

The Employment Relations Act 2004 legislated for the amendments made necessary by two ECtHR decisions, the *Wilson and Palmer* and *ASLEF* cases, which feature in chapter three.

A recast Acquired Rights Directive saw new TUPE Regulations implemented in 2006. The long running transfer of undertakings saga is covered below, in chapters four and chapter six, but of interest here as a rare instance of the government going beyond what was required in the directive, to 'gold plate' the new regulations.

New Labour were replaced in office in 2010 by the Conservative and Liberal Democrat Coalition Government. The Coalition government oversaw the passing of the Equality Act 2010.³⁴⁵ The Bill had been introduced by the Gordon Brown led New Labour administration of 2007-2010. The new Act was a consolidation and revision of the discrimination legislation of the previous 40 years, and that it should have been required so soon after the 2006 Equality Act is a measure of the pace of progress in that sphere set largely by the EU - aspects of the 2006 and 2010 Act are discussed in chapter seven. However, the attitude of the new government to the Bill, and the Act, is instructive in terms of the differing approaches of the Tory, Lib Dem and New Labour 'brands' of neoliberalism to equality and anti-discrimination protections, in particular the antipathy of the Coalition to anything that smacked of collectivism. The new Home Secretary was unimpressed by what she called 'Harman's Law' - section one, requiring public authorities to have regard to socio economic inequalities 'when making decisions of a strategic nature' (see chapter seven). *The Guardian* reported that 'Theresa May scraps legal requirement to reduce inequality' - the Government failed to implement section one into law.³⁴⁶

³⁴⁵ The Temporary Agency Work Directive³⁴⁵ was adopted in 2008. ³⁴⁵ The UK Regulations came into force in 2011 under the Coalition government, but they were drafted by New Labour,³⁴⁵ and they are discussed below in chapter seven.

³⁴⁶ 17 November 2010. The paper reported that she had said that it was 'ridiculous.'

Labour, she argued, had ‘stopped treating people like individuals and instead viewed them as part of some amorphous herd...we need to move beyond defining people simply by their membership of a particular group.’³⁴⁷

In reality the 2010 Act ‘maintains a generally individualistic approach to the systematic problem of discrimination,’³⁴⁸ and arguably only sections one and 149 saw New Labour adopting the systematic or collective approaches capable of beginning to tackle the ‘structural,’ and ‘entrenched,’³⁴⁹ inequality of the labour market. The Tories and Liberal Democrats were unhappy with both sections.

The new government also failed to implement section 14 on ‘combined discrimination,’ which allowed for claims based on less favourable treatment rooted in the ‘intersection’ between two protected characteristics. While it did implement section 40 (2),(3) and (4) which permitted employees to bring a claim against an employer for permitting ‘3rd party harassment’ it announced a consultation on the extension of the anti-harassment measures and ultimately repealed those subsections.³⁵⁰ Arguably these can be seen as political gestures intended to reflect the Coalition deregulatory campaign, traditional Tory scepticism for anti discrimination measures, and to at least make it appear to Eurosceptical elements in the Tory party and the electorate that the government’s hands were not entirely tied by membership of the European Union.

Scepticism was similarly broadcast by the publication of *The Public Sector Equality Duty: Reducing Bureaucracy*. S149 of the 2010 Act revised the PSED and extended it beyond sex, race and disability to require public authorities to have regard to ensure equality in the spheres of sexual orientation, pregnancy, maternity, gender reassignment, religion, belief and age.

³⁴⁷ From the text of a speech given by May on 17 November 2010. In it she used the word ‘individual’ and ‘individualistic’ multiple times. www.gov.uk/government/speeches/theresa-mays-equality-strategy-speech

³⁴⁸ A Mccolgan, *Equality Act 2010*, Liverpool, 2012, p50.

³⁴⁹ *ibid*

³⁵⁰ By s65 Enterprise and Regulatory Reform Act 2013.

The new government announced a consultation and review of the duty,³⁵¹ but despite the comparatively collective nature of the duty s149 was retained.

Swingeing cuts were made to the funding of the Equality and Human Rights Commission. The Commission noted in its 2012 report on the Enterprise and Regulatory Reform Bill 2012-13,³⁵² that the Bill aimed to repeal s3 of the Equality Act 2006 which set out the general duty of the Commission, and the s10 duty for it to 'promote good relations between different groups,' along with many of the powers which enabled it to fulfill that duty, and that the intention of the government was to half the funding of the Commission during 2010-15.³⁵³ The Commission also reported that the Bill sought to withdraw the 'discrimination questionnaires,' what it called the 'question and answer procedures,' introduced by the 2010 Act.³⁵⁴

The right to the use of discrimination questionnaires was ultimately withdrawn by the repeal of s138 Equality Act by s.66 of the 2013 Act. This denied tribunal claimants the right to present a list of searching questions to the respondent before the hearing, an initiative in accord with the requirements both of EU law and the European Social Charter for states to take measures to address the inherent difficulties in presenting a discrimination claim, one closely related to the 'reverse burden of proof.' A failure to provide a satisfactory reply had the potential to severely compromise the employer's defence. This, and a subsequent proposal to repeal of s.124 of the 2010 Act, which gave tribunals the power to make general recommendations to the employer following a successful discrimination claim, drew the attention of the ILO's Committee of Experts, who, 'Recalling that the burden of proof can be significant obstacle to justice,' requested further information.³⁵⁵

³⁵¹ Little came of this. See 'The Independent Steering Group's report of the Public Sector Equality Duty (PSED) review and government response', 6 September 2013, and the TUC 'Touchstone' blog 'The good the bad and the ugly of the Equality Duty Review', by Ben Moxham, 11 September 2011.

³⁵² Equality and Human Rights Commission, *Enterprise and Regulatory Reform Bill 2012-13, Report Stage and Third Reading Briefing, House of Commons*, October 2012.

³⁵³ McColgan 2012, *op cit*, p4 and note 2 on p4.

³⁵⁴ *Ibid*, p12-14.

³⁵⁵ Observation (CEACR) adopted 2014, published 104th ILC Session 2015, on Discrimination (Employment and Occupation) Convention, 1958, (No.111).

Nevertheless, section 2 of the Deregulation Act 2015 subsequently amended s.124 to restrict permissible recommendations to those made ‘for the purpose of obviating or reducing the adverse effect on the claimant of any matter to which the proceedings relate.’ Now exercise of the power is restricted to cases where the claimant remains an employee, and to matters pertinent to the claim which will benefit the claimant, which might plausibly be said to reflect the hostility of Cameron’s Tories to treating the right to non-discrimination as anything other than an exclusively individual right.

Despite the embedding of individualism by successive governments since 1979 the Tories, assisted by their ‘Orange Book’ Liberal Democrat partners,³⁵⁶ apparently considered it necessary to renew the ‘scattergun’ approach of the Thatcher and Major governments and set about amending and neutralising anything which smacked of collectivism. Labour market deregulation enjoyed a renaissance too, and the ambitions and attitudes of many of those on the right of the Conservative Party in relation to employment protection law were given expression in the unambiguously neoliberal *Beecroft Report* on employment law reform, leaked in October 2011 to *The Daily Telegraph*. The Coalition partners appeared to find common ground in their commitment to deregulation,³⁵⁷ claiming that their intention was to encourage employers to recruit, despite the absence of any persuasive evidence that employment protection law discourages employers from taking staff on, and compelling evidence indicating that employment protection has no negative effect on recruitment.

In terms of substantive law, these reforms amounted to little more than political gestures. The principal change was to the collective right to a minimum period within which a consultation with workers must take place where an employer proposes to make 100 or more employees redundant. This was cut from 90 days down to 45 days, the period during which previously consultation had to be made when between 20 and 99 workers were threatened by redundancy. Those coming

³⁵⁶ P Marshall and D Laws (eds), *The Orange Book; Reclaiming Liberalism* (Exmouth, Profile Books, 2004) is essentially a collection of articles on neoliberal policies written by some of the then leading Lib Dems – hence the term ‘Orange Book Liberals.’

³⁵⁷ Although it could be argued that the Beecroft report facilitated compromise by giving the Liberal Democrats the opportunity to appear to restrain their Coalition partners, and allowed the Tories to indicate to the more extreme of their supporters what they perhaps might have pressed for with a majority in the House.

to the end of fixed term contracts were excluded from the consultation regime,³⁵⁸ and the TUPE regulations were tinkered with in line with recent ‘business friendly’ decisions made by the CJEU in the wake of the Euro Zone financial disaster.³⁵⁹

Essentially the Coalition went far as it felt it could to stamp its authority on effectively entrenched EU legislation without provoking the interest of the Commission. The impact assessment on what was to become the Collective Redundancies and Transfer of Undertakings Regulations 2014 made the rather feeble claim that the reform ‘seeks to remove unnecessary gold-plating, allowing parties to concentrate on the key issues, and discouraging delay or avoidance of consultation.’³⁶⁰

While the deregulation, such as it was, appeared motivated by ideology, the employment tribunal procedural reforms appeared initially to have been made in order to reduce expenditure and to discourage employment claims, and the by now traditional ‘new broom’ adjustment to the qualifying period for unfair dismissal was said to have been aimed at encouraging recruitment and lifting spirits in the business world.³⁶¹ However, doubling the qualifying period to two years saved businesses only a paltry £4.7 million in the year following the change, and a BIS report from March 2013, found that the small businesses they surveyed in the four months after the qualifying period had been raised were unaware of the Coalition’s efforts on their behalf.³⁶²

The legislative centre piece of the Coalition’s employment programme was the Enterprise and Regulatory Reform Act 2013, referred to above. This wide ranging Act also abolished the Agricultural Wages Board – the last of the Wage Councils -

³⁵⁸ Following *University of Stirling v UCU* [2012] IRLR 266. However, the High Court ruled in *USDAW v Ethel Austin Ltd* [2013] IRLR 686, that redundancies can no longer be spread over a number of different ‘establishments’ to avoid the s188-s199 rules (21 or more redundancies proposed by one employer serve to trigger the consulting requirements).

³⁵⁹ See chapter six.

³⁶⁰ BIS Collective Redundancy Consultation: Government Response 1st December 2013.

³⁶¹ The Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012 amended the Employment Rights Act 1996.

³⁶² Department for Business Innovation & Skills, Jordan, Thomas, Kitching and Blackburn, *Employment Relations Research Series 123, Employment Regulation Part A: Employer perceptions and the impact of employment regulation* March 2013, p.29. Of course, the two year period applied only to those employed after 6th April 2012.

and is perhaps most notorious for shifting the burden of proof back on to the employee in accident at work claims.³⁶³

The Act deprived employees relying on the disclosure of information not considered to be matters of public interest in employment claims of ‘whistle blower’ status. It introduced ‘no fault’ *settlement agreements* to replace the ‘compromise agreements’ previously commonly used to ease the departure of unwanted employees who could not easily be dismissed on a pretext, as well as the much trailed but quickly forgotten concept of the ‘employee shareholder’, allowing existing employees to sign away rights to redundancy payments, unfair dismissal,³⁶⁴ the right to request flexible working and certain maternity rights, in return for a shares. The Act reduced the existing maximum unfair dismissal for the lower paid by limiting the compensatory award to the equivalent of 12 months’ gross wages for those earning less than the then existing cap of £74,200.

The Coalition were however able, at a stroke, to remove most of the burden they professed to see imposed upon employers by employment protection law, and reduce considerably the cost of the tribunals system by a procedural step implemented by statutory instrument - the introduction of tribunal fees.

The fees regime, introduced in July 2013 under the power conferred by 42(1) of the Tribunals, Courts and Enforcement Act 2007, required claimants pay an initial issuing fee of either £160 or £250, followed – if the claim was not settled or withdrawn – by a hearing fee of £250 or £950.

So, ‘Type B’ claims now cost £310, and ‘Type A’ £1,200. There was a much criticised fees remission scheme, which denied all but the very poorest of claimants assistance,³⁶⁵ and the fees were introduced as it was becoming understood that very many workers who had succeeded at tribunal were not receiving the sums they had been awarded. The result was that the number of tribunal claims plummeted, with, broadly speaking, in excess of 70% fewer claims being made overall. Equal pay, discrimination claims and claims for unpaid wages

³⁶³ See chapter six on OSH protections.

³⁶⁴ Not automatically unfair dismissals or discriminatory dismissals.

³⁶⁵ See E Rose, L Wood and E Kirk, *The Price of Justice: The Impact of Employment Tribunal Fees on CAB Clients in Scotland* (University of Strathclyde and Citizens Advice Scotland, March 2015). The Remissions scheme is discussed and set out at pp9-14.

and for written statements of terms and conditions were affected most, but essentially there was a massive and sudden ‘across the board’ reduction.³⁶⁶

Remarkably it appears that the fees regime was not anticipated to have much effect on the numbers of employment claims received by the HMCTS,³⁶⁷ and for the Tories the subsequent ‘cliff edge’ drop in employment claims was arguably a happy accident. For the Liberal Democrats, and Business Secretary Vince Cable in particular, it was a political catastrophe. The effect was to make them complicit in a fresh paring back of what remained of the post war compromise.

Not only the right not to be unfairly dismissed, but anti-discrimination and equal pay rights, far more politically sensitive than unfair dismissal, and, of course, effectively entrenched by virtue of Britain’s membership of the EU membership,³⁶⁸ were effectively withdrawn from the very many now no longer in a position to afford to bring a claim. Wage claims were made uneconomic for the lower paid; a £130 issuing fee, and a £250 hearing fee for a claim which even if successful might well not be paid meant that such claims all but dried up-

Nevertheless, the Tories won a working majority in the 2015 general election,³⁶⁹ and the new Cameron administration’s Trade Union Act 2016 further tightened the ‘blue tape’ that has been steadily stifling freedom of association since the early 1980s in the time served ‘stepping stones’ fashion. The new Act also cast the traditional attrition aside to deliver an unprecedented legislative attack on trade union freedom in the form of the new balloting thresholds.

³⁶⁶ See Andrew Moretta *Access to Justice: Exposing the Myths*, IER, 2016 for a basic description of the fees regime and criticism of the justification for it, and Abi Adams and Jeremias Prassl, ‘Vexatious Claims: Challenging the Case for Employment Tribunal Fees’ (2017) 80 *Modern Law Review* 42 for a highly regarded critique of the regime. Prof. Michael Ford QC was Counsel for the Equality and Human Rights Commission in the UNISON case and his article in the *Industrial Law Journal*, ‘Employment Tribunal Fees and the Rule of Law: R (Unison) v Lord Chancellor in the Supreme Court’ is of special interest (2018), 47 *ILJ* 1.

³⁶⁷ See the government impact assessment *Introducing a Fee Charging Regime in the employment Tribunals and Employment Appeal Tribunal* 30 May 2012 at 4.12 (and thanks to Michael Ford’s talk at the IER, 8 February 2017).

³⁶⁸ As well as the less immediately pressing requirements of the European Council, ILO and UN membership, and associated supranational instruments.

³⁶⁹ The Lib Dems secured so few seats they would have been of little assistance to the Tories even if they had been inclined – or required - to form another alliance with the Tories.

The Policy Exchange ‘research note’, *Modernising Industrial Relations*,³⁷⁰ provided the basis of the Bill which became the Trade Union Act 2016.³⁷¹ The authors of this badly informed yet highly influential paper argue that increased mobility of labour, and modern competition law, has made collective bargaining redundant, and that strike action should be permitted only in very restricted circumstances. It introduced the novel concept of the individual strike,³⁷² reminiscent of what was permitted – after due notice had been given - when the Master and Servant and Combination Acts were in force. The paper claims that:

‘Voting for changes to employment law, internal grievance procedures and appeals to industrial tribunals allow individuals to protect their (or others’) employment conditions. Going to one’s employer with a job offer from another firm is a more effective individual expression of discontent than an individual strike.’

The term ‘freedom of association’ was never once mentioned.

The Act this paper inspired arguably was, and remains, the most egregious attack on freedom of association in modern times. The principal effect of the Act is to make it difficult or impossible for workers to engage in lawful industrial action.

The 2016 Act, has turned what had previously been described as ‘trips and hurdles’ into barriers. Under the Act a minimum of 50% of those entitled to vote must take part in the ballot. In ‘important public services’ at least 40% of those entitled to vote must vote in support of the action. A simple majority of those who vote will no longer suffice. I discuss the illegality of these measures in chapter five, but a brief examination of the Welsh Assembly’s response to the 2016 Act (and the abolition of last of the Wages Councils) is appropriate at this point in my narrative: The Labour majority in the Assembly has resisted the

³⁷⁰ September 2010, by Ed Holmes, Andrew Lilico, and Tom Flanagan.

³⁷¹ Professor Alan Bogg of Bristol University spotted the connection: see ‘Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State’ (2016) 45 *ILJ* 299, pp301-2.

³⁷² To be contrasted with the ‘individual right to strike’ conferred by some states.

imposition of the Act,³⁷³ a bold stance which serves to highlight the extreme nature of this attack on collectivism.

The Trade Union (Wales) Act 2017 excluded Welsh public authorities from the provisions in the 2016 Act which placed conditions on the use of the ‘check off’ to pay union subscriptions straight out of workers’ wages,³⁷⁴ required the publication of details of union ‘facility time’ granted officials to undertake union business,³⁷⁵ and gave ministers the power to issue regulations limiting facility time.³⁷⁶ Most significantly, however, the Welsh Act excludes the balloting thresholds, and expressly prohibits public authorities from hiring agency workers to replace strikers.³⁷⁷

This ‘slap in the face’ for the Tories came shortly after the Agricultural Sector (Wales) Bill, providing for an Agricultural Advisory Panel to replace the AWB abolished by the Cameron government, had been subject to a failed challenge by the Attorney General at the Supreme Court under the dispute resolution mechanisms provided by the Government of Wales Act 2006. The Attorney General’s office had argued that the Assembly’s competence did not extend to industrial relations, an area which the GWA neither expressly reserved for Westminster as an ‘exception,’ nor expressly devolved, while the Assembly had taken the view that the Bill ‘related to’ agriculture, an expressly devolved matter under the terms of the 2006 Act. The Supreme Court ruled in favour of the Assembly, and the Agricultural Sector (Wales) Act became law in 2014.³⁷⁸

The 2017 Act was expressly intended to preserve the Welsh ‘social partnership’ approach to the provision of public services, and the view of the Assembly’s

³⁷³ ACL Davies, ‘Legislative Comment: The Trade Union (Wales) Act 2017’ 47 *Industrial Law Journal* 2018 135.

³⁷⁴ 116B TULR(C)A 1992.

³⁷⁵ 172A TULR(C)A 1992.

³⁷⁶ A power exercisable subject to certain provisos 3 years after the provision came into force (s14 TU Act inserting new 172A in TULR(C)A 1992).

³⁷⁷ Regulation 7 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 continues to forbid the use of agency workers to break strikes, but the government had announced plans to abolish what it described as a ‘nonsensical’ prohibition when introduced the Bill which became the Trade Union Act 2016 in 2015.

³⁷⁸ *AG v Counsel General for Wales* [2014] UKSC 43 [2014] 1 WLR. The position is that if a Bill has two or more purposes, none of which are ‘excepted,’ but one of which relates to a devolved matter then it is within the competence of the Assembly. If, however, one relates to an expressly reserved matter then it is not, unless that relationship is merely ‘consequential’ and unrelated to the purpose of that Bill (See Davies pp. 145-146).

Presiding Officer had been that the Bill was, therefore, within the competence of the Assembly. Had it been solely said to have been concerned with industrial relations then it would not have been within that competence. The provision of public services in Wales, however, embraces a number of expressly devolved matters and therefore the TU Wales Act, in preserving the way public services are delivered, can be said to relate to a devolved matter.

This did not 'go down well' at Westminster, with the Secretary of State for Wales indicating that the Act would be challenged after the Wales Act 2017 had come into force. When it does, employment and industrial relations will have become an expressly reserved matter, solely within the competence of Westminster.³⁷⁹ The provisions of the Wales Act are not retrospective, but while the TU Wales Act cannot be challenged in the courts the Secretary of State for Wales appears prepared to use the 'clarification' provided by the Wales Act to justify fresh primary legislation repealing the TU Wales Act, a step likely to increase support in Wales for Plaid Cymru, and for independence, as well as for the Labour Party.

However, whether the Tory Government is prepared to commit any further acts of self harm is questionable, for the furore over the Trade Union Act 2016-along with all else in the political arena, has been to a considerable extent eclipsed by the unexpected result of the June 2016 EU referendum, by that of the June 2017 general election and by the disastrous handling of 'Brexit.' Cameron had attempted to patch over the long standing rift in the Tory Party with the promise of a referendum on membership of the European Union. The intention had been, once the nation's support for continued membership had been established, to re-negotiate some of the obligations of membership, with particular emphasis placed on 'repatriating' employment law.³⁸⁰ Cameron meant, in effect, to seek the

³⁷⁹ By contrast, while the Scottish Government stated it was 'strongly opposed to the UK Government's Trade Union Bill,' under the terms of the Scotland Act 1998 all it was able to do was 'guarantee that it would not employ agency staff to cover strike action' (pp19-20 of International Covenant on Economic, Social and Cultural Rights, Scottish Government Response to List of Issues March 2016). Employment law is explicitly reserved to the UK government (see, for example, House of Commons Scottish Affairs Committee 'The future of working practices in Scotland,' Second Report of Session 2017-19, 4 March 2018, p3).

³⁸⁰ Prior to 2016 the referendum was to follow a negotiated deal: 'We will negotiate a new settlement for Britain in the EU. And then we will ask the British people whether they want to stay on this basis or leave...' (2015 Tory election manifesto). The European Parliament's Policy Department paper on the 'United Kingdom's Renegotiation of its Constitutional Relationship with the EU: Agenda, Priorities and Risks' (2015) by B. De Witte, C. Grant and J Piris noted that Cameron planned to renegotiate during 2015, taking the view that negotiations would probably 'spill over' into 2016 with an in/out referendum in the light of the deal taking place in the autumn of 2016. The authors took a very sceptical view of what could be achieved. Changes to the treaties were considered to be

permission of the EU to repeal, or substantially amend legislation long resented by the right wing of his party, like the Working Time,³⁸¹ and the Collective Redundancies Regulations, restore the cap on discrimination claims, and abandon ‘reversed burden of proof’ in discrimination cases,³⁸² with the supposed purpose of making the UK ‘more competitive.’³⁸³ There was arguably never any realistic prospect of any such repatriation,³⁸⁴ but that was what he told his party and the electorate.³⁸⁵

unlikely in the long term, and, of course, almost impossible in the short term. As for the prospects for changing the law, and what was referred to as the ‘big issue’ of the Working Time Directive, it was noted that there had been previous unsuccessful attempts at reforming the WTD: ‘There is no reason to believe that the current Parliament would be much more open to changing the WTD than its predecessors, so Cameron would be well advised not to make a priority of this directive.’ Unsurprisingly, although talks took place, Cameron ultimately chose to pledge to agree a deal after the referendum.

³⁸¹The WTR provoked a private members Bill, The Working Time Directive (Limitation) Bill 2015-16. The authors of the Bill, seemingly unaware of the very weak nature of the WTRs, essentially sought to permit all workers the liberty to opt out of the regulations. Arguably the Bill can be seen as political posturing by ‘Euroseptic’ Tory MPs, but also symptomatic of the view of the WTDs as ‘wrongs’ inflicted on the Tories and the UK.

³⁸² See, for example, Dominc Raab, Centre for Policy Studies, ‘Escaping the Strait Jacket’ November 2011, a document which displays the usual unconvincing neoliberal concern for the interests of worker: TUPE ‘can have negative consequences for jobs...The Government should push for a change to the Directive at the EU level’; ‘abolish the Working Time and Agency Workers Regulations’ – all in order to ‘promote jobs and respect worker choice.’

³⁸³ As Michael Ford recalled in 2016, prominent ‘Brexiters’ like Boris Johnson, Michael Gove and Priti Patel professed prior to the referendum to see further ‘deregulation’ of the labour market ‘as one of the major benefits of Brexit,’ with Patel, as Minister for Employment, going so far as to call for the UK to halve the ‘burdens’ of social and employment legislation after Brexit. These leavers drew on what Ford calls ‘dubious’ evidence that, for example, the combined cost of the Working Time Directive and the Temporary Agency Work Directive was £6.3 billion each year (‘The Effect of Brexit on Workers’ Rights,’ (2016) 27(3) *King’s Law Journal* 398 p 399).

³⁸⁴ The task was, arguably, at best, ‘not impossible’ which is no doubt why the referendum preceded the negotiations: “...[R]epatriation of EU competences on social and employment policy” would require the government “to persuade other Member States to unravel the *acquis* and hand British companies competitive advantage....difficult indeed, but **not impossible**” [emphasis added] Phillip Lynch, University of Leicester, Briefing Paper No.1: ‘The Conservative Party and Europe: Options after Lisbon’, 27 October 2009, issued part of the Lynch’s project undertaken in collaboration with Richard Whitaker and Gemma Loomes on ‘Competing on the Centre Right: An Examination of Party Strategy in Britain’). Even the ‘non partisan and independent,’ but arguably very obviously eurosceptic ‘think tank’ Open Europe was happy to broadcast that ‘substantial repatriation’ was ‘a huge challenge,’ although one which ‘would **not be impossible**’ (Open Europe: ‘Repatriating EU Social Policy: The best choice for jobs and growth?’ November 2011, By S Booth, M Persson and V Scarpetta, emphasis added. This paper cited the ‘dubious’ statistics referred to by Michael Ford [above]).

³⁸⁵ See, for example, ‘Conservative Party European Election Manifesto 2009:’ ‘...EU legislation has too often disregarded the particular needs and practices of the British workplace...That is why Conservatives believe that these laws are best decided at the national level and why **the restoration of British control of social and employment legislation will be a major goal for the next Conservative Government** (p 13, emphasis supplied); Tory 2010 Manifesto “A Conservative government will negotiate for three specific guarantees – on the Charter of Fundamental Rights, on criminal justice and on social and employment legislation – with our European partners to return powers that we believe should reside with the UK, not the EU. We seek a mandate to negotiate the return of these powers from the EU to the UK.” [p114] The references to the Criminal law and Charter related to

However, 51.89 % of those who voted in the referendum favoured leaving the European Union.³⁸⁶ The political landscape, already considerably altered by the election by the Labour Party of a socialist, Jeremy Corbyn, as leader of the opposition, literally changed overnight. Cameron resigned and was succeeded by Theresa May.

Portraying the Labour Party as an unelectable ‘busted flush,’ the Prime Minister made clumsy overtures to Labour’s core supporters, claiming that the Tories were now the Party representing the interests of working families. On 1 October 2016 May appointed Matthew Taylor, to head what became known as the *Taylor review on modern employment practices*.³⁸⁷ Taylor had formerly worked for Tony Blair.

While this was a distinct shift away from the Thatcherite approach of the Cameron cabinet, the Government showed no sign of backing down to any significant degree on employment tribunal fees, a move which might well have added much needed substance to May’s claims to be championing the interests of working people. The government’s *Review of the introduction of fees in the Employment Tribunals*, published in January 2017, ignored the injustice implicit in the *de facto* withdrawal of individual employment rights from those with more than £3,000 worth of property which could conceivably be sold to finance a claim to find that:

‘While there is clear evidence that ET fees have discouraged people from bringing claims, there is no conclusive evidence that they have been prevented from doing so.’³⁸⁸

European Arrest Warrants, proposals for European Public Prosecutor’s Office, and to the supposed fear that the Charter might confer fresh social and employment rights (see chapter four).

³⁸⁶ 48.11% voted to remain in the EU. The ‘turnout’ was 72.21%. Arguably the result was akin to tossing a coin. Had the ballot been held a month later, or a week earlier then remain votes might have been in the majority - by an equally narrow margin. Moreover, if 16-18 year olds, the 3.3 million people from EU states resident in the UK, and the 700,000 British ‘ex pats’ had been given a vote then very likely remain would have won the day. See B. Davies, ‘The EU Referendum: Who were the British People?’ (2016) 27(3) *King’s Law Journal* 323.

³⁸⁷ See gov.uk/government/news/taylor-review-on-modern-employment-practices-launches

³⁸⁸ *The Review of the introduction of fees in the Employment Tribunals*, Cmnd. 9373, Executive Summary, para 8.

In April 2017, the Prime Minister called an election with what was acknowledged to be the intention of strengthening her hand in the House of Commons, and in negotiating the terms of withdrawal at Brussels.

This, however, was a second failed gamble. In the June 2017 election, the Tories lost their overall majority in the House.³⁸⁹ By contrast the standing of the Labour Party, which had pledged to restore full freedom of association, introduce sectoral collective bargaining mechanisms, and, of course, abolish tribunal fees, was enhanced considerably.

May sought the support of the Northern Irish Democratic Unionist Party, and following the conclusion of a 'confidence and supply' agreement, she was able to form a Government.³⁹⁰ With the support of the DUP the Government now has an effective working majority of two in the House of Commons.

In July 2017 the Supreme Court ruled tribunal fees to be unlawful restoring the individual rights effectively withdrawn in 2013.³⁹¹ Much as the government had been held six months earlier in *Miller* to be unable to rely on prerogative power to exercise Article 50 TEU to exit the European Union,³⁹² the court ruled that Ministers could not use their powers under the Tribunals, Courts and Enforcement Act 2007 to emasculate the rights conferred by Parliament.³⁹³

The case can plausibly be seen as a clash of individual interest, of Diceyan concerns for taxation, public spending and the liberty of the employer,³⁹⁴ pitched against what can best be described as the collective good. The Law Lords took the collectivist side, finding that there had been a

³⁸⁹The Liberal Democrats gained 4 seats and now have 12 seats in the Commons. This still a far cry from the 57 seats they had before the 2015 election. The SNP lost 21 seats at Westminster, its 56 seat reduced to 35.

³⁹⁰ The DUP have 10 seats in the Commons.

³⁹¹ *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51.

³⁹² *R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union* [2017] UKSC 5. The UK entered the Common market on the basis of a Commons vote in 1972 on the European Communities Bill – passed by a majority of 112.

³⁹³ The Added Tribunals (Employment Tribunals and Employment Appeal Tribunal) Order 2013, SI 2013/1892 and Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, SI 2013/1893.

³⁹⁴ Only the former was considered by the court. That Tribunal Fees delivered *Beecroft Plus* has never been officially acknowledged (see above chapter*).

‘failure in setting the fees, to consider the public benefits flowing from the enforcement of rights which Parliament had conferred, either by direct enactment, or indirectly via the European Communities Act 1972...’³⁹⁵

The court noted that Article 52(3) of the EU Charter provides that the European Convention on Human Rights provides a floor to the *acquis*, the source of the majority of rights which workers seek to enforce at tribunal. Consequently, the ‘constitutional right of access to the courts...inherent in the rule of law,’³⁹⁶ considered in the light of the principle of proportionality,³⁹⁷ along with Articles 6(1) and 13,³⁹⁸ of the European Convention on Human Rights, which oblige states to guarantee access to justice and the effectiveness of Convention rights,³⁹⁹ led the Law Lords to rule that the imposition of the fees regime amounted to an unlawful barrier to justice.⁴⁰⁰

In a second blow struck for the collective interest it was held, with reference to the EU Charter,⁴⁰¹ and the Equality Act, that the fees ‘Order is indirectly discriminatory with the meaning of the 2010 Act, which is itself based on the concept of indirect discrimination in EU law.’⁴⁰² The Government had unlawfully discriminated against those sharing the protected characteristics in the provision of a public service by placing discrimination claims in the more expensive of the two categories;

‘the higher fees payable, either for Type B claims in general, or for discrimination claims in particular are indirectly discriminatory...This has put the people who bring such claims at a particular disadvantage. Deterring discrimination claims is thus in itself discrimination...’

³⁹⁵ Para 102.

³⁹⁶ Para 66.

³⁹⁷ Its recognition as a constitutional principle by the Supreme Court apparently assisted by the emphasis placed on it by the Strasbourg and Luxembourg courts (paras 80-89).

³⁹⁸ Paras 108-115.

³⁹⁹ In both the Strasbourg and Luxembourg jurisprudence. Article 47 of the Charter of Fundamental Rights of the European Union reflects the EU principle of effectiveness, Article 52(1) its interaction with the principle of proportionality.

⁴⁰⁰ The HRA was not relevant, because UNISON was not a ‘victim’, nor was the Strasbourg jurisprudence merely ‘taken into account’ as required by S3 HRA – it was used as a guide to the extent to which it was necessary to safeguard access to the EU rights, and to the UK constitutional protections for access to justice.

⁴⁰¹ The Charter arguably effectively being shorthand for the rights of the *acquis*. (see chapter four).

⁴⁰² Para 124.

Given that there was no objective justification for the fees order as a whole, it was not open to the government to attempt a justification for the premium;

‘it is accepted that the higher fees generally have a disparate impact and in my view it has not been shown that they are justified.’⁴⁰³

It is, however, instructive that the Law Lords were wholly preoccupied by the demands of the EU treaties and directives, interpreted with the aid of the Charter of Fundamental Rights, and with the Convention. The Convention’s sister instrument, the European Social Charter, ILO Conventions 100 and 111, the UN Covenant on Economic, Social and Cultural Rights all featuring very relevant and workplace specific anti-discrimination and ‘access to justice,’ obligations incumbent upon the Government, and arguably part of the UK constitutional ‘furniture,’ were ignored. This is explicable. Those rights have been ‘eclipsed.’ The ECHR rights to justice are anchored like the EU rights in black letter primary legislation (the HRA for the former, and the 1972 and 2010 Acts for the latter), and made mutually reinforcing at domestic level by the EU Charter, which takes the ECHR as a template to express the fundamental rights of the *acquis*, and which by Articles 52(3) and 53 explicitly cites the ECHR protections as the minimum provided by European Union law. In contrast the ILO, UN and European Social Charter rights ‘feed into’ domestic anti-discrimination protections only indirectly through the conduit of the Strasbourg Court, and they have largely been forgotten – forgotten by the electorate and necessarily ignored by successive governments with anti-collectivist agendas.

However, if the political hubris that had spawned the Trade Union Act could be said to have evaporated with the June 2017 election result, following the result of the fees challenge, the proponents of neoliberal industrial relations were now definitely ‘on the back foot.’

The decisions to hold the 2016 referendum, the subsequent 2017 general election, and the negotiations with the EU which have resulted in the Withdrawal Agreement, set to be the subject, under the terms of the Withdrawal Act, of a ‘meaningful vote’ in January 2019, have served to divide and weaken both the Tory Party, and the Tory government. Britain is said by some to be in the throes of

⁴⁰³ Paras 127-134.

a ‘constitutional crisis’; others prefer to describe it as the biggest political crisis since Suez in 1956. Nationalism and right wing resentment of European employment protections have caused the Tories to trigger the likely departure of the UK from a free trade agreement the terms of which appear entirely compatible with the neoliberal policies of the British governments of the past 40 years (see chapter four) against the interests (and perhaps, to a lesser extent, the wishes) of the majority of their MPs and supporters. Few believe that the current administration will survive much longer, and many believe that a general election is imminent.

If, as seems likely, the Tories are unable to form a government following a general election, the UK will very likely see, under a Labour government, or Labour dominated coalition, the restoration of the collective rights and freedoms withdrawn during the last 40 years, and, in effect, a fresh reconciliation between capital and labour achieved.

I have shown in this chapter that after hundreds of years of struggle such a compromise appeared, by 1875, to have been achieved by then lost due to the hostility of the judiciary at the turn of the 20th Century. Having seemingly been secured once more by the 1906 Act, it was partially withdrawn by Parliament during 1915 –1919 and 1927-1945, then once more restored in the immediate aftermath of World War Two. The Attlee government bound it and its successors to the maintenance of freedom of association by means of ILO Conventions 87 and 98, and Article 11 ECHR, while arguably just as crucial was the acknowledgement by the Tory administrations of 1951-1964 of the value of securing for workers freedom of association, and of the binding nature of the ILO obligations. That consensus ultimately manifested itself in the acceptance by the Macmillan government of the European Social Charter.

That entailed, as I explain in detail in the following chapter, the explicit recognition by a Tory led UK government of the right to strike, and bound it, and its successors, to guarantee for workers the right to bargain collectively. Further constitutional entrenchments for the protection of freedom of association and of

civil rights in the workplace were to follow - the ratification of the United Nations Convention on the Elimination of Racial Discrimination, and the two United Nations Human Rights Covenants. The first statutory individual rights were conferred to complement collective bargaining, providing what Wedderburn recognized as both a 'floor of rights,' and the beginnings of a 'collective right to associate' out of the bricks of certain 'individual rights,'⁴⁰⁴ like the right not to be dismissed for membership of a union, and the right to time off for trade union activities.

However, as the political consensus unraveled, individual rights came to be used to undermine collective bargaining, and to replace the collective protection provided by trade unions. The 'golden thread' was thus removed from the weave on the individual level, and on the collective level. As the freedom to bargain collectively, and for workers to lawfully take strike action to protect their immediate terms and conditions of employment, and their wider economic and social interests, was withdrawn it became no longer necessary for the government to maintain the individual rights it had conferred. As a consequence, the government was able to effectively withdraw those individual rights for the vast majority of workers by imposing, and maintaining the employment tribunal fees regime, and to follow that up with the crushing blow to what remained of freedom of association that was the Trade union Act 2016.

An appreciation of the illegality of the catastrophic 1980 - 2016 denial of full freedom of association requires an understanding of the legal instruments which underpinned the post war compromise. This I provide in chapter 3.

⁴⁰⁴Wedderburn, 1976, *op cit*.

Chapter Three: The rights instruments

In this chapter I set out the nature of these instruments, the nature of the obligation they impose, and the attitude the British government has taken towards them

I show that where treaties on industrial relations are concerned, the approach of the UK government has arguably always been to try to 'have its cake and eat it,' to both accede in principle to obligation, yet to shield domestic arrangements from outside interference, a policy apparent particularly in relation to ILO Conventions. Only rarely, and New Labour's acceptance of the EU 'Social Chapter' must be considered a special case,⁴⁰⁵ has the UK bound itself to respect labour standards which do not reflect existing British law and practice.

As a consequence, rather than submitting to the supervision of a gradual improvement in labour standards during 1945-1979, successive administrations can instead be said to have made a series of binding commitments to protect the full freedom of association which was the basis of the post war reconciliation. Where individual rights have been at issue, matters like working hours and holidays, voluntarism was usually cited as the reason for declining to bind the government. These were said to be matters that the British unions and employers preferred to negotiate.

During the 1980s, as the Thatcher government gradually restricted freedom of association, it sought to dispense with those commitments, and, in addition to adopting a policy of declining to ratify instruments which could potentially impose fresh obligations, was necessary to denounce those which were at odds with its new policies. It became apparent, however, that the UK was bound by multiple obligations to safeguard full freedom of association and, moreover, that multiple denunciations would be likely to cause unacceptable damage to the interests of the Government in domestic party political terms, and adversely affect British prestige and British interests on the international plane.

⁴⁰⁵See chapters 2, 4 and 7.

Rather than proclaim formally to the world its abandonment of treaty commitments, it chose instead to breach those labour relations obligations it considered politically inexpedient to renounce, and to 'ride out' any subsequent condemnation.

Called to account, its approach now is to variously ignore, obfuscate, and to question, either implicitly or explicitly, the authority of the supervisory body to which it is required to answer. Almost argumentative when responding to the European Social Charter's European committee on Social Rights and the UN Committee on Economic and Social and Cultural Rights, it is more cautious where the ILO's Committee of Experts is concerned and it is overtly respectful of the Committee on Freedom of Association. Real respect, however, is reserved for the Strasbourg Court. It has always – if tardily – changed the law in response to adverse rulings by the European Court of Human Rights. Compliance will, however, often still be questionable, and the process often overshadows the specific issue at hand, accompanied as it often is, with undignified, and usually ill informed, threats by members of the Government to either denounce the Convention or withdraw from the Council of Europe.

Unfortunately for the Government, however, since the start of the 21st Century where labour rights are concerned, this supra-national jurisprudence has been at its most influential. At Strasbourg a new 'integrated' approach has invigorated the interpretation of Article 11 ECHR,⁴⁰⁶ and the Court places particular reliance on ILO Conventions, the provisions of its sister instrument, the Charter, and the interpretation of those rights by the Committee on Freedom of Association, the Committee of Experts on the Application of Conventions and Recommendations and the European Social Rights Committee. On occasions it refers to the UN Covenant on Economic, Social and Cultural Rights, to the findings of the UN Committee, and to the EU Charter of Fundamental Right and Freedoms. In contrast to the use of the European Social Charter in the Belgian Police Trilogy

⁴⁰⁶ The identification of this integrated approach is credited to Virginia Mantouvalou (see 'Work and Private Life: *Sidabras and Dziutas v Lithuania*' (2005) 30 *European Law Review* 573), but Mantouvalou (in 'Labour rights in the European Convention on Human rights: An Intellectual Justification for an integrated approach to interpretation,' *Human Rights Law Review*, 2013, 529-555), gives credit to Martin Scheinin (see Scheinin: 'Economic, Social and Cultural Rights as Legal Rights' in Eide, Krause and Rosas (eds), *Economic, Social and Cultural Rights*, 2002).

(see chapter one) this positive, inclusive, approach, has led the Strasbourg Court to interpret Article 11 as protecting the right to bargain collectively and its corollary, the right to strike.

During the same period in the UK a new generation of senior judges, more conscious than their predecessors of British obligations under international and regional treaties, and obliged by the Human Rights Act 1998 to take account of the ECtHR jurisprudence, have been moved to provide workers a measure of protection against the statutory restrictions that had been imposed on freedom of association. While the traditional antipathy of the judiciary for trade unionists cannot be said to be a thing of the past, this new approach will perhaps at least give those judges less willing to shake off the constraints of the common law, and their individualistic prejudices, pause for thought.

The drafting of Article 11 ECHR

With the benefit of 70 years of hindsight it might seem remarkable that the Attlee Government, advised by Foreign Secretary Ernest Bevin that it 'treat with strict reserve any schemes for the pooling of sovereignty or for the establishment of European supranational machinery',⁴⁰⁷ passed over the opportunity to enshrine explicit protections for the right to bargain collectively in what was to become Article 11 of the European Court of Human Rights.

As one of the leading figures of the British delegation at Strasbourg, David Maxwell Fyfe, put it:

'The Europe of 1950 was avid for British leadership....our position as the holders of the conscience of European civilisation in the black years of the war gave Britain her fantastic reputation among our European friends.'⁴⁰⁸

⁴⁰⁷ TNA CAB 128-16-19, Cabinet meeting, 27 October 1949, p55.

⁴⁰⁸ *A Political Adventure, The Memoirs of Viscount Kilmuir*, 1964, p186. Maxwell-Fyfe was very critical of the attitude of the Attlee cabinet and of senior Conservatives, and considered that Britain had thrown away a great opportunity to take a leading role in Europe. For an argument that the Tories at Strasbourg sought to undermine UK post war collectivism with individual rights see Marco Duranti, 'Curbing Labour's totalitarian temptation: European human rights law as a Conservative political project' (2013) *History and Policy*.

Such was the respect accorded HMG that the Committee of Human Rights Experts was invited by the Secretariat General of the Council of Europe to pay particular attention to British criticism of the UN draft international Bill of Rights.

Unfortunately the UK preferred to qualify the rights and freedoms in both instruments as heavily as possible, and the British delegation's most significant contribution to Article 11 was a negative one. It ensured, in collaboration with the other Northern European states which relied on comparatively 'light touch' industrial relations arrangements (and arguably 'closed shop' union membership agreements are the inevitable and desirable consequence in such circumstances),⁴⁰⁹ that a right not to be required to associate was not included in Article 11. This 'Anglo- Nordic' alliance, sought to ensure that states could not be required to intervene in industrial relations beyond the provision of legislation required to guarantee a bare freedom to organise and associate.

The Attlee cabinet had become wary of wording which left undue scope for judicial or quasi judicial creativity. In April 1949, after having discussed the possible prosecution under Order 1305 of the leaders of the unofficial and official strikes then affecting the London docks, believed by some of the cabinet to have been triggered by communist 'agitators' seeking to undermine both the government and the T&GWU,⁴¹⁰ 'some anxiety was expressed' by Ministers over ILO Convention No.87. The instrument had been drafted 'in very general terms,'⁴¹¹ and they worried that 'it might be found that it unduly restricted the Government's freedom of action in dealing with illegal strikes inspired by political, rather than industrial objectives.'⁴¹²

⁴⁰⁹ Highly structured systems of industrial relations will ensure through regulation that employers recognise trade unions through, for example, statutory recognition procedures or state sponsored sectoral unions. Under conditions of 'collective laissez faire' workers are left to ensure that recalcitrant employers bargain with them with the threat of direct action by their employees and secondary action, often through the 'blacking of that employer's products by members in firms with which the employer deals. Solidarity may be ensured by obliging such employers to employ only union members, as in *Quinn v Leatham, op cit*).

⁴¹⁰ TNA Cabinet Conclusions CAB 128-15-27, p155-7. In fact almost all of the industrial action orchestrated by the unofficial Port Workers' Committees after 1945 was undertaken in aid of the very modest improvements in terms and conditions demanded by 'The Dockers' Charter,' (see Jim Phillips 1994, *op cit*)

⁴¹¹ Principally under the influence of the British delegation (see the Minister of Labour commending C87 to his colleagues below).

⁴¹² TNA Cabinet Conclusions CAB 128-15-27, p158.

HM Government pressed for obligations under the UN instrument to be expressed 'in clear and precise terms,' a demand the British representatives on the Committee of Experts were to make of the draft Convention.

The Committee of Experts ultimately produced two drafts of what became Article 11 ECHR, the Anglo-Nordic 'precise definition' version based on the heavily qualified UK draft of Article 19 of the UN Covenant, and a comparatively simple three point article protecting freedom of assembly, association, which included the right to form and join trade unions and the right to not be forced to join an association.⁴¹³ The Anglo-Nordic version dispensed with the negative right of association, but failed to mention trade unions.⁴¹⁴

The Ministers asked a Conference of Senior Officials, to amalgamate the two versions.⁴¹⁵ The Report of the Senior Officials noted of the final version of Article 11 ECHR that a compromise had been struck:

'In this Article, the conference has introduced express reference to the right to form trade unions, so as to bring this article into conformity with the United Nations Universal Declaration. On account of the difficulties raised by the 'closed shop system' in certain countries, the Conference in this connection considered that it was undesirable to introduce into the Convention a rule under which 'no one may be compelled to belong to an association' which features in the United Nations Universal Declaration.'⁴¹⁶

The British delegation had also opposed the establishment of a court. This too resulted in a compromise, the provision of the 'optional articles,' Article 25 and Article 46. If ratified, Article 25 gave citizens given the right of individual petition, and Article 46 saw the state acknowledge the compulsory jurisdiction of the court. The Strasbourg Court heard its first cases in 1959, and the UK ratified the two optional Articles in 1966.

⁴¹³ They produced two versions of the Convention.

⁴¹⁴ To Articles 8 -11 of the ECHR. All of these Articles are subject to the British qualification, although the formulation varies slightly between each one.

⁴¹⁵ Agreed at the Committee of Ministers' third Session 30 March – 1 April 1950. The Senior Officials convened 8-17 June 1950.

⁴¹⁶ Ibid, p11 and the Report of 19 June 1950 of the Conference of Senior Officials, *Collected Edition of the Travaux Préparatoires*, vol IV, p 262. (the TP was cited in *Young, James & Webster, op cit*, para 51).

The European Social Charter

For those states which had chosen to accept the jurisdiction of the Court, there was a considerable discrepancy between the robust protections afforded the Convention rights and the reporting procedures of the Convention's sister instrument, the European Social Charter.

So feeble was the Charter's monitoring programme that the Foreign Office, in a memorandum on the Charter supposedly written by Foreign Secretary, Alec Douglas – Home,⁴¹⁷ which was presented to the cabinet in October 1961,⁴¹⁸ did not trouble Ministers with any details of the supervisory regime.

It did, however, note with palpable approval that the declaratory Part I of the Charter had only

‘...to be accepted by all Contracting Parties as ‘aims of policy.’ No date is mentioned for fulfilment of the aims, and there is no requirement to report on them.’⁴¹⁹

Inconsequential as that seemingly open ended commitment appears to have been regarded in 1961 by the Macmillan Government, wedded as it was to the post war compromise and to collective bargaining, these aims have arguably been an embarrassment to the post 1979 administrations committed to withdrawing full freedom of association and isolating the individual worker.

Since 1965, when the Charter came into force, the Government has been required by the first sentence in Part I of the Charter, to ‘accept as the aim of their policy, to be pursued by all appropriate means, both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realised’:

⁴¹⁷ The Foreign Secretary then had the hereditary title of Lord Home, but as Alec Douglas Home he was Prime Minister for a year after Macmillan's October 1963 resignation.

⁴¹⁸ ‘The European Social Charter, Memorandum by the Secretary of State for Foreign Affairs’, 7 October 1961, para 2 (TNA CAB 129/107/6).

⁴¹⁹ Annex A ‘Comments on the Provisions of the Charter’, Para 2.

- 1: Everyone shall have the opportunity to earn his living in an occupation freely entered upon.
- 2: All workers have the right to just conditions of work.
- 3: All workers have the right to safe and healthy working conditions.
- 4: All workers have the right to a fair remuneration sufficient for a decent standard of living for themselves and their families.
- 5: All workers and employers have the right to freedom of association in national or international organisations for the protection of their economic and social interests.
- 6: All workers and employers have the right to bargain collectively.

and

- 8: Employed women, in case of maternity, and other employed women as appropriate, have the right to a special protection in their work.⁴²⁰

What were *mandatory* 'aims of policy' in 1965 arguably be seen as binding obligations in 2019, and a requirement that *all workers and employers should have the right to bargain collectively* would appear unequivocally to oblige the government to guarantee any worker the right to have his or her terms and conditions of employment negotiated by a trade union.⁴²¹

In Part II of the Charter, the 19 aims of policy were expanded upon in 19 articles. These did have to be reported upon, although certain of those rights that Governments were as yet unable or unwilling to guarantee could be set aside, the prospects for their ratification to being subject to review during the reporting cycle under the terms of Article 22. A minimum of 10 of the 19 articles had to be ratified, but the opportunity for states to choose what they were bound by went

⁴²⁰ These are the 8 of the 19 provisions that relate to the workers' rights considered in this dissertation.

⁴²¹ Para 6 of Part I, along with the mandatory Article 6 of Part II, which makes the same demand, which involves the fulfilment of paras 6(1) - (4). The ever patient ECSR has yet to take this uncompromising line with ratifying states, although, as the first Statement of Interpretation on Article 6 put it: 'This article seeks to ensure that *both* employers and workers can exercise the right to bargain collectively' (emphasis supplied, Conclusions I, 01/1/1965-31/12/1967).

further than that - each article comprised of numbered paragraphs which could be excluded providing a minimum of 45 numbered paragraphs were accepted in total. However, of the accepted articles, at least five had to be selected in their entirety from among the seven 'core' articles.

The Articles are immediate obligations, and were treated as such. The UK Government adopted its standard approach of committing itself only to those provisions with which current UK law or practice could be said to be compliant.

Having consulted with the Ministry of Labour, the Foreign Secretary was able to provide a commentary on which of the substantive Articles could be accepted and which could not. He emphasised to his colleagues that what the Foreign Office called 'restrictions' – equivalent to the Article 8-11 ECHR paragraph 2 qualifications permitting state infringement of those right in certain circumstances – were permitted,⁴²² and that the rights could, in accord with voluntarism, be implemented by collective agreement if coverage was such that it secured enjoyment of the right for the 'great majority' of workers.⁴²³

All the provisions deemed to be in accord with UK law or practice, and therefore acceptable, were ultimately ratified.

Crucially, however, those paragraphs where compliance was reliant upon the existence of collective agreement covering the 'great majority of workers' now arguably demand either fresh agreement to secure the rights in question in practice, or legislation to secure those rights as black letter law. All post 1979 UK administrations have been in breach of Article 6 paragraphs 2 & 3, which require the government to promote collective bargaining and bargaining machinery.

Article 1, one of the 'compulsory' core Articles, on '**the right to work**,' includes a commitment to 'the attainment of full employment,' and the right 'to earn a living in an occupation freely entered upon:

'With a view to ensuring the effective exercise of the right to work, the Contracting Parties undertake:

⁴²² Under Article 31.

⁴²³ Article 33.

- 1) to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment;
- 2) to protect effectively the right of the worker to earn his living in an occupation freely entered upon;
- 3) to establish or maintain free employment services for all workers;
- 4) to provide or promote appropriate vocational guidance, training and rehabilitation.'

Article 1 was said to be acceptable. No comment was made on the explicitly neutral approach to the 'closed shop' specified in the Annex to Part II of the Charter.

Article 2, on 'the right to just conditions of work' states that;

'With a view to ensuring the effective exercise of the right to just conditions of work, the Contracting Parties undertake:

- 1) to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit;
- 2) to provide for public holidays with pay;
- 3) to provide for a minimum of two weeks annual holiday with pay;
- 4) to provide for additional paid holidays or reduced working hours for workers engaged in dangerous or unhealthy occupations as prescribed;
- 5) to ensure a weekly rest period which shall, as far as possible, coincide with the day recognised by tradition or custom in the country or region concerned as a day of rest.'

Paragraphs 2, 3 and 5, on the provision of paid holidays and weekly rest were considered acceptable. Collective agreement secured these rights for the great

majority, and the Working Time Regulations largely serve to secure those rights today. Paragraph 1 requiring 'reasonable hours' and the progressive reduction of the working week, was not deemed suitable for ratification

'as it anticipates the course of collective bargaining which is traditionally a matter left to Employers and Workers in the United Kingdom.'

Paragraph 4, committing the UK to the provision of extra 'time off' for those engaged on dangerous or unhealthy work, on which the case for acceptance was said to rest 'on the terms of section 60 of the Factories Act 1937, and the limitations on hours in coal mines,' was ultimately accepted, arguably a mistake given that the UK is currently held to be in breach of 2(4) (see chapter 6).

Article 3 – The right to safe and healthy working conditions:

'With a view to ensuring the effective exercise of the right to safe and healthy working conditions, the Contracting Parties undertake:

- 1) to issue safety and health regulations;
- 2) to provide for the enforcement of such regulations by measures of supervision;
- 3) to consult, as appropriate, employers' and workers' organisations on measures intended to improve industrial safety and health.'

Article 3 was said to 'present no difficulty for the United Kingdom...The Article implies no obligation to issue safety and health regulations for all spheres of employment.'

Article 4 – The right to a fair remuneration

'With a view to ensuring the effective exercise of the right to a fair remuneration, the Contracting Parties undertake:

- 1) to recognise the right of workers to a remuneration such as will give them and their families a decent standard of living;

- 2) to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases;
- 3) to recognise the right of men and women workers to equal pay for work of equal value;
- 4) to recognise the right of all workers to a reasonable period of notice for termination of employment;
- 5) to permit deductions from wages only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreements or arbitration awards.

The exercise of these rights shall be achieved by freely concluded collective agreements, by statutory wage fixing machinery, or by other means appropriate to national conditions.'

Ensuring the right to fair remuneration, which requires the provision of wage sufficient for a decent standard of living, increased rates for overtime (para 2), and reasonable notice on termination (para 4), was said to pose 'no problem.' Today, however, again largely by reason of the decline in collective agreement coverage in the UK, the UK is held by the European Committee on Social Rights to be in breach of 4(2) and 4(4). Although the committee has yet to rule on 4(1), pending the provision of more information by the Government, it is clearly also in breach that paragraph too (see chapter 6).

A commitment by the Government to the 'equal pay' demanded by Article 4 (3) was considered unacceptable

'because there is no Equal Pay among the Government's own industrial employees or among the domestic grades of hospital staff.'

Paragraph 3 has yet to be ratified, although there can be no doubt that the UK is now compliant. The acceptance of Article 4 (5) on wage deductions was said to be dependent upon what was decided following the then current review of the Truck Acts, but it was ultimately accepted. Today the UK is held by the ECSR to be in breach of para 5 (see chapter 6).

No comment was made, nor in 1961 was any necessary, on the last, unnumbered paragraph in Article 4.

Article 5 – The right to organise:

‘With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.’

This, the second ‘compulsory’ Article, Article 5 on the right to organise was deemed acceptable. HMG is required to ensure or promote the freedom of workers to the form of unions and ‘national law shall not be such as to impair, nor shall it be so applied to impair this freedom.’ The similarity of the wording to Article 8(2) and 9(1) of ILO Convention No. 87 was noted.

Article 6 – The right to bargain collectively

‘With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:

- 1) to promote joint consultation between workers and employers;
- 2) to promote, where necessary and appropriate, machinery for voluntary negotiations 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;
- 3) to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise:

4) the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.’

This third ‘compulsory’ article was also considered acceptable to HMG. Paragraphs 1-3 require the government to promote consultation, collective bargaining and bargaining machinery. Clearly UK governments have long neglected these obligations. The ECSR, however, is ostensibly currently waiting for further information on this matter, having so far received only obfuscatory comments from HMG. There can, of course, be no question that the UK is in breach of paras 2 and 3.

Paragraph 4, recognising the right to strike, was said to have given “rise to considerable discussion” during the negotiations. The memo noted – inaccurately – that ‘[t]he Charter will be the first international instrument adopted to recognise this right,’⁴²⁴ and, emphasising that acceptance means only ‘recognition’ of the right by the Government, and that it is not ‘an unqualified right,’ Ministers were assured that:

‘Our own acceptance of the text rests on the [Article 31] exceptions allowed... there would, for example, be no obligation on the Government to declare legal strikes called in contravention of collective agreements.’⁴²⁵

Article 8 – The right of employed women to protection

‘With a view to ensuring the effective exercise of the right of employed women to protection, the Contracting Parties undertake:

1) to provide either by paid leave, by adequate social security benefits or by benefits from public funds for women to take leave before and after childbirth up to a total of at least 12 weeks;

⁴²⁴ Convention 87 implicitly acknowledges the right to strike.

⁴²⁵ Para 10. Recognition by HMG of the right to strike was a considerable step, and this example of illegal strikes in breach of collective agreement might be considered odd given that in the UK collective agreements have rarely been legally enforceable. This may well, however, have reflected views on policy which manifested themselves in the Industrial Relations Act 1971 (the Tories were defeated in the October 1964 election and returned to power in June 1970), which provided for enforceable collective agreements and lifted the statutory immunities when strikes were called in breach of such agreement .

- 2) to consider it as unlawful for an employer to give a woman notice of dismissal during her absence on maternity leave or to give her notice of dismissal at such a time that the notice would expire during such absence;
- 3) to provide that mothers who are nursing their infants shall be entitled to sufficient time off for this purpose;
- 4) (a) to regulate the employment of women workers on night work in industrial employment;
- (b) to prohibit the employment of women workers in underground mining, and, as appropriate, on all other work which is unsuitable for them by reason of its dangerous, unhealthy, or arduous nature.'

Of Article 8, only paragraphs 1 & 4, requiring the provision of a minimum of 12 weeks adequate pre and post natal maternity pay or benefit, and a prohibition on women being employed in dangerous or underground work were considered acceptable. Paragraph 4 was denounced in 1986. Paragraph 2, prohibiting those on maternity leave being given notice, and paragraph 3, requiring nursing mothers to be given time off, were not considered acceptable, on the grounds that fresh legislation would be required.

The Retreat from the European Social Charter commitments

The process of monitoring the respect of states for these substantive rights has not changed markedly since the Charter first came into force. Government reports on their implementation and exercise are submitted to the European Committee on Social Rights (previously known as the Committee of Independent Experts), and to the national representatives of workers and employers.⁴²⁶ Initially these were submitted every two years, but since 2006 an annual report has been submitted on one of four 'thematic areas'.⁴²⁷ After the reports – and any accompanying comments that the unions or employers wish to make known to the Committee - have been examined by the Committee their Conclusions are sent to the Consultative Assembly, and to the Governmental Committee. A sub

⁴²⁶ Article 23 ESC.

⁴²⁷ For example, the Conclusions of the committee on the 2015 report on health and safety rights in group 2 were thus handed down in December 2017 and will be published in January 2018.

committee of the Governmental Committee comprising of a representative from each Government, accompanied by representatives from internationally accredited domestic trade union and employers' organisations will then examine them. The sub committee then presents its own conclusions, along with those of the ECSR, to the Committee of Ministers,⁴²⁸ which then considers both sets.

Until 1992 the views expressed by the Consultative Assembly on the ECSR's Conclusions were considered by the Ministers alongside those Conclusions, and those of the sub committee.⁴²⁹ The Ministers may then, according to Article 29 of the Charter, subject to a two thirds majority being achieved in each particular case, hand down "any necessary recommendations" to errant Governments.⁴³⁰

However the Ministers did not, before the amending Turin Protocol of 1991, make any such individual recommendations. Such a step required a two thirds majority of all Council of Europe states, and it never proved possible to obtain that majority.

The protocol sought to remedy this by streamlining the supervisory procedure, to give it the modest political bite that had originally been envisaged. The protocol also made it clear that the ECSR had sole responsibility for deciding whether states were or were not in compliance with the Charter (and therefore the interpretation of the provisions), and that the Governmental Committee's role was restricted to suggesting to the Ministers the most effective recommendation to be adopted based on the national situation in a particular state.

As an amending protocol it required the ratification of all of the states then bound by the Charter. Unfortunately the UK, Germany, Denmark, and Luxembourg have so far failed to ratify it, stopping it from entering into force. Despite this, the Committee of Ministers has, in collaboration with the Assembly, implemented the provisions of the protocol, and the position now is that, with a two thirds majority of those states (abstentions no longer being no longer allowed to effectively count as a vote against such a step), the Committee can adopt a Resolution at the end of each reporting cycle, which may contain Recommendations. If there is no satisfactory response then, at the instigation of the Governmental Committee, and another two thirds majority being achieved, then an Individual

⁴²⁸ Article 27 ESC.

⁴²⁹ Article 28 ESC.

⁴³⁰ Article 29 ESC.

Recommendation will be handed down to the errant state.⁴³¹ This unusual situation, whereby a protocol ostensibly successfully blocked by four states has nevertheless been given effect, has been downplayed by all involved.⁴³²

The Turin Protocol had its origins in the negotiations which had commenced in very early 1980s, with the intention of revising and revitalising the Charter,⁴³³ and which also led to the 1988 Additional Protocol (ETS No. 128).

That instrument extended the reach of the 1961 Charter to cover require states to guarantee equal treatment in employment on grounds of sex; a right of workers to information and consultation, as well as to involvement in the improvement of working conditions at establishment level, and to provide social protection to the elderly. Negotiated by the UK on the proviso that it would not be obliged to sign or ratify the instrument, the official reason for non-ratification was dissatisfaction with 'the precise wording' of the rights. The Additional Protocol came into force when the third ratification was made in 1992. Of our Government's allies in the amending protocol episode, Denmark signed and ratified on the same day in 1996, and Germany and Luxembourg signed when the instrument opened for signature, but have yet to ratify. The UK has neither signed nor ratified the protocol.

In contrast to the desire evinced by the Attlee, Churchill and Eden governments for precise obligations to be laid down in supra national instruments, it appears that the Thatcher and Major governments much preferred the scope for obfuscation that the more general obligations in the 1961 Charter provide. This was evinced when the comparatively precise obligations of Article 4(1) of the Charter caused something of a panic at Whitehall in 1982 before the Thatcher government had gauged quite how far it go in breaching the rule of law.

⁴³¹ See Council of Europe Committee of Ministers, Resolution ChS(95)2 On the Implementation of the European Social Charter During the Period 1991-92 (13th supervision cycle – part II) Adopted by the Committee of Ministers on 14 December 1995 at the 522nd meeting of the Ministers' Deputies.

⁴³²The official Council of Europe website describes the position thus: "The reporting system is set out in Part IV of the 1961 Charter as amended by the 1991 Turin Protocol (ETS No.142), which is applied on the basis of a decision taken by the Committee of Ministers." Council of Europe, Reporting System of European Social Charter (www.coe.int).

⁴³³Reading the civil service files on the early negotiations it is notable that there is an assumption by civil servants that a revision of the Charter will be a *good thing*, and that HMG is in favour of strengthening state obligation and the power of the Committee.

Then concerns were raised that the withdrawal of certain of the responsibilities of the Wages Councils in accord with the government's 'stepping stones' attrition of collectivism would breach the European Social Charter obligations. It was noted that Article 4(1) requires fair remuneration, and that the government was required to ensure that the 'exercise of this right shall be achieved by freely concluded collective agreements, by statutory wage fixing machinery or by other means appropriate to national conditions,' and that the effect of the proposals would be to leave overtime rates, equal pay, notice periods and deductions for very many workers protected neither by collective agreement, the Wages Councils, or any other method.⁴³⁴

The Ministry also reported that the proposals might result in a breach of ILO Convention No 26 on Minimum Wage Fixing Machinery, and that

'...views are being sought on the acceptability under IL[O] Convention 26 of any move to exclude the groups [from Works Council coverage]. Should the answer be in the affirmative we will need to consider quickly whether there are any other major international considerations or obstacles to be overcome (we have assumed the Social Charter would not have the same force as the Convention)...'⁴³⁵

By March 1984 the Department had realised that the ILO would not be amenable to changing the Convention to suit the British government, but felt that restricting

'the powers of the Councils to the setting of a single minimum rate for adults, coupled with provision for preventing minimum rates for young people rising above a specified proportion of the adult rate could be defended as compatible with IL[O] Convention 26.'⁴³⁶

Effectively they felt that the government could breach the Convention and bluster in response to the Committee of Experts;

⁴³⁴ Emphasis supplied. See the Department of Employment file 'Council of Europe European Social Charter Wage Councils and international obligations' in TNA LAB 10/2969 from which this and subsequent passages have been taken.

⁴³⁵ *Ibid*, Note by JA Dyble 16 February 1982.

⁴³⁶ *Ibid*, draft memorandum 'by the Secretary of State' for Employment.

‘there are grounds for thinking that we should be unlikely to incur serious criticism....The TUC might well lodge a complaint with the ILO but we would have good counter arguments.’⁴³⁷

However, the matter was obviously reconsidered, and the Convention was denounced in July 1985, while Article 4(1) of the European Social Charter, not having ‘the same force as the Convention,’ was simply ignored.

In 1988 officials at the Department of Employment noted, in relation to the proposed abolition of the Wages Councils, that ‘[t]here are no relevant EC Directives, and we have denounced the relevant ILO Convention.’⁴³⁸ The ‘heavy hitters’ were out of the way.

Where the European Social Charter was concerned it was admitted that

‘I think we might have to concede (privately at any rate) that a finding by the Committee of Experts [now the European Committee on Social Rights] that by abolishing Wages Councils we were in breach of our obligations under Article 4:2 would be well founded. How seriously should it be regarded?’

The author stated that the Charter supervisory procedures were very different from those of the ILO. It was emphasised that there were no Eastern Bloc member states, or worker representatives, able to take the opportunity to lambast the Government. Moreover:

‘The sanctions are the informal ones arising from the embarrassment which member states feel at being found in breach of their obligations by a European organisation-of which the UK was a founder member and has fully supported over the years. Such embarrassment would be felt most directly by the Foreign and Commonwealth Office, which has lead responsibility for our relations with the Council of Europe, particularly as HMG takes the general line that we should strictly comply with our international obligations.’ Denunciation ‘would certainly not be well received in the Council of Europe, and it might be preferable for us to bear

⁴³⁷ *Ibid.*

⁴³⁸ Convention No.26 on Wage Fixing Machinery of 1928.

with the criticism of infringement rather than incur the odium of further denunciation.⁴³⁹

While adverse findings would assist domestic critics of abolition ‘and arguably lend force to the charge that the Government is selective in its observance of its international obligations,’ it was concluded that a finding of non compliance by the supervisory committee would merely be ‘regrettable,’ and that it would be appropriate to consult the FCO were it decided to abolish the Works Councils.

Another Department of Employment brief reassured colleagues and the minister that the Charter

‘has no complaints machinery and is not a tripartite body where the trade unions can raise complaints. The Council [of Europe] supervisory machinery which monitors whether member state[s] are meeting their Charter obligations operates on the basis of reports submitted to it by member states not in response to complaints.’

The slowness of the reporting cycle was also seen to blunt the repercussions of a breach, and it was noted that the Government report mentioning abolition need not be submitted until ‘mid or late 1990 and the comments of the Council’s Committee of Experts on that report would not be available until late 1991,’ by which time they would be very old news.

The brief also revealed how the lack of political bite had permitted the Government to undermine the authority of the Committee. Extraordinarily the official admitted that they had found that they were able to rely on their own assessment of compliance:

‘In practice we do not regard the Experts’ views on the application of particular Charter provisions as definitive. We examine their findings on their merits and normally respond by submitting further arguments to support our view that UK law and practice meets the Charter obligation.’

⁴³⁹ TNA LAB 10/2969. From papers by WRB Robinson Overseas Division Department of Employment 29 January and 29 February 1988. Articles 8.4(a) European Social Charter on night work and 84(b) on underground work had been denounced and it was considered that a “further tranche of denunciations” would be a step too far.

With remarkable cynicism it was stated that:

‘The Government has only found it necessary to denounce Charter provisions where in its own judgement a measure proposed by the UK was clearly contrary to Charter requirements... Abolition of Wages Councils certainly does not fall into this category in respect of the Charter obligations...To set in train the denunciation of the relevant charter obligations now on the basis that abolition would involve a breach would unnecessarily concede a debating point to the opposition... In general the UK pursues a policy of complying fully with its obligations... although there are a number of issues of varying importance on which we have not accepted the Experts conclusions of non-compliance, it is more difficult for us to do so if we are removing a previously cited means of compliance...’⁴⁴⁰

After 1988 denunciation was employed only on one other occasion. Ultimately, all the remaining Wages Councils with the exception of the Agricultural Wages Board were abolished in 1993, when notice was given of the denunciation of the two industry specific conventions.⁴⁴¹ Arguably the Major government had decided to minimise the adverse reaction by muddying the waters – the treaty obligations in respect of the Wages Councils were breached at the same time as two of the more minor related conventions were denounced. This might at least suggest some degree of residual respect for the rule of law. The AWB was ultimately abolished in 2012.

The UK was able to effectively depart from the evolution of the Charter when the Tory government rejected – along with Germany, Denmark, and Luxembourg - the Collective Complaints Procedure which was adopted in 1995 and came into force in 1998. New Labour evinced no interest in the initiative.⁴⁴²

The Protocol on the Collective Complaints Procedure has been ratified by France, Greece, Portugal, Italy, Belgium, Bulgaria, Ireland, Finland, the Netherlands, Sweden, Croatia, Norway, Slovenia, Cyprus, and the Czech Republic. The Protocol

⁴⁴⁰ TNA LAB 10/2969, WRB Robinson, 8 February 1988.

⁴⁴¹ Convention No.99, Minimum Wage Machinery (Agriculture) 1951, which had been ratified in 1953, and Convention No.101, Holidays with Pay (Agriculture) ratified in 1956.

⁴⁴²The files on the Revised Charter, and the Complaints Procedures, and the Additional Protocol, although released to the National Archive and listed by them, have been withheld by the FCO. The FCO refused to release them to me when I made a Freedom of information request in 2018 claiming, unconvincingly, that the files contained only the instruments in question.

can be said to have substituted *enforcement* for mere monitoring, and the reporting procedures have been eclipsed. A decision by Committee of Ministers saw, in 2006, a simplified reporting procedure introduced for those states which have ratified the Collective Complaints Protocol and thus permit their citizens direct access to the Committee.

The revitalised ECSR can now be said to rival the ILO Committee of Experts and CFA, the Governmental Committee, and even the Strasburg Court, in the provision of authoritative, effectively binding determinations on the protections provided by the Charter.

However, the 1961 Charter can also be said to have been eclipsed by the Revised Charter. This consolidated the 1988 Protocol and the 1961 Charter, added new rights, and made certain amendments. It opened for signature in 1996 and came into force after 3 ratifications in 1999. It has been signed by the four dissenting states but has yet to be ratified by them. The revised Charter and the Collective Complaints procedure arguably amount, in effect, to a new Council of Europe labour and social rights regime which the UK has rejected.

While, the evolving case law of the Complaints procedure and the provisions of the revised Charter inevitably influence the interpretation of the 1961 Charter by the ESRC, and to an extent the work of the Strasbourg Court, the ILO supervisory bodies, and, theoretically at least, that of the ECJ, that influence is indirect.

British workers have, with remarkably little having been said on their behalf in Parliament, been denied the opportunity to call the Government directly to account for failing to guarantee a raft of rights that they have supposedly had the benefit of the past 50 years.

The UN Instruments

The UN Covenants, and the work of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, have received considerably less publicity in the UK than the ILO and Council of Europe instruments and jurisprudence, although the UNICESCR has, since the establishment of the UN Committee on Economic and Social Rights in 1985, become a significant force.

The early contribution to the negotiations at the UN by the UK was an inglorious one. The British saw trade union rights as an associated but separate issue, and by January 1950, the UK delegation was arguing that the then current draft Article on freedom of association was satisfactory, dealing as it did ‘with the right of Association in a manner suitable to the nature of the Covenant.’ That meant that it failed to mention trade unions. It was argued that, with the revitalized ILO, and Conventions 87 and 98 in place, there was no need.⁴⁴³

Essentially the Attlee government supported the creation of a clearly defined and binding, ‘International Covenant designed to ensure the observation of fundamental rights within the territories of signatories,’ but wanted to go no further than that. It wished to avoid any prospect of being obliged to act or to legislate, and it pressed for the incorporation of the widest qualifications to the guarantees of freedom of association in both the UN and Council of Europe instruments (the ECHR), and the ‘limitation clauses’ in the drafts of both were substantially expanded in response to amendments tabled by the UK.

During 1950, however, it became apparent that, in contrast to the European Convention, economic and social rights were very likely to feature in the proposed Covenant.

Consequently, in March 1951, Foreign Secretary Herbert Morrison presented a memorandum to the cabinet,⁴⁴⁴ asking his colleagues

‘whether our attitude during this next session of the Human Rights Commission should be one of continued co-operation aimed at obtaining the least objectionable draft or whether we should disengage from the exercise.’⁴⁴⁵

The question was considered by the cabinet three weeks later, and Cabinet Secretary Norman Brook’s transcript of the discussion gives an extraordinary insight into the attitudes of ministers to the UN Covenant, and to the ECHR.

⁴⁴³ 7 January 1950 UK,E/CN.4/353/ Add.2 (*The International Covenant on Economic, Social and Cultural Rights Travaux Préparatoires* Edited by Ben Saul, 2016, p53).

⁴⁴⁴TNA CAB 129-45-7 Cabinet Memorandum by the Secretary of State for Foreign Affairs 19 March 1951, paras 1 & 2.

⁴⁴⁵Ibid, para 5.

On the UN Covenant Morrison admitted:

‘I don’t know anything about this – except that we are in a mess. Started as anti-Soviet propaganda. As it goes on, it looks as though it will put us on the spot-especially re Colonies.’⁴⁴⁶

The Lord Chancellor, Lord Jowitt described both the Covenant and the European Convention as the ‘...Work of cranks. Vague language – formulae by compromise,’ but stated that the UK had ratified the ECHR ‘for foreign policy reasons,’ and that if necessary he would support the ratification of the Covenant on the same grounds. However he was cautious:

‘We have never before thus limited the sovereignty of our Parliament...if we go on, let’s look very narrowly at every article.’

Hugh Dalton [who had been a member of the Strasbourg delegation] reminded his colleagues that the UK had not accepted Article 46 of the ECHR: ‘On Council of Europe, have we not excluded jurisdiction of [the] court?’

Jowitt: ‘Yes: but we may be pressed to accept it later.’

Dalton: ‘In doing so we made it clear that we were satisfied with our law.’

Jowitt: ‘On UN Covenant: we have proposed some judicial power to pronounce whether our legislation is satisfactory [he was referring to the powers of enforcement and implementation that the UK favoured]. This therefore is much more dangerous than the Council of Europe.’

Morrison: ‘I am sceptical of foreign policy value. Totalitarian states will ignore it anyway [the Soviet Bloc opposed enforcement]. I would have preferred manifesto, vice [‘as a substitute for a’] covenant. I would wish to play it slow: get it so muddled that nothing will happen.’

Jowitt: ‘Stay in and make difficulties. Very difficult for us to walk out.’

⁴⁴⁶TNA CAB 195-9-5, 12 April 1951

It is apparent that the cabinet were united in their opposition to outside interference, but that the maintenance of British prestige was of paramount importance. It is also apparent that Jowitt was acutely conscious of the potential of both the Convention and the Covenant to cause the Government problems in the future.

Later that year, however, a compromise that the British government could work with was agreed. At the Human Rights Commission's Seventh Session, and with the help of representatives from the ILO, a draft Covenant on economic, social and cultural rights was completed. A report was submitted to the UN Economic and Social Council,⁴⁴⁷ and after due consideration, the Council took the view that economic, social and cultural rights should be protected in a separate Covenant,⁴⁴⁸ and ultimately the General Assembly formally requested the Council to instruct the Commission to set about drafting two covenants.⁴⁴⁹

Following the October 1951 election the Conservative Party formed a government. Foreign Secretary Anthony Eden reported to the cabinet on the Covenants,⁴⁵⁰ recommending that the UK should support a civil rights covenant with precise obligations. However, like the Attlee cabinet, Eden argued that the government should merely 'go along' with the negotiation of economic and social rights and attempt to guide delegates towards producing some loosely drafted non binding instrument.⁴⁵¹

British enthusiasm for effective enforcement of the UNICCPR, appears to have faded as the provisions of the draft Covenant became more expansive and the 1950s progressed.⁴⁵² However, such was the broad nature of the post war consensus that by 1954 the UK delegation (under the direction of a Tory government) was arguing 'that failure to mention trade union rights' in the UNICCPR 'could lead to an erroneous interpretation that these rights were not civil rights as well as economic or social rights.'

⁴⁴⁷ Report E/1681 (and Corr. 1-4)

⁴⁴⁸ Resolution 384 (XIII) 29 August 1951.

⁴⁴⁹ Resolution 543 (VI) 5 February 1952.

⁴⁵⁰ TNA CAB 129-50-22, 'Memorandum by the Secretary of State for Foreign Affairs', 10 March 1952.

⁴⁵¹ *Ibid*, para 2. Recommendation (c) was to 'Continue to oppose the inclusion in either Covenant of an Article on 'self-determination of peoples' as being out of place.'

⁴⁵² See for example, *Ibid* para 9

It was the recognition of this important principle which carried the day at the Human Right Commission, and explicit protection was afforded trade unions in the text.⁴⁵³ Neither the UK delegation, nor the Human Rights Commission, can therefore be said to have considered freedom of association to be merely a right of the individual.

Moreover, the right to form or join trade unions ‘for the protection of his interests’ rather than the then current UNICESCR formulation ‘for the protection of his economic and social interests’ (‘promotion and protection’ was used in the final draft of the UNICESCR) was preferred on the grounds ‘that trade union organisations must often struggle for the protection of the civil rights as well as the economic and social rights of their members,’⁴⁵⁴ a choice which indicates clear support for political strikes.

The inclusion of Convention 87 in the UNICCPR, long championed by the British, had been questioned on the grounds that international law forbade states from undermining one treaty by reference to another, and that its inclusion was therefore without purpose. However:

‘it was emphasised that failure to make the suggested cross-reference could be interpreted as an indication that the United Nations overlooked or under-estimated the progress achieved in safeguarding trade union rights in international law. The proposal was finally adopted...’⁴⁵⁵

This is particularly interesting because it indicates that Convention 87 was ultimately included to link the Article to progress in the sphere of industrial relations and international law, therefore to the evolving ILO jurisprudence on freedom of association and the right to organise. It will, of course, be recalled that the work of the ILO’s CEACR in securing the compliance of member states with the Convention was underway by 1948, and the CFA had since 1951 been handling complaints brought by trade unionists from states party to the fundamental Conventions.

⁴⁵³Saul, *op cit*, para 146. Nowak, (M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2005), states that this was a UK motion – E/CN.4/L146;E/CN.4/SR.326,4f.

⁴⁵⁴*Ibid*, para 147

⁴⁵⁵ Nowak 2005, *op cit*, p290.

The texts were released for inspection in 1963. The final drafts were completed in 1966. The Covenants came into effect in 1976.

Unfortunately, despite the fact that the only concerns of the Wilson Government in terms of compliance with either Covenants that I have been able to find in the National Archives relate to the possibility of the UK government being prevented from prohibiting private education, Britain failed to sign up for the Optional Protocol to the UNICCPR (there was then no equivalent economic and social OP), adopted by the UN along with the Covenants in 1976.

In view of the enthusiasm evinced in the 1940s and 1950s by all administrations for a binding enforcement procedure it seems very likely that the escalating importance and influence of the ECtHR, the evolution of the Convention obligations (see below), and, perhaps, the ‘hooded men’ Northern Irish torture case *Ireland v UK*, lodged with the Commission in 1971, persuaded both the Heath and Wilson governments that it would not be in their interests, to ratify the protocol.⁴⁵⁶

Wilson had, of course, been prime minister when the UK submitted to the compulsory jurisdiction of the ECtHR, and had given citizens the right to petition in 1966. He can arguably be seen as something of a human rights pioneer, having presided over the government which first ratified Articles 25 and 46 ECHR, and which bound itself, and its successors, to the first specific race equality treaty obligations, and introduced the first workplace equality protections into UK law.

The European Social Charter had, when it came into force in 1965, as we have seen, obliged the government to guarantee a right to work (Part I (1), and Part II Article 1), the right to just conditions of work (Part I (2) & Part II Article 2) and, in the preamble, a requirement that the ‘enjoyment of the rights be without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin.’

However, the Race Relations Act 1965, although aimed largely at public manifestations of racial hatred, had not provided workplace protection.

⁴⁵⁶ [1978] ECHR 1. On these extremely compromising and well documented practices in Northern Ireland, see Ian Cobain, *Cruel Britannia: A Secret History of Torture* (London, Portobello Books, 2012, pp135-203..

Article 5 of the United Nations International Convention on the Elimination of All Forms of Racial Discrimination, 1965 was the first *explicit* supranational obligation to tackle workplace inequality. The Wilson government signed the Convention in 1966.

That obliges the government to protect the right to work, to equal pay for equal work, fair remuneration, just and favourable conditions of work ‘without distinction as to race, colour or national or ethnic origin.’⁴⁵⁷ Article 6 requires

‘effective protection and remedies, through the competent national tribunals...as well as the right to seek from such tribunals, just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.’

In retrospect it is remarkable that in the UK, as late as 1968, Bob Hepple, in his important book *Race Jobs and the Law in Britain*, was able to ask:

‘May a worker bring an action against an employer who refuses him employment on racial grounds? The answer is no.’⁴⁵⁸

Legislative action was, however, in train. The Race Relations Act 1968 augmented the 1965 Act to make discrimination on racial grounds in employment or trade union activities unlawful, and the UK was able to ratify the UN Convention in March 1969.⁴⁵⁹

However, to return to the UN Covenants, while neither the Heath or Wilson governments could reasonably have been said to be in breach of their UNICCPR

⁴⁵⁷ Article 5(d)(i).

⁴⁵⁸ (London, Allen Lane/Penguin, 1968) p109. Hepple argued that workers had no protection against discrimination. He dismissed the European Social Charter on grounds that it ‘provides no right of individual complaint.’ Concerned both about the refusal of employment, and membership of a trade union where union security agreements were in place, Hepple took the view that the only recourse an aggrieved worker would have been the common law doctrine of restraint of trade, but that S3 Trade Union Act 1871 immunity would have intervened to protect a trade union against any action (p.125). Oddly, he ignored or overlooked the fact that after 1966 any worker refused membership of a trade union on grounds of race would have had the theoretical option of taking the case to the ECtHR to complain of a failure of the government to extend the protection required by A11 and A14.

⁴⁵⁹ See chapter two.

Article 22 obligations in respect of freedom of association, there can be no doubt that every administration since the first Thatcher government has been.

Yet where freedom of association is concerned the UK, in contrast to the robust approach adopted by the ILO's CFA and CEACR, has largely escaped the censure of the Human Rights Committee, a remarkable state of affairs when one considers the comparatively wide terms of Article 22, and the explicit reliance upon Convention 87 as a floor of rights. The UN Human Rights Committee has since 1977 reviewed the state reports submitted every five years by the UK government, and makes 'Concluding Observations' which ultimately influence the General Comments addressed to all states party to the Covenant.

Essentially the Covenant, the Committee, and the Optional Protocol have not had the impact that had been anticipated in the 1940s and 1950s when a legally binding and rigorously enforced – rather than merely 'implemented' - 'International Bill of Rights' had been envisaged, even for those states which have accepted the Optional Protocol.

Under the 'OP' individual complaints, euphemistically termed 'communications,' can be submitted to the HRC when internal avenues have been exhausted. If the complaint is found to be admissible, the case is considered, and the opinion of the Committee published as a 'view.' Breaches may result in a non binding 'order' from the HRC to rectify the situation, and although it has been rightly acknowledged that these cases 'have created a considerable and important body of doctrine related to the ICCPR,' to be found in both HRC published material like the annual reports, and in 'a handful of scholarly articles and books,' the practical impact of the OP as been slight:

'Only occasionally do views figure in a discursive way in judicial opinions of state courts...however valuable for the relatively small number of individual

beneficiaries” the OP “has not made a significant contribution to the development of the human rights movement.’⁴⁶⁰

The individual complaints procedure of the UNCESCR might be said to offer rather more to those seeking to enforce the extensive labour rights the instrument obliges states to guarantee.

The economic and social rights OP is unarguably a product of the post Cold War acknowledgement of the artificiality of the division between the two sets of covenant rights. Ultimately adopted by the UN Committee on Economic, Social and Cultural rights in 2008, the OP had been the subject of negotiation since shortly after the fall of the Berlin Wall - 1990.⁴⁶¹ There had been no prospect of the Conservatives acceding to the complaints procedure, but, to the surprise of some, New Labour was not prepared to sign up to the OP either.

New Labour did, however, ratify the Optional Protocol to the UN International Convention on the Elimination of All Forms of Discrimination against Women in 2004,⁴⁶² and the OP to the Convention on the Rights of Persons with Disabilities in 2009.⁴⁶³ Progressive as these ratifications might appear, they were not likely to impose any politically unacceptable obligations on the government, and, were arguably simple media friendly electoral messages, rather than motors of change.

The UN Convention on the Elimination of All Forms of Discrimination against Women 1979,⁴⁶⁴ was signed by the UK in 1981, and finally ratified in 1986. It commits the government to securing ‘equal treatment in respect of equal value, as well as equality of treatment in the evaluation of the quality of work.’⁴⁶⁵ The very comprehensive Convention provisions require ‘practical realisation...through

⁴⁶⁰ Henry J. Steiner, ‘Individual claims in a world of massive violations: What role for the Human Rights Committee?’ (From *The Future of UN Human Rights Treaty Monitoring*, Phillip Alston and James Crawford (Eds), (Cambridge CUP 2000) pp38-39.

⁴⁶¹ Adopted by the UN December 2008 it came into force in 2013.

⁴⁶² ‘CEDAW’ – the OP was adopted by the UN in 2000.

⁴⁶³ ‘CRPD’ – the Convention and the OP were adopted by the UN in 2009.

⁴⁶⁴ Signed by the UK in 1981 and ratified in 1986.

⁴⁶⁵ Article 11. This is a very wide ranging Article, and its final provision leaves compliance a continuing challenge, demanding that ‘Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary’ (11(3)).

competent national tribunals' to ensure 'the effective protection of women against any act of discrimination.'⁴⁶⁶

However, Sandra Fredman has remarked on its lack of impact:

'CEDAW is little known and little used in the UK, even among women activists. Although the Government duly goes through the motions of preparing reports and responding to questions, it does not regard CEDAW as normative, in the sense of shaping policy or providing direction...where there is a challenge or a shortfall...it generally finds a means to justify its reluctance to change....Instead of CEDAW, of course, it is the EU that has been the strongest influence on gender equality law in the UK in recent decades.'⁴⁶⁷

On only three occasions has the UK been the subject of an individual complaint to the Committee on the Elimination of Discrimination Against Women. None of the cases were related to employment.

The New Labour Government ratified the UN Convention on the Rights of Persons with Disabilities 2006 in 2009,⁴⁶⁸ signing up to the OP on the same date. The very comprehensive Article 27 ICRPD requires States Parties, *inter alia*, to:

'Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment...Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable condition of work, including equal opportunities and equal remuneration for work of equal value...Promote the employment of persons with disabilities in the private sector through appropriate policies and measures which may include affirmative action programmes, incentives and other measures;

⁴⁶⁶ Article 2 and Article 2(c).

⁴⁶⁷ CEDAW in the UK, by Sandra Fredman www.edf.org.uk/report-cedaw-in-the-uk/.

⁴⁶⁸ It is notable that the International Convention on the Protection of the Right of All Migrant Workers and Members of their Families – which has no OP and largely refers to existing obligations in other instruments – remains unratified, despite having been adopted by the UN in 2003. However, it is arguable that even in 2003/2004 (in retrospect a very significant time for immigration into the UK from the EU) ratification of this instrument would have not worked to the political advantage of New Labour (witness Blair's handling of the proclamation of the EU Charter of Fundamental Rights in chapter 4). Since 2010, and the return of the Tories, and especially since the EU referendum, ratification has arguably been a political impossibility.

Ensure that reasonable accommodation is provided for persons with disability in the workplace.’

On only one occasion has the UK been the subject of an individual complaint.⁴⁶⁹ British governments have, however, far less to be proud of in relation to the protection for full freedom of association required by Article 8 UNCESCR, and to the economic and social rights that comparable western European states guarantee for their citizens – states which have signed up for the OP to the Covenant, and to the individual complaints procedure to the European Social Charter. If UK citizens – trade unions and other civil society organizations have standing under the OP - were permitted to petition the Committee over government failure to meet the obligations under the terms of the Covenant, then the government would find itself the subject of numerous complaints.

Although the Committee can do little to *enforce* the Covenant rights (only around 30% of governments ‘respond adequately’ to the complaints procedure),⁴⁷⁰ the political damage wreaked – providing an effective opposition is in place - would be likely to be considerable. The Committee, by United Nations standards at least, is remarkably demanding.

The ILO does not require ratified Conventions to be implemented into domestic law, and the Council of Europe does not require the incorporation of either the European Social Charter or the ECHR into the domestic legal framework. Compliance is enough, and compliance does not always require legislation. The UN Committee on Economic and Social Rights, however, takes a more uncompromising line. In its Concluding Observations on the UK 2009 report the Committee it demanded of the British government that the Covenant be ‘given full legal effect in its domestic law, that the Covenant rights are made justiciable, and that effective remedies are available for victims of all violations of economic, social and cultural rights. The Committee reiterates its recommendation that,

⁴⁶⁹ Communication No. 6/2011, submitted by Kenneth McAlpine, [2012]. The communication followed an unsuccessful domestic tribunal claim for unfair redundancy dismissal and disability discrimination. An application to appeal to the EAT had been rejected, as had an application to the ECtHR, and the complaint to the CPRD supervisory committee was also found to be inadmissible, the alleged violation having occurred before the UK had ratified either the Convention or the OP.

⁴⁷⁰ Marco Odello and Francesco Seatzu, *The UN Committee on Economic, Social and Cultural Rights, The Law, process and Practice*, (Abingdon, Routledge, 2013), p96.

irrespective of the system through which international law is incorporated in the domestic legal order (monism or dualism), following ratification of an international instrument, the State party is under a legal obligation to comply with such an instrument and to give it full effect in its domestic legal order.⁴⁷¹ That continuing failure was the first matter tackled in the last set of Concluding Observations on UK compliance in 2016.⁴⁷²

Were British failures in regard to UNCESCR obligations to be subject to quasi-judicial adjudication at the UN then it is quite possible that the determinations of the Committee would become as influential as rulings by the ECtHR.⁴⁷³ If a particular case gains enough ‘traction’ then, even if the government fails to rectify the breach, a change of government will - as we saw in relation to GCHQ - almost always be sufficient to secure change. Political will when in government is often strengthened by the political capital that was created on a particular matter when in opposition.

It will however, require a change of government to secure British accession to the Optional Protocols. Although there have been no specific pledges, it seems likely that a Labour government will be at least sympathetic to the argument that British citizens be permitted to petition the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, and will, as it is required, implement the provisions of the UNICESCR into domestic law.

The International Labour Organisation

The hostile attitude of the Attlee cabinet to the UN Covenant(s) and the European Convention was very different to the almost reverential view it took to the ILO, an attitude which permeated the UK political infrastructure to influence the Tory Party of the 1970s, before the *volte face* of the late 1970s.

⁴⁷¹ Economic and Social Council of UN Committee on Economic, Social and Cultural Rights, Consideration of Reports Submitted by State Parties, Concluding Observations 2009,E/C.12/GBR/CO/6, 14 July 2016 para 13. See also General Comment on Article 7 (2016) para 50, citing CESCR General Comment No.3 (1990) on the nature of States parties’ obligations.

⁴⁷² *Ibid*, Concluding Observations 2016, para 5.

⁴⁷³ Although ECtHR rulings are binding we see that they are not always complied with – the ‘votes for prisoners’ saga is the leading example, and in relation to the ILO we have seen the example of the GCHQ case.

This is not as surprising as it might at first seem. The ILO was revived after WWII by the Constitution of the International Labour Organisation Instrument of Amendment, and the Final Articles Revision Convention (No.80) adopted by the International Labour Conference in 1946. The memo by Minister of Labour George Isaacs which accompanied the subsequent White Paper stated that:

‘The United Kingdom delegation played a leading part in the work of constitutional revision culminating in the adoption of the Instrument and the Convention, and I think it would be particularly appropriate for His Majesty’s Government to effect these ratifications at the earliest possible date.’⁴⁷⁴

Article 1 of Chapter 1 of the ILO Constitution now read:

‘A permanent organisation is hereby established for the promotion of the objects set forth in the Preamble to this constitution and in the Declaration concerning the aims and purposes of the International Labour Organisation adopted at Philadelphia on 10 May 1944 the text of which is annexed to this constitution.’⁴⁷⁵

The Declaration of Philadelphia, as the White Paper subsequently acknowledged, ‘thus becomes part of the constitution.’⁴⁷⁶ The text of the Declaration states that:

‘The Conference recognises the solemn obligation of the International Labour Organisation to further among the nations of the world programmes which will achieve...(e) the effective recognition of the right of collective bargaining, the co-operation of management and labour in the continuous improvement of productive efficiency and the collaboration of workers and employers in the preparation and application of social and economic measures.’

⁴⁷⁴TNA CAB 129-17-22 Memo by Minister of Labour 28 February 1947

⁴⁷⁵Ibid, annex. The Cabinet paper has the old constitution alongside the new, with the additional text underlined.

⁴⁷⁶International Labour Conference Proposed Action By his Majesty’s Government in the United Kingdom of Great Britain and Northern Ireland regarding The Constitution of the International Labour Organisation Instrument of amendment 1946 and The Final Articles of Revision 1946, para 6.

So even before the key fundamental Conventions were adopted the UK government was arguably bound ultimately to provide workers with *a right* to collective bargaining, and for that bargaining to be extended to social and economic measures beyond the immediate terms and conditions of employment.⁴⁷⁷ Certainly the Attlee cabinet considered itself bound by the commitments it had signed up to – the commitments which its representatives had overseen the drafting of – in the constitution. *A right* of collective bargaining had arguably been supplied (or was in the process of being supplied) British workers by the lifting of the prohibition on secondary action, by the Wages Councils Act providing for extended sectoral bargaining in poorly organised sectors, the Fair Wages Resolution, and, paradoxically, by Order 1305 (and, after 1951, Order 1376), which obliged recalcitrant employers to negotiate with their workers, albeit through the medium of compulsory arbitration.⁴⁷⁸

Cabinet concern over the obligations imposed by the constitution was reserved for the ‘recognition of the principle of equal remuneration for work of equal value’ in the preamble to the Constitution. They decided that if they were to be reminded of their commitment – whether in Geneva or Westminster - it would be conceded that:

‘while they accepted the principle of equal pay, current economic conditions made it impracticable for them to give effect to that principle at the present time.’⁴⁷⁹

⁴⁷⁷ An essential element of collective bargaining is, of course, strike action.

⁴⁷⁸ Kahn-Freund might be said to have disagreed. Arguing from the standpoint of one who regarded UK post war policy as one of collective *laissez faire* (despite these state interventions), writing in 1953, he stated that while a refusal by a large firm was ‘rare’ (citing the *Thomson* case, see below), there was ‘no legal duty imposed on employers to bargain with the unions,’ and that C87, requiring by Article 1 ‘adequate protection against acts of anti-union discrimination,’ ‘has not yet been translated into law’. (Chapter II, ‘Legal Framework,’ Flanders & Clegg (eds), *The System of Industrial Relations in Great Britain; Its History, Law and Institutions*, (Oxford, Blackwells, 1954), p53. It had, however, been translated into practice for the overwhelming majority – as evinced by the Thomson case, and despite Kahn-Freund’s claims, in 1953, of 22 million workers in the UK, one and a half million were self employed, ‘a small proportion were employed under individual contracts,’ while ‘nearly five million are still covered by statutory systems’ – the Wages Councils (p55 and 69 of *British Trade Unionism, Five Studies by PEP*, London, PEP, 1955). While that still left 15 million, given that ‘[t]he conditions of service of the vast majority were however decided not between each employee and his employer but on the basis of decisions embracing the whole craft of trade concerned, either in the district or nationally’ (ibid, p55), even the most ardent anti trade unionist employer would have had to concede that collective bargaining impacted on the terms and conditions of their employees.

⁴⁷⁹ TNA CAB 128-9-26, Cabinet Conclusions, 6 March 1947.

When, in a 1949 memorandum on Convention 87, Isaacs urged ‘speedy ratification’ because of the ‘considerable importance in the international field’ of the instrument and ‘the leading part played by the United Kingdom delegation in securing its adoption,’⁴⁸⁰ Isaacs was able to reassure his colleagues that ratification of the Convention ‘involves no change in UK law.’⁴⁸¹

By June 1950 the cabinet records tell us that ministers, still very conscious that the equal pay principle was binding upon the Government, felt obliged to respond to the then current consultation over equal pay (which led to the adoption of Convention 100) by stating that they would ratify any Convention if the economic circumstances permitted it, but hoped that the International Labour Conference would merely adopt a Recommendation on the matter. Minister of Defence A.V. Alexander’s view of the ILO Conventions was that;

‘...we enforce and others don’t.’ Minister of Labour Isaacs told his colleagues that a positive decision ‘will be better for our prestige [abroad] and for public opinion in the UK.’⁴⁸²

As a measure of the nature of the obligation imposed on government by the ILO Constitution and Conventions these early discussions among the ministers who oversaw the negotiation of the terms on which those obligations were assumed are invaluable.

However, an examination of the Tory government’s handling of the events surrounding the famous case *D.C. Thomson & Co Ltd v Deakin* [1952],⁴⁸³ illustrating both the nature of the post war reconciliation and the demands of the ILO Conventions, is perhaps more instructive still. The well known printing and publishing firm D.C. Thomson had dismissed 79 workers on the grounds that they were members of a union,⁴⁸⁴ and as a consequence very many trade unions had ‘blacked’ the firm. Although Thomson’s had sought injunctions to prevent this

⁴⁸⁰TNA CAB 129-34-11, International Labour Conference, San Francisco, June-July 1948, Freedom of Association and Protection of the Right to Organise; Memorandum by the Minister of Labour and National service, 6 April 1949, para 1.

⁴⁸¹TNA CAB 195-7-27 Cabinet Secretary’s Notebook 2 May 1949.

⁴⁸²Cabinet Secretary’s Notebook, TNA CAB 195-9-5, 6 June 1950.

⁴⁸³ 2 All ER 361. However, for an alternative interpretation of the post war reconciliation see H Jones and MD Kandiah (eds) *The Myth of Consensus: New Views on British History, 1945-64* (London, Macmillan,1996).

⁴⁸⁴*Report of a Court of Inquiry into a dispute between DC Thomson and Company Limited and certain workpeople, members of the National Society of Operative Printers and Assistants, Cmnd, 8607.*

secondary action, which they argued was ‘actionable interference with a commercial contract,’ the Court of Appeal had found that the trade unions had acted lawfully. This decision was, as I have shown, interpreted by many as judicial acceptance of full freedom of association, and of the post war reconciliation of labour and capital.⁴⁸⁵

Although, Thomson’s had acted lawfully when they had sacked the men, it had placed the government in breach of its obligations under ILO Convention 98. This was pointed out in a briefing sent to Winston Churchill, by the Ministry of Labour.⁴⁸⁶

It was explained that the Attlee government had successfully pressed for the text be amended from ‘*be accorded* adequate protection against acts of anti-union discrimination’ to ‘*shall enjoy* adequate protection’ in order to avoid any suggestion that states be obliged to legislate. It also explained that the Government is obliged by virtue of membership of the ILO ‘to bring Conventions adopted by the Conference before Parliament ‘for the enactment of legislation or other action.’ It is bound, if a decision is taken to ratify a Convention, ‘to take such action as may be necessary to make effective the provisions of such Convention.’⁴⁸⁷

Churchill told the TUC, and the press, that at a meeting with the Minister of Labour, Thomson’s had been asked to pay close ‘attention to the principles embodied in International Labour Convention No.98 of 1949.’⁴⁸⁸ The firm had been presented with the choice of either permitting their staff to organise or being obliged to do so by law.

It is arguably evidence of the extreme reluctance of the government to legislate that the file shows that the Ministry sought Counsel’s Opinion on ‘whether the powers conferred by the Notification of Vacancies Order 1952 may be used in such a manner as to prevent a particular firm from obtaining further employees until it has consented to reinstate certain workers who left the employment of

⁴⁸⁵ See chapter two.

⁴⁸⁶ TNA PREM 11/556, ‘Note on the International Labour Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively.’

⁴⁸⁷ Ibid, paras 3 & 4.

⁴⁸⁸ TNA PREM 11/556, an excerpt from a press release of Churchill’s statement to a delegation from the TUC made on 8 September 1952.

the firm in the course of an industrial dispute.’ However the unnamed barrister advised that to use the Order it to compel Thompsons to employ particular workers was not authorized by the Supplies and Services Acts which governed its operation.⁴⁸⁹

The sacked men were never reinstated, despite personal efforts by Churchill to persuade the firm’s notoriously irascible chairman, but Thomson’s did thereafter permit their workers to join trade unions.

The Thomson affair had seen both the judiciary, and a Tory Government acknowledge the importance of the fundamental rights the men had fought for. More significantly still, it shows the respect and importance attached by that administration to its obligations under international law and, that in a clash of rights where both sides were acting lawfully, the fundamental right of freedom of association was seen, even by a Tory Government, to eclipse the right of DC Thomson to run his business as he saw fit.

The Thomson affair also illustrates the questionable value and nature of voluntarism, and its relationship to the non-ratification of Conventions. Given the long tradition of judicial hostility to organised labour, the trade unions were understandably wary of the prospect of more than minimal judicial intervention in industrial relations. The Attlee government’s stance on the wording of Convention No. 98 arguably reflected both respect for the trade unions, as well as the perhaps peculiarly British reluctance to be required to legislate evidenced in the cabinet conversations on the ECHR, UN Covenants and ILO conventions recorded above. The Tories, and the likes of D.C. Thomson, on the other hand, simply did not want employers to be obliged by domestic black letter law to either adhere to collective agreements or to permit workers full freedom of association. Nevertheless when it suited the Conservatives they were happy enough to intervene in industrial relations.

Respect for voluntarism was routinely cited as an excuse by the Tories for the failure to ratify later Conventions. An example was Convention No.111 concerning Discrimination in respect of Employment and Occupation (1958). Discrimination on grounds of sex and race in the sphere of employment was of course rife, in

⁴⁸⁹ *Ibid*, ‘Opinion – Notification of Vacancies Order 1952’ given to The Solicitor at the Ministry of Labour and National Service 31 October 1952.

both the public and private sectors, and the prospect of having to legislate on the matter startled the Tories. In 1958 the UK was, of course, enjoying 'never had it so good' prosperity and post war austerity could not be said to be a barrier to the ratification of either C100 or C111.

The Tory Minister of Labour instead warned his colleagues that ratification of C111 would 'raise difficulties',⁴⁹⁰ and the accompanying Annex to the Minister's Memorandum seized upon the excuse that it would 'require the Government to intervene in the normal processes of voluntary negotiation and collective bargaining.'⁴⁹¹ The Macmillan government had balked at providing what then would have been termed civil rights, and would now be seen as fundamental human rights.

Arguably the Tories have always exhibited a reluctance to intervene to address race and sex discrimination. As we have seen, it was the Wilson Labour administrations which introduced the Race Relations Acts of 1965, 1968 and 1976.

Nevertheless, 1958 - 1976 was remarkable period of change when supranational obligation and changing social attitudes imposed broad political consensus on civil rights. But perhaps more remarkable still is the fact that such was the weight of public opinion, and the perceived necessity to abide by international commitment, and the Rule of Law, that throughout that period of radical change there remained broad political consensus on freedom of association. A denial of the right to bargain collectively was as unthinkable in 1958 as it was in 1976

As we saw in chapter two, the Heath government did not question the value of collective bargaining, and the restrictions on the right to strike which the 1971 Act sought to impose were offset, like the Attlee Government's retention of Order 1305, by the provision of formal bargaining structures, and an impressive statutory recognition procedure. The ill judged prohibition on secondary action aside, after the Industrial Relations Act had come into force, the UK could not be said to be in breach of any of its fundamental international obligations on labour rights.

⁴⁹⁰ TNA CAB 129-97-37, memo by Minister of Labour 7 May 1959 para 2.

⁴⁹¹ Ibid.

The Heath Government had added to those obligations. In 1972 it ratified ILO Convention No.135, and Recommendation No. 143, which extended the anti-trade union discrimination provisions of Convention 98 to trade union representatives, commitments which were accepted by the cabinet as a matter of course.⁴⁹²

Considered by the cabinet alongside a Convention and a Recommendation aimed at protecting against benzene poisoning in the workplace, these measures, and, *inter alia*, the provision of time off for trade union business, workplace facilities, the 'check off' for union subscriptions, so recently brought to prominence by the passage through Parliament of the Trade Union Act 2016, were not considered in any way controversial in the early 1970s.

While it is true that the Minister considered that the law and practice in the UK was in accord with the Convention 135 and Recommendation No.143, they were ratified at a time when the Government was effectively at war with the unions. A refusal could scarcely have made matters worse – these were the days of the '3 day week' and of power cuts. Had the Government then been contemplating the withdrawal of collective bargaining that was implemented during 1980-1993 then they would not have decided not to commit themselves to retaining these facilities and protections.

The defining feature of the post war cross party British approach to the obligations of ILO membership, was that it was a *commitment* to collective bargaining rather than to the improvement of labour standards. While respect for voluntarism was usually cited as a reason for not ratifying a treaty, more compelling political or economic reasons appear to have been decisive factors. For example, in 1958 the Minister of Labour had advised his colleagues to decline to ratify Convention No. 106 or accept Recommendation No. 103, concerning Weekly Rest in Commerce and Offices on those grounds,⁴⁹³ and the formula was adhered to even as the Tories had fought to replace voluntarism with more

⁴⁹² TNA CAB 129-163-16, Note by the Secretary of State for Employment accompanying the White Paper 'International Labour Conference. Proposed action by Her Majesty's Government in the United Kingdom of Great Britain and Northern Ireland on two Conventions and two Recommendations adopted at the 56th (1971) Session of the International Labour Conference' 21 June 1972.

⁴⁹³ TNA CAB 129-93-41, para 4 of the Memorandum by the Minister of Labour and National Service 7 July 1958..

formal structures. The 1972 White Paper on the Holidays with Pay Convention No. 132, (1970) ruled out ratification,⁴⁹⁴ stating that:

‘The Government believes that employers and unions should be free to determine wages, hours, and other similar conditions of work, including holidays with pay, without detailed statutory intervention, in the light of the different social and economic circumstances of the industry concerned.’⁴⁹⁵

The three weeks’ holiday (excluding bank holidays) required by the Convention was, of course, a minimum rather than a maximum, and the only intrusion into collective negotiation that would have been necessary would have been a prohibition of payment in lieu of holiday. The implementation of such minima by means of individual tribunal claim and collective negotiation backed by a right to refer collective agreements to the CAC would arguably have been simple – certainly in comparison with the recently enacted EPA 1970. While the unions might not have called for legislative intervention they would scarcely have objected.⁴⁹⁶ Arguably, while the entirely justified suspicion of the judiciary should not be understated, trade union suspicion of the law can be overstated.⁴⁹⁷ Arch

⁴⁹⁴ A revision of Convention No.52 1936. This guaranteed adults a minimum of six days paid holiday a year and had not been ratified by the UK.

⁴⁹⁵ TNA CAB 129-157-17. An excerpt from the White Paper included in the file.

⁴⁹⁶ The unions welcomed the raft of individual rights in the Employment Protection Act 1975; they were intended to complement collective bargaining (see CD Baker, ‘Employment Protection: Individual rights,’ (1976) 5 *ILJ* 65) . While they may have been some truth in the Macmillan government’s argument that ratifying and implementing C111 would have been objected to by many members of the public in 1959, by 1969 society had changed sufficiently to permit the passage of and very widespread support for the Equal Pay Bill, and employers and trade unionists were give five years grace to get used to the idea and to amend collective agreements and contracts so as not to be obliged to do so by the law. By 1975 those who objected to equal pay and non discrimination were an increasingly marginalised minority, and trade unionists who objected to individual rights which complemented collective bargaining would arguably have been rarer still (see chapter two for a discussion of the difference between individual rights and individualistic rights).

⁴⁹⁷ For example, two books published in 1955 and 1957, the workmanlike *British Trade Unions, Five Studies by PEP* (1955 *op cit*), and VL Allen’s important and comprehensive book on trade unions (the title is misleading) *Trade Union Leadership* (London, Longman, 1957), are essentially all about British voluntarism (though neither use that term ,or Kahn-Freund’s preferred term. ‘*collective laissez faire*’). However, neither book mentions distrust of the intervention of the law. Typical is Allen on the ‘two types of trade union political needs’: the need to bring about ‘structural alterations in society’ to secure ‘social and economic equality,’ and ‘legislation to create changes in industries where voluntary negotiation could not effectively be undertaken’ (pp141-2). Similarly, in *British Trade Unions*, the ILO Conventions relevant to the 40 hour week are discussed. While there is no mention of any desire on the part of the unions for the UK to ratify the relevant conventions (that the UK had ratified the Sheet Glass Convention which imposed a 42 hour week is merely mentioned in passing [see n.511 below], there is a clear assumption that the matter would continue to be addressed by collective negotiation under conditions of full freedom of association. The authors conclude that: ‘Since the general achievement of the forty-four hour week,

voluntarist Bill Wedderburn, for example, in his magisterial *The Worker and the Law* conceded that:

‘The statutory ‘floor of rights’ now extends into many facets of employment law and even into the law affecting social discrimination; but it does not normally prevent the erection of superior conditions by way of collective bargaining. It was meant to be floor not a ceiling.’⁴⁹⁸

The attitude of most modern trade unionists was arguably summed up by Len McClusky,⁴⁹⁹ when he told the Industrial Law Society in March 2015 that ‘progress for working people has only ever been attained by the collective self-empowerment of organised labour and not through the accumulation of individual rights alone, however worthy they may be.’⁵⁰⁰

Even Kahn-Freund, by 1977, was able to acknowledge that a

‘considerable body of labour legislation resulted from the ratification by the United Kingdom of ILO Conventions,’⁵⁰¹ that the ‘influence of the on the Equal Pay Act 1970 of the relevant ILO Convention of 1951 and of the European Social Charter are obvious...foreign standards have in their turn helped to promote a more positive attitude to regulatory labour legislation in this country.’⁵⁰²

It has been said that UK policy has always been to only ratify after domestic law and practice was in accordance with the requirements of a particular Convention.⁵⁰³ I would argue that a more accurate assessment would be to say

however, there has been no mention by the TUC of further reductions...the reduction in hours for which the trade unions are working is a reduction in the annual hours by increasing the length of holidays with pay.’

⁴⁹⁸ 3rd edition, fully revised, (Harmondsworth, Penguin Books, 1986), p 6.

⁴⁹⁹ General Secretary of Unite.

⁵⁰⁰ L McClusky, ‘Can Unions Stay Within the Law Any Longer?’ (2015) 44 *ILJ* 439.

⁵⁰¹ Kahn-Freund, *Labour and the Law*, 2nd Edition, (London, Stevens, 1977), p42. He cites as examples the Employment of Women, Young Persons and Children Act 1920 and the Merchant shipping (International Labour Conventions) Act 1924, and Johnston, ‘The Influence of International Labour Standards on Legislation and Practice in the United Kingdom,’ (1968) 79 *International Labour Review*, 465.

⁵⁰² *Ibid*, pp42-43. ‘Regulatory legislation’ was a phrase used by Kahn-Freund which embraced laws conferring collective rights like the Wages Council Acts as well as individual employment rights.

⁵⁰³ Breen Creighton, ‘The ILO and Freedom of Association in the UK,’ in *Human Rights and Labour Law, Essays for Paul O’Higgins*, Ewing Gearty and Hepple (Eds), 1994, p3. See for a detailed examination of the British approach to ratification and implementation chapter 4 in KD Ewing, *Britain and the ILO*, 1994.

that if the terms of a convention were not in accord with the Government's intentions in relation to UK law and practice then the convention would not be ratified and any accompanying Recommendations not accepted. Such are the options open to ratifying states in terms of reservations and 'lead in' periods that laws and mechanisms did not have to be in place before ratification took place.

For example, the Equal Pay Act 1970 was passed 'with a view to securing that employers give equal treatment as regards terms and conditions of employment to men and women...employed on like work...of equal value.'⁵⁰⁴

The key terms of the Act were derived from ILO Convention 100, and a Cabinet memorandum of 22nd September 1969 on equal pay,⁵⁰⁵ written by the Minister of Employment, Barbara Castle, noted that that the Cabinet had agreed that legislation on equal pay should be introduced in the next session of Parliament.⁵⁰⁶ She stated that:

'Legislation on the lines I have suggested would enable us to ratify ILO Convention 100 and we should do so when the legislation was passed. The introduction of equal pay on these lines would bring us into line with the developing practice in the European Economic Community countries.'

Convention No.100 was adopted in 1971, the active support of the Heath Government arguably owing more to the need to align the UK with the *acquis* than any enthusiasm for social justice. The UK, of course, became a member of the EEC on 1 January 1973.

However, the Act did not come into force until 29th December 1975, shortly after the Sex Discrimination Act 1975 had become law. Employers and trade unions were thus permitted a long 'lead in' period to adjust to the new requirements, to 'secure orderly progress before the commencement of this Act towards equal

⁵⁰⁴ (S1(1), S1(1)(a) and s1(5). However, in practice claimants were only permitted to exercise the right to equal pay for equal work, and the matter became subject to infringement proceedings brought by the Commission (see chapter 7).

⁵⁰⁵ TNA CAB/129/144.

⁵⁰⁶ *Ibid*, Agreement in CC(69) 42nd Conclusions, Minute 3, basis of legislation c(69)113 by Secretary of State for Employment and Productivity.

treatment,⁵⁰⁷ an atypical approach which demonstrates that the Government had no real difficulty in acceding to international obligation prior to domestic law and practice becoming compliant (law which is on the statute book, but which is not in force, does not amount to compliance),⁵⁰⁸ nor any difficulty in persuading the unions that individual rights, implemented so as to complement collective negotiation, can further the interests of unions and their members.

The Retreat from the ILO obligations

After 1979 the government's relationship with the ILO changed markedly. A merchant shipping Convention aside,⁵⁰⁹ the only ratification in the Thatcher years, after the Labour Administration Convention 1978 (No.158), and the Labour Relations (Public Service) Convention 1978 (No.151) in 1979 and 1980, which had been set in train by the Callaghan government, was the uncontroversial Labour Statistics Convention, 1985 (No.160).

In 1980, Jim Prior, one of the remnants of the Heath Cabinet, and Thatcher's Secretary of State for Employment, had been asked by Keith Joseph and Geoffrey Howe to set about denouncing Convention No.94.⁵¹⁰ This was literally unprecedented.⁵¹¹

⁵⁰⁷ S9(2) EPA. See Daphne Romney, *Equal Pay-Law and Practice* (Oxford, OUP, 2018) pp18-19.

⁵⁰⁸ Although I argue that this is the unexpressed attitude taken by the EU Commission in relation to compliance with employment law (see chapters 4, 6 & 7).

⁵⁰⁹ Unavoidable - merchant vessels 'flagged' in the UK would be unable to operate without such ratifications.

⁵¹⁰ Both Howe and Joseph wished to see the end of CAC schedule 11 and Fair Wage Rulings, steps which would have breach government obligations under the Labour Clauses (Public contracts) Convention, 1949 (No.94). The Employment Protection Act 1975 had repealed section 8 of the Terms and Conditions of Employment Act 1959 to permit the CAC to extend accepted industry terms to those employed by 'rogue' employers (see chapter 2), and FWRs in relation to public service contractors (grounded in the Fair Wages Resolution 1946) obliged contractors to pay industry minimums when they negotiated with local authorities and the government. These were seen by Howe and Joseph to impede competition, to artificially inflate wages and unnecessarily drain the resources of local government and the Exchequer. Schedule 11 was repealed by the Employment Act 1980 – two years before the Convention was denounced, but FWRs continued until 1983.

⁵¹¹ Denunciations were rare, and had never previously been made for political or policy reasons. The Attlee government denounced two night work Conventions from 1934 and 1919 relating to women and young persons in 1947 in anticipation of the 1948 revisions. The Macmillan government denounced the Sheet Glass Work Convention 1933 (No.43) for technical industrial reasons – new processes invented in the UK meant that special protection for working time was no longer necessary in the industry. The Heath Government denounced the Employment Service Convention 1948 (No.88) because it proposed to charge employers for the services covered by the convention, but stated that it considered itself bound by all other aspects of the Convention, and would continue to report on it (the Heath case is from an article by Kelvin Widdows, 'The Denunciation of International Labour Conventions,' *International and Comparative Law Quarterly*, vol 33, issue 4, October 1984, 1055-1063).

Prior protested that

‘we cannot lightly set aside our international obligations. These are quite clear. ILO Convention No 94 provides that denunciation can take place only at 10 year intervals following the Convention’s [sic] being brought into force... Short of simply disregarding our international commitments there is no way we can improve on that timetable.’⁵¹²

It is apparent that Prior’s was unhappy about the fact of denunciation, and not merely informing his colleagues of the procedures. Convention No.94 was denounced in September 1982, a year after Prior had been ‘exiled’ by the Thatcherites – he was appointed Secretary of State for Northern Ireland.

The first big break with tradition in terms of ratifications was the Tory refusal to ratify the Collective Bargaining Convention 1981(No.154) in 1982. There can be little doubt that Heath’s Cabinet would have nodded it through - law and practice was compliant. Nevertheless, endorsement of the Convention would certainly have been at odds with the spirit, if not the word of the Employment Bill then progressing through Parliament, and, of course, the unstated overarching intention of the Thatcherites to attack collective bargaining mechanisms at every opportunity. The government claimed that it could not *promote* the extension of collective bargaining by government intervention – an excuse which combined government antipathy to Fair Wage Rulings with traditional reservations.⁵¹³ The promotion of collective bargaining was, and remains, a governmental obligation under the provisions of both Convention 98 and the European Social Charter. The following year, 1983, the government declined to ratify the Termination of Employment Convention 1982 (No.158), and, lessons having been learned about the ILO procedures, the Protection of Wages Convention, 1949 (No.95), concerned largely with protecting regular payment, and protection against deductions and ‘truck’ style payments in kind, was denounced in September 1983. The ILO were told that

‘because of intended revisions to legislation which might affect the government’s ability to satisfy the terms of the Convention, it would

⁵¹² Prior to Howe 12 March 1980, TNA PREM 19/263. The exchange of letters between the three ministers can be seen in this file, and in PREM 19/264.

⁵¹³See KD Ewing, *Britain and the ILO*, 1994,p19.

denounce it at that time because otherwise it would have to wait a further ten years.’⁵¹⁴

As we have seen, with the abolition of the Wage Councils in mind, the Minimum Wage – Fixing Machinery Convention 1927 (No.25) was denounced in July 1985. The Wages Act 1986 reduced the powers of the Councils and ensured that no more could be established. It will be recalled that they were intended to promote collective bargaining in poorly organised industries.

The formal withdrawal from the fundamental Conventions which protected rights the government restricted with the Employment Act 1982 and subsequent legislation (listed in chapter 2), was, both for electoral, and for foreign policy reasons,⁵¹⁵ politically unfeasible and, as it turned out, unnecessary. Instead, as they became more confident, the Thatcherites simply did what Prior had in 1980 seemingly believed to be unthinkable – they disregarded their international commitments. When pressed, Ministers would affect to disagree with the criticisms of supervisory bodies like the CEACR, CFA, and ECSR, and question their authority.

The pivotal episode was the GCHQ case. Staff at Cheltenham were told that they had the choice of transferring to less ‘sensitive’ civil service roles or leaving their union – if they refused to do one or the other they were to be sacked. These were civil servants ‘who had for five decades in the Whitley tradition been encouraged to join unions.’⁵¹⁶ It was a strange case – arguably an ideological step taken under the pretence of national security. While the Government was under pressure from the Americans to tackle the occasional instances of industrial action at Cheltenham,⁵¹⁷ the possibility of banning unions at GCHQ as a security measure had first been considered in the 1950s. That proposal had been rejected in 1956 and in 1962 largely on the grounds that it was likely to cause the Government great problems with the civil service unions, and would be likely to draw

⁵¹⁴Widdows, 1984, *op cit*, pp 1059-1060.

⁵¹⁵As well as procedural reasons – like most Conventions (some are renounceable at 5 year intervals) Conventions 87 and 98 can only be denounced during a one year period every 10 years after first coming into force, and the Tories would have had to wait until 1988 and 1989 to denounce them, by which time they had run the proverbial coach and horses through them on a number of occasions. For detail on ratification and denunciation see the ILO *Handbook of procedures relating to international labour Conventions and Recommendations*, 2012

⁵¹⁶Wedderburn 1986, *op cit*, p277. Wedderburn states that they were also offered £1,000 to relinquish employment protection rights

⁵¹⁷ See the account of the GCHQ affair in Ian Beesley, *The Official History of the Cabinet Secretaries* (London, Routledge, 2017) pp 442-448.

unwelcome attention to the existence of GCHQ and to the eavesdropping activities in which it specialised.⁵¹⁸

The government had arguably blatantly breached Convention 87,⁵¹⁹ as well as the more specific Convention No.151 on the Right to Organise in the Public Sector. Severe censure from the CFA and CEACR followed as a matter of course. When the government refused either to act to rectify the situation, or (aware that the court would very likely rule against them) to refer the case to the International Court of Justice, the matter was considered by the Conference Committee on the Application of Standards. After the inevitable condemnation by the CAS, and further intransigence on the part of the UK, the matter was sent back to the CEACR.⁵²⁰ The government refused to back down, and the case was referred back to the CAS, a process which was repeated on two further occasions. The committee came very close to dealing with the case in a special paragraph of its annual report to Conference – the most severe sanction then available. However, a reluctance to confer pariah status upon a state which had previously been such a stalwart ally of the ILO appears to have saved the UK from international disgrace. Arguably it must have been obvious to the government that it had pushed the ILO as far as it could be pushed, and had demonstrated to the Thatcherites just how far they could go when breaking international law.

They had learned that the terms of the fundamental instruments protecting freedom of association could not be broken in the guileless fashion that characterized the Government's handling of that case without sustaining unacceptable damage to British prestige, and to Tory electoral prospects.⁵²¹ While they knew it was better not to be bound in the first place, they must also have come to understand that their policy of non ratification and denunciation could not be extended to a denunciation of the fundamental instruments. Documents on the case in file LAB 13/3017/1 at the National Archive indicate that the government was acutely conscious of the damage caused by CFA Case No.1261. The credibility of the government's stance when condemning human rights violations by Iron curtain states was said to be compromised when the ILO supervisory bodies made adverse findings against the UK, and it seems that what

⁵¹⁸See chapter 12 of Ewing, Moretta and Mahoney 2019, *op cit*.

⁵¹⁹Although it was ultimately held only to have breached Articles 2 and 11 of C87.

⁵²⁰Ewing, *Britain and the ILO* 1994, *op cit*, chapter 5: GCHQ: A Case Study in the Supervision of Standards.

⁵²¹The notices to GCHQ staff were issued in January 1984, six months after the Tories had won a very large working majority in the June 1983 General Election.

the government most feared was a Commission of Inquiry being set up by the ILO.⁵²²

Something of the sting was taken out of the GCHQ scandal when the application of the trade unions to Strasbourg was rejected as inadmissible by the European Commission of Human Rights in *Council of Civil Service Unions v UK* [1987].⁵²³ While acknowledging that the January 1984 ban on trade union membership was a breach of the 11(1), the Article 11(2) qualification was found to apply: The GCHQ civil servants were engaged in the administration of the state with a role comparable to that of the police or armed forces, and the restrictions, brought under the terms of the 1982 Civil Service Order were, therefore proportionate, lawful measures, necessary to secure the collective interests of the citizens of the UK.⁵²⁴

Just as the Tories had understood, as it had prepared for power in the late 1970s, that instead of the direct assault on collective bargaining proposed by Hayek the ‘Stepping Stones’ policy of changing collective political subjectivity combined with incremental changes to the law was the workable domestic approach, it understood that attrition was the correct tactic to adopt on the international plane. While radical breaches or denunciations had the potential to erupt into political firestorms more modest breaches or retreats from obligation could, however implausible the justification, be undertaken without risking more than a manageable spat with treaty monitoring bodies.

One more denunciation took place during the Thatcher years. The Underground Work (Women) Convention 1926 (No.45) was dispensed with in May 1988 as the Government seized the opportunity in response to the imposition European Community principle of equal treatment at work,⁵²⁵ conscious, I would suggest, of

⁵²²TNA LAB 13/3017/1 ‘CSSA and Political Affiliation: ILO Procedure and Implications,’ Note by Department of Employment.’ A Commission of Inquiry is one step short of a referral to the ICJ, instigated by the Governing Body following a complaint by a state or a delegate to the ILC that a state is in breach of a convention. If the GB considers an inquiry to be necessary on the evidence, or if it has approached the state and been unhappy with the response (cases are usually handed to the CEACR or CFA) then it may establish a Commission of Inquiry. If the state takes issue with the findings of the Inquiry then it can refer the matter to the ICJ (see Vogt, et al, 2019 pp 15-16).

⁵²³ 10 EHRR 269.

⁵²⁴ See Ewing, 1994, *op cit*.

⁵²⁵ See BA Hepple, *Working Time: A New Legal Framework?* 1990, p8. He characterised it as ‘downwards harmonisation.’

the opportunity to make it seem that denunciation was not always a regressive step: The Sex Discrimination Act 1986 and the Employment Act 1989 had seen the removal of such protections for women on the domestic plane. The equivalent provision of the European Social Charter was also denounced.⁵²⁶

Although the first Blair administration could have been said to have ‘picked the low hanging fruit’ in terms of ILO Conventions, there was no significant change in policy. Since 1997 the UK has ratified just three fundamental Conventions. In 1999 the government ratified the Discrimination (Employment and Occupation) Convention, 1958 (No.111) – the Convention which had caused Macmillan’s Minister of Labour such concern. After it had legislated to permit staff at GCHQ freedom of association,⁵²⁷ it ratified the Minimum Age Convention, 1973 (No.138), along with the Worst Forms of Child Labour Convention 1999(No.182), in 2000. The Promotional Framework for Occupational Safety and Health Convention, 2006 (No.187) was ratified in 2008, the Maritime Labour Convention 2006 was ratified by the Coalition in 2013, and the Work in Fishing Convention 2007 (No.188) was ratified on 11 January 2019.

However, despite New Labour’s reluctance to import fresh supranational obligation in relation to labour rights, the Human Rights Act 1998 inadvertently provided the conduit from the Strasbourg court for the post 2008 wide ‘integrated’ interpretation of Article 11 which ultimately has obliged UK courts to recognise a limited right to bargain collectively and to strike. That evolution, and the changing attitude of the UK government to the ECtHR after 1970, is examined in the next section.

⁵²⁶ A8(4)(b). The denunciations permitted the government to repeal s.124(1) of the Mines and Quarries Act 1954. A7(8) was denounced in order to permit the government to lift working time protection for 16-18 year olds in the Employment Act 1989 (*ibid*, p9).

⁵²⁷ The matter had long been a manifesto promise which had arguably helped give the impression of ‘clear blue water’ between the Tories and New Labour.

The evolving jurisprudence of the European Court of Human Rights

A prime example of the post 1970 evolution of the Convention is the case of *Golder v United Kingdom* [1975].⁵²⁸ *Golder* turned on what the British government had considered an ‘expansive’ interpretation of Article 6(1) of the Convention, which requires civil and criminal proceedings to be heard within a reasonable time by an independent and impartial tribunal. The Government argued that the reach of the Article was restricted to proceedings already instituted before a court, and that it did not guarantee access to justice.

The court, on the other hand, upheld the report of the Commission, to hold by nine votes to three that right of access was an inherent element of Article 6.⁵²⁹

The British judge, Sir Gerald Fitzmaurice, in his dissenting judgment, argued that had Governments agreed to ‘concede some legislative role’ to the Commission or Court, or that that the parties to the Convention had ‘intended to delegate in some degree the function...of changing or enhancing its effects’ then HMG could not have justifiably object to this dynamic interpretive approach. In the absence of such agreement, Fitzmaurice believed the UK Government had been justified in having refused to settle the case on the basis of the Commission’s interpretation of the Convention.

Fitzmaurice’s arguments reflected concerns voiced by members of the Government during 1972 – 1973 over the creeping competence of Strasbourg. Ultimately, the Prime Minister, the Home Secretary and the Attorney General, resolved to seek to rein in the power of the Commission and Court rather than to withdraw acceptance of Articles 25 and 46 when the then optional articles fell to be renewed in January 1974.⁵³⁰ Nevertheless, they chose only to renew

⁵²⁸ ECHR 1.

⁵²⁹ Para 36. The right is not, of course, absolute, and the court stated that ‘there was room for implied limitations.’

⁵³⁰ The Commission’s handling of the *Golder* case had been cited as one of the reasons for not renewing the acceptance by HMG of the then ‘optional articles,’ the Article 25 right of individual petition and Article 46 acceptance of the ‘compulsory jurisdiction’ of the court when it was considered by the Heath Government. Ultimately in 1973 it was decided to renew for only another 2 years, from January 1974 to January 1976 (see TNA FCO 41/1110 – 1113). Fitzmaurice, referring in his judgment to the UK’s acceptance of Article 25 and 46 ‘only for a fixed, though renewable period’ appears to have been warning the court that the UK and other signatory states might in future not renew their acceptance of the articles (para 38).

acceptance for a further two years. In 1976 the Wilson Government renewed British acceptance for a further 5 years.

The court's interpretation of the Convention continued to evolve. In *Tyrer v United Kingdom* [1978] it described the Convention as a 'living instrument' for the first time,⁵³¹ and in 1979, in *Airey v Ireland*⁵³² and *Marckx v Belgium*,⁵³³ the Court acknowledged that civil and political rights had economic and social elements, early recognition of the unsatisfactory nature of that crude division.

It was held in both cases that Article 8(1) went beyond a 'negative' prohibition of unjustified state interference in family life,⁵³⁴ and both Governments were held to have a positive obligation to put in place legal structures to ensure for citizens the enjoyment of the Article 8 rights through the exercise of legal social rights. In *Airey* the Court observed that:

'The substance of her complaint is not that the state has acted but that it has failed to act, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities... in addition to this primarily negative undertaking there may be positive obligations inherent in respect for private or family life.'⁵³⁵

In assessing whether Ireland had failed to protect Mrs Airey's Article 6(1) right of access to justice the Court acknowledged that:

'While the Convention sets forth what are essentially civil and political rights many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the sphere covered by the Convention.'⁵³⁶

⁵³¹ ECHR 2.

⁵³² [1979] ECHR 3

⁵³³ [1979] ECHR 2

⁵³⁴ Article 8: Right to respect for private and family life, home and correspondence.

⁵³⁵ *Airey* paras 31 - 32. See also *Marckx* at para 31

⁵³⁶ *Airey* para 26.

The Court had little difficulty in interpreting and applying the protection the Convention afforded Mrs. Airey against the state's failure to give her the right in practice to divorce, and to lead a life wholly separated from her abusive husband. As a consequence the Irish government was ultimately compelled to introduce a Legal Aid system which permitted less affluent citizens to exercise their legal social and economic rights.⁵³⁷

The scene was thus seemingly set for a reinterpretation of the labour rights which sat astride the increasingly uncertain dividing line between civil and economic or social rights. 'Negative textual inference' could surely no longer justify the failure of the court to protect a right to bargain collectively or to strike, and the obvious next step in relation to freedom of association, after a recognition that Article 11 protected those rights must, I argue, have seemed likely to be an acknowledgement by the court that states were required to facilitate collective bargaining, just as the Irish government had been required to facilitate Mrs Airey's Article 8 and Article 6 rights.

Small wonder then that when the first Thatcher administration was obliged to consider the question of renewing acceptance of the optional articles in November 1980, as the fifth anniversary of the Wilson renewal approached, the cabinet noted that the

'Commission and the Court were increasingly placing unexpected and embarrassing interpretations" on the Convention, and that "the time might come when a judgment was so damaging to the Government as to be unacceptable.'⁵³⁸

Nevertheless, UK acceptance of Article 25 and 46 continued through the Thatcher and Major years,⁵³⁹ legislating, albeit often reluctantly and only as far as it gauged was necessary to avoid further action, in response to adverse rulings against the UK. There was no refusal to accept a ruling, nor any serious suggestion that the

⁵³⁷ Judge Thor Vilhjalmsson argued the case for adherents of the human rights paradigm in his dissenting judgement.

⁵³⁸ TNA CAB 128/68/17 Cabinet meeting 13 November 1980. They were discussing a memorandum notionally written by the Home Secretary (Whitelaw) and the Foreign Secretary (Carrington) (CAB 129/210/16).

⁵³⁹ Ed Bates has pointed out that no member state failed to renew its acceptance of those articles ('The UK and Strasbourg: A Strained Relationship' in *The UK and European Human Rights: A Strained Relationship?*, Zeigler, Wicks and Hodson (eds), p48, note 51.

Convention be denounced. In 1990, when the question of renewal coincided with the Convention's 30th anniversary, letters from senior ministers to Downing Street on the matter indicate complete support for renewal, with Thatcher in a letter sent out relating to the UK's leading role in the anniversary celebrations professing to be 'a strong supporter of the Council of Europe, in particular its work on human rights.'⁵⁴⁰

There can be no doubt that the *Young James and Webster* case had a powerful influence on the attitude of the Thatcherites towards the authority of Strasbourg. While that case did see the court build on *Merckx* and *Airey* to hold that the state had a positive obligation to intervene to secure the Article 11 protections, it also showed them that where labour rights were concerned, the Commission and the Court could be considered allies of a neoliberal Government and, like the government, championed the rights of the individual over those of the collective.

The case signaled a fresh turn back towards the individualistic interpretation of Article 11 and away from the collectivist path which appeared to have been opening following *Airey*.

It will be recalled that I have stated that Thatcher's inner circle, in collaboration with the extreme right wing Freedom Association, had 'run' the case in the hope that the court would rule that Article 11 incorporated a guarantee of non-association.⁵⁴¹ As *The Times* of 11 August 1981 reported: 'The National Association for Freedom, which has sponsored the case, expects a thorough-going condemnation of the closed-shop practices which might oblige Mrs Thatcher's Cabinet to change British law.'⁵⁴²

Shortly after the ECtHR had passed judgement, Margaret Thatcher remarked on the case in a letter to Sir Walter Salomon, indicating that the Tories had sought an 'adverse' ruling, and had in effect, run the case against itself for political purposes:

'I wholeheartedly welcomed the European Court's ruling in their favour. As you know we have consistently condemned their dismissals...However, *I do*

⁵⁴⁰TNA PREM 19/3314. The letter, dated 24 September 1990, was to the Italian Prime Minister.

⁵⁴¹See chapters one & two.

⁵⁴² By Paul Routledge, 11 August 1981.

not believe that the government should, as you suggest, have let the case before the European Court drop when we took office. The fact was that it raised a number of key issues...'

When the case for the Government had first been prepared under the direction of the Callaghan administration, Article 11(2) and the importance of the closed shop in safeguarding and facilitating effective collective bargaining in the context of voluntarism, had been the central argument. The 11(2) qualification, like the other paragraph 2 qualifications in the Convention, in effect allows the state to override the individual's claim if the restriction of enjoyment of the freedom in question is a lawful and proportionate accommodation with the collective interest, as well with the individual rights of other citizens.

Yet at Strasbourg 11 (2) was not once referred to by counsel for the UK Government. It was briefly considered by the court, dismissal for non membership under the terms of a union membership agreement being found to be neither 'necessary' nor 'proportionate' as a measure to safeguard and facilitate collective bargaining.

Had counsel argued the point, particularly if the tiny proportion of dismissals made for non-membership had been made known to the court, then the court may have taken a different view about proportionality. Instead, Thatcher's Solicitor General, Sir Ian Percival had, before both the Commission and the Court, relied on the argument that 11(1) did not embrace the right not to associate that counsel for the three men alleged to have identified, ensuring that the argument to the contrary, which he knew there was support for at Strasbourg, was the focus of the case, directing the court towards making the ruling on the so called negative right of non-association which the Government sought.

Percival had also argued that the railway men had the opportunity to join a union of their own choice, or to form a union of their own, while remaining members of one of the 3 unions that BR had secured a UMA with,⁵⁴³ which was patently untrue, and easily rebutted by counsel for the applicants. It seems likely that this was an attempt not only to undermine the Government's own case, but to draw attention to another aspect of British trade unionism considered vulnerable to

⁵⁴³Young, *James and Webster*, [1981], *op cit*, para 56.

attack at Strasbourg, the *Bridlington Principles*, the TUC's arrangements for managing inter-union disputes over the recruitment of members.⁵⁴⁴

As we have seen the court ultimately ruled 'against' the Government, although it refused to be drawn on the question of whether there was such a negative right, and chose instead to base its ruling on freedom of conscience in the context of freedom of association.

Nevertheless, the Tories 'milked' the ruling as best they could. The unions, and the 1974 – 1979 Governments, were cast as violators of human rights, and Norman Tebbit, made a considerable show of earmarking £2 million of his department's budget available to compensate workers who had been dismissed for refusing to join a union during 1976 – 1980.⁵⁴⁵

More significantly for adherents of individualistic human rights paradigm and opponents of collective bargaining, it overcame the exceptional status of the closed shop in the Strasbourg jurisprudence, and paved the way for later cases based on the emerging recognition of the negative side to Article 11 identified by the Commission and 6 of the 18 judges who found for the railwaymen. This negative element evolved into a right, in most circumstances, to not to be obliged to join a union.

The first stage of this evolution was the remarkable, and by the standards of treaty monitoring, almost immediate, *individualising* influence on the European Social Charter's Committee of Independent Experts (now ECSR). The Committee turned to Article 5 of the Charter, which obliges signatory states to guarantee the right to organise, to reserve for itself the possibility of a future condemnation of the closed shop. It held that even if the explicit neutral status on the closed shop in the Appendix to Part II of the Charter, (which refers to Article 1(2) on the right to work), could be said to apply to Article 5, 'it would not follow that the negative aspect of the freedom to organise would fall completely outside the scope of

⁵⁴⁴ On the basics of the *Bridlington Principles* and *Cheall* (below), see pp518-521, Collins, Ewing and McColgan 2012, *op cit*.

⁵⁴⁵ See TNA PREM 19/804.

Article 5 or that an obligation to join a trade union would always be in conformity with the spirit of this provision.’⁵⁴⁶

The obvious next target for the UK neoliberals was the Bridlington Principles. *Cheall v UK* [1985]⁵⁴⁷ was another tilt at collective solidarity and bargaining facilitated by the human rights paradigm. Cheall’s case, however, followed expulsion from a union.

While s4 of the 1980 Employment Act protected workers against unreasonable refusals of membership, or unreasonable expulsions, the Bridlington Principles, endorsed by the Donovan committee in 1968, had not been challenged until Mr. Cheall sought judicial review of his case at the High Court.⁵⁴⁸ He had been expelled from APEX for joining while still a member of ACTTS,⁵⁴⁹ and citing *Young James and Webster*, he argued that he had been denied the opportunity to join the union of his own choice. However, the then Mr. Justice Bingham, acknowledging that the union had a ‘duty to act in the best interests of its members as a whole’, and noting that Cheall was not facing dismissal as a consequence of his expulsion, rejected Cheall’s application for an injunction.

Bingham’s decision was reversed by the Court of Appeal.⁵⁵⁰ The Lords subsequently reversed that decision,⁵⁵¹ but at Strasbourg the Commission rejected Cheall’s claim that his Article 11 rights had been violated, holding that the protection of the Convention only extends to guarding against ‘abuse by unions of their dominant position...Expulsion from a union in breach of the union’s rules, decided upon arbitrary rules or entailing *exceptional hardship*.’

The case was therefore declared inadmissible. It was becoming apparent that *proportionality*, the extent – the consequences – of compulsion, was the key to these cases.

⁵⁴⁶See *Opinion VII* Reference Period 1/1/1980 – 31/12/1981, and *Conclusions IX-1* Article 5 United Kingdom, Reference Period 1982-1984, when the Committee approved of the anti closed shop measures in the 1982 Act but ‘felt that in practice’ dismissals for non membership ‘should fade out altogether.’

⁵⁴⁷ Cheall was heard by the Commission and a reproduction of the printed report is accessible on the HUDOC ECtHR data base (Application Request No.10550/83, Decision of 13 May 1985 on the admissibility of the application as well as at 8 EHRR 74.

⁵⁴⁸ *Cheall v Association of Professional, Executive, Clerical and Computer Staff* [1982] 1 All ER 858..

⁵⁴⁹ Association of Clerical Technical and Supervisory Staff. Cheall had been an official at the Vauxhall Cars Plant at Luton but had fallen out with the union, supposedly over its support for left wing causes.

⁵⁵⁰ *Cheall v APEX* [1983] 1 QB 126.

⁵⁵¹ *Cheall v APEX* [1983] 2 WLR 679.

The questions posed by closed shop style arrangements were revisited by the ECtHR in *Sibson v UK* [1993],⁵⁵² and *Sigurjonsson v Iceland* [1993],⁵⁵³ which helped clarify the question of proportionality in relation to an obligation to join a union. In *Sibson*, there was held to have been no breach of the applicant's A11 rights when he was presented with the choice of either rejoining the T&GWU or transferring to another depot. The applicant, a truck driver worked under a contract of employment which incorporated a mobility clause, had been an active member of the union, and was willing to rejoin if a grievance was acknowledged with an apology. As a consequence the restrictions on his Article 11 freedoms – no mention was made of any negative right of non association - were not found to be disproportionate,⁵⁵⁴ the Court concluding that he 'was not subjected to a form of treatment striking at the very substance of the freedom of association guaranteed by Article 11.'⁵⁵⁵

In *Sigurjonsson*, which was heard just two months after *Sibson*, the applicant was a taxi driver, said to have sincere beliefs irreconcilable with membership of a trade association which he had to join in order to continue plying his trade. The Icelandic Government based their case on 11(2), and on the collective benefits accruing from compelling the driver to join the association. The court, in its deliberations, drew upon Article 5 of the European Social Charter, and the relevant conclusions of the Committee of Independent Experts, as well as on *Young James and Webster* and *Sibson*. The court found that the level of compulsion was a disproportionate restriction of Mr. Sigurjonsson's negative freedom of association.

⁵⁵² [1993] ECHR 18.

⁵⁵³ [1993] 16 EHRR 462.

⁵⁵⁴ *Sibson* had been a member of the T&GWU but, dissatisfied with the response of the union to a complaint about another member he had resigned and joined the United Road Transport Union. His workmates had threatened to strike if he was not transferred or failed to re-join the T&GWU. The case related to events in 1984 and 1985 and his claim for unfair dismissal had failed because he was found not to have been dismissed. Commentary on this case is often confused because although a UMA with the T&GWU had been negotiated it was not in force during the time *Sibson* was employed.

⁵⁵⁵ Para 29.

In 2003 the European Committee of Social Rights heard *The Confederation of Swedish Enterprise v Sweden*,⁵⁵⁶ a complaint brought by the Swedish equivalent of the CBI under the collective complaints procedure alleging a breach of Article 5 of the Charter. Exhibiting the familiar concern of the libertarian for workers who inexplicably wish to forgo the advantages of collective bargaining, the organisation argued that in permitting union membership agreements which saw employers obliged to give preference in recruitment to workers belonging to a particular union or unions Sweden was in breach of the negative right the ECSR had identified in Article 5 following *Young James and Webster*. Although these were merely prospective recruits who were given the choice of joining or not joining, and non membership did not exclude them from recruitment, the Committee duly found Sweden to be in breach of its Article 5 obligations.

Three years later it was the turn of the ECtHR to further tighten the restrictions on union membership agreements. Where previous closed shop cases considered by the court had, like *Young James and Webster*, concerned workers having the requirement of membership imposed upon them, in 2006, *Sorensen and Rasmussen v Denmark* [2006],⁵⁵⁷ concerned contractual requirements for recruits to become members of a specified union. By permitting this the Danish Government was held to have breached the applicants' Article 11 rights. This was another overtly political case. The two Danes, one who had taken a summer job and an older worker who had been unemployed for some time before being recruited, objected to contractual requirements to join the appropriate trade union, preferring instead remain as members only of the *Free Trade Union* and the *Christian Trade Union* – organisations established to attack freedom of association.

Despite ostensibly convincing 11(2) arguments that the UMAs advanced the rights of workers through effective collective representation and the vastly different consequences for the two workers of being refused work, the Court found there had been a disproportionate interference in the Article 11 freedoms in both cases.

⁵⁵⁶Case No. 12/2002, and the Decisions, Resolutions and Findings of the Committee in the case can be accessed at www.coe.int in 'Processed Complaints.'

⁵⁵⁷ [2006] 46 EHRR 29.

Perhaps unsurprisingly there were 5 dissenting judgments in the Grand Chamber. The Court had drawn on Article 5 of the ESC, ILO Conventions 87 and 98, the EC Charter of the Fundamental Rights of workers of 1989, and the EU Charter of Fundamental Rights. The European Committee of Social Rights now takes the bizarre view that even 'union shop' (aka 'agency shop') agreements are a breach of Article 5 of the ESC, and the Committee of Freedom of Association holds that closed shop agreements *imposed by law* breach Conventions 87 and 98.

The evolution of the Article 11 rights to bargain collectively and to strike

Remarkably however, just as the Strasbourg Court, trailed by its little sister the ECSR, appeared to have accommodated the highly individualistic negative supposed right of non association into its Article 11 jurisprudence, it started to dispense with the narrow individualistic interpretation of - for want of a better word - *positive* freedom of association that it had adopted in the mid 1970s.

Gustafsson v Sweden [1996] saw the Strasbourg Court arguably starting to grasp the collective aspect of Article 11.⁵⁵⁸ This was another carefully selected political case. The litigation, took place at the climax of years of struggle by the Swedish Conservative Party and the Swedish Employers' Federation to force neoliberal reforms on the country.⁵⁵⁹

We saw in chapter one that the court recognised the importance of collective bargaining to Sweden when it held that there was no Article 11 protection for an employer against industrial action intended to persuade him to enter into a collective agreement the Court. Nevertheless the court stopped short of holding that there was an Article 11 right to bargain collectively or even to present a collective claim to an employer.

UNISON v UK [2002],⁵⁶⁰ was an inadmissible application, screened out by the Court, the Commission having been abolished in 1998. A National Health Service 'Private Finance Initiative' had meant it was proposed that many members of staff

⁵⁵⁸ [1996] ECHR 20.

⁵⁵⁹ See David Harvey 2005, *op cit*, p 113.

⁵⁶⁰ [2002] IRLR 497.

of the University College London Hospital ('UCLH') were to be transferred to private companies. The union sought assurance that collective bargaining would continue under the same terms after any transfer, and union members were balloted on the question of whether industrial action should be taken in support of that demand. The domestic courts granted UCLH an injunction on the grounds that a dispute about terms and conditions in the future with an as yet unknown employer was not a trade dispute within the terms of s244 TUL(C)A 1992.

The New Labour Government argued that 'Article 11 did not confer any right to strike but only a freedom to protect the occupational interests of its members' – a freedom it believed to be adequately protected in this instance by TUPE and by the Employment Relations Act 1999 Schedule 1 recognition procedures and the s10 right of accompaniment. The Government also argued that if there had been any interference with freedom of association, the 11(2) qualification applied.

The Court agreed with the Government on the reach of Article 11, recalling that Article 11 contained 'no express inclusion of a right to strike or an obligation on employers to engage in collective bargaining,' citing the third case in the 'Belgian Trilogy', *Schmidt and Dahlstrom v Sweden* [1976].

It did find that there had been a restriction of the Article 11 right to protect the occupational interests of the UNISON members, but it confirmed the Government's view that the approach of the UK was within the margin of appreciation afforded states in industrial relations, and 'can be regarded as a proportionate measure and 'necessary in a democratic society' for the protection of the rights of others, namely UCLH.'

Six months later the Court handed down their judgement in *Wilson, National Union of Journalists and Others v UK*, a case perhaps better known as *Wilson and Palmer v UK*. The applicants were a journalist employed by *The Daily Mail*, and his union the NUJ, two London dock workers, and their union the RMT, and five other workers employed at Cardiff docks.⁵⁶¹

⁵⁶¹ ECHR 1345.

This pivotal case saw the Strasbourg Court starting to allow those labour rights to be found in regional and international legal instruments to influence, rather than merely occasionally confirm its interpretation of Article 11.⁵⁶² Although the interpretation of Article 11 owned up to by the court arguably only widened slightly beyond that established in the Belgian Trilogy,⁵⁶³ the court appeared at times to be close to acknowledging the inevitable: that trade unions are formed and workers join them in order to come to collective agreements with employers, that protection for freedom of association in the context of labour relations must implicitly embrace a right for workers to bargain collectively.

The court stated that

‘it is of the essence of the right to join a trade union for the protection of their interests that employees should be free to instruct or permit the union to make representations to their employer or to take action in support of their interests on their behalf. If workers are prevented from doing so their freedom to belong to a trade union, for the protection of their interests becomes illusory.’⁵⁶⁴

The conjoined cases concerned the provision by employers of substantial pay rises to workers who, following decisions by their employer to derecognise their unions, agreed to sign up to individual contracts of employment, and renounce their existing contractual right to collective negotiation and representation. Initially held to be breaches of the TULRCA 1992 s.146 right not to be discriminated on the grounds of trade union membership, the House of Lords had deemed the withholding these payments from workers who preferred that the union to continue to negotiate on their behalf to be lawful on the grounds that they were acts of omission rather than commission.

The case had been referred to in New Labour’s 1998 industrial relations White Paper, *Fairness at Work*, which declared that the new Government was to address

⁵⁶² See Part II of the judgement ‘Relevant Non-Convention Material,’ and para 48.

⁵⁶³ See paras 42, 44 & 46. The Court cited the Belgian Police Case [1975], *op cit*, p.18, paras 39-40 and the Swedish Engine Drivers’ Case [1976], *op cit*, pp.15-16 paras 40-41 (at para 42 of Wilson).

⁵⁶⁴ Para 46.

the heavily criticised ruling by making it 'unlawful to discriminate by omission on grounds of trade union membership, non membership or activities.'⁵⁶⁵

However, collective bargaining had been defined by elements of the judiciary during the course of the *Wilson and Palmer* cases as a trade union service rather than as an activity. Acceptance of that arguably unsatisfactory distinction had allowed the EAT to essentially direct the tribunal to reject the claim that s.146 had been breached. The Court of Appeal had subsequently taken the commonsense view that collective bargaining was an activity and was protected by s.146. The response of the Major Government to that decision was the so called 'Ullswater amendment,' s.13 of TURER 1993,⁵⁶⁶ which amended s.148 of TULR(C)A 1992, to effectively permit these inducements by providing that s146 applied only if the action was not one a 'reasonable employer would take.' However, the Lords overturned the ruling of the Court of Appeal in 1995, holding that collective bargaining was a service, and not an activity.

Thus separated from the protected spheres of membership and activities, collective bargaining remained vulnerable to attack and New Labour, arguably just as enthusiastic as the Thatcher and Major governments about the individual contract of employment, were happy to implement that distinction into black letter law. In ERA 1999 New Labour revised s.146 to encompass acts as well as omissions, but at the same time replacing 'action short of dismissal' with a 'right not to be subjected to any detriment *as an individual*,' resisting recognising collective bargaining by the union on behalf of the individual as a central element of membership. The Ullswater amendment was retained. Pleading lack of time, the Government had legislated only to allow the Secretary of State to introduce regulations governing incentives to encourage employees to relinquish collective bargaining, and permitted the opposition, with what became known as the 'Miller amendment' to amend the Bill to ensure that Wilson style bonuses which 'reasonably' related to the employee's services, and did not require the employee to cease to be a member, could not be regarded as S.146 detriments. New Labour's muted, Machiavellian, and determined opposition to collective rights

⁵⁶⁵ *Fairness at Work* 4.25

⁵⁶⁶ S13 of the Trade Union Reform and Employment Rights Act 1993.

was becoming embarrassingly obvious to trade unionists, if not to the wider public.

The Strasbourg Court recognised that New Labour's legislative response had been inadequate. It noted that the European Social Charter's Committee of Experts had, in its 1995 and 1998 Conclusions, found that in permitting these inducements the UK government was in breach of its Article 5 and 6 obligations, and had required the repeal of s13 of the 1993 Act.⁵⁶⁷

For the first time the ECtHR relied on the ILO jurisprudence - the work of the CFA and CEACR - and also on the provisions of the European Social Charter. Not only was the narrow interpretation of Article 11 widened – the first step taken away from the individualistic interpretation adopted by the court in the Belgian Police Trilogy of cases in the mid 1970s - but the collective right of the trade union, as well as the rights of the individual complainant workers, under Article 11 'to make its voice heard' by the employer in the regulation of employment relations was recognised.⁵⁶⁸

This 'integrated' approach took root in the ECHR jurisprudence, and flourished, resulting in the effective recognition of full freedom of association by the Strasbourg Court in 2008 and 2009. It also took into account the obligations incumbent on the Government to promote and facilitate collective bargaining in ILO Conventions 87 and 98, and a recent complaint that the Committee on Freedom of Association had considered, alleging intimidation, and a 'by-passing' of the union, aimed at facilitating de-recognition at a British steel works. The CFA in that case had recalled that while collective bargaining should be voluntary, if it appears that there is majority support for it then:

'the authorities should take appropriate conciliatory measures to obtain the employer's recognition of that union for collective bargaining purposes.'⁵⁶⁹

⁵⁶⁷ Paras 30-34 and 48. It will be recalled that the provisions of the Charter were used in the Belgian Trilogy to support a narrow interpretation of A11 (see chapter 1).

⁵⁶⁸ "It is not to be overlooked that the second and fifth applicants in the Wilson and Palmer case in Strasbourg were the NUJ and the NURMTW, and it was accepted by the Court that their rights had been violated," KD Ewing 'The Implications of Wilson and Palmer,' (2003) 32 *ILJ* 1 at p12.

⁵⁶⁹ On the views of the ILO paras 34-37; on recognition para 37. The particular case was no. 1852, 309th Report of the Freedom of Association Committee Vol.LXXXI, 1998, Series B, no.1, at para 337. The CFA referred to paras 845 and 824 of the Digest of Decisions

The CFA had recommended the UK ‘reconsider’ s13 in the light of Article 4 of C98, a step which the Strasbourg Court noted had been approved by the ILO’s Governing Body.⁵⁷⁰ In a unanimous decision the Court found that the UK was in breach of its Article 11 obligations by continuing to permit employers to make these inducements.

Forced to legislate to take account of the ECtHR decision the Government nevertheless continued to refuse to align union membership and activity with the provision of collective bargaining. By ERA 2004, S146 was amended to make detrimental treatment to deter the use of trade union services unlawful. Sections 30-31, inserted sections 145A and 145B into TULRCA 1992, specifically prohibiting inducements relating to union membership and activities (including the use of union services). Section 145B applied only to inducements relating to collective bargaining. 145B (4) states that:

‘Having the terms of employment determined by collective agreement shall not be regarded for the purposes of section 145A (or section 146 and 152) as making use of a trade union service.’

Collective bargaining was thus now distinct from membership, activities *and services*. The protections against inducements to forego collective negotiation and agreement were undermined by further legislative sleight of hand:

‘145B(1) A worker who is a member of an independent *trade union which is recognized, or seeking to be recognised by his employer* has the right not to have an offer made to him by his employer...’

But this restricted protection was subject another caveat: ‘The employer’s *sole or main purpose* in making the offer’ must, for the purposes of 145B, be to achieve the result that the worker’s ‘terms of employment, or any of those terms will not (or will no longer) be determined by collective agreement negotiated by or on behalf of the union.’⁵⁷¹

⁵⁷⁰ Case no.1852 (ibid) para 341, referring to 294th Report, Case no.1730.

⁵⁷¹ S145B(2).

Consequently the employer can simply derecognise the union and then make whatever offers it thinks appropriate. However, if the employer is not prepared to take this step, and if it can satisfy the tribunal that the attempt to persuade the employee or employees to forgo collective representation in negotiations over terms and conditions was merely incidental to another purpose - to allow success to be more readily rewarded, for example - then the offer of the incentive payments will not be a breach of 145B.

The remedy for a breach of 145B is the award of £4,093.⁵⁷² Employees who choose to accept the payment will not be returned to the collectively negotiated terms, and arguably many employees will be unlikely to consider it worth alienating the employer by pursuing a claim. The prospect having to pay an award of £4,093 to any employees brave or foolhardy enough to risk their career by making a tribunal claim is unlikely to stop many employers from offering them.⁵⁷³ The nature of these 'sweeteners' is that they are short term financial sacrifices made with the intention of saving very considerable sums of money in the long term.

I suggest that these remedies for breaches of collective rights must be seen to have been provided as part of an initiative *to appear* to provide the bare minimum of rights for individual workers sufficient to bring UK collective rights in line with her international obligations. Close analysis reveals that the rights provided have no real substance - in reality they provide less than the minimum demanded: the *Daily Mail* would have been unlikely to have fallen foul of 145B had the newspaper made its offers to Mr. Wilson and his colleagues after the 2004 Act.

Even the most robust of new individual rights would not have sufficed to remedy the breaches of the rights of the NUJ and RMT identified by the Court. The ruling clearly requires that trade unions be given standing to protect their right, and the right of their members, not to have inducements made to workers to forego collective bargaining, yet New Labour, and all subsequent Governments, have

⁵⁷² S145E.

⁵⁷³ However, see the use – under the supervision of the union - of multiple individual claims for each unlawful offer in *Kostal UK Ltd v Dunkley & Ors* [2017] UKEAT/0108/17/RN.

resolutely refused to go beyond the heavily compromised individual rights that were ceded so grudgingly in 2004.

While the ECtHR was apparently satisfied with New Labour's legislative gestures, the European Social Rights Committee was not. As we have seen, it had long taken an interest in the use of these inducements, and following *Wilson*, it continued to hold the UK to be in breach of Article 6(2). In its most recent published pronouncement, Conclusions XX-3(2014), the Committee observed that although it is

‘unlawful for employers to offer financial incentives to induce workers to exclude themselves from the scope of collective bargaining [S145A TULRCA 1992]’, there is no right for “workers who did not receive an offer with the right to complain about offers made to co-workers...the law also does not create a free standing right for a trade union to appeal in a case of infringement on its own right to collective bargaining.’

However, even as the ECSR were harrying the UK government on the inadequate response of the UK government to *Wilson*, and in doing so highlighting the more exacting demands of the Charter, the two sister instruments and supervisory bodies appeared to fall into line with each other on freedom of association -in 2008 *Demir and Baykara v Turkey* had changed everything.⁵⁷⁴

The acceptance by the Grand Chamber of the ECtHR that, based upon the international and regional norms evinced principally by the ILO, European Social Charter jurisprudence, that the right to bargain collectively is an essential element of Article 11 saw real recognition of the collective nature of the right to freedom of association in the European Convention of Human Rights. That this right to bargain collectively necessarily embraced a right to strike was confirmed the following year in *Enerji Yapi-Yol v Turkey*.⁵⁷⁵

In the UK, cases like *Metrobus* and *EDF*, betrayed the reluctance of the Higher Courts to ‘take account’ of events in Strasbourg as required by the Human Rights

⁵⁷⁴ ECHR 1345 2008.

⁵⁷⁵ ECHR 2251 [2009] . See also *Hrvatski liječnički sindikat v Croatia* ECHR 27 [2014].

Act.⁵⁷⁶ Nevertheless, in the conjoined cases of *RMT v Serco* and *ASLEF v London & Birmingham Railway*,⁵⁷⁷ heard at the Court of Appeal in February 2011 by Lord Justices Mummery, Elias and Etherton, the influence of the integrated approach supplied through New Labour's legislative conduit, the Human Rights Act 1998, was for the first time felt in a ruling at the Royal Courts of Justice.

Mummery and Elias were ex-heads of the Employment Appeals Tribunal, Elias more than usually expert on labour law matters, and led by John Hendy they relied on ILO Conventions 98 and 151, the European Social Charter, and on the recent ECtHR jurisprudence supposedly 'given effect by the Human Rights Act', to recognise a right to strike in English law and to hold as a consequence that compliance with the 'trips and hurdles' of the balloting requirements cannot be construed strictly against trade unionists, and must instead be construed in the normal way. As a consequence the injunctions that had been granted in the High Court on the basis of very minor procedural balloting errors on the part of the unions were discharged.

A comparatively minor victory for the trade unionists perhaps, but it can nevertheless be said that the labour law rulings of the ECtHR have taken root in our jurisprudence. These rights to bargain and to strike are, of course, far from absolute, and they can be rendered ineffective in practice when the courts permit substantial interference. Unfortunately for British trade unionists the ECtHR did permit substantial interference when the RMT took the EDF case to Strasbourg in 2014, and when Unite challenged the abolition of the last of Wages Councils there in 2016.

The Tories had been watching developments in the Strasbourg jurisprudence with dismay. Eighteen months after the Tories had formed a Coalition government with the Liberal Democrats in 2010, the UK took over the chair of the Council of Europe, and the Tories were able to take practical steps towards reining in the court. Exploiting concerns about the back log of ECHR cases, the Tories pressed a draft declaration on the future of the court on member states. That draft provided the basis of what became the *Brighton Declaration*, which in turn evolved into ECHR Protocol No.15 (which, requiring ratification by all member states, has yet to come into force). The declaration called upon the court to apply

⁵⁷⁶ *EDF Energy v National Union of Rail Maritime and Transport Workers* [2010] EWCA Civ 173 and *Metrobus v Unite* [2009] EWCA Civ 829 CA (see chapter two).

⁵⁷⁷ EWCA Civ 226.

procedural rules relating to the admissibility of cases more strictly, to, in effect, restrict decisions which departed from 'settled case law' to the Grand Chamber, and to widen the already wider margin of appreciation, accorded states in the protection of the labour and social rights embraced by the Convention by laying more emphasis the application of the principal of subsidiarity.⁵⁷⁸

Essentially the Brighton Declaration saw the UK ally with other states unhappy about the judicial activism of the court (notably the Russian Federation) to fire a shot across the bows of the Strasbourg Court. It demonstrated to the court that the UK is a dangerous and influential enemy. That warning appears to have had the desired effect. Subsequently, in *RMT v UK* [2014],⁵⁷⁹ the court departed from a run of freedom of association decisions which had seen each respondent state held to have breached the newly invigorated Article 11. The prohibition on secondary action in the UK was held to fall within the wide margin of appreciation accorded states in matters of labour relations, and the challenge to the restrictions on the right to strike imposed by the procedural 'trips and hurdles' was held to be inadmissible.⁵⁸⁰

UNITE v UK [2016],⁵⁸¹ saw the union rely principally on the requirements in ILO Convention 98 and Article 6 of the European Social Charter for states to provide machinery to facilitate collective bargaining to challenge the abolition of the Agricultural Wages Board, the last of the Wages Councils, by the Enterprise and Regulatory Reform Act 2013. That Article 11 challenge was also held by the court to be inadmissible. The court took the view that there was no positive obligation to secure collective bargaining for workers; the government was obliged merely to ensure 'the right for their union to be heard with a view to protecting their interests,' and to 'enable trade unions, in conditions not at variance with Article 11, to strive for the protection of their members' interests.'⁵⁸² The essential elements of Article 11 included

'the right to form and join a trade union, the prohibition of closed shop agreements, the right for a trade union to seek to persuade the employer

⁵⁷⁸ See 'The Future of the European Court of Human Rights in the Light of the Brighton Declaration' by Klaus Lorcher, in Dorsemont, Lorcher and Schomann, *The European Convention on Human Rights and the Employment Relation*, (Oxford, Hart Publishing, 2013).

⁵⁷⁹ [2014] ECHR 366.

⁵⁸⁰ See Alan Bogg and KD Ewing, 'The Implications of the RMT Case' (2014) 43 *ILJ* 221.

⁵⁸¹ [2016] ECHR 1150.

⁵⁸² *Ibid*, para 53.

to hear what it has to say on behalf of its members, and, *in principle, the right to bargain collectively with the employer...States remain free to organise their systems so as to grant special status to trade unions if appropriate.*⁵⁸³

The court referred back to the individual human rights paradigm to state that

‘the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities.’

While ‘there may be positive obligations on the State to secure the effective enjoyment’ of freedom of association, and that it was necessary for a ‘fair balance to be struck between the competing interests of the individual and the community as a whole,⁵⁸⁴ as far as the protection for collective bargaining conferred by Article 11 the court held that:

‘[I]n the present case the United Kingdom does not restrict employers and trade unions from entering into voluntary collective agreements...the applicant is not prevented from engaging in collective bargaining.⁵⁸⁵

Disappointing as these cases were to trade unionists, the RMT case had at least confirmed that the rights to bargain collectively and to strike were essential elements of Article 11.⁵⁸⁶ Significantly, in the *Unite* case the court, while holding that Article 11 protection for collective bargaining did no more than prevent states from stopping workers and employers from engaging in collective negotiation, arguably made it clear enough that governments were free to oblige employers to negotiate with unions at either establishment or sectoral level.⁵⁸⁷

The RMT case had also clarified the court’s view of the status of the interpretations placed upon the ILO Conventions by the CFA and CEACR as binding upon the government.⁵⁸⁸ The government had raised the argument that they were not, in anticipation of the court confirming it, much as the Tories had raised

⁵⁸³ *Ibid*, para 54, emphasis added.

⁵⁸⁴ *Ibid*, para 56.

⁵⁸⁵ *Ibid*, paras 59 and 64.

⁵⁸⁶ *As Hrvatski liječnički Sindikat v Croatia* [2014], *op cit*, did later in the same year.

⁵⁸⁷ See *Gustafson v Sweden* [1996], *op cit*.

⁵⁸⁸ In accord with the ‘Employers’ Rebellion’ at the ILO (see introduction, above).

the argument that there was no negative side to Article 11 in *Young James and Webster* in anticipation of court holding that there was. That weapon had failed them then, but this time however it had 'backfired.'

To conclude then, and to take first the relationship of Britain and ILO, it is a considerable understatement to say that the position of the government has altered radically since it took the leading role in negotiations over the ECHR, the ILO constitution and Conventions 87 and 98 in the late 1940s.

Since 1980 only one ILO convention of significance has been ratified by the UK – Convention No.111 on Discrimination in 1999. Two other fundamental Conventions relating to child labour, as well as the Promotional Framework for OSH Convention were also ratified by New Labour, but neither can be said to be of any consequence to British workers. Under Conservative administrations, only a handful of maritime conventions, and an administrative convention,⁵⁸⁹ have been ratified - the two conventions ratified in 1980 were, in reality, ratified by the Callaghan government of 1976 - 79.

Yet prior to 1981 62 conventions were ratified by HMG. 34 of those were ratified between 1945 and 1980.⁵⁹⁰

During that period the UK can be said to have led the world in terms of respect for the fundamental labour rights. The Attlee governments had effectively required signatories of the fundamental ILO Conventions, and the Convention to adopt British standards. As a consequence successive administrations were able at once to be seen to endorse, impose, yet also to effectively largely avoid supranational obligation, other than to maintain for British workers full freedom of association.

All administrations evinced extreme reluctance to legislate on labour relations in response to supranational obligation, but such was the respect accorded the rule of law that the post war governments considered themselves to be bound by those treaty requirements even when it seemed that they would have to break with voluntarism to legislate to ensure compliance.

⁵⁸⁹ The Labour Statistics Convention No. 160 of 1985.

⁵⁹⁰ | exclude maritime conventions.

The last Macmillan administration of 1959 – 63 compounded this post war cross party commitment to maintain full freedom of association when it signed the European Social Charter in 1962. This was overlaid by the unmistakably collectivist contributions to the protections for trade union freedom implemented into the UN Covenants overseen by British delegates at Geneva, protections ultimately ratified by the Wilson government in 1976. We saw too in this chapter that the misguided narrow individualistic interpretation of Article 11 ECHR adopted in the mid 1970s was ultimately abandoned by the Strasbourg Court to reflect the collectivist freedom of association which I showed in chapter one to have been implicit the Article 11 and UN Covenant protections for freedom of association by virtue of the use of ILO Convention 87 as a floor to those guarantees.

Ultimately, I would argue, that despite the efforts of the post 1979 Governments, and the emergence of the ‘negative freedom of non association,’ partially as a consequence of the machinations of the Thatcher Governments, there is no escaping the commitments entered into during 1945 – 1976. The law breaking and obfuscation of the politicians, the reluctance of the domestic judiciary to protect for workers their right to bargain collectively, and the failure of the Strasbourg judges to protect the full freedom of association it had appeared to have promised during 2008 - 2014 (and, as we shall see, the similar failure of the Luxembourg Court) cannot continue indefinitely. A reappraisal is imminent.

Only membership of the European Union has obliged the government to legislate to improve domestic labour employment protection to any appreciable extent, and UK withdrawal from the EU can be said to be a manifestation of a desire to evade this well publicised example of supranational obligation in the sphere of individual employment rights. Elements on the right wing of British politics profess to believe that ‘Brexit’ will serve to divest the UK of long resented European employment protection obligations, permitting fast moving, ‘dynamic’ free trade with other states with similarly unprotected ‘flexible’ workforces.⁵⁹¹

The reality, of course, is that if the UK does leave the European Union (and the customs union) to negotiate trade treaties with ‘third states’, it will not emerge as a newly ‘competitive,’ lean, deregulated state. It will still be bound by the very

⁵⁹¹ As discussed and evidenced in chapter two.

considerable ILO, Council of Europe and United Nations obligations it entered into in the post war years. Formal British escape from these commitments, as the Tory administrations of 1979 – 1997 discovered, is not possible without incurring severe, almost certainly unacceptable, domestic political difficulty and condemnation from abroad.⁵⁹²

Moreover, such is the collective power of the EU as a trading bloc that the UK government will still almost certainly have to adhere to the very comprehensive employment protection that it was bound by when it was a member of the EU, and party to the most extensive free trade agreement in the world. It will not want to permit an 'off shore sweatshop' access to the single market.⁵⁹³

⁵⁹² See the GCHQ affair above.

⁵⁹³ See chapter two.

Chapter Four: The influence of the European Union

In this chapter I show that the EU, like the English common law, is fundamentally concerned with the protection of the interests of business. Whatever might be said of the EU Charter of Fundamental Rights, and of the protection conferred by the Charter and the CJEU of the fundamental freedoms rights and principles of the EU, freedom of association is subservient to the freedom to do business.

I show too that, despite the relaxed approach of the EU Commission to the enforcement of the individual employment rights deployed to ‘rebalance’ the bias of the EU – resisted at every turn by all UK governments since 1979 - that the primacy accorded the right to do business has, in the cause of the pursuit of a ‘level playing field’ for business, provided British workers with a formidable mechanism for the protection of employment rights of EU origin.

The Treaty of Rome – ‘the four freedoms’ and other rights

What has become known as the European Union was, for the first fifteen years of its existence,⁵⁹⁴ essentially an exclusively economic project. The European Economic Community was based on free trade,⁵⁹⁵ and the fundamental freedoms enshrined in the 1957 Treaty of Rome were economic rights - negative rights requiring that Member States open their borders to the citizens of the other Member States to create a common market.⁵⁹⁶ The intention was the ‘progressive liberalisation’ of the movement of goods,⁵⁹⁷ workers, services, and capital.⁵⁹⁸

⁵⁹⁴It was envisaged in Article 8 that the ‘common market shall be progressively established during a transitional period of twelve years’ (all Treaty references below, unless stated otherwise, are from the 1957 Treaty of Rome).

⁵⁹⁵It evolved from the European Coal and Steel Community established by the 1951 Treaty of Paris. Of course, those involved in negotiating these treaties were acutely aware of the contribution that free trade made towards keeping the peace. Open borders, free trade and a European Court of Justice make waging war on fellow Member States near enough impossible (although opponents of the EU almost invariably ascribe the unprecedented post 1945 Western European peace to NATO) .

⁵⁹⁶Article 2: ‘It shall be the aim of the Community, by establishing a common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.’

⁵⁹⁷Part 2, Title I.

⁵⁹⁸Part 2, Title III ‘The Free Movement of Persons, Services and Capital’: Chapter 1 – Workers; Chapter 2 – The Right of Establishment; Chapter 3- Services; Chapter 4-Capital.

These business rights became known as the ‘four freedoms,’ guaranteed under the Treaties by Member States, and promoted by Community legislation.⁵⁹⁹

The few labour rights the Treaty conferred were incidental to the economic rights.⁶⁰⁰ Discrimination on the grounds of nationality had to be prohibited to protect freedom of movement and freedom of establishment.⁶⁰¹ Equality of treatment for men and women,⁶⁰² that most influential tenet of European law,⁶⁰³ had its origins in French fears that the Germans would underpay its comparatively large female population and undercut French production costs.⁶⁰⁴

These immediate concerns aside, human rights were scarcely considered by those negotiating the treaty. Arguably there was no obvious need. The six nations had similar attitudes towards civil, social and labour rights, and the majority had new post war constitutions which guaranteed the right to strike, and the right to bargain collectively. This new Western European legal, political and constitutional consensus was reinforced by the ILO Conventions, by membership of the Council of Europe,⁶⁰⁵ by the United Nations Universal Declaration of Human Rights, and the evolving UN covenants on civil and social rights. The founding states – membership was confined to the original six until the UK, Denmark and Ireland joined the European Economic Community in 1973 - had ratified the European Convention on Human Rights in the early fifties, and all were party to the lengthy negotiations over the provisions of the European Social Charter, which was ultimately signed by the UK in 1962. National laws in relation to freedom of association, to the right to organise, bargain collectively and take industrial action were beyond Community competence, and in the 1956 *Ohlin Report*, the ILO

⁵⁹⁹Labour related legislation, under the Ordinary Legislative Procedure, is proposed by the Commission, following consultation with the Economic and Social Committee and employers’ and workers’ representatives (although see below on the social dialogue) and reviewed, and very likely amended, by the Council of Ministers and the European Parliament, and if agreement is reached, it is adopted as EU law.

⁶⁰⁰Of course freedom of movement for workers confers the right to be an economic migrant. However this is a business right, allowing labour as a commodity to serve the requirements of the common market (Article 45), rather than a labour or social right.

⁶⁰¹Articles 7, and 48(2).

⁶⁰²Article 119.

⁶⁰³The Equal Pay Act 1970 was passed in anticipation of the UK’s entry into the EEC, or the ‘Common Market’ as it was popularly known, and came into force within days of the Sex Discrimination Act 1975 in December 1975 (the UK joined the EEC on 1 January 1973).

⁶⁰⁴ Martin J. Dedman, *The Origins and Development of the European Union 1945-95*, 1996, p103 and Novitz & Srypis, ‘Human Rights in the European Union’ in Fenwick & Novitz, *Human Rights at Work, Perspectives on Law and Regulation*, 2010, p466.

⁶⁰⁵All were members of the Council of Europe - all states that have subsequently joined the EEC/EC/EU have been members.

Committee of Experts essentially took the view that a common market would not stop Member States from improving workers' living standards, and could certainly not restrict freedom of association.⁶⁰⁶

In the same year the *Spaak Report* had concluded that free movement would ensure that employers were drawn to areas where wages were low and the law of supply and demand would force wages up.⁶⁰⁷ As Catherine Barnard put it, it was 'believed that a successful economic model, delivered through an economic constitution governed by the rule of law, would bring higher levels of social benefits in its wake. Improved working conditions would be the *consequence of* market integration, not a prerequisite to it.'⁶⁰⁸

The first Social Chapter: Title III Social Policy, Chapter 1 - 'Social Provisions.'

Article 117 enshrined in the Treaty this belief that a free European market, the 'Common Market', would deliver prosperity, but gave equal weight to the importance of 'the approximation of legislative and administrative provisions' in improving "the living and working conditions of labour."

Article 118, however, emphasised the incidental status of labour rights:

'Without prejudice to the other provisions of this treaty and in conformity with its general objectives, the Commission shall have the task of promoting close co-operation between member states in the social field particularly in matters relating to:

- Employment;
- labour law and working conditions;
- basic and advanced vocational training;

⁶⁰⁶*Social Aspects of European economic co-operation: Report by a group of experts*, Geneva, 1956.

⁶⁰⁷See Hepple 'The Crisis in EEC Labour Law,'(1987) 16 (1) *ILJ* 78. Hepple cited the Spaak Report: 'Equalisation, so far from being a condition precedent to the operation of the Common Market is, on the contrary, its result.' The report was presented to the European Coal and Steel Community by Paul-Henri Spaak, then the Belgian Foreign Minister who had headed a committee of representatives from the Foreign Offices of the Member States who prepared the report.

⁶⁰⁸Catherine Barnard, 'Employment Rights, Free Movement Under the EC Treaty and the Services Directive', Europa Institute, *Mitchell Working Paper Series*, 2008, p2 (Barnard's emphasis).

- social security;
- Prevention of occupational accidents and diseases;
- Occupational hygiene; the right of association, and collective bargaining between employers and workers.⁶⁰⁹

Article 120 provided that: 'Member States shall endeavour to maintain the existing equivalence between paid holiday schemes.' Parity, rather than progress, was at the heart of Community social policy.

Articles 123-128 established the European Social Fund with 'the task of rendering the employment of workers easier and of increasing their geographical and occupational mobility within the Community.'⁶¹⁰ Vocational training, and resettlement allowances,⁶¹¹ can be obtained by Member States in order to facilitate 'the harmonious development both of the national economies and of the Common Market.'⁶¹² The Commission and a Committee, based on the tripartite ILO model, with representatives from Governments, trade unions and employers' organizations, administer the fund, in consultation with the Economic and Social Committee.⁶¹³

The European Court of Justice rules on questions of law in matters related to the legal competences conferred by the treaties. The role of the ECJ is not merely that of a constitutional court, interpreting the law relating to cases referred to it by member states. It also enforces those laws. From 1957 to 1992, however, the court had only the power to make a declaration to the effect that a member state had failed to comply with a ruling of the Court. Infringement proceedings were brought at the instigation of the Commission only after other approaches had failed to secure compliance and to this day the Commission is the 'guardian of the treaties.' Nevertheless, with only a small number of broadly similar states in the

⁶⁰⁹ Article 118 of Title III, Chapter 1, *Social Policy*. The Article goes on to state that: 'To this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organisations.' The rest of the chapter, which extends up to Article 122, consisted of little more than a few lines on health and safety, and equal pay for equal work.

⁶¹⁰ Article 123.

⁶¹¹ Article 125.

⁶¹² Article 128.

⁶¹³ Article 124. The Economic and Social Committee was established to advise the Council and Commission (Article 4(2)).

Community, all broadly committed to the European project, these enforcement measures sufficed. The use of financial penalties is a relatively recent innovation. They were introduced by the Maastricht Treaty, and the first penalty payment was imposed on Greece in 2000.⁶¹⁴ Arguably financial penalties became essential when the EU admitted states sharing neither the prosperity nor the common values of the original European Economic Community states – ‘peer pressure’ was weakened as the EU became a union of 28 states.

Since the introduction of these penalties in 1993 it has been arguable that EU treaty obligations are of a wholly different order from those imposed by the ILO, European Social Charter of 1961 or the UN Covenants – even the European Court of European Rights. The potential severity of the consequences sets them apart.

The position now is that infringement proceedings can be brought under Article 258 TFEU by the Commission, by other member states (Article 258) and by individuals or organisations making complaints to the Commission.⁶¹⁵ States are given ample opportunity to rectify their mistakes before the Commission notifies the Court, and even when the court makes an adverse finding, the state is permitted to ‘set matters straight’ (Article 260(1)). However at the instigation of the Commission sanctions will be imposed by the Court for a failure to comply with a judgment (Article 260(2)). ‘Lump sums’ and ‘penalty payments’ may be imposed for a failure to implement a Directive (Article 26-(3)), the unequivocal intention being to place the state under economic pressure to rectify the matter. Of course, this will very likely also bring very considerable domestic political pressure to bear on any errant Government. Financial penalties continue to be ‘racked up’ if non-compliance continues, based on the seriousness of the breach, and the ability of the state to pay.

However, the Commission often shows a marked reluctance to invoke infringement proceedings. Where employment protection is concerned, other than in the sphere of Occupational Safety and Health where enforcement action beyond the immediate post implementation period, is rare enough, proceedings

⁶¹⁴ Commission v Greece [2000] Case C-387/97, ECR I-5047.

⁶¹⁵ For a readable summary of the infringement process see https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en

are very rare indeed.⁶¹⁶ In December 2017 there were only 15 cases pending in the field of 'Justice (including non-discrimination and data protection)' in the entire EU. Just over half of all infringement cases (51.2% or 698 cases in 2017) concern late transposition of EU directives, while the 'bad application' of directives accounts for just a fifth of all cases (21.5% or 293 cases in 2017).

Although labour rights - equality and anti-discrimination provisions aside - did not fall within the legal competences ceded by member states to the Community under the 1957 Treaty, national employment laws and practices were occasionally challenged at the European Court of Justice on the grounds that they interfered with the Treaty rights.⁶¹⁷ Collective bargaining systems, collective agreements and national laws and practices in relation to the right to strike, were not subject to any such challenges.

Initially reluctant to look outside of the treaty for sources of law,⁶¹⁸ by the early 1970s the ECJ was drawing upon international and regional legal rights instruments, and on the rights conferred in the constitutions of member states to determine, on a case by case basis, how far basic rights could be permitted to infringe upon Community law, when Community law was engaged.⁶¹⁹ These rights, although neither Treaty rights, nor rights conferred by legislation adopted by the Community under the powers conferred by the Treaty, helped establish the parameters of the economic rights, and became recognised by the Court as fundamental Community rights. Without the incorporation of these fundamental rights into the Treaty, or into the black letter law of the Community, the question asked was not whether the Treaty rights could be allowed to infringe these fundamental rights, but whether fundamental rights could be permitted to

⁶¹⁶Even in the field of OSH the UK has been permitted to withdraw protections very considerably over the last 30 or so years, the subject of proceedings only, along with almost all other states, following the inadequate transposition of the 1989 '6 pack' framework directive (see chapter 6).

⁶¹⁷ See *Defrenne v Sabena* [1976] C-43/75, ECR 1365. In this case the complainant relied successfully on the direct effect of A119, and, as regards fundamental rights in other instruments, the court drew on the provisions of ILO Convention 100 on equal pay.

⁶¹⁸See PP Craig, 'The Charter, the ECJ and the National Courts', in *Re-socialising Europe*, Countouris and Freedland (eds), 2013. Craig cited *Stork v High Authority* [1959] C -1/58, ECR 17. The HA was the executive of the European Coal and Steel Community which was established following the Treaty of Paris in 1951. The ECSC was integrated into the EEC in 1967 and the HA was usurped by the European Commission.

⁶¹⁹ See *Internationale Handelsgesellschaft Case* [1970] C-11/70, ECR 1125, and *Nold v Commission* [1974] C-473 ECR 491. See also The ECHR, the EU and the Weakness of Social Rights Protection at the European Level, Roderic O'Gorman, *German Law Journal* Vol. 12 No.10, 1833.

infringe the economic rights.⁶²⁰ This is substantially the same approach that the Court employs to this day.

As we shall see, the failure of the European Union to provide more effective protection for fundamental labour rights can arguably be at least in part ascribed to British resistance to ceding further legal competence in the employment sphere to Brussels, to the failure of the EEC/EC/EU to protect the right to bargain collectively, and to the reluctance of the ECJ to give sufficient weight to rights based arguments. This continuing failure, while scarcely something that could be said to have been unexpected in a regional organisation so unequivocally geared to the promotion of interests of business, was later to cause workers considerable trouble.

As the prosperous and politically placid years of the late 1950s and early 1960s gave way to the more turbulent late 1960s and early 1970s, with the radical left enjoying a resurgence in the six member states, the failure to include labour rights in the Treaty - the 'social deficit' - stoked opposition to what now appeared to many to be a trans-national organisation geared to promoting the interests of capital.

The Treaty of Rome has been described as a neoliberal treaty, and the years 1957 to 1972 as period of economic neo-liberalism for the EEC.⁶²¹ The four freedoms are bulwarks against anti-competitive measures - market place 'distortion.'⁶²² In that respect it can be argued that the European project has always been, and remains, a neo-liberal project. As Hepple put it:

'The founders of the EEC were economic determinists. Although article 2 of the EEC treaty proclaims the task of promoting "an accelerated raising of the standard of living," this is firmly based in an ideology of economic neo-liberalism. The task, says article 2, is to be performed "by establishing a

⁶²⁰ See the approach of the ECJ in *Viking* and *Laval* (below). The supremacy of EU law and the surrender of legal sovereignty might well be seen to have compounded the high handed attitude of the ECJ to rights not found in the Treaties, Directives and Regulations. The initial case on EEC supremacy was *Costa v ENEL* [1964] C-6/64 ECR 585. As regards the UK's grudging acceptance of what had been signed away in 1972, see *Factortame v Secretary of State for Transport (No.2)* [1991] 1 AER 70, 436 [ECJ: C- 213/89].

⁶²¹By Hepple in "The Crisis in EEC Labour Law," 1987, *op cit*. Tory neoliberal strategists Strauss and Hoskyns in 'Stepping Stones' (see chapter two) ascribed the dislike of many on the left for the Common Market to their belief that it was a 'capitalist's club.'

⁶²²Article 3 (f) one of the aims of the Treaty: "the institution of a system ensuring that competition in the common market is not distorted."

Common Market and progressively approximating the economic policies of the Member States”...Approximation of municipal laws was described as an objective but only “to the extent necessary to the functioning of the Common Market.”⁶²³

In the early years of the Community Member States and the European Council, were not however dominated by ideologically driven neoliberals, but by pragmatic social and liberal democrats with a keen interest in ensuring that their electorates benefited from what Article 2 called a ‘continuous and balanced expansion, an increased stability,’ which they hoped would characterise that ‘accelerated raising of the standard of living.’

As the post war boom faded and the 1973 ‘Oil Crisis’ started to bite, it became obvious that the market alone could not be relied upon to deliver increased prosperity. It certainly could not provide the desired balance or stability.⁶²⁴

We have seen that Article 117, as well as pinning pious hopes on the power of the market to improve living standards, also recognised that the necessity for the ‘approximation of legislative and administrative provisions,’ and it was Articles 117, 118, and Article 100 - permitting the adoption of legislation to facilitate the ‘establishment and functioning of the Common Market’⁶²⁵ - which provided the basis for a subsequent change of Community policy. The *Social Action Programme*, adopted in 1974, was a bold and radical attempt at incorporating the required minimum standards of labour protection in the *acquis*. The preamble to the Council Resolution on the programme recalled that:

‘The Heads of State or of Government affirmed at their conference held in 1972 that economic expansion is not an end in itself...such a programme involves actions designed to achieve full and better employment, the improvement of living and working conditions and increased involvement of management and

⁶²³ Hepple, 1987, *op cit*, p77.

⁶²⁴ *Ibid*, p80 noted that free movement of workers had not “resulted in large scale internal movements of labour to countries with higher social standards; it had instead created a secondary labour market within several Member States, populated by a sub class of ‘guest workers’ mainly from outside the Community.” Free movement of capital saw the relocation of industry to areas with “low social and wage costs” but also with “low productivity, lack of skills, energy and resources.”

⁶²⁵ Article 235 permitted legislation as a step towards an objective of the Community in situations where “this Treaty has not provided the necessary powers, the council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.”

labour in the economic and social decisions of the community, and of workers in the life of undertakings...'

The Council envisaged the adoption of a wide range directives and regulations to protect the interests of migrant workers, disabled workers, older and younger workers, agency and part time workers, workers on fixed term contracts and workers with families. Working time was to be regulated, and workers faced with collective redundancies, business transfers and insolvencies were to be given a measure of protection.⁶²⁶ Significant strides were taken towards the harmonisation of health and safety regulations. An Advisory Committee on Safety, Hygiene and Health Protection at Work was set up to assist the Commission, and in the following year, 1975, the European Foundation for the Improvement of Living and Working Conditions was established. The same year the Commission produced a Green Paper on 'Employee Participation and Company Structure,' and it appeared that the Community was to take the initiative on a question that had been provoking considerable interest in the UK – that of workers' representatives in the board room.⁶²⁷ Trade unions, part of the fabric of society in the six founding states, were, of course, deeply involved in all of these initiatives, required or expected to monitor, report on and enforce any rights conferred.

This ambitious programme was brought to a halt soon after the first Thatcher Government was elected in 1979.⁶²⁸ Political consensus was required for a legislative programme, and the election of a neoliberal Government in a member state destroyed that consensus. The New Tories were set to implement a 'social dumping' programme under the guise of cutting the burden of 'red tape' on business,⁶²⁹ and wanted no part of the Social Action Programme.⁶³⁰ We have seen that in their first term in office they had stopped ratifying ILO Conventions, and had set out on a programme of denunciation - there was no prospect of the UK being obliged by European law to protect workers' rights.

Essentially, the Tories intended to secure a competitive advantage in the Common Market, and with Japan and the USA, by a number of strategies including the

⁶²⁶ *Council Resolution of 21 January 1974 concerning a social action programme.* eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C.1974.013.01.0001.01.ENG

⁶²⁷ See Jeff Kenner, *EU Employment Law From Rome to Amsterdam and Beyond*, 2003, pp 23-42, for an overview.

⁶²⁸ Brian Bercusson, *European Labour Law*, 2009, p 102.

⁶²⁹ The genesis of this programme was known to those in Thatcher's inner circle of Hayakian disciples as *Stepping Stones*.

⁶³⁰ The previous Tory leader Edward Heath had been personally involved in formulating the programme.

withdrawal of certain collective labour rights, to ensure what is euphemistically referred to as a *flexible* labour market. That competitive advantage was permitted by the absence of community competence in the sphere of pay and the freedom to organise and bargain collectively.

Nevertheless, the Tories had to work around some ideologically incompatible so called ‘social’ (employment) provisions – the price of continued access to the Common Market. The Directives on equal pay and equal treatment,⁶³¹ and the protection of ‘acquired rights’ on the transfer of an undertaking had already been adopted under the programme, and were non-negotiable.⁶³²

The floor of rights required by the Equal Pay Directive of 1975, and the Equal Treatment Directive of 1976, had been laid in December 1975, when the Equal Pay Act 1970, and the Sex Discrimination Act 1975 had come in to force. Protection for pregnant and nursing mothers had followed in the Employment Protection Act 1975 which had also implemented the Collective Redundancies Directive.⁶³³ The Framework Health and Safety Directive of 1980 on protection from chemical, physical and biological agents,⁶³⁵ proved acceptable to the Thatcher Government,⁶³⁶ and it had no choice but to implement the Acquired Rights Directive as the TUPE Regulations in 1981.⁶³⁷ But that was the end of the Social Action Programme.

In subsequent years any European initiatives to confer employment rights were almost invariably resisted by the Tories. When implementation became unavoidable those rights would be provided with as thick an individualistic veneer as it was possible to apply.

⁶³¹Fleshing out the existing Treaty rights on equal treatment.

⁶³²While the equality laws are politically unassailable – except by pricing justice beyond the reach of prospective litigants – the TUPE and Collective Redundancy Regulations appear to this day to be seen by the Tories as an ancient wrong inflicted on the UK.

⁶³³Directive 75/129/EC. Something of a misnomer because, as Mark Freedland commented, Part IV of the Act ‘Procedures for Handling Redundancies’ was ‘concerned with entirely individual dismissals’ (‘Employment Protection: Redundancy Procedures and the EEC,’(1976) 5 *ILJ* 24)

⁶³⁵Directive 80/1107 EC

⁶³⁶During 1979 – 1982 the Tories were proceeding very carefully, and Jim Prior, the Employment Minister was an old school ‘wet’, one nation Tory (see chapter 2). Even amongst Thatcher’s intimates the veto of such an obviously benign Directive was very likely judged to be a step too far at that stage of the Neo Liberal Revolution.

⁶³⁷Directive 77/187/EC. Directive 80/987/EEC, on the protection of workers on insolvency did not require the UK to legislate. The required protection had long been in place.

The social dialogue

It was not until the 'Social Europe' project was launched under the direction of European Commission President Jaques Delors in 1985, following the re-election of the Thatcher and the New Tories in 1983, that a serious solution to the post 1979 *impasse* was sought, and further steps taken towards remedying the social deficit.

Greece had joined the Community in 1981, and Spain and Portugal were due to join in 1986. The disparity of wealth between these former right wing dictatorships and the rest of the Community heightened the perceived need for an approximation of social standards which would facilitate a relatively balanced expansion.⁶³⁸ It was recognised that large scale movements of workers and capital between states enjoying vastly different standards of living, and differing levels of social protection, would be likely to undermine job security, and the terms and conditions of employment of workers, threatening popular support for the European Project. The phrases 'social dumping' and 'race to the bottom' became current,⁶³⁹ and the 'social dialogue' - 'relations based on agreement' - commenced with the 'Val Duchesse' meeting of the 'social partners' - the representatives of labour and capital, employers and trade unions - in January 1985.⁶⁴⁰

The 1986 Single European Act extended qualified majority voting to certain areas of Community competence that had previously required unanimity in order to speed progress towards the single market.⁶⁴¹ QMV now permitted the Council to side step the British veto 'on measures for the approximation of the provisions laid down by law, regulation or administrative action in Member states which have as their object the establishment and functioning of the internal market.'⁶⁴²

⁶³⁸See Article 2 Treaty of Rome.

⁶³⁹For an analysis of this 'social regime competition' see Bercusson, 2009, *op cit*, pp132-138.

⁶⁴⁰*Ibid*, pp 132 -33 and 141-2. The Commission were instrumental in forcing the employers to the bargaining table. Bercusson saw the dialogue as 'a kind of class struggle at European level' (p138) and famously described it as 'bargaining in the shadow of the law' (*Ibid*, p148- 151). Progress was slow (*ibid*, p132 for the first 15 'joint opinions' of the social partners). The social dialogue was a key feature of the Maastricht TEU and the Social Protocol in 1991 (see below) and was subsequently central to the negotiation of EU labour legislation.

⁶⁴¹ See Article 8a Single European Act. Article 100A, introduced by the SEA, permitted the adoption of measures to harmonise the laws of Member States that might otherwise impede the operation of the single market by QMV. Previously, by Article 100, unanimity was always required.

⁶⁴²Article 100A Treaty of Rome, as amended by SEA. Previously such measures had required unanimity (see above). Article 235 provided a 'catch all' legal basis for legislation which had no obvious basis in the Treaty, but is invoked sparingly, undermining as it does the supposed requirement for Community law to have a basis in the Treaty.

The Thatcher Government succeeded in ensuring that QMV was not extended 'to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons,'⁶⁴³ a qualification which appeared to make it impossible for the Social Action Programme to be revived without the approval of the British.

The Thatcherites did, however, acquiesce to two revisions of the Treaty of Rome related to labour rights. Article 118A permitted QMV in relation to health and safety legislation,⁶⁴⁴ and Article 118B saw the recognition of social dialogue as a mechanism for steering Community labour policy.⁶⁴⁵ Consequently, subsequent Health and Safety Directives compelled the Major Government to make considerable improvements to the maternity leave system,⁶⁴⁶ and introduce 'day one' enhanced unfair dismissal protection for those dismissed for 'whistle blowing' on health and safety matters.⁶⁴⁷ Following a Directive based on Article 100, and facilitated by 100A,⁶⁴⁸ the Major Government also had to extend the right for workers to require an employer to provide written particulars of employment.⁶⁴⁹

The European Court also intervened to force the Tories to legislate on employment matters. Rulings in sex discrimination and equal pay cases compelled the Thatcher Government to amend the Equal Pay Regulations,⁶⁵⁰ and the Employment Protection (Part-time employees) Regulations,⁶⁵¹ and to introduce the Bills that became the Sex Discrimination Act of 1986,⁶⁵² and the Employment Act of 1989.⁶⁵³ A ruling of the ECJ compelled the Major government to revise the Collective Redundancy consulting procedures.⁶⁵⁴

⁶⁴³ Ibid, Article 100A.

⁶⁴⁴ See Bercusson, 2009, *op cit*, pp 122-8.

⁶⁴⁵ Ibid, 132-8.

⁶⁴⁶ Directive 92/85/EEC.

⁶⁴⁷ Health and Safety Framework Directive 89/39/EEC.

⁶⁴⁸ See n.641 above.

⁶⁴⁹ Directive 91/533/EEC.

⁶⁵⁰ Equal Pay (Amendment) Regulations which following *Commission v UK* [1982] C-65/82.

⁶⁵¹ To give part time workers the same qualifying period for unfair dismissal as full time workers.

⁶⁵² Following the ECJ's ruling in *Marshall v Southampton Health Authority* Case [1993] C-271/91 ECR I-4367 the Government had to raise the woman's retirement age to 65, and, in order to comply with the ruling in *Commission v UK* [1982] C-61/81 ECR I-2601, to bring small firms and domestic employees within the ambit of the sex discrimination legislation.

⁶⁵³ Age limits for redundancy brought into line with retirement ages.

⁶⁵⁴ *Commission v United Kingdom* [1994] C-383/92 ECR I-2479.

Otherwise the Tories can be seen to have largely succeeded in avoiding being obliged to implement employment protection law. At the tail end of the last Major administration the Tories came perilously close to having to concede two potentially humiliating defeats. The Protection of Young Persons' Directive, which threatened to prevent 15 year olds from doing a daily paper round while working on a 'Saturday job,' was adopted in 1994 as a health and safety Directive despite the vigorous resistance of the Major Government.⁶⁵⁵

The big fight, however, was over the Working Time Directive,⁶⁵⁶ which had been adopted on the same legal basis in 1993. The Government, with some justification, saw the regulation of working time as a social measure aimed at improving conditions of employment, and challenged the validity of the Directive at the ECJ.⁶⁵⁷ The case was lost in November 1996, and the Tories left office in May 1997 without having implemented either the Working Time Directive, or the Young Persons' Directive.

The 1989 Community Charter on the Fundamental Social Rights of Workers

The Charter had its origin as an attempt to incorporate a floor of labour rights into the Treaties. This was blocked by the UK Government. Without British support the other 11 states were obliged to settle for a declaration of rights.

The Community Charter created no obligations, and there was no timetable for the implementation of the protections featured. Article 27 gave Member States responsibility for implementing its provisions in 'the form of laws, collective bargaining, or existing practices.'⁶⁵⁸ This open ended programme was too much for what proved to be the last Thatcher administration, and the UK was the only Member State to fail to ratify the Community Charter.

⁶⁵⁵ Directive 94/33/EEC. Having to accept European regulation of what were essentially New Tory core values was totally politically unacceptable to the Major government, long perceived to have been 'weak' on European matters.

⁶⁵⁶ Directive 93/104/EC

⁶⁵⁷ *UK v Council* [1996] C-84/94 ECR 57/55. The UK argued that Article 118a TFEU was not the correct legal basis for the Directive, and it should have been adopted under Article 100 or Article 235 (requiring unanimity). See pp39-43, Stephen Weatherill, *Cases and Materials on EU Law*, OUP, 2005 for an overview.

⁶⁵⁸ Article 27, Community Charter.

Nevertheless, the Community Charter was enormously influential. Article 28 was an invitation by the European Council to the European Commission to initiate legislation, and shortly before the other Member States ratified the Charter, another *Action Programme* was launched setting in train a series of early 1990s directives - this was where the Working Time Directive, the Young Persons' Directive and the Directive on the Protection at Work of Pregnant Women had their origins. Some of the numerous Charter Action Programme initiatives went on to be implemented under the Social Protocol, and the subsequent Treaty of Amsterdam Social Chapter.⁶⁵⁹

The Action Programme adopted the wording of Article 27 by providing that employers and workers' representatives could negotiate the implementation of the directives at national level - the Member State having to guarantee that the agreement complied with the minimum demanded by the directive.⁶⁶⁰

The Social Protocol

A Protocol and Agreement on Social Policy, laying out radical new procedures for the negotiation and implementation of community social protections, was appended to the 1992 Maastricht Treaty.⁶⁶¹ Of the 12 Member States, only the UK, failed to ratify what was popularly known in the UK as the 'Social Chapter.'⁶⁶² Creating a mechanism which fell outside of the treaty permitted the Member States to address the social deficit without the prospect of the British veto being used.⁶⁶³ It also permitted the Major Government, then under very considerable pressure from anti-European elements within the Tory party to hold a referendum on whether the Government should approve the Maastricht Treaty, to sign the Treaty while claiming to have thwarted European attempts to extend

⁶⁵⁹Which made the protocol redundant when the Treaty came into force in 1999. See KD Ewing, *The EU Charter of Fundamental Rights: Waste of Time or Wasted Opportunity?*, IER 2002, pp 25-27.

⁶⁶⁰Bercusson, 2009, *op cit*, p455.

⁶⁶¹Treaty of the European Union (TEU). It appears to have been assumed that all member states had collective bargaining structures in place to allow the domestic social partners to implement the Directives (See KD Ewing 'The Death of Social Europe? Collective Bargaining in Times of Austerity,' 2015*King's Law Journal*, pp3-5).

⁶⁶² So called because the intention had been to replace the Social Chapter in the Treaty of Rome with the text of what, because of the British veto became the SPA. The SPA ultimately became the Social Chapter of the Treaty of Amsterdam (see below). Sweden, Finland and Austria joined the EU in 1995 and also signed up for the Social Protocol.

⁶⁶³Making QMV unnecessary.

the legal competence of the EU.⁶⁶⁴ Arguably it was at this point that the events that led to the 2016 Referendum and 'Brexit' were set in train. Tory nationalism and anti-collectivism could not be squared with the 'social Chapter,' and essentially the Commission and the UK Government agreed to disagree.⁶⁶⁵

The protocol was hugely significant. Member States were to be obliged to legislate to protect workers. In a radical departure – first signalled, as noted above, in Article 27 of the Community Charter - it was the social partners, essentially the European employers' organisations CEEP,⁶⁶⁶ BusinessEurope,⁶⁶⁷ and the European Trade Union Confederation, rather than the Council of Ministers, who were to negotiate agreements which became the core content of the Directives. The Commission also contributed, working with these organisations on consultative committees to shape the agreements on which subsequent Directives were based. The Assembly were not involved. The protocol also permitted member states to allow the social partners to implement the Directives through collective bargaining machinery.⁶⁶⁸

Of course, this was abhorrent to the Tories. This was collective bargaining on a European level, with the social partners now able to collaborate to produce agreements on health and safety, working conditions, information and consultation, equal treatment, and 'the integration of persons excluded from the labour market,' which could be put to the Council by the European Commission, and, adopted by QMV.⁶⁶⁹

The Tories could, however, take comfort that any putative initiatives on social security, broader social protection of workers, dismissals, non-EU migrant workers, and measures to create jobs would require unanimity, and that Article 2(6),⁶⁷⁰ appeared to ensure that the employment aims of social policy as a whole

⁶⁶⁴ Article 6(2) of the Maastricht Treaty on the Functioning of the European Union (TFEU) – the revised Treaty of Rome - recognised formally the ECJ's *ad hoc* approach to the recognition of fundamental human rights.

⁶⁶⁵ See chapter two.

⁶⁶⁶ Representing public sector employers.

⁶⁶⁷ Representing private sector employers. Previously known as UNICE.

⁶⁶⁸ Bercusson, 2009, pp152-5.

⁶⁶⁹ A huge problem for John Major - see chapter two.

⁶⁷⁰ However, Bercusson questioned this, arguing that the social dialogue mechanisms could be seen to permit agreements concluded by the social partners on matters such as freedom of association. Essentially 'agreement is

did not encroach upon the Member States' exclusive competence in relation to 'to pay, the right of association, the right to strike or the right to impose lock-outs.'⁶⁷¹

After a final failed attempt in 1994 to secure the agreement of the UK to agree to a draft Directive on 'atypical' work, part time, fixed contract and agency work,⁶⁷² the social partners were briefed by the Commission, and agreement was reached in 1997. A Directive aimed at securing equal protection for part time workers, which included the agreement in the text, was adopted in 1998.

At the time that the Tories had been fighting with each other and with the EU over the Maastricht and the social chapter rights, a parallel employment strategy was emerging as part of the attempt to address the Community rights deficit. A *Comité de Sages*, appointed to examine the matter observed in its 1996 report that:

'As regards the Treaties of the European Union, it is not possible as yet to speak of a genuine structure of social and civil rights, but rather of *ad hoc*, piecemeal measures to accompany economic integration and allow minimum social policies to be pursued: Articles 117-122 of the Treaty of Rome, as supplemented by the Single Act of 1986; the Community Charter of the Fundamental Social Rights of Workers, which was adopted in 1989 by 11 of the then 12 Member States; the new provisions of the Maastricht

reached in another forum authorised by Member States...outside the formal scope of EC competence' and the Member States are obliged to implement the agreement. The old limits are not carried over to the new procedures (Bercusson, *op cit*, pp 156-158).

⁶⁷¹ The same words are to be found in Article 153(5), Lisbon Treaty, A 118(6) Amsterdam Treaty, A 137(5) Nice Treaty. Article 151, which incorporates what is essentially the preamble to the social chapter (Title X 'Social Policy') remains as it was in the Amsterdam Treaty (then Article 117), an expanded version of Article 1 of the SPA: 'having in mind...the European Social Charter...the Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour...the Union and Member states shall implement measures *which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy.*' This cautious drafting scarcely augured the emergence of a European super state. The employment title, promoting the 'co-ordination' of employment measures as Union employment policy expressly states that "*These measures shall not include harmonisation of the laws and regulations of the Member States*" (Article 149, Lisbon Treaty, A109(r) Amsterdam Treaty).

⁶⁷² See Jeffery, 'The Commission Proposals on 'Atypical Work': Back to the Drawing Board... Again,' (1995) 24 *ILJ* 296

Treaty more especially the Protocol on social policy, which was adopted by 14 of the 15 Member states. Generally speaking, social rights are defined outside the Treaty and mainly apply to workers only. The Treaties contain no list of fundamental social rights to which the Court of Justice could refer in order to review Community acts.⁶⁷³

They proposed that the Community Charter of the Fundamental Social Rights of Workers be incorporated into the Treaty ECJ framework, along with 'the main international agreements signed by the Member States.'⁶⁷⁴

This, they reasoned, would incorporate the Charter 'indirectly' into the Treaties, and would enable the ECHR to be drawn upon and adjusted in a way that would not be possible if the community acceded to the Convention. The Committee concluded that "accession would offer very limited benefits and would certainly not make it unnecessary for the union to set out its own view."⁶⁷⁵

The Committee considered that an EU 'Union specific appeal court' would be better placed to consider questions of breaches of fundamental labour rights than the ECtHR.⁶⁷⁶ They observed that

'political, civic and social rights...are interdependent and inseparable...the committee therefore advocates a declaration featuring both civic and social rights.'⁶⁷⁷

They proposed incorporating this mixed bag of eight rights into the treaty, including the 'right of association and right to defend one's rights; right of collective bargaining and action,' and a list of social rights be listed in the Treaty as 'objectives to achieve.'⁶⁷⁸

⁶⁷³For a Europe of Civic and Social Rights' Report by the Comite' des Sages, European Commission, 1996. P15. The dissident state was, of course, the UK.

⁶⁷⁴ Ibid, P17

⁶⁷⁵ Ibid, pp 35-6 & 47. See p15 for employment rights as positive rights.

⁶⁷⁶At the time the Strasbourg Court took a very narrow interpretation of Article 11 freedom of association, recognising neither a right to collective bargaining nor a right to strike. The Committee did not mention this approach – formulated in the 1975 Belgian Police trilogy' cases (see chapter 1) - and appeared to take as little notice of the realities of the Strasbourg jurisprudence as it did to the impossibility of getting the UK Government to agree to the proposals it recommended.

⁶⁷⁷Comite' des Sages, 1996, *op cit*, P39.

⁶⁷⁸Ibid, p17. See also Part 3 p48 & p51.

The eight rights were, of course, to apply only in matters relating to member states under community law. As an economic counterbalance, the principle of freedom of movement within the community was one of the eight fundamental rights. Although the committee had separated fundamental labour rights from social rights, it is notable that collective action ‘including the right to strike’ was to be ‘guaranteed *subject to any obligations which might arise from current laws and collective agreements,*’⁶⁷⁹ acknowledging and ensuring that EU competence did not stray into the realm of industrial relations.

The Treaty of Amsterdam

Nothing resembling a bill of rights was included in the Treaty. A few tentative steps had been taken towards incorporating human rights in the Treaties:

The new Article 13 TFEU was of major importance. It extended Union legal competence to cover discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Directives on these areas of discrimination in relation to employment followed in 2000 and 2006.⁶⁸⁰

Article 6(1) TEU now emphasised the importance of human rights and fundamental freedoms to the community, Article 6(2) formally recognised the ECHR as a source of community law and Article 46(d) TEU purported to make the ECHR rights ‘justiciable.’ However, these were arguably no more than gestures made towards assuaging demands for rights protections to be incorporated into the Treaties. The revisions left it open to the ECJ to choose the level of protection afforded, and had no real relevance to labour law. Questions of freedom of association were not within the Court’s jurisdiction, and Article 11 ECHR was then interpreted very narrowly by the Strasbourg Court, which evinced far more enthusiasm for ‘negative’ freedom of association, than in the right to organise, bargain collectively and take industrial action.⁶⁸¹

⁶⁷⁹Ibid, p50.

⁶⁸⁰Directive 2000/43/EC: equal treatment race or ethnic origin; Directive 2000/78/EC: general framework for equal treatment in employment; Directive 2006/54: equal treatment of men and women in employment and occupation.

⁶⁸¹They did in *Viking* and *Laval* (see below).

Following the defeat of the Tories at the general election on 1 May 1997, and the election of a 'New Labour' Government ostensibly committed to Social Europe, it had been possible to incorporate a new social chapter in the Treaty,⁶⁸² which became the latest of the labour law generating mechanisms.⁶⁸³ At the time the Treaty was signed, in June 1997, two Directives had been adopted under the Social Protocol: the European Works Council Directive and the Parental Leave Directive.

Remarkably, however, the social dialogue was already on the way out.

The Treaty included a new employment 'title' which provided for a soft law *open method of co-ordination of labour rights*.⁶⁸⁴ Despite the new social chapter, and the incorporation of the social dialogue procedure in the TFEU, 'OMC', rather than legislation, became the approach adopted for the 21st Century.

Following the November 1997 meeting of the Council of Ministers yearly employment guidelines were issued, and on the basis of these guidelines Member States submitted *National Action Plans* to the Commission and Council. This new *European Employment Strategy* was based initially, on four employment 'pillars': employability, entrepreneurship, adaptability and equal opportunities.⁶⁸⁵ Black letter law was out, soft law was in. The arrival of the alternative strategy was followed by a change in the political complexion of the EU.

Bercusson has noted that at the time of the Lisbon meeting of the Council of Ministers in 2000, and the formal adoption of the 'Lisbon Strategy' – the post 1997 Social Policy Agenda – 'the position was much different from that of the mid and late 1990s.' Remarkably, the Spanish and British were pushing for de-

⁶⁸²Articles 136-139. As was the case with the SPA, QMV could secure adoption. The SPA continued to exist until the new Treaty came in to force in 1999.

⁶⁸³The SAP, the Community Charter and the SPA were, of course, the old mechanisms. The Community Charter has a residual influence as guidance for the CJEU.

⁶⁸⁴Articles 125 -130. See Bercusson 2009, *op cit*, p102 & 168 -71. This was the incorporation of the 'Essen Strategy' agreed by the Council of Ministers in 1994, an approach which essentially returned to Member States the choice of whether to legislate or not in these areas.

⁶⁸⁵The strategy changed in 2003 from four pillars to 'three overarching objectives (i) Full employment (ii) Improving Quality and Production at Work and (iii) Strengthening Social Cohesion and Inclusion' to be attained by ten priorities for action – 'the management of change and adaptability, synergy between flexibility and security, human capital development, gender equality, making work pay and health and safety at work' (Bercusson 2009, *op cit*, p. 177).

regulation. In 2001 the Italians elected Berlusconi, and by 2002 the three Member States had become a neoliberal faction, with Italy and Britain issuing a joint declaration calling for greater labour market 'flexibility.'⁶⁸⁶

The Commission had been pushing the concept of 'flexicurity' since the early 1990s but by the very early years of the 21st Century the annual employment guidelines were placing the emphasis on employment 'flexibility'. The social partners were now merely invited into a domestic 'partnership' with the Member States at enterprise level. The need to tackle any fresh 'challenges' that the new Century might present aside, new legislation was envisaged only 'to ensure the respect of fundamental social rights,'⁶⁸⁷ very likely a reflection of the uncertainty surrounding the likely legal status of the Charter of Fundamental Rights which was seen by some to have the potential to restart the stalled social programme.⁶⁸⁸

In the UK 'partnership' had become one of the New Labour 'buzzwords.' Trade Unions were invited to go into partnership with employers, and the long awaited union recognition procedures introduced in the Labour Relations Act 1999 were intended to instigate voluntary agreement.⁶⁸⁹

However, the little new legislation that was introduced was steadfastly individualistic, and the new Government appeared to see the unions as friendly societies or staff associations, rather than as regulatory bodies. Moreover, the Government had failed to repeal the legislation which had undermined the unions so effectively during 1980 - 1993.⁶⁹⁰ It did, however, succeed in pleasing many on the centre left with the incorporation of the ECHR into UK law under the provisions of the Human Rights Act 1998.

⁶⁸⁶Bercusson 2009, *op cit*, p171, citing Alberta M. Sbragia, 'Shaping a Polity in an Economic and Monetary union: the EU in Comparative Perspective' in Martin and Ross (eds) *Euros and Europeans: Monetary Integration and the European Model of Society*, (Oxford, OUP, 2004), pp66-8.

⁶⁸⁷See Bercusson (*ibid*) pp177-189. The quote is from the European Commission Social Policy Agenda 2000-5, COM (2000).

⁶⁸⁸ The Community Charter of 1989 had been the impetus for a number of employment Directives, and the precursor of the SPA, and although, in retrospect, we can see that for Social Europe the tide had turned, at the turn of the Century there were high hopes for the Charter. An EU constitution was being drafted and the Charter was to be incorporated into this constitution. The constitution was to replace the Treaties, and consequently many believed that labour rights would, at last, be given equal status with the economic freedoms.

⁶⁸⁹See chapter 5.

⁶⁹⁰New Labour was careful not to pledge that it would, and it was only in the 1998 White Paper *Fairness at Work* that it was made abundantly clear that there was to be 'no return.'

Courts and tribunals, like other public authorities, had to take into account the jurisprudence of the Strasbourg court in their deliberations, interpret existing legislation and case law in the light of the convention rights, and where legislation was in conflict with those rights, it had the option of issuing a ‘declaration of incompatibility.’ This declaration is essentially an invitation to the Government to rectify matters – an invitation which it is free to ignore.⁶⁹¹ Arguably the HRA did far less than it purported to do and far less than most of its opponents and proponents appeared to believe it would – much like the EU Charter of Fundamental Rights.

As well as proclaiming the HRA as its flagship manifesto promise, New Labour made much of the promise to ‘sign up’ for the Social Chapter. Yet in the foreword to the employment 1998 White Paper *Fairness at Work*, Tony Blair promised that:

‘Even after the changes we propose, Britain will have the most lightly regulated labour market of any leading economy in the world.’⁶⁹²

Despite the seeming contradiction Blair was as good as his word. The White Paper proposed to change very little, and Blair ensured that the social chapter conferred very little extra protection on British workers. The Major administrations of 1990 – 1997 had been obliged by internal Tory party politics, and by pressure from the right wing press, to be seen to resist European employment legislation forced upon on them on the basis of powers ceded to the Community under the SEA. However, New Labour, if not able to reconcile the conflicting demands of business and the unions while implementing the Directives spawned by the SPA and the Social chapter, it was able to *manage* those demands. The Government publically welcomed the employment protections demanded by the Directives, accepted the plaudits of the left, and set about rendering the legislation ‘business friendly.’⁶⁹³

The Working Time Directive, the Part-Time Workers’ Directive, the Fixed Term Contracts Directive, and the Parental Leave Directive, were all transposed into

⁶⁹¹See Chapter 2.

⁶⁹²*Fairness at Work*, May 1998, Cm 3968. Today the UK is ranked by the OECD as just behind the US, Canada and New Zealand in the world ‘light touch’ employment regulation stakes.

⁶⁹³New Labour were able to assuage the left’s long suspicion of the business based EU by implementing Directives which appeared to defend workers’ interests, and to please the right wing of the Labour Party, the Liberal Democrats, many otherwise natural Tory voters, and big business, with a cautiously presented enthusiasm for the EU.

domestic regulation during 1998 – 2002. Those that conferred substantive rights were rendered comparatively inconsequential by the Government's clever drafting team, matters which I examine in chapters six and seven. Nevertheless, the very fact that the UK is required to have those rights in its statute book is arguably of huge potential value to British workers – they are entrenched minima on which collective bargaining may build, and which subsequent Governments may choose to 'gold plate' beyond that which is required by the European Commission.

THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

In 1999 a second Comité published '*Leading by Example: A Human Rights agenda for the European Union for the year 2000,*' which was focused on the need for Member States to fulfil their obligations under international and regional rights instruments. It recommended Community accession to both the European Convention on Human Rights and the European Social Charter.

Another report on social rights published in the same year '*Affirming fundamental rights in the European Union: Time to Act*' by the Expert Group on Fundamental Rights⁶⁹⁴ revived some of the proposals of the 1996 *Comité de Sages*. The Expert Group recommended that Articles 2 to 13 of the ECHR, along with the protocols to the Convention, and a number of economic, social and labour rights, be incorporated into a charter of fundamental rights.

In June 1999 the European Council voted in favour of drafting a charter, and on 14 January 2000 the European Assembly concluded consideration of the Council's decision by commending the ECHR

'and the Court of Human Rights, which have proved their efficiency. It accordingly calls on the attention of the body in charge of elaborating this Charter to take this mechanism into account. In particular, it recommends it to follow the conclusions of the Expert Group on Fundamental Rights... to include and incorporate the articles of the ECHR into the Community law,

⁶⁹⁴European Commission, 1999.

together with the relevant rights in the protocols to the ECHR... The Parliamentary Assembly also reiterates its recommendations that the European Communities/Union accede to the ECHR, to which all its member states are Parties, as was advised on many occasions in the past both by the institutions of the European Communities and by the Council of Europe. It could also accede to the European Social Charter. In order to allow this accession, the Committee of Ministers should start preparatory work.⁶⁹⁵

The Charter was 'declared' in December 2000. Representatives of the Member States had come to agreement over the provisions of the Charter – if not the status - as the Nice Treaty was being negotiated. That Treaty revised the social chapter, and the previously stated aim of the harmonising the laws of Member States was replaced by anodyne references to co-operation and co-ordination taken from the Amsterdam Treaty TEU Employment Title.⁶⁹⁶

At Westminster, the opposition had railed against the new Charter. Leader of the Opposition William Hague condemned the Charter as a further erosion of Parliamentary sovereignty, citing the European Commission's modest claim that

'It can reasonably be expected that the Charter will become mandatory through the Court's interpretation of it as belonging to the general principles of community law.'⁶⁹⁷

Prime Minister Tony Blair responded:

'The right hon. Gentleman goes on about the Charter of Fundamental Rights. The reason the Commission is asking for it to have legal status is that it does not have legal status. Our case is that it should not have legal status, and we do not intend it to.'⁶⁹⁸

The Government assessment – at the time accurate enough in its way - was that the Charter was no more than

⁶⁹⁵ Preliminary conclusions, paras 50-51, Parliamentary Assembly 14 January 2000 Doc. 8611.

⁶⁹⁶ Bercusson 2009, *op cit*, p 189-90.

⁶⁹⁷ Hansard, HC Deb 11 December 2000 column 352.

⁶⁹⁸ Hansard HC Deb 11 December column 354.

‘a showcase of existing rights, rights that have been conferred by either the Treaties or legislation...we will resist any attempts to make it binding...The Charter is not a platform for new European Union competences, nor a launch pad for new EC legislation.’⁶⁹⁹

The French Government provided a less carefully presented, and more accurate, interpretation of the Charter’s status;

‘while not legally binding itself, the Charter reaffirms rights which are legally binding due to their provenance from other sources that are recognised by EU law as binding sources.’⁷⁰⁰

The preamble to the Charter makes it clear:

‘This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe, and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.’

The Charter purported to be a codification of the rights of the citizens of the European Union exercisable in relation to the competences conferred on the EU by the Treaties, and was to be incorporated into the draft EU constitution that was intended to replace the Treaties. Consequently many believed – although it seems unlikely that the New Labour leadership shared their credulity - that the Charter was likely to place labour rights on a par with the economic freedoms.⁷⁰¹

⁶⁹⁹Keith Vaz MP: Evidence by the Minister of State, Foreign and Commonwealth Office, on the Helsinki European Council, 3rd Report 1999-2000, HL 22. Q 50 and Q 260 to the Lords Select Committee on the European Union (quoted in 8th Report 1999-2000 para 55).

⁷⁰⁰Bercusson, 2009, *op cit*, pp387-388, based on the oral submissions of the French Government in European Parliament v Council [2006] ECR I-05769, para 38.

⁷⁰¹ Encouraged by the wording of the Lisbon Treaty (see n. 626 below, Bercusson, 2009, *op cit*, pp394-5, and P. Sypis, ‘The Treaty of Lisbon: Much ado...But about What?’ (2008) 37 *ILJ* 232). Jean Michel Servias (2014, *op cit*)

Arguably the great contribution of the Charter was to augment the influence of the ECHR by explicitly citing the Convention as the floor of any EU rights embraced by the Convention and the ECtHR jurisprudence:

Article 52(3):

‘In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’

In 2009 when the Lisbon Treaty came into force, Article 6(1) TEU gave the Charter ‘the same legal value as the treaties’ while providing that ‘the Charter shall not extend in anyway the competences of the Union as defined in the Treaties.’⁷⁰² Unlike the treaties, however, the Charter rights can only be relied upon when states engage EU law.⁷⁰³

appears to believe that the Charter has been incorporated into the treaties (para 283), and for an example of an academic who believed that the Charter would have equal status see n.701below.

⁷⁰²Lisbon also added to the evolution of Article 6(2) TEU. The TEU now requires EU accession the ECHR. However, a similar caveat to that in Article 6(1) was added in regard to the competences of the treaties and the Convention rights. The British and Polish protocol to the Lisbon Treaty appeared to make these carefully worded reservations certain. However it has been argued that this Protocol 30 is not all it seems. Although Article 1(1) of Protocol 30 states that the Charter does not permit any court, including the CJEU, to find that the UK has acted inconsistently with the provisions of the Charter, and 1(2), re-iterates this statement with particular regard to the ‘solidarity chapter’ of the Charter, PP Craig has argued that had the UK wished to opt out of the Charter then a far less convoluted form of words would have done the job and that the text of the Protocol confirms that the Charter does apply to the UK. He points out that Article 1(1) does no more than reaffirm Article 51(2) of the Charter, that the Charter does not extend the competences of EU law, and that Article 2 of the protocol, which states that the Charter applies to the UK only as far as national law and practices allow, appears to overlook the fact that it is up to the CJEU to determine what national laws which engage matters within the competence of the treaties allow or do not allow. Craig mentions the ‘official view’ that the government were concerned about the possible effect of the Charter on UK businesses, and suggests that ‘the protocol was motivated as, much, if not more, by the Government’s desire to show that the Lisbon Treaty differed in certain respects from the Constitutional Treaty, and that therefore a referendum on the former was not necessary’ (See PP Craig, ‘The Charter, the ECJ and the National Courts,’ 2013, *op cit* pp 84-87).

⁷⁰³Charter Article 51(1). ‘Implementing’ is the usual UK term for legislating in response to a directive. However, it is uncontroversial to argue that the Charter applies where Member States ‘act within the scope’ of EU law, and not merely when legislating, and Craig argues, *inter alia*, that the CJEU have tended to use ‘implementing’ in this latter sense, and cites the original charter explanatory memorandum as stating that the Charter rights are “only binding

Nor, arguably, can they be *truly* said to have either vertical direct effect, or to have horizontal direct effect. Treaty rights, regulations and decisions do have horizontal direct effect and can be invoked in disputes between private parties, and directives have vertical direct effect and can similarly be enforced by private parties against public authorities. The Charter can, of course, be referred to show that a right relied upon in the *acquis* is a fundamental right or to interpret a legal right of EU origin or to show that state protections are inadequate.⁷⁰⁴ While the rights and principles the Charter lays down are part of the *acquis*, and EU black letter law is supreme, the Charter is not a Bill of Rights permitting judges to strike out conflicting legislation.

Craig has argued that:

‘Member States are bound by the Charter when implementing Union law. This includes national courts, which would therefore also be subject to the injunction to respect observe and promote the application of Charter rights, irrespective of whether the case involves a public authority or not.’⁷⁰⁵

In essence Craig was stating that the Charter is an interpretive tool. However, in practice the Charter is now arguably being used by judges less as the interpretive tool it was intended as, but as a Bill of Rights permitting the disapplication of national law which prevent the exercise of rights which have been identified in the Charter as fundamental rights whether or not EU law is engaged.

For example, following the Supreme Court’s ruling in *Benkharbouche* in 2017,⁷⁰⁶ when diplomatic immunity conferred by the State Immunity Act 1978 was lifted

on the Member states when they act in the context of community law” (pp 91 -94 ‘The Charter, the ECJ and the National Courts’ by PP Craig, in *Re-socialising Europe*, Countouris and Freedland (eds), 2013.).

⁷⁰⁴ In a piece posted on eutopialaw.com by Dr. Albert Sanchez Graells *Is Costa v ENEL forgotten? CJEU trips over supremacy and direct effect in case concerning Art 41(2)(c) CFREU (C-313/12)*, Dr Graells professed surprise that despite Article 6(1) TEU (see above) the Luxembourg Court continues to refuse to give the Charter rights the same status as the Treaty rights: ‘I cannot get my head around the fact that, as no one would doubt, the CJEU has kept for time immemorial the position that the Treaties (now including the Charter of Fundamental Rights for these purposes) are supreme and directly effective without any need for internal measures...they are directly and unconditionally applicable in all Member States- and yet it shows a stark resistance to apply these principles to the Charter.’ The reality is that just because TEU says the Charter rights have the same legal value as the treaty rights does not mean they are the same – see below on Viking and Laval, and on the failure of the CJEU to keep pace with the new interpretation of Article 11 ECHR.

⁷⁰⁵ PP Craig, 2013, *op cit*, p91.

⁷⁰⁶ *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62.

by the court to permit a victim of domestic servitude to access justice, it was questioned whether the court was actually implementing EU law,⁷⁰⁷ and it was argued that the case ‘illustrates how the Charter can, in practice, be applied mechanically, without sufficient attention to its proper limits, both in EU law and UK law’ to “override clear legislative choices made by Parliament.”⁷⁰⁸

And in practice the Charter is also being given direct effect: For example, in *Max-Planck –Gesellschaft v Shimizu* [2018],⁷⁰⁹ the CJEU held that as the right to leave in the Working Time Directive is incorporated in the Charter (Article 31(2)) as ‘an essential principle of EU social law,’ it is, in effect, directly horizontally effective between private parties, in addition to being directly vertically effective against public authorities.⁷¹⁰

Arguably the Charter has, in practice, permitted the British judiciary to rely on the *acquis*, or what it imagines the *acquis* to be, much as it relies on the common law. In the recent judicial review of the CAC decision to deny couriers working for Deliveroo the right to bargain collectively – a matter which did not engage EU law - the judge in, confirming the Committee’s extraordinary ruling, relied heavily on Article 16 of the Charter which recognises the freedom to conduct a business, and to the protection for the owners of capital to bargain conferred by the common law.⁷¹¹ However, it seems very likely that this decision will be the subject of an appeal.

The Information & Consultation Directive

The evolution of the Information & Consultation Directive of 2002,⁷¹² had its origins in the 1974 Social Action Programme,⁷¹³ and Article 17 of the 1989

⁷⁰⁷The court had placed considerable reliance on Article 5 of the Charter which does not reflect black letter EU law but which identifies the prohibition of forced labour as a fundamental right.

⁷⁰⁸‘Latest Supreme Court judgment shows why the EU Charter must be axed,’ a ‘blog’ by Mikolaj Barczentewicz for the right wing Policy Exchange, 19 October 2017.

⁷⁰⁹ EU C -206/874 6 November 2018. The court held that workers are able to carry annual leave entitlement over from one year to the next if the employer has failed ‘diligently’ to give the worker the opportunity to take that leave in the year it should have been taken.

⁷¹⁰See chapter six.

⁷¹¹*R (On the Application of the IWUGB) v CAC and Roofood Ltd, t/a Deliveroo* [2018] EWHC 3342 (Admin). See also chapter 7.

⁷¹²Directive 2002/14/EC

⁷¹³See above. The promotion of worker participation was, as noted, expressly part of the SAP and the Acquired Rights and Collective Redundancy Directives (1977&1975) incorporated information and consultation requirements.

Community Charter states that: 'Information, consultation and participation for workers must be developed along appropriate lines, taking account of the practices in force in the various member states.'⁷¹⁴ Preliminary, ultimately unsuccessful, negotiations between the Commission and the social partners began following the 1994 adoption of the European Works Council Directive,⁷¹⁵ 'EWC's essentially being vehicles for information and consultation.'⁷¹⁶

The near total absence of works councils, and relative scarcity of collective bargaining structures in the UK, and the consequent consultative compromises necessary when Directives were implemented,⁷¹⁷ had helped convince the Commission of the need for an Information and Consultation Directive.⁷¹⁸ With the Commission unable to persuade the social partners to come to an agreement the terms of the Directive were negotiated by the Council of Ministers. New Labour, which had been compelled to implement the EWC Directive as part of the price of signing up for the social chapter,⁷¹⁹ had now a hand in drafting the terms of the new Directive, and the ETUC delegation in Brussels were evidently surprised 'to find that the Directive had a strong and determined enemy in the new British government.'⁷²⁰ Strong information and consultation rights, in addition to those already conferred on recognised unions for the purposes of collective bargaining,⁷²¹ might well have been thought to have provided a

⁷¹⁴ Article 17.

⁷¹⁵ Directive 94/45, adopted under the SPC without British input, and subsequently implemented in the UK in 2000. EWCs were established in very large trans-European undertakings – with at least 1,000 employees within the EU with undertakings in at least two member states employing at least 150 each.

⁷¹⁶ See Brian Bercusson, *European Works Councils-Extending the Trade Union Role*, (London, IER, 1997). Bercusson cited the 1993 closure of the Hoover plant at Dijon and its relocation to Scotland following the renegotiation of the Scottish collective agreements as the trigger for agreement on the adoption of the EWC directive. The French and British unions had been 'wrong footed,' by the firm and had there been effective I&C arrangements in place they would have at least been able 'to coordinate their response' (p1). Bercusson refers to 'The Hoover affair and social dumping' (1993) 230 *European Industrial Relations Review* 14.

⁷¹⁷ TUPE, Collective Redundancy, Working Time, Maternity and Parental Leave, and Fixed Term contracts Regulations, for example. British arrangements were condemned by the ECJ in cases C-382/92 and C-383/92 *Commission v UK* [1994] ECR I-2479, see P Davies and C Kilpatrick, 'UK Worker Representation After Single Channel' (single channel being that between recognised union and employer, a dual channel 'European approach' being through a union and a works council) (2004), 33 *ILJ* 121.

⁷¹⁸ In June 1997 – with the British finally behind the social chapter - the Commission proposed that the social partners negotiated an agreement on information and consultation. Unfortunately, and paradoxically, the private sector employers could not be coaxed to the negotiating table, and it fell to the Council to negotiate the terms of the Directive.

⁷¹⁹ In the form of the Transnational Information and Consultation of Employees Regulations 1999.

⁷²⁰ F. Beckett and D Hencke, *The Blairs and Their Court*, 2004, p. 201, cited by Collins, Ewing and McColgan, *Labour Law*, 2012, p625. The last sentence was John Monks' observation on New Labour's aggressive stance.

⁷²¹ Labour imposed a 'General Duty of employers to disclose information...for the purposes of all stages of collective bargaining' (now TULR(C)A 1992 s 181) in the EPA 1975, along with the provisions necessary to

convenient ‘third way’ in industrial relations following the retention by New Labour of the restrictions imposed by the Tories on freedom of association. It appears, however, that New Labour understood that ‘I&C’ requirements had the potential to empower recognised unions,⁷²² by expanding the range of matters employers were required to reveal and discuss with them, and provide a ‘foot in the door,’ at firms where unions were not welcome.⁷²³ While a ‘second channel’ might have been perceived by some to pose a threat to a recognised union, it is notable that the TUC was an enthusiastic proponent of the Directive,⁷²⁴ and there were, for example, high hopes that requirements for consultation for collective redundancies would, as a consequence, be less easily ignored by employers.⁷²⁵

Council opposition to the proposed Directive, orchestrated to a considerable degree by the British Government folded in 2001,⁷²⁶ but the UK fought a spirited rearguard action during the negotiations, succeeding by one account in persuading the Council to drop the requirement to impose effective sanctions on firms failing to inform and consult, dispense with references to a ‘right’ to information and consultation, and to give Member states the option of making the provisions of the Directive applicable either to *undertakings* with 50 or more were employees, or *establishments* where 20 or more were employed.⁷²⁷

implement the consultation requirements of the Collective Redundancies Directive of 1975. These were added to the consultation requirements of the Health and Safety at Work Act 1974. The TUPE consultation requirements were implemented by the first Thatcher administration in 1981. For an overview of I&C rights see chapter 15, ‘The right to be informed and consulted’ in Collins, Ewing and McColgan, *Labour Law*, (Cambridge, CUP, 2012).

⁷²² See the regard trade unionists had for the opportunity for consultation even at the height of voluntaristic union power in HA Clegg and TE Chester, ‘Joint Consultation,’ in A Flanders and HA Clegg (eds), *The System of Industrial Relations in Great Britain; It’s History, Law and Institutions* (Oxford, Blackwell, 1954)

⁷²³ See K Sisson ‘The Information and Consultation Directive: Unnecessary “Regulation” or an Opportunity to Promote “Partnership?”’ (2002) 67(2) *Warwick Papers on Industrial Relations* 6.

⁷²⁴ See Mark Hall ‘Assessing the Information and Consultation of Employees Regulations,’ 2005, *ILJ* 34(2), p116.

⁷²⁵ See KD Ewing and GM Truter, ‘The Information and Consultation of Employees Regulations: Voluntarism’s Bitter Legacy,’ 68 *The Modern Law Review* 626 (at p626 and [p3 of 6], and see also ‘A Pick and Mix Approach,’ n.727 below .

⁷²⁶ The Directive was arguably an attempt to impose German style works councils on the EU 15, and many Member States were unenthusiastic about it.

⁷²⁷ On the negotiation by the Council, and much more, including (at p108-9) a very useful chart presenting ‘The ICE Regulations in Outline,’ see Hall 2005, *op cit*. Since 2008 the UK threshold has been 50 workers in an ‘undertaking.’ On the distinction between undertakings and establishments, see Mark Butler, ‘A ‘Pick and Mix Approach to Collective Redundancy : *USDAW*’ (2018), 47 *ILJ* 297 on the ‘Woolworths Redundancies’ ECJ ruling, C-80/14, Union of Shop, distributive and Allied Workers (*USDAW*), *Wilson v WW Realisation 1 Ltd*, in liquidation, *Ethel Austin Ltd*, Secretary of State for Business, Innovation and Skills EU:C:2015:291. Broadly speaking an undertaking is taken to be the entire firm, and an establishment a ‘distinct entity’ within that undertaking. Marks & Spencer, for example, would be seen as the undertaking, with the various warehouses, shops and offices in different localities seen as establishments - as the units to which an individual worker is assigned.

More remarkably the British pressure ensured that the Directive permitted the adoption of wholly alternative arrangements in lieu of the standards required by the Directive, to allow employers to pre-empt employee attempts at negotiating information and consultation. This carefully engineered *lacuna* is reminiscent of the then recently adopted British statutory union recognition procedures which allow an employer to set up a ‘poodle’ staff association to block legitimate recognition bids from the workforce.⁷²⁸ As Ewing and Truter pointed out in 2005, ‘[t]here is a legitimate fear that some employers will use the Regulations to establish workplace procedures which will have the effect of discouraging trade union organisation in non recognised workplaces. The announcement by News International in October 2004 that it was planning to cut 700 jobs should be a timely reminder to any worker tempted by the seduction of non union forms of workplace organisation.’⁷²⁹

The implementation period was extended to 3 years for the UK, permitting New Labour to wait until 2005 before legislating – even then the Directive was not fully implemented until 2008. The Regulations were complex, and in characteristic New Labour style, riddled with calculated flaws. According to Collins, Ewing, and McColgan:

‘Having failed to block the Directive, the British government managed successfully to dilute its impact. The weaknesses of the Directive are now fully exposed by the ICE Regulations, weaknesses reflected in the apparently limited use of the procedures they contain, even those these procedures would appear to be especially relevant in an age of austerity and the erosion of workers’ rights. There are in fact a number of problems with the ICE Regulations, including the need for workers to trigger the creation of an information and consultation procedure, the encouragement to set up a voluntary ‘pre-existing agreement’ that need not meet the Directive’s standard provisions, and the absence of a sensible enforcement regime even where a statutory procedure as been triggered.’⁷³⁰

⁷²⁸See chapter five.

⁷²⁹ See Ewing and Truter 2005, *op cit*.

⁷³⁰ Collins, Ewing and McColgan 2012, *op cit*, p625.

In December 2018 it was announced that the percentage support of the workforce required to trigger ‘entitlement to data’ and to request the negotiation of agreement is to be reduced from 10% to 2% from April 2020,⁷³¹ although the minimum number of employees compromising the percentage remains at 15. It is perhaps a tribute to the innocuous nature of the Regulations and the amendment that in the explanatory notes to the amending instrument the government states that ‘an impact assessment has not been prepared as no significant impact on individuals or businesses is foreseen.’

The Expansion of the EU

In 2004 and 2007 the accession of 12 nations not yet able to offer citizens the wages and the social protections enjoyed by the other Member States,⁷³² saw the European Community firmly back on the road favoured by business interests and the British Government – ‘wider and shallower’ integration. While the existing industry in these States posed little challenge to British exports to the EU, new markets were opened up to British manufacturers, but more significantly a huge fresh pool of cheap labour became available. The effects of the expansion were more than merely economic: it changed the political complexion of the EU. A number of the new Member States were served by right wing Governments, and the accession of Poland, Estonia, Lithuania, Latvia and Hungary to the European Union has been described of as the entry of a ‘neo-liberal Trojan horse,’⁷³³ the political contents of which seemingly only became apparent when the former Soviet satellite states were inside the EU. Even in the former Czechoslovakia, arguably long considered the most ‘western,’ and politically liberal of the Iron Curtain States, an aggressive strain of neoliberalism emerged following the ‘Velvet Revolution.’ Czech lawyer and academic Barbara Havelková confirms that ‘economic liberalism tied to capitalism with an emphasis on the free market’ have tended to prevail, an approach ‘concerned with unbounded freedom of markets

⁷³¹The Employment Rights (Miscellaneous Amendments) Regulations 2019.

⁷³² In 2004: Estonia, Lithuania, Latvia, Hungary, Poland, the Czech Republic, Slovakia, Slovenia and Cyprus (although the latter could not be described as typical of the new intake). In 2007: Bulgaria and Romania.

⁷³³Darina Malova, *A Neoliberal Trojan horse? The New Member States and EU Social Model*, Paper for the Woodrow Wilson International Centre for Scholars, USA, www.wilsoncenter.org/publication/309-noeoliberal-trojan-horse-the-new-eu-member-states-and-eu-social-model.

and entrepreneurs,’ and ‘very hostile to civil society and rights as well as to the rule of law,’ yet wedded to ‘socially conservative attitudes.’⁷³⁴

Most of the EU15 states had chosen not to elect to adopt the full transitional seven year suspension of the right to free movement for workers from the new Member States, although most imposed some restrictions. The UK government permitted workers from the states admitted to the EU in 2004 immediate access, and in subsequent years many British workers perceived their terms and conditions of employment to be threatened as employers hired migrants seemingly prepared to work long hours for low wages.⁷³⁵ In industrial relations terms, however, little happened;⁷³⁶ the comparative absence of collective agreements and low levels of union membership in the industries most affected meant that the labour market was left to adjust accordingly.

⁷³⁴ Havelková: *Gender Equality in Law: Uncovering the Legacies of Czech State Socialism*, (Oxford, Hart Publishing, 2017), p200. Havelková states ‘Czech liberalism has been centred on a very fundamentalist understanding of individual liberty and the free market. The ideal has been... ‘anarcho capitalism,’ a very tough Darwinistic 19th Century capitalism in which greed for money and wealth, not social, are the preferred attitudes of the economic actors’ (277-8).

⁷³⁵ According to the Commission in 2008 the influx new workers made ‘a largely positive contribution’ to economic and social conditions in the EU. The very comprehensive Commission Report *Employment in Europe 2008* (Directorate General for Employment, Social Affairs and Equal Opportunities) concluded that: ‘Third country immigration and intra-EU mobility have made a significant contribution to growth in recent years, but also pose important policy challenges’ (p19). Worker hostility to the influx of eastern European labour is one such challenge – see, for example, Sonia McKay’s ‘Migrant workers in hard times,’ (particularly pages 6-8) in *Labour migration in hard times: Reforming labour market regulation?* (Liverpool, IER, 2013). In the same volume, in ‘Workers without footprints: the legal fiction of migrant workers as posted workers’ Hayes and Novitz refer to a Swedish paper which in essence shows that while buying imported manufactured goods amounts to much the same thing as the use of posted workers, the latter excites much more opposition (Camfors, Dimidins, Gustafsson Sendén, Montgomery and Stavlot: ‘Why Do People Dislike Low Wage Trade Competition with Posted Workers in the Service Sector’ (2012) CESifo Working Papers Series No.3842). The chapter by Hayes, Novitz and Hannah Reed, ‘Applying the Laval Quartet in a UK Context: Chilling, Ripple and Disruptive effects on Industrial Relations,’ in Bucker and Warneck (eds) *Reconciling Fundamental Social Rights and Economic Freedoms After Viking, Laval and Ruffert*, (Baden-Baden, Nomos, 2011) acknowledges that the approach of the ECJ fuels hostility to posted workers by discouraging or stopping industrial action which would serve to neutralise that hostility. The authors (at pp223-4) state that the fear of being undercut and replaced by cheaper eastern European labour played a significant role in the triggering of the Heathrow Gate Gourmet dispute (see chapter five below), and the related British Airways ‘unofficial walkouts’ by baggage and cargo handling staff.

⁷³⁶ For a study of European trade union reactions to the 2004 and 2007 expansion, see Torben Krings, ‘A Race to the Bottom? Trade Unions, EU Enlargement and the Free Movement of Labour’, *European Journal of Industrial Relations*, 2009, Vol 15, No.1, 49.

There was, however, an element of protection. The Posted Workers Directive had been adopted in 1996.⁷³⁷ It explicitly protected the freedom for firms to operate in other states using its own workers (under the fiction that they do not gain access to the host state's labour market),⁷³⁸ employed on the (invariably inferior) terms they had been hired on in their home state. These economic rights were ostensibly balanced that by requiring that they adhere to the core statutory labour rights in host countries and 'universally applicable' national or sectoral legally enforceable standards established by collective agreement or statute, like OSH protections, limits on working time, and minimum wage.⁷³⁹ However, it has been convincingly argued that the PWD is a directive intended primarily to promote the interests of businesses rather than those of 'guest workers,' or workers in the host state,⁷⁴⁰ that it is another manifestation of the primacy afforded the interests of capital by the EU.

Reflecting EU consciousness of the limits of its competence in the sphere of employment, the Directive emphasised that its provisions were 'without prejudice to the law of the Member states concerning collective action to defend the interests of trades and professions.'⁷⁴¹ Nevertheless, subsequent events were to further emphasise the fact that the EU is primarily a vehicle for business - one

⁷³⁷ Directive 96/71/EC.

⁷³⁸ See Hayes and Novitz, in *Labour migration in hard times* 2013, *op cit.*.

⁷³⁹ Although neither the directive, nor the subsequent 2014 and 2018 directives (below) do not mention the ILO, they are obviously based on the 1949 ILO Convention No. 97 Migration for Employment Convention, which was ratified by the UK in 1951. Article 6 requires the UK government to "apply without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals.' Where such 'matters are regulated by law or regulations, or are subject to the control of administrative authorities,' migrant workers are entitled to equal 'Remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age for employment, apprenticeship and training, women's work and the work of young persons,' and to accommodation and social security. The value of collective bargaining in imposing equality is recognised, with migrant workers being guaranteed equal access to 'Membership of trade unions and enjoyment of the benefits of collective bargaining.'

⁷⁴⁰ On the PWD as an instrument intended to protect service providers rather than workers see L Hayes, T Novitz and T H Olsson, 'Migrant workers and collective bargaining: institutional isomorphism and legitimacy in resocialised Europe,' in Countouris and Freedland (eds) *Resocialising Europe in a Time of Crisis* (Cambridge, CUP, 2013).

⁷⁴¹ Cited in the introduction by Ewing and Carolyn Jones to KD Ewing and John Hendy (eds) *The New Spectre Haunting Europe – the ECJ, Trade Union Rights, and the British Government*, p4.

which has failed to accommodate workers exercising their right to freedom of association.

New Labour implemented the bare minimum of protection – ‘the UK government did not seek to make use of any of the permissions contained in the Directive so as to apply to workers posted into the UK any non-core rules whether to be found in legislation or collective agreements.’⁷⁴² This manifestation of New Labour’s neoliberal philosophy backfired badly for Gordon Brown in 2009 when a well organised workforce at the Total Oil Refinery at East Lindsey took industrial action in response to the use of posted Italian workers on terms which were inferior to the terms of their collective agreements.⁷⁴³ While the trade unions wanted to see ‘equal pay for equal work’, New Labour, pragmatic as ever, fell back on the decidedly protectionist tabloid friendly sound bite of ‘British jobs for British workers’, until the dispute was settled and the story faded.⁷⁴⁴

In Sweden and Finland however the use of cheap posted Estonian and Latvian labour triggered the events that led to two ECJ cases which revealed that the European Union remains a fundamentally neoliberal project.⁷⁴⁵ The two cases, decided within days of each other in 2007, went beyond merely highlighting the continuing weakness of the protection afforded fundamental labour rights by the EU. They can arguably seen as an attack on organised labour, with the Court, encouraged by New Labour, effectively choosing to extend the legal competence of the EU into collective labour law to restrict freedom of association.

VIKING AND LAVAL & the right to strike in EU law

The EU had by 2007 increased in size considerably. The subsequent economic upheavals led to industrial action as workers acted to force employers to agree to employ the influx of labour on the same terms as the existing workforce. The

⁷⁴²Paul Davies, ‘The Posted Workers Directive and the EC Treaty’ (2002), 31 *ILJ* 298.

⁷⁴³Remarkably Total had not breached either the Regulations, or the Directive. The terms of the Directive have to be reconciled with the freedom to provide services – see Viking and Laval, below.

⁷⁴⁴See C. Barnard, ‘British jobs for British workers’: the Lindsay Oil Refinery dispute and the future of local labour clauses in an integrated EU market,’ *ILJ* 2009,38(3) 245.

⁷⁴⁵Compare the response of the EEC to the oil crisis and radical (1968 – 1976) Europe with the response to the Eurozone crisis and to Neo-Liberal Europe.

Baltic region was particularly affected. Finland and Sweden, with perhaps the most comprehensive social protections in the EU, and very high levels of trade union membership,⁷⁴⁶ were close neighbours of the relatively impoverished states of Estonia and Latvia.

The now famous *Viking* and *Laval* cases were brought by Finnish and Swedish employers against unions that had responded to 'social dumping' by taking industrial action. The employers claimed that the action taken breached the economic freedoms guaranteed by the EC treaties.

Viking, a Finnish ferry company, had sought to move its base from Finland to Estonia to make use of the many workers in the former Soviet Bloc country prepared to work for considerably less than Finnish workers, and to take advantage of the less stringent Estonian 'flagging' arrangements. Those of *Viking's* workers who belonged to the Finnish Sailors' Union went on strike. The FSU is affiliated to the International Transport Workers' Federation. The ITF, which had long been campaigning against 'flags of convenience', urged its members to 'black' *Viking*.

Laval was a Latvian construction company working on a site in Sweden. *Laval* refused to accept the terms of a collective agreement with the Swedish unions which would have put its posted Latvian employees on the terms and conditions enjoyed by Swedish workers. The response of the Swedish trade union was to mount a picket. The Swedish building workers 'blockaded' the site, and other trades unions boycotted all of *Laval's* Swedish work. *Laval* took the unions to court in Sweden claiming they had breached the company's Article 49 freedom to provide services within the EC.

The ITF is based in the UK and *Viking* were granted an injunction in the High Court.⁷⁴⁷ On appeal however the Court of Appeal,⁷⁴⁸ less certain than the High Court judge as to whether industrial action fell within the ambit of the treaties

⁷⁴⁶Trade union membership densities in 2004: Sweden 78.1%; Finland 71.5%; UK 28.9%; Estonia 10.1% (OECD.Stat Trade Union Density). Latvia has yet to join the OECD but ETUI estimate trade union membership in Latvia to be about 13% (www.worker-participation.eu/National-Industrial-Relations/Countries/Latvia/Trade-Unions).

⁷⁴⁷Article 13 of the Finnish constitution guarantees the right to take collective action, and the blacking would almost certainly have been ruled legal under Finnish domestic law. Not so in the UK where no forms of secondary action (other than in relation to picketing) have had the protection of the statutory immunities since 1990. However, the question at issue was whether EU law rendered the blacking unlawful.

⁷⁴⁸[2005] EWCA 1299(CA).

and whether European law was capable of ‘direct horizontal effect’ in such cases, referred the case to the ECJ. The Swedish Court, expressing similar doubts, also made a referral.

Although domestic labour law had, as we have seen, been subject to challenge when provisions had conflicted with the business rights conferred by the Treaty, disputes between employers and trade unions had previously been thought to have fallen outside the jurisdiction of the Luxembourg Court.⁷⁴⁹ In *Albany*,⁷⁵⁰ in 1999, the ECJ had acknowledged, in relation to EU competition law, that:

‘It is beyond question that certain restrictions of competition are inherent in collective agreements...However the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to [the Treaty]...It therefore follows from an interpretation of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of [the Treaty].’⁷⁵¹

Written observations on the *Viking* case were submitted to the Court by a number of Member States and organisations. The UK New Labour Government took the opportunity to argue that the right to strike *was not* a fundamental principle of European law, and that EU competence *did extend* into the regulation of industrial relations.⁷⁵²

⁷⁴⁹The ECJ is, of course, only concerned with matters governed by EU law. The *Laval* and *Viking* cases concerned the free movement guaranteed by the Treaties, but it was argued that Article 137(5) EC (now 153(5)) stipulated that the competences conferred by the Treaties do not extend to strikes, lock outs and pay, and that the ECJ had no jurisdiction over the disputes at issue. However, the court held that this merely excluded EU from legislating on strikes, lock outs and pay, and does not exclude the ECJ from considering the effect of Treaties on industrial action (see N. Reich ‘Free Movement v Social Rights in an Enlarged Union – the *Laval* and *Viking* cases before the ECJ, 2008 9 *German Law Journal*, 105, pp128-129). *Laval* and *Viking* were novel cases in that trade unions, not member states (for permitting the interference with the economic freedoms) were challenged in the Luxembourg court. The Finnish and Swedish Governments submitted arguments to the court supporting the opinions of the trade unions: that the right to strike is a fundamental social right not affected by the Treaty; that A137(5) [A 153(5)] explicitly excluded the Treaty from the cases; and that *Albany* [1999] had demonstrated that such collective matters were outside of the ambit of the Treaty.

⁷⁵⁰ [1999] C-67/96 ECR I 5751.

⁷⁵¹ Bercusson on *Albany* (*ibid*) in *The Trade Union Movement and the European Union: Judgement Day*, *European Law Journal*, Vol. 13, No.3, May 2007, 279-308 at p282

⁷⁵² Bercusson looked into the arguments offered in ‘The Trade Union Movement and the European Union: Judgement Day’, *European Law Journal*, Vol. 13(3), May 2007, 279 at pp 282-286.

Brian Bercusson, who was closely involved with the conduct of the *Laval* and *Viking* cases, observed that despite the conflicting views presented in the various submissions, there was an overwhelming consensus that European law incorporates a fundamental right to collective action, and that this consensus largely derived from ILO Conventions 87 and 98, the European Social Charter, and ECHR, and Article 28 of the Charter of Fundamental Rights.⁷⁵³ Even the Estonian Government and the Viking Line accepted that the right to strike was a fundamental principle of European law, and ‘the only unequivocal assertion that there was no fundamental right to take collective action in community law came from the UK.’

This perverse argument was based on a reading of the treaties which ignored the influence of all other sources of European law – with the exception of the jurisprudence of the ECtHR. The Government appeared to have shopped around for a team of barristers prepared to sell them a Counsel’s Opinion that told them what they wanted to hear. According to the UK submission:

‘Collective bargaining agreements are expressly made subject to Community law by existing legislation...There is no indication in the Treaty that social rights should have primacy over other provisions. Article 140 EC states it is ‘without prejudice’ to other Treaty provisions. *Albany* provides at best a limited immunity...There is no legally binding fundamental social right to take collective action in community law... Although Article 11 of the 1950 ECHR safeguards a generalised form of collective action, it is not the case that rights are guaranteed to take specific forms of collective action. Article 11 recognises a right to be heard but not as fundamental [sic] any of the specific actions a trade union may adopt in pursuit of that right. It does not confer a right to strike. None of the other charters creates any fundamental right to take collective action that is protected by community law. The fundamental social right to take collective action...is not a legally binding right in community, as it law it derives from the Community Charter. The 1989 Charter is not leally binding. The UK accepts the trade union interest in collective action, but not that EU law accepts a right to strike.’⁷⁵⁴

⁷⁵³ Ibid, p 300 and 306. As noted above, the Charter appeared to be on the verge of incorporation into an EU Constitution.

⁷⁵⁴ Ibid, footnotes 16, 29, and 137 pp 283-284, and p300. The UK submission was prepared by O’Neill, Andersen, Swift and Lee.

Of course, these wholly disingenuous arguments (see chapter five on the right to strike) could cut no ice with the Luxembourg Court. The provisions of the Community Charter, the Charter of Fundamental Social rights, the European Social Charter and ILO Convention 87, gave the court no option other than to describe the right to strike as a fundamental right in EU law. However, ultimately the court did reach a decision which must have found favour with the British Government. The ECJ determined that when unions were exercising a *regulatory function* they were drawn in to the legal competences conferred by the Treaties.⁷⁵⁵ In both *Viking* and *Laval* the court found that the unions had restricted the economic freedoms while exercising a regulatory function, ‘market access’ had been impeded.⁷⁵⁶

The court had reached back to a 1991 case, *Sagar*, which had established that where labour law permitted practices ‘liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services’ then those restrictions had to be justified by the principle of proportionality.⁷⁵⁷ They had to have been imposed for a legitimate purpose compatible with the treaties – ‘overriding reasons of public interest.’ They had to be proportionate in the circumstances.⁷⁵⁸

By the time of *Laval* and *Viking* this approach to restrictions on the freedom to provide services – reminiscent of the grounds permitting state infringement upon the rights protected by Articles 8, 9, 10 and 11 ECHR - had been extended to all restrictions on freedom of movement,⁷⁵⁹ although restrictions on Treaty rights imposed in order to protect workers, to prevent social dumping or to maintain order in the labour market had, when considered by the ECJ, all been seen to have been justified.⁷⁶⁰

⁷⁵⁵ *Viking* [2007]C-438/05 ECR I-10779 paras 64 & 65, see also KD Ewing *The function of Trade Unions*, 2005, 34(1)/IJ 1.

⁷⁵⁶ *Laval* [2007] C-341/05 ECR I-11767

⁷⁵⁷ *Sagar*[1991] C-76/90 ECR I-4221.

⁷⁵⁸ *Sager* paras 12 and 14. See Novitz and Syrps ‘Giving with One Hand and Taking with the Other: ‘Protection of Human Rights in the European Union’ in *Human Rights at Work, Perspectives on Law and Regulation*, 2010, pp474 – 479 for discussion of ‘legitimate aim and proportionality.’

⁷⁵⁹ See *Commission v Denmark (company vehicles)* Case C-464/02 [2005] ECR I-7929, para 45 (see Barnard, ‘Employment Rights, Free Movement Under the EC Treaty....’ 2008, *op cit*, pp6-7)

⁷⁶⁰ *Webb* [1981] C- 279/80 ECR 3305 para 19; *Commission v Germany* [2006]C-244/04 ECR I-885 para 41; *Commission v Luxembourg* [2004] C-445/03 ECR I-10191 para 38 (See Barnard, 2008, *op cit*, p7).

In *Viking* the court acknowledged that the protection of workers was one of the overriding reasons of public interest.⁷⁶¹ However, it ruled that the restriction on the freedoms guaranteed by the Treaty – the industrial action – could only be justified to counter serious and immediate threats to jobs or attempts to impose inferior terms and conditions of employment.⁷⁶² Although the court considered this a question for the UK court to decide it made it plain that it considered the action of the FSU was, in the circumstances, not justified. The court ruled that industrial action should be resorted to only when negotiation had failed and all other legal options exhausted, indicating that it considered that the FSU had been too quick to go on strike. The court offered the opinion that the Court of Appeal would be unlikely to find that attempts on the part of the ITF to prevent reflagging in Estonia were restrictions on Articles 43 (now 49) and 49 (now 56) which could be justified. However, the case was settled before the case could be heard by the Court of Appeal.⁷⁶³

In *Laval* the court was rather less equivocal. It acknowledged that industrial action to prevent social dumping could be regarded as a matter which could justify restricting the fundamental freedoms, and that the action taken by the Swedish union, seen as a response to a serious threat to jobs and to the terms and conditions of employment, could be seen to be justified. However, as an attempt to coerce the employer into coming to an agreement with the union the Court held that the action could not be justified - the Posted Workers Directive prohibited member states from requiring the employer to engage in negotiations on pay and conditions with the unions in the host member state or to attempt to coerce the employer into providing terms and conditions beyond those demanded by the directive.⁷⁶⁴ Having determined that the breach could not be justified it did not go on to consider the question of proportionality.

⁷⁶¹ Para 77 and *Laval* [2007], *op cit*, para 103.

⁷⁶² *Viking* [2007], *op cit*, para 81.

⁷⁶³ Bercusson 2009, *op cit*, noted of the many submissions received from Member states in *Viking* 'It is a bracing reminder that to EU lawyers of the power of political and economic context to influence legal doctrine that the new Member States [Estonia, Czech Republic, Latvia, Poland etc] were unanimous on one side of the arguments on issues of fundamental legal doctrine (horizontal direct effect, discrimination, proportionality) and the old Member states virtually unanimous on the other' (p305). The UK, however, sided with the new Member states.

⁷⁶⁴ As Hayes, Novitz and Olsson (2013, *op cit*) point out, the consequence is that these national and sectoral standards consequently, for posted workers, set maximum rather than minimum standards (p457-8).

Back before the Swedish Court at the end of 2009 Laval were awarded substantial damages. The Swedish Government which, as we have seen, had supported the right of the trade union to take action were subsequently subject to a complaint made by the Swedish Trade Union Confederation under the European Social Charter collective complaints procedure. The European Committee of Social Rights found that in permitting the restrictions on the right to strike imposed by the ECJ the Swedish Government were in breach of Article 6(4) of the European Social Charter, and in permitting Laval to ignore the relevant collective agreement in respect of the terms and conditions of the Lithuanian workers, they found that the Swedes had breached Article 19(4)(a) and (b).⁷⁶⁵ There could be little doubt too, that this was a breach of the post Demir interpretation of Article 11 ECHR - that the PWD, as it then stood, breached the principles of freedom of association laid down in the fundamental ILO conventions, the UNICESCR, as well as the ECHR.⁷⁶⁶

The right to strike had been recognised by the ECJ. Unfortunately, just as the UK confers heavily circumscribed immunities from civil liability rather than a right to strike, the European Court preferred to cast the right to strike as a very narrowly defined derogation from the economic rights conferred by the Treaty, instead of as a truly fundamental right given equal weight with the economic freedoms conferred by the treaties.

Two new directives on posted workers were adopted in the wake of Viking and Laval in order to ease the tensions when posted workers were used. The approach was one of rebalancing the rights of businesses to provide services in other states with the right of posted workers to equal treatment, while discouraging the abuse of posted worker status by employers who were primarily interested in circumventing the employment rights in the host country.

⁷⁶⁵Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden, complaint No.85/2012 ('Processed complaints' at www.coe.int), see Ewing and Hendy, *The Eclipse of the Rule of Law: Trade Union Rights and the EU*, 2016, pp9-10.

⁷⁶⁶ See Hayes, Novitz and Olsson, 2013 *op cit*, p458-9. It seems likely that the 2018 one year/18 month limit to 'posted' status (see p219 below) would see the treatment of posted workers 'excused' by Article 11(2).

Directive 2014/67/EU on the enforcement of the 1996 Directive emphasised that posting was an aspect of the right to provide services in another member states (Article 56 TFEU) unrelated to the free movement of workers,⁷⁶⁷ that the use of these guest workers must be transparent, closely monitored by host states, and should not be allowed to impinge upon fair competition, or upon the freedom for workers to take industrial action and conclude collective agreements. Essentially the directive defined posted work as a strictly temporary arrangement to permit workers from another EU state, employed by firms established in that state, to carry out specific ‘substantial activities.’ It required the host state to be supplied with all the employment details of the workers, and to oblige host states to provide mechanisms whereby posted workers can complain to trade unions about their terms and conditions of employment, and to bring claims against their employer – in the host state. Crucially it provided the basis of a system of cross border procedures to permit states to settle disputes, including the use of financial penalties, arguably a first step towards the establishment of the EU European Labour Authority in 2019 (when Article 24 of the 2014 directive is scheduled for review) which will deal with all cross border labour disputes.

In 2018 directive 2018/957 amended the 1996 directive to further discourage the abuse of posted worker status. States have to implement it by 30 July 2020, so it is very likely it will become UK law whatever our future relationship with the Union.

The core terms and conditions in Article 3 of the 1996 directive were extended, and states are required to publish them on one well publicised official web site. Article 1(2) requires that posted workers must have parity with workers in the host country in relation to rights to working time limits, paid holidays, remuneration (other than pensions), agency worker protections, OSH, pregnancy and maternity rights, non-discrimination, accommodation and accommodation and travel allowances imposed ‘by law, regulation or administrative provision, by

⁷⁶⁷ This didn’t stop two MEPs contributing an article to the *Independent* entitled ‘The EU has just passed a law that could end the problems with free movement which led to Brexit in the first place’ following the adoption of the 2018 directive (30 May 2018). Jude Kirton-Darling and Agnes Jongerius probably still believe that posted workers are migrant workers exercising freedom of movement.

collective agreements or arbitration awards which have been declared universally applicable.’ However, the really important change was the imposition of a 12 month limit for those with posted status.

Those workers posted beyond 12 months have to be given complete parity with the terms and conditions enjoyed by workers in the host state, although if a good reason can be found as the basis of a ‘motivated application’, a state can permit an employer to provide the particular workers with only the basic Article 1 (2) rights for a total of 18 months (Article 1(2)(b)).

Demir and Baykara & the right to collective bargaining

Remarkably, the right of workers to engage in collective bargaining was not expressly considered in either *Laval* or *Viking*, or in *Rüffert v Land Niedersachsen*,⁷⁶⁸ in which the contractual requirement of a local authority that contractors adhere to minimum standards of pay and conditions for their workforce was successfully challenged as a breach of the Posted Workers Directive.⁷⁶⁹ This was despite the explicit requirements of Article 3 of the Directive (above) in relation to the terms of ‘generally applicable’ collective agreements.

It appears that the right of workers to bargain collectively is not something that the Court wishes to consider unless compelled. Yet Article 28 of the EU Charter explicitly refers to the right to collective bargaining. Unlike protection in the Charter for businesses, which is framed merely as the recognition of the freedom to conduct business in accordance with domestic and EU law and practice, Article 28, apparently drawing on the European social Charter, confirms that workers in EU states have *the right* to bargain collectively:

‘Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels

⁷⁶⁸[2008] C-346/06 ECR I-1989.

⁷⁶⁹See Novitz and Syrps 2010, *op cit*, p473.

and, in cases of conflicts of interest, take collective action to defend their interests, including strike action.'

There can be no doubt that the right to engage in collective bargaining is a fundamental right of the European Union,⁷⁷⁰ although one not enshrined in the *acquis* as black letter law, and seen by the court as subservient to the business freedoms. As we have seen, the Social Protocol looked to European level collective bargaining to negotiate the content of the directives, and to collective bargaining at national level for their implementation. The constitutions of many Member States guarantee workers the right to engage in collective bargaining.⁷⁷¹

Moreover, the developments at the ECtHR with regard to Article 11 must be said to have fed into Article 28 to further bolster that status.

In 2008, the year that the ECJ considered *Rüffert*, the ECtHR, as we saw in chapter three,, changed tack on freedom of association, and building upon the approach it had taken in *Wilson and Palmer*, it gave a much more generous interpretation of the protections afforded by Article 11 holding the right to bargain collectively to be an essential element of freedom of association. Like the European Court, the ECtHR drew on the ILO Conventions, the European Social Charter, the EU Charter, and to national practices, to determine whether the Turkish courts had breached Article 11 in refusing to recognise the collective agreement that had been entered into by a Civil Service union. Crucially the Court held that the ILO conventions, recommendations, and the reports and observations of the organisation's various bodies were a floor of labour rights for the Council of Europe.

The fact that Turkey had not ratified the ILO Conventions relied upon was considered irrelevant. The Court ruled that there had been a breach of the civil servants' Article 11 rights, found that there had, then looked to 11(2) to assess whether the interference could be justified. The court asked the familiar questions – was it lawful? Was it made in pursuit of a legitimate purpose

⁷⁷⁰ See also Hayes, Novitz and Olsson 2013, *op cit*, p451-2.

⁷⁷¹ See KD Ewing, *Labour Rights or Human Rights? - It is Time to Move On* pp5-7 (speech to the International Society for Labour and Social Security Law, Dublin, 18 September 2014), and Bercusson, 'Collective Bargaining and the Protection of Social rights in Europe' in Ewing, Gearty, Hepple (eds) 1994, *op cit*.

recognised in 11(2)? Was it a proportionate measure in the circumstances? The Turkish Government had requested that the case be heard by the Grand Council, and a full panel of 7 judges found against the Turkish Government.

The decision has considerable significance in relation to the law of the European Union:

Article 12 of the Charter of Fundamental Rights states that

‘Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.’

Article 52(3) of the Charter:

‘In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.’

The next year the Strasbourg Court’s radical new approach was followed in *Enerjii Yapi-Yol Sen v Turkey*, a case which concerned the disciplinary action taken against civil servants who had participated in a strike in order to press their case for a collective agreement. There was an absolute ban on strike action by public servants and again the ECtHR found against the Turkish government. Three more cases followed in the same year which turned on the right to take industrial action, two brought against the Turkish Government and one against the Russian Government.⁷⁷²

K. D. Ewing has observed that the ECHR jurisprudence has fed into the Charter, and into the EU jurisprudence, making the ‘token gesture’ offered by the ECJ in *Viking* and *Laval* in relation to the importance of the ILO Conventions, now ‘a

⁷⁷² See chapter 2 .

positive duty to engage with the substance of the Conventions, and to the decisions, rulings and recommendations of the its supervisory bodies.’

He argued that:

‘One effect of *Demir and Baycara v Turkey* relates to its impact on the relationship between articles 12 and 28 of the Charter. The effect of that influence could work in one of two ways. One possibility is that Art.28 of the EU Charter has become redundant because of the higher standard of Article 12. Or Art.28 is informed by Art,12, so that when Art 28 refers to a right in accordance with Community law, that Community law must include Art 12 of the Charter, which, by virtue of Art.52(3) must be construed by reference to the Strasbourg jurisprudence...although there may be no direct obligation under EU law to have “legislation necessary to give effect to the provisions of the international labour conventions already ratified”⁷⁷³ by the Member State in question, such an obligation arises by virtue of what is probably the unanticipated consequences of Article 12 as informed by the ECHR.⁷⁷⁴

Consequently the Charter of Fundamental Rights has, in theory at least, worked to indirectly raise the bar for EU Member States. The unexpected *volte face* at Strasbourg should have had consequences for European labour law. But, so far, it has not, because the European Court has chosen to ignore the new wide interpretation of Article 11 and the new protection for the freedom to bargain and to strike.⁷⁷⁵

⁷⁷³ Referring to para 157 of *Demir*.

⁷⁷⁴ Ewing above ‘Labour Rights or Human Rights’, pp10-11.

⁷⁷⁵ The Strasbourg cases, and the ILO Conventions, were cited in recent decisions of the Supreme Court of Canada where repressive labour laws were struck down in cases turning on the Canadian Charter of Rights and the guarantee of freedom of association: *Saskatchewan Federation of Labour v Saskatchewan* [2015] SCC 4 and *Mounted Police Association of Ontario v Canada (Attorney General)* [2015] SCC 1.

Pragmatism: the revival of Community neoliberalism and ‘the eclipse of the rule of law’

Since the 2008 – 2014 financial crisis in the ‘Eurozone’, Brussels and Luxembourg appear, in practice, to have largely abandoned even the pretence of protecting workers’ rights. The EU might be said to have revealed itself to be the essentially neoliberal construct some had long believed it to be.⁷⁷⁶

Article 28, and Article 52(3) of the EU Charter appear to have been forgotten by the ECJ, and the court has paid scant attention to developments at Strasbourg.

All states have been put under pressure to withdraw from national sectoral bargaining by the Commission, which has argued that such arrangements put states at risk of breaching EU competition laws. Those states unfortunate enough to have required financial assistance from the ‘Troika’ have found themselves obliged to at least cut back severely their national and sectoral mechanisms,⁷⁷⁷ depending on the terms of the particular *Memorandum of Understanding* which they had to agree to in order to receive that assistance in a coercive ‘attempt to further economic objectives as opposed to respect human rights...intended to drive down labour standards,’ unsupported by ‘external international legitimacy’ and running ‘entirely counter to previous established human rights norms.’⁷⁷⁸

Collective bargaining mechanisms in Spain, Greece, Portugal, Romania, Italy, Belgium and Ireland, have been attacked by the European Commission, the European Bank and the International Monetary Fund as part of the austerity measures instituted as part of the financial ‘bail outs’, and in the guise of co-ordinating economic policy.⁷⁷⁹

⁷⁷⁶ See, for example, Hepple 1987, *op cit*.

⁷⁷⁷ Thus making it harder to oblige the employers of posted workers to adhere to collective agreements (Hayes, Novitz and Olsson, 2013, *op cit*, p449).

⁷⁷⁸ *Ibid*, p 454-5. The authors consider EU efforts to apply the template of the 1996 PWD to third country migrants and ultimately raise the question ‘whether Laval and other judgments really did depend upon free movement of services rights or whether they were more simply about promoting cheap labour’ (p 463).

⁷⁷⁹ See Ewing, above, ‘Labour Rights or Human Rights’, pp12-19 and Ewing and Hendy ‘Eclipse of the Rule of Law: Trade Union Rights and the EU’, 2016.

For example in Portugal there has been a reduction of sectoral coverage from 50%, down to 10%. The Government is however now committed to a return to

‘an approach to collective bargaining that favoured inclusiveness and stability, through promotion of regular sectoral bargaining and extended coverage and improvement of company level agreements.’⁷⁸⁰

In Rumania national level bargaining ceased, sectoral bargaining coverage fell by 60%, and overall collective bargaining coverage fell from 98% in 2010 to 35% in 2014. Rights to organise, bargain and strike have been said to have been ‘slashed.’⁷⁸¹ Extraordinarily, attempts to legislate to conform to ILO minimum standards were opposed by the Troika.⁷⁸² In Greece, the hardest hit state, ‘disorganised decentralisation’ was said to have ‘brought the bargaining system to the brink of collapse,’ effectively delivering the long standing pre-crisis demands of Greek employers’ organisations,⁷⁸³ and there, as well as in Ireland and Portugal, laws were passed to permit establishment level negotiations between an employer and ‘non-trade union, even non elected representatives.’⁷⁸⁴

In July 2017, the head of the IMF, Christine Lagarde, advised the Greek Government that the Government ‘should reconsider the decision to reverse cornerstone collective bargaining reforms after the end of the program...’⁷⁸⁵

The attacks by the Troika on sectoral mechanisms, and the associated campaign against French collective labour protections by President Macron’s government, are legislative assaults, justified by the state economic audits of the Commission, and upon the arguably willfully misinterpreted requirements of the single market. The ILO Committee on Freedom of Association holds that the ‘determination of

⁷⁸⁰ The influence of the Troika on the erosion of collective bargaining in Portugal: changing rules and outcomes by Maria Da Paz Campos Lima, Lisbon University(2.3), from the EU sponsored workshop on *Evolution of Collective Bargaining in Troika Programme and Post Programme Member States* Brussels 18 February 2016, Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy.

⁷⁸¹ ‘The state of play of collective bargaining in Romania’, by Aurora Trif of Dublin City University, (3.3).

⁷⁸² Ibid (2.4).

⁷⁸³ The Greek system of collective bargaining during the economic crisis, by Aristeia Koukiadaki, University of Manchester, *ibid*, (2.6).

⁷⁸⁴ Hayes, Novitz and Olsson 2013, *op cit*, p455 & 456.

⁷⁸⁵ *IMF Executive Board Approves in Principle 1.6 Billion Stand-By Arrangement for Greece*, IMF Press Release No. 17/294, 20 July 2017.

the bargaining level' should be left to negotiation and 'not be imposed by law',⁷⁸⁶ and the largely unilateral withdrawals of sectoral mechanisms in the EU states hit hardest by the Eurozone crisis are of doubtful legality.

The ILO Committee of Experts,⁷⁸⁷ and the Council of Europe's European Committee on Social Rights,⁷⁸⁸ expressed grave reservations about these events. The ILO Committee on Freedom of Association deprecated the Spanish, Irish,⁷⁸⁹ and Greek Government's Troika prompted unilateral retreat from national and sectoral collective bargaining arrangements.⁷⁹⁰ The Committee appointed an ILO High Level Mission to investigate events in Greece, and were appalled by what they found - brazen breaches of C87 and C98.⁷⁹¹

The rights and principles of the EU Charter clearly have nothing like the value of the treaties – it would seem that even the fundamental principles enshrined in the treaties are dispensable. Citing Article 2 TEU commitment to 'the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights',⁷⁹² and the claim in the preamble to the Charter of Fundamental Rights that 'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity...the principles of democracy and the rule of law',⁷⁹³ Ewing and Hendy have argued that

'the EU legal order is built on a lie, or a series of up to 28 lies. The Member States collectively may have committed themselves to the rule of law...but they do not observe the commitment, at least in relation to labour rights.'

Initially the fundamental Community labour rights were drawn from the constitutions and national practices of Member States, from the European Social

⁷⁸⁶ 2006 ILO CFA Digest of Decisions, para 988 – 91.

⁷⁸⁷ Ewing, 'Labour Rights or Human Rights'(above), p17.

⁷⁸⁸ European Social Rights Committee, Conclusions XX-3 (2014). The committee found that the Spanish Government had violated Art.6(2) of the ESC (See Ewing and Hendy, 2016, *op.cit*, pp8-9).

⁷⁸⁹ The Irish government didn't require prompting.

⁷⁹⁰ ILO Committee on Freedom of Association, Case No.2947 (Spain), Report No.371 (2014); Case No.2780 (Ireland), Report No. 363(2012); Case No.2829 (Greece), Report No.365 (2012)

⁷⁹¹ International Labour Office, Report on the High Level Mission to Greece (Athens, 19-23 September 2011); see also the CEACR Reports in 2010 (99th Session) and 2011 (100th Session) cited by Hayes, Novitz and Olsson (2013, *op cit*) at p459.

⁷⁹² Ewing and Hendy, 2016, *op cit*, p3.

⁷⁹³ *Ibid*, p6.

Charter, and the Strasbourg jurisprudence, by the ECJ. The 1974 labour and social policy initiative was temporarily halted by the by the emergence of the Thatcher government, revived by Delors in the mid 1980s, revitalised by the Community Charter and fashioned into the Maastricht Social Protocol Agreement. The social dialogue, the resulting directives, and the subsequent legislation – sabotaged in the UK by New Labour – saw the brief flowering of *Social Europe* before it was abandoned,⁷⁹⁴ in favour of a new fundamental rights strategy - the Charter. Any hopes that the Charter might see a resurgence of labour rights were dashed by *Viking*, *Laval* and *Ruffert* at Luxembourg, then seemingly salvaged by *Demir* and *Baycara* at Strasbourg, and then sunk without trace in the wake of the Eurozone crisis.

Now, however, just as the EU is making a strong economic recovery and there are signs of some signs of a limited revival of social europe,⁷⁹⁵ the UK is seemingly poised to leave the EU and the single market.

‘BREXIT’

The very considerable margin of appreciation afforded states where labour relations are concerned and the singularly relaxed approach taken by the Commission to enforcement action made apparent in this chapter have given states in practice ample opportunity to emasculate the employment protection required of members of the European Union. New Labour took full advantage of this. I set out the detail in the two chapters on individual employment rights, chapters 6 and 7.

However, for many Tories, the very fact that HMG had been obliged to legislate and intervene in the contract of employment was unacceptable. This is why, prior to the 2016 referendum the Cameron administration was making much of

⁷⁹⁴See Gold, Cressey and Leonard, ‘Whatever Happened to Social Dialogue? From Partnership to Managerialism in the EU Employment Agenda’, *European Journal of Industrial Relations* (2007) 13(1)7.

⁷⁹⁵ See, for example, European Commission: ‘Priority Policy Area; European Pillar of Social Rights; Building a more inclusive and fairer European Union: ‘Today we commit ourselves to a set of of 20 rights and principles and rights. from the right to fair wages to the right to health care: from live long learning, a better work life balance and gender equality to minimum income: with the European Pillar of Social rights, the EU stands up for the rights of its citizens in a fast-changing world.’ (President Jean-Claude Juncker 17 November 2017) [www://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en](http://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en)

supposed ‘renegotiation’ with Europe and of ‘repatriating employment rights,’ with particular emphasis being placed on the Working Time Directive.⁷⁹⁶ The much misunderstood EU Charter of Fundamental Rights was a similarly totemic symbol of EU ‘oppression.’ As a consequence S.5(1) of the Withdrawal Act makes the apparently unequivocal statement that the ‘Charter of Fundamental Rights is not part of domestic law on or after exit day.’

S.5(1) has arguably been included in the Act for political reasons. As we have seen, the Charter never has been part of domestic law. As we have seen, it reflects the *acquis*, and should only be cited to support claims in court when EU law is engaged, whatever certain judges may believe. That is why s5(5) of the Act states that ‘references to the Charter’ may still, after exit from the EU, made in respect of ‘any fundamental rights or principles which exist irrespective of the Charter.’ The potential for legal confusion and uncertainty is considerable.⁷⁹⁷

If we do leave the EU, and the Single Market, then, under the terms of the Withdrawal Act, the directives which have been implemented under authority of the 1972 Act into UK regulations,⁷⁹⁸ and those Articles in the treaties, EU decisions and regulations, which confer rights apt for inclusion in domestic law (which previously applied directly without the necessity for transposition), but which have not so far been so implemented, will survive the repeal of the European Communities Act 1972.⁷⁹⁹

Decisions of the EAT, Court of Appeal and Supreme Court, reflecting and influenced by the *acquis*, and the ‘pre-exit’ case law of the CJEU, will remain binding precedents for the lower courts.

⁷⁹⁶ See chapter two.

⁷⁹⁷ See Schona Jolly ‘EU Law and the effect of Brexit,’ in Daphne Romney QC 2018, *op cit*, p 4-5. Jolly makes much of the robust entrenchment of equality rights in the *acquis* (which she details pp6-13) and their vulnerability post Brexit, whatever political pledges are made, and suggests that much more use may need to be made of the ECHR (p5). One might add that, given the UK’s record with regard to international and regional treaty obligations guaranteeing labour rights and freedoms, employment rights will be vulnerable whatever treaty arrangements are made with the EU.

⁷⁹⁸ Not the directives themselves, although the domestic courts may refer to them in interpreting the regulations.

⁷⁹⁹ On ‘retained EU law,’ see Jolly 2018, *op cit*, pages 3-4. She points out that it ‘seems likely that there will remain considerable legal uncertainty as to the manner in which ‘retained EU law’ status will operate.’

However, there will be no fresh *Defrenne* style direct application of the treaties, no *Marshall* style ‘direct effect’ of inadequately transposed directives,⁸⁰⁰ and no *Francovitch* style awards to compensate those who suffer loss as a consequence of state failure to implement a directive. While judges may choose to interpret law with EU origins in the light of the terms of a directive, regulation, decision, treaty article, or post BREXIT decision of the ECJ,⁸⁰¹ there will be no *Factortame* style ‘disapplication’ of national law, and no referrals to the European Court.⁸⁰² The Supreme Court will, if we leave the EU on the terms envisaged by the Withdrawal Act, be no more bound by EU case law than it is by UK case law, and, of course, it will no longer be bound by the Treaties.

It had initially been anticipated that EU derived employment rights would no longer be effectively entrenched in domestic law, and even subject to alteration by the Henry VIII powers given ministers post BREXIT to change regulations. The restrictions on the exercise of those powers imposed during the Bill’s turbulent passage through Parliament, followed by agreement for a post Brexit transition period during which the UK will still be subject to EU law until at least December 2020, and the November 2018 ‘backstop’ protocol to the Withdrawal Agreement, have, however, since put a stop to such speculation.

As matters stand the UK will, whatever else is agreed after the transition period ends, have to comply with at least the EU standards on labour protection extant at the end of the transition period,⁸⁰³ because that is what is required by the ‘backstop’ protocol to the Withdrawal Agreement. In effect it is the bare bones of any subsequent free trade agreement.

The Protocol states that: The provisions of this Protocol shall apply unless and until they are superseded, in whole or in part, by a subsequent agreement.⁸⁰⁴

⁸⁰⁰ *Defrenne* saw Article 119 of the Treaty of Rome used directly in a national court and thus horizontally in a claim against a private employer, and *Marshall* is the classic example of a directive being directly effective in a claim against a public authority employer.

⁸⁰¹ Withdrawal Act S.6

⁸⁰² Withdrawal Act s.5(1). On this ‘removal of critical enforcement mechanisms,’ see Jolly 2018, *op cit*, p3 & p4

⁸⁰³ Articles 12-132 Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators’ level on 14 November 2018 (TF59(2018)-Commission to EU27.

⁸⁰⁴ Article 1(4) Protocol on Ireland/Northern Ireland, annexed to the Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators’ level on 14 November 2018 (TF59(2018)-Commission to EU27.

Article 6(1) of the Protocol requires that in order to ensure ‘the maintenance of the level playing field conditions’ necessary for the maintenance of a single customs territory, ‘the provisions set out in Annex 4 to this protocol shall apply.’

Article 4 of the annex demands ‘non regression of labour and social standards.’ The level of protection cannot be ‘reduced below the level provided by the common standards applicable within the Union and the United Kingdom at the end of the transition period’ (Article 4(1)).

The arbitration procedures, and the threat of lump sums and penalty payments of Articles 170-181 (in effect the proposed post transition period infringement procedures) do not, however, apply (Article 4(2)).

Nor do they apply to the requirements of Article 5 on social dialogue, adherence to the ILO Conventions and the provisions of the European Social Charter, and on the ‘exchange of information on the respective situations and advances of the Member States and of the United Kingdom’ on the (revised) Charter and the ILO Conventions. They do, however apply to the ‘monitoring and enforcement of labour and social standards:

‘Noting that within the Union the effective application of Union law reflecting the common standards referred to in Article 4(1) is ensured by the Commission and the Court of Justice of the European Union acting under the Treaties the United Kingdom shall ensure effective enforcement of Article 4 and of its laws, regulations and practices reflecting those common standards in its whole territory, *without prejudice to Article 4(2)*.

The United Kingdom shall maintain an effective system of labour Inspections, ensure that administrative and judicial proceedings are available in order to permit effective action against violations of its laws, regulations and practices, and provide for effective remedies, ensuring that any sanctions are effective, proportionate and dissuasive and have a real deterrent effect.’

These are an interesting set of demands, and arguably illustrate the very relaxed approach the Commission takes to the enforcement of employment rights. The UK has not got an effective system of labour inspection. Indeed it is arguable that

it has no system of labour inspection at all,⁸⁰⁵ and for four years, between 2013 and 2017, tribunal fees ensured that most of the EU labour protections were in practice denied the majority of workers. That was a matter rectified by judicial review without any intervention from the Commission. There was no suggestion that the infringement procedures would be invoked. Moreover, even without the fees regime, the remedies and sanctions for breaches of very many employment rights of EU origin are not effective, proportionate or dissuasive as they are required to be (see chapters 6 and 7). Seldom has the Commission evinced interest beyond requiring that the rights are on the statute book.

Consequently, while the requirement that the UK *shall maintain an effective system of labour inspections*, can plausibly be said to mean that the UK will liable to enforcement action if at some point it is held not to have an effective system,⁸⁰⁶ such action is unlikely.

Obviously one cannot predict the outcome of future negotiations, but given the need to discourage other states with ‘populist’ anti EU movements,⁸⁰⁷ and the fact that the EU does not want a large economy operating as an ‘off shore sweat shop,’⁸⁰⁸ it seems very likely that ultimately the UK will be obliged to concede ‘dynamic’ alignment or compliance with EU labour standards under any future free trade deal.

It seems likely that the negotiators stopped short of an explicit requirement for dynamic alignment in order to give the agreement more of a chance of being approved by Cabinet and Parliament.⁸⁰⁹ Article 6 (1) of the backstop protocol, referring to Annex 4, and the requirement for the UK to adhere to EU labour standards (see above), states that “Where appropriate, the [EU/UK] Joint Committee may modify Annex 4 in order to lay down higher standards for these

⁸⁰⁵ While Article 6 might be said to infer that the UK does have an effective labour inspection regime, effective sanctions and the like, it is arguably imposing the EU principle of effectiveness on the post withdrawal UK and making a breach of that principle grounds for infringement proceedings.

⁸⁰⁶ As opposed to recognition that it has an effective system and is required to maintain that system.

⁸⁰⁷ Italy and France for example.

⁸⁰⁸ A phrase employed by Neil Kinnock during John Major’s ‘Maastricht crisis.’

⁸⁰⁹ Article 4 (1) ‘The United Kingdom shall ensure that no diminution of rights, safeguards and equality of opportunity...as enshrined in the provisions of Union law listed in Annex 1 to this Protocol.’ Annex 1 (pp331-332) lists the equality directives. (Protocol on Ireland/Northern Ireland, annexed to the Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators’ level on 14 November 2018 (TF59(2018)-Commission to EU27).

level playing field conditions.”⁸¹⁰ This would appear to allow for negotiation over improved standards; it permitted both sides to postpone the decision on dynamic alignment.

The UK is then explicitly required, in the (unlikely) event both of the Agreement being sanctioned by Parliament and of no deal being in place after the end of the transition period, to maintain the employment rights of EU origin.

However, we know now that non regression in employment rights must be the minimum requirement of any future arrangement, unless the UK ‘crashes out’ with no agreement in place – an increasingly unlikely scenario. The questions of whether any breach of that condition can be the subject of infringement proceedings and financial penalties, and of whether dynamic alignment will be required, have effectively been left open, ‘kicked down the road’ by clever drafting.

If the UK joins EFTA, and therefore remains in the EEA, known as the ‘Norway option’ or as ‘Norway plus,’ it will, in practice,⁸¹¹ have to accept dynamic alignment with the EU protections. The UK will accept the jurisdiction of the EFTA Court, which, while it makes rulings on non compliance with input from the Commission and often from the ECJ, it has no powers to impose infringement penalties. Iceland, Lichtenstein, Switzerland and Norway deal settle such matters through negotiation.

However, the only labour law initiative on the horizon, is the proposed ‘European Pillar of Social Rights,’ an expansion of the employment rights featured in the EU Charter. Among other proposals very likely to send many in the Tory party apoplectic with rage, states will be very likely ultimately be required to legislate to provide a right not to be unfairly dismissed, and to provide social protection for all workers, including the self employed. But all this is a very long way off. Few of the ex Soviet Bloc states admitted to the EU after 2003 can realistically be believed to

⁸¹⁰The role of the Joint Committee, the Arbitration panel and the CJEU are well explained in an article in *Civil Service World* by Richard Johnson – see ‘Brexit: EU-UK joint committee to oversee withdrawal agreement disputes under draft deal’, 15 November 2018 www.civilserviceworld.com/article/news/brexit-eu-uk-joint-committee-oversee-withdrawal-agreement-disputes-under-draft-deal

⁸¹¹While EFTA states can in theory decline to accept fresh legislation, refusal in practice is limited to wholly fresh areas of regulation which would not require a very likely unworkable ‘unpicking’ exercise. See J Hendy and T Novitz, ‘The Holships Case,’ (2018) 47 *ILJ* 315.

comply with current EU employment protection standards,⁸¹² and setting the bar higher still would be for the Commission to risk considerable criticism from all sides, not least from the new Member States themselves.

As a consequence the approach is to be one of gentle persuasion rather than obligation, and the initiative currently amounts to little more than a series of proposals for Commission Recommendations,⁸¹³ for interpretive ‘guide’ Directives on the Working Time and Written Statement Directives, and for a ‘New Start to support work-life balance for parents and carers,’ intended to set ‘a number of new or higher minimum standards for parental, paternity and caring leave.’⁸¹⁴

There are, however, proposals in train on consultation with workers, on ‘social dialogue,’ and on managing *Laval* and *Viking* style cross border disputes. A ‘European Labour Authority,’ effectively a supra national Ministry of Labour, is to be established in 2019, to be fully functioning by 2023, and it is to be hoped that, as the EU enters a post crisis era, with the economies hit hardest by the Eurozone crisis recovering well, that the value of national and sectoral level collective bargaining will be accorded proper recognition.

The workshop held at the request of the European Parliament’s Committee on Employment and Social Affairs on the *Evolution of Collective Bargaining in Troika*

⁸¹² For example, Czech academic lawyer Barbara Havelková (2017, *op cit*) has stated that ‘the Czech Republic’s EU derived anti-discrimination provisions, were seen merely as an ‘offering’ to the EU in the process of their adoption, are also widely disregarded and routinely misapplied by the courts’ (p75). She also tells us that employment regulations are ‘widely circumvented or disregarded’ (p193); that ‘the adoption of anti-discrimination guarantees has been strongly and persistently resisted in Parliament and no woman thus far has won a sex discrimination case outright before any Czech court. Sex equality and anti discrimination measures are ‘largely still a mirage’ (p212); ‘...while Czechia has formally transposed the EU gender equality *acquis*, it has done so without its lawmakers and judges really subscribing to and understanding its rationales. This has resulted in a poor standard of implementation’ (p225); Havelkva tells us that the doctrines of direct and indirect effect have been used only once in a sex discrimination case ‘even when specifically and...correctly, requested to do so by the claimant (p236). As for ‘real and effective compensation or reparation,’ Havelkova reports that Czech courts have been known to require discriminatory employers merely to apologise to claimants (p236).

⁸¹³ See the following European Commission documents: Proposal for a Council Recommendation on access to social protection for workers and the self employed COM (2018) 132 final; Stakeholder Consultation - Synopsis Report accompanying the Proposal for a Recommendation on access to social protection for workers and the self employed SWD(2018) 79 final; Impact assessment accompanying the Proposal for a Recommendation on access to social protection for workers and the self employed SWD(2018) 70; DG Employment Social Affairs and Inclusion, Stakeholder Consultation Strategy – Access to social protection (2017). See also Sacha Garben, ‘The European Pillar of Social Rights: Effectively Addressing Displacement?’(2018) 14 *European Constitutional Law Review* 210.

⁸¹⁴ European Commission, Employment, Social Affairs & Inclusion, ‘European Pillar of Rights in detail’: ec.europa.eu/social/main.jsp?catId=1310&langId=en#navitem-2

Programme and Post Programme Member States,⁸¹⁵ noted that it was the states with very high levels of national collective bargaining coverage which had weathered the crisis most successfully - Austria, Belgium, Denmark, Finland, France, the Netherlands, Slovenia and Sweden.⁸¹⁶ Collective bargaining was said to have 'shown to have important potential to increase sector and company competitiveness and productivity,' enabling 'businesses to adapt to global challenges...policy makers should take action to support collective bargaining as an important asset of the EU social model.'

With the panic engendered by the Eurozone crisis subsiding, given the importance placed on collective bargaining by the original six states which comprise the core of the EU, as well as by Austria, Sweden, Denmark, Slovenia, Spain, Croatia, Romania, Greece, Malta and Portugal, the pragmatists at the Commission may yet lead Europe to a fresh reconciliation of labour and capital, and a return to respect for the rule of law.

In this chapter I have outlined the evolution of the EU employment protections, and the extraordinary success of the European project in obliging the government to provide important workplace rights by making such protection a condition of access to the single market, and by the ever present threat of the invocation of the potentially very powerful EU infringement regime. Nevertheless, such is the modest nature of the demands of the EU in respect of the effectiveness of those rights, that British workers should not place much reliance on the protection conferred by Europe – as the tribunal fees episode attests.

I characterised the EU as essentially a vehicle to facilitate cross border business, institutionally incapable of reconciling the right of workers to bargain collectively and to strike with the protections afforded employers to do business within the single market. Even before the 'Euro Zone Crisis' the *Viking* and *Laval* cases had

⁸¹⁵2016, *op.cit.*

⁸¹⁶See the EU 2015 report 'Collective Bargaining in Europe in the 21st Century,' overseen by Ricardo Rodriguez of the EU Eurofound Agency. Chapter 4 makes it apparent that prosperity and stability goes hand in glove with collective bargaining. Tables 14 and 15 in show that the states listed were those with 'very high' collective bargaining coverage in 1997-1999, with the exception of Spain, the same states with very high coverage in 2011-13 which were least affected by the crisis. While coverage in Germany had decreased ,the state has lately experienced an 'impressive U-turn' and coverage is extending, with new *erga omnes* regulations adopted in 2014 (p49).

showed that the collective labour rights in the EU Charter were subservient to the business freedoms. Individual rights on the other hand, are compatible with business freedoms. When economic disaster loomed the ECJ and Commission revealed that they were prepared to sanction the dismantling of sectoral collective bargaining mechanisms. Although the EU has demonstrated the importance it places on the contribution of trade unions to the European project, in particular the ground breaking 'social dialogue' negotiation and implementation the 'social' rights, and another attempt at reconciling the rights and interests of labour and capital appears to be underway, the events of the last decade outlined in this chapter indicate that British workers would be ill advised to look to the EU for effective protection for freedom of association, either now or in the future.

Chapter Five:

BENCHMARKING COLLECTIVE LABOUR RIGHTS

I established in chapter one that the right to bargain collectively and the right to strike are the two inextricably linked essential elements of freedom of association.⁸¹⁷

There we saw that the ILO constitution, and ILO Conventions 87 and 98, when read independently and when read together, provide the basis for the recognition of these interdependent rights in international law, and in UK law. They are the core of our labour law obligations, and through the interpretations placed upon their provisions by the CFA and CEACR, they provide the common standard for the protection of freedom of association in the UN Covenants, the Council of Europe rights instruments and the EU Charter of Fundamental Rights.

When the full freedom of association the two conventions demand is protected the implementation and enforcement of the economic and social rights which the less fundamental ILO Conventions seek to protect are, in broad terms, assured. Those economic and social rights particularly valued by trade unionists, like housing, education and the provision of social protections for the elderly and the vulnerable, which the European Social Charter and the UN Covenant on Economic, Social and Cultural Rights oblige states to guarantee, are also lent a measure of protection when the right to strike is exercisable beyond the bounds of a 'trade dispute'.

This is the essence of the 1946 ILO Constitution and, although more honoured in the breach than the observance, the provisions of the constitution (and we have seen that representatives from the UK exercised considerable influence over the drafting of the constitution) are a commitment to which the UK government remains bound. The adoption of Conventions 87 and 98 in 1948 and 1949, and the subsequent ratification by the UK, 'fleshed out' the detail, and the 'fine

⁸¹⁷In the context of modern UK industrial relations the right to organise is best considered an essential element of the right to bargain collectively.

tuning' of interpretation and application has been a task undertaken by the CEACR and CFA during the past 60 odd years.

Arguably, when these basic freedoms are respected, and collective bargaining facilitated, eventually all else will follow even without statutory minima in place – OSH, working time, equality protections and fair remuneration will be negotiated.⁸¹⁸ However, when they are not sufficiently well protected industrial relations become unstable,⁸¹⁹ and society itself becomes unstable.⁸²⁰

It is for that reason that I will examine first the extent to which the UK's regional and international treaty obligations protect the fundamental rights with and the extent of current UK compliance with the standards demanded – whether the position is lawful or unlawful.

I consider first the protection of the freedom for workers to take industrial action – 'the right to strike' which secures the right to bargain collectively. Having established in previous chapters the nature of the right in the UK as a limited freedom, reliant upon the suspension of the common law by the statutory immunities, and augmented by regional and international treaty obligations, I will begin with a consideration the legality of procedural obstacles to industrial action – the 'trips and hurdles' first considered in chapter two.

.1: PROCEDURAL OBSTACLES TO INDUSTRIAL ACTION

Other than in sectors providing essential services, the only lawful restrictions on the right to strike are proportionate requirements for unions to ballot members on whether to take industrial action; to give an employer reasonable notice of any action duly sanctioned or to suspend industrial action for a reasonable period in

⁸¹⁸ The basis of the case for voluntarism.

⁸¹⁹ As the CFA put it: "repeated recourse to statutory restrictions on collective bargaining could, in the long term, only prove harmful and destabilize labour relations, as it deprived workers of a fundamental right and a means of furthering and defending their economic and social interests" (ILO 2018 *Compilation of Decisions of the Committee on Freedom of Association* ('2018 *Compilation*'), para 1422).

⁸²⁰ See KD Ewing and John Hendy, 'New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining,' (2017), 46 *ILJ* 1.

order to facilitate arbitration or conciliation, where effective mechanisms are available to the parties.

The International Labour Organisation's CEACR holds that

'procedural rules before launching a strike are admissible provided that they do not make the exercise of the right to strike impossible or very difficult in practice which would result in a very wide restriction of this right in fact.'⁸²¹

Whether presented as a 'cooling off period,' or as balloting or strike 'notice', periods during which action is suspended 'should not be an additional obstacle to bargaining, with workers in practice simply waiting for its expiry in order to be able to exercise their right to strike.'⁸²²

The UN CttESCR considers 'that...[an] excessively lengthy procedure for declaring a strike legal constitutes a restriction on the right [to strike] provided for in article 8(1)(d) of the Covenant.'⁸²³

The ILO's CFA places much emphasis on what is 'reasonable' in the circumstances.⁸²⁴ Extended periods of strike notice are permissible where important public services, and essential services,⁸²⁵ are concerned, as long as they are proportionate. 20 days' notice where 'services of social or public interest' were concerned,⁸²⁶ and a 40 day 'cooling off' period intended to provide the opportunity for an agreement to be reached prior to a strike in an essential service,⁸²⁷ have both been deemed acceptable by the Committee.

⁸²¹ 1994 ILO General Survey on the Reports on Convention 87 and 98 by the CEACR ['1994 General Survey'], para 179. Whether lawful strike action is impossible for a week, a month or indefinitely, it will still be a breach of Convention No.87.

⁸²² 1994 General Survey para 172.

⁸²³ UN CttESCR Concluding Observations ['CO'], Bolivia E/C.12/1/Add.60, 21 May 2001, para18.

⁸²⁴ Procedures 'should be reasonable and...should not be so complicated as to make it practically impossible to declare a legal strike' (2018 *Compilation*, paras 789, 790 and 793).

⁸²⁵ See below.

⁸²⁶ 2018 *Compilation* para 801 citing the 2006 CFA *Digest of Decisions*, which in turn cites 309th Report Case No.1912 (United Kingdom 1998) where the CFA held that the notice requirement for a 'sit in' at a power station was justified.

⁸²⁷ 2018 *Compilation* para 802.

The principle of proportionality thus governs the legality of the restrictions, and while the suspension of a strike for ‘a reasonable period’ to facilitate voluntary conciliation and arbitration is a proportionate restriction, there must be effective mechanisms in place to facilitate such negotiation.⁸²⁸ A requirement for advance notice to be given to an employer before a strike takes place is, it should be noted, merely ‘acceptable’ to the Committee.⁸²⁹ ‘Secret and direct voting’ on the other hand, ‘is certainly a democratic process and cannot be criticised as such,’⁸³⁰ the Committee holding that ‘The only limitation on the rights set out in Article 3 of Convention No.87 which *might possibly* be acceptable *should aim solely at ensuring respect for democratic rules within the trade union movement.*’⁸³¹

The UK procedures, however, are, as we have seen in chapter two, products of the neoliberal revolution, essentially intended to prevent industrial action, or to delay, and consequently blunt the effectiveness of any action taken. The unions have been deliberately mired in over complex regulation, and - the basic requirement for a strike ballot apart - the procedures have little to do with ‘democratisation.’⁸³²

The restrictions unarguably go beyond that which is necessary to safeguard the rights of others, and by the restrained standards of international and regional treaty reporting and monitoring, there has been a barrage of condemnation from the various supervisory bodies.

Although the trips and hurdles were the subject of one of the complaints presented to the European Court of Human Rights in *RMT v UK* [2014], the court avoided considering the matter by the application of newly adopted rules of procedure – a matter, it will be recalled, which was considered in chapter 3. The Council of Europe’s ECSR has however been vocal in its condemnation of the UK

⁸²⁸ *Ibid*, paras 792, 794 and 798.

⁸²⁹ *Ibid*, para 799.

⁸³⁰ *Ibid*, para 572.

⁸³¹ *Ibid*, para 676. This is a reference to internal administration/organisation rather than strike balloting, but it is a principle that might be employed by the government to justify the balloting thresholds.

⁸³² Proposals for strike ballots were set out by the government in *Democracy in Trade Unions*, 1983 (Cmnd.8778). It has been suggested that the original balloting requirement was intended to make workers think twice about engaging in secondary action (Collins, Ewing and McColgan, *Labour Law, Texts and Materials*, 2005, p897). On the ‘simplifications’ of the balloting regime in 1999 and 2004 see B Simpson, ‘Code of Practice on Industrial Action Ballots and Notice to Employers 2000 (2001) 30 *ILJ* 194, and ‘Strike Ballots and the Law: Round Six: Code of Practice on Industrial Action Ballots and Notice to Employers 2005 (2005) 34 *ILJ* 331.

procedures, and in 2014 it referred to both the UK Court of Appeal case *RMT v Serco* [2011],⁸³³ as well *RMT v UK* to reiterate its 2010 conclusion that the notice periods required for ballots and strikes notice are ‘excessive,’ ‘imposing unrealistic burdens on unions and their officers,’ and consequently breach Article 6(4) of the European Social Charter.⁸³⁴

The Committee had concluded in 1987 (reference period 1984-85) that a requirement for secret strike ballots imposed by the Trade Union Act 1984 ‘does not adversely affect the exercise of the right to organise as provided for in Article 5.’ In Conclusions XII-I 1991, however, the Committee asked the Major government for a detailed account of the narrowing of the immunities since 1980, and one of the matters of concern raised by the Committee was that ‘strikes are only lawful if they have been approved by a majority of workers, through a secret ballot, the legal provisions regarding which are highly complex and limiting.’⁸³⁵

No satisfactory response was received.

In 1995 the Committee greeted the Trade Union Reform and Employment Rights Act 1993 [TURERA] requirements for unions to provide employers with notice that a ballot is to be held (s18, inserting 226A TULR(C)A 1992), notice of ballot result (s19, inserting 231A) and notice that industrial action is to be taken (s21, inserting 234A) demanding what was effectively a list of union members in each establishment (234A(3)(a)) – as ‘a threat to freedom of association.’⁸³⁶ In 2004 New Labour amended the legislation to remove the requirement for names, but what are now the section 226A Trade Union and Labour Relations (Consolidation) Act [TULR(C) A] requirements for notice of a ballot remain in the view of the Committee ‘excessive.’⁸³⁷ As yet unresolved, the matter has become one the Committee’s pet subjects, and in Conclusions XX-3 2014 it reiterated its view ‘that 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 [234A TULR(C) A] before taking action.’ Indeed, it is arguable that strike notice should

⁸³³See chapter 3.

⁸³⁴Conclusions XX-3. This has been a regular theme of the Committee’s since 1991. In Conclusions XVI-1 (2003) the ECSR concluded that ‘the onerous procedural requirements and the serious consequences for unions where industrial action is found not to be lawful’ places the UK in breach of 6(4).

⁸³⁵Conclusions XII-I 1991.

⁸³⁶Conclusions XIII-3 1995, Article 5.

⁸³⁷Conclusions XVI-I 2003, Article 5.

not be permitted to suspend industrial action at all, but be incorporated into a pre strike conciliation period, or post ballot ‘window’ when the result has been communicated to the employer, and arrangements being finalised between the workforce and the union.⁸³⁸

In the Direct Request adopted by the CEACR in 2012,⁸³⁹ the committee, while welcoming the new approach to the consideration of applications for labour injunctions which rely on minor procedural errors made by trade unions established in *RMT v Serco* [2011],⁸⁴⁰ referred to the danger of imposing ‘unrealistic burdens on unions and their officers,’ and to TUC complaints that ‘the legislation continues to impose intolerable demands on trade unions.’

Nevertheless, the grip of procedural ‘blue tape’ has tightened since 2014.

In a Direct Request in 2016 the CEACR noted, in the light of the long standing criticism of the UK procedures by the ESRC, that the proposal for 14 days’ strike notice, (previously 7 days) in the Bill that became the Trade Union Act 2016,⁸⁴¹ and the requirement for postal voting factors in further delays, imposing, according to the TUC, *de facto* strike notice of as much as 42 days.⁸⁴² The extended strike notice was explicitly allied to proposals to change the law to allow agencies to hire out strike breaking labour.⁸⁴³ The extension was presented solely, and unashamedly, as an initiative to help employers make preparations to mitigate the effects of a proposed strike.

This was the context in which the Committee considered the restriction of the ballot mandate in the Act to six months (or nine months with the agreement of the employer), which means that in long running disputes, unions are now required to hold more than one ballot. This replaced the previous requirement for the industrial action proposed to commence within 4 weeks of the ballot (the period could be extended to 8 weeks with the agreement of the employer), after

⁸³⁸The IER Manifesto for Labour Law (2016 & 2018) proposes a 3 day strike notice period.

⁸³⁹ On Convention No.87 - Published 102nd ILC session (2013).

⁸⁴⁰ See chapter 3.

⁸⁴¹ S8 Trade Union Act 2016, substituted ‘14th day before the starting date’ of the industrial action in s234A TULR(C)A 1992.

⁸⁴² Direct Request (CEACR) – adopted 2016, published 106th ILC session (2017) C87.

⁸⁴³ The proposals were not included in the Bill. Prior to 8 June 2017 they remained ‘under consideration, although there is no prospect that the proposals will be implemented by the current minority Tory government.

which the union had an open ended mandate to continue with the action.⁸⁴⁴ While the CFA has held that a legal requirement for a second ballot if the industrial action has not commenced 3 months after the initial ballot does not amount to an infringement of freedom of association,⁸⁴⁵ the new mandate provisions were held by the CEACR to be a breach of Article 3 of Convention No.87. Arguably they must also be considered breaches of Article 6(4) of the European Social Charter and Article 8 of the UN Covenant on Economic, Social and Cultural Rights. Workers must be permitted ‘to call a strike for an indefinite period if they so wish,’ and the CEACR expressed ‘its *concern* that the expiration of the ballot mandate coupled with the extensive notice requirements and the current context of a postal ballot’ are a breach of Convention No.87. The Committee indicates, however, that should electronic balloting be allowed then the necessity to refresh the mandate may be permissible.⁸⁴⁶

The wholly unconvincing pretence of union ‘democratisation’ arguably unravelled as long ago as 1988 when s3 of the Employment Act (now s65 TULR(C)A 1992) withdrew the right of unions to discipline members who ignore ballots in favour of taking industrial action,⁸⁴⁷ and sections 10 (now incorporated into s222 TULR(C)A 1992) and 11 of the Act made ‘post entry’ closed shop Union Membership Agreements unworkable.⁸⁴⁸ With dismissal no longer a potential lawful consequence of non membership, much of the sting was taken out of expulsion.⁸⁴⁹ In 1990 the threat of exclusion was similarly neutralised when non membership could no longer be used as a lawful justification for the rejection of an applicant for a job.⁸⁵⁰

⁸⁴⁴A ‘trip’ provided by sections 7 and 8 of the Employment Act 1990.

⁸⁴⁵2018 *Compilation* para 814.

⁸⁴⁶Direct Request (CEACR) – adopted 2016, published 106th ILC session (2017) C87.

⁸⁴⁷ The ILO held this to be a breach of Article 3 C87 in a 1989 Observation by the CEACR published 76th ILC session (1989) .

⁸⁴⁸S 10 made industrial action to enforce membership unlawful and s11 made action by employers to enforce membership of employees actionable.

⁸⁴⁹ What are now sections 174 – 177 TULR(C) A, further limiting the freedom of unions in this sphere, followed in 1993. The 1988 Act (by section 1) attempted to add the appearance of democratisation by making the failure by a union to adhere to the balloting rules grounds for an application by a member entitled to vote in such a ballot to the High Court to ‘make such order as it considers appropriate’ to oblige the union to repudiate the industrial action in question. This appears to have been a response to the accusation that the requirement for strike ballots was intended to benefit employers rather than trade union members, and had the no doubt ideologically pleasing virtue of permitting individual union members to undermine and halt collective action. No such applications were ever made, and s1 has been repealed.

⁸⁵⁰Employment Act 1990, section 1.

The 1988 Act, which was the main concern of the ECSR in 1991, also required unions to ballot each individual workplace separately where members were employed at different establishments under the same employer, increasing the opportunity for solidarity to be undermined – a lesson very likely drawn from the effect the dissension of large numbers of Nottinghamshire miners had on the national strike of 1984-1985.⁸⁵¹ While that provision can plausibly be justified as the promotion of democratic principles, the requirement for ballots to be conducted by post cannot.

Between 1984 and 1993 secret balloting could lawfully take place in the workplace, but the Major government, by s17 of TURERA 1993, obliged unions to use postal voting, which not only slows the process but ensures the lowest possible participation at the greatest expense to the union – it will be recalled that the 1993 Act also withdrew the balloting subsidies provided by the Employment Act 1980. These, I would argue, are *prima facie* breaches of the obligations considered above, intended to undermine, rather than to bolster, trade union democracy, and they are a key element of the quorum and majority threshold package ultimately introduced to Parliament in the first year of the first Tory government [2015] since 1997.⁸⁵²

We can then see that, with regard to the pre-strike procedures, the record of the UK is less a matter of non compliance with treaty standards, than one of active opposition to those standards. Since 1984 numerous procedural requirements have been imposed making it increasingly difficult for workers to take lawful industrial action and correspondingly easier for employers to find procedural irregularities on which to base applications for labour injunctions. The government has been found to be in breach of its international and regional treaty obligations on the following grounds:

- The procedures are overly complex;
- The requirement for ‘ballot notice’ is disproportionate;
- The required period of strike notice is disproportionately long;

⁸⁵¹ See Beckett and Hencke, *Marching to the Fault Line*, 2009, pp219-225.

⁸⁵² *Unfinished Business* is the title of Norman Tebbit’s 1991 memoir of the political events of 1979-1990, and many Tories saw their 2015 election victory as an opportunity to ‘finish the job’ of destroying the unions.

- Only postal voting is permitted;
- Workers are obliged to re-ballot every six months to sanction lawful industrial action.

The requirements for postal voting, ballot notice and strike notice are not unlawful *per se*, despite their arguably obvious adoption as devices to undermining the opportunity to take lawful strike action. However, taken together, and with the other lesser procedural hurdles, like the necessity to produce a copy of the ballot paper for the employer 3 days before the ballot, which do not delay the industrial action, they compound the ‘chilling effect’ on the exercise of the right to strike created by the procedures as a whole.⁸⁵³

2) Quorums and majorities

A quorum of 50% or less is a lawful restriction on the right to strike. Although failure to reach such a quorum will invalidate a strike ballot, votes not cast must not be allowed to affect the result, and consequently the lawfulness of majority thresholds is questionable. It is certainly the case that any threshold must be pegged at less than 50%, and if, as is the case now in certain sectors in the UK,⁸⁵⁴ a majority threshold of 40% coupled with a quorum of 50% serves to make it ‘very difficult or impossible’ to secure a majority sufficient to sanction lawful industrial action then that threshold is unlawful, unless the sector concerned can be considered to provide an essential service. The current position of the ILO supervisory bodies on the matter is unclear, but it seems likely that states seeking to impose lawful restrictions on the right to strike in non essential services through the imposition of balloting thresholds are limited to choosing either a quorum of up to 50% or a majority threshold of 25% plus one vote.

⁸⁵³ The term coined by Hayes, Novitz and Reed 2011, *op cit*, to characterise the inhibiting effect on industrial action of the *Viking* and *Laval* series of cases discussed in chapter four.

⁸⁵⁴ Section 3, Trade Union Act 2016. On the new procedures see R Dukes and N Kountouris, ‘Pre-strike Ballots, Picketing and Protest: Banning Industrial Action by the Back Door?’ (2016) 45 *ILJ* 337, pp 345-355.

As with the approach taken in relation to procedures in general by the ILO supervisory bodies the overarching question is whether lawful strike action is made 'difficult' in all the circumstances.⁸⁵⁵

The ILO's CFA holds that a quorum 'may be considered acceptable.'⁸⁵⁶ A quorum of two thirds would, however, appear in most circumstances to be unacceptable.⁸⁵⁷ The CEACR considers that in general a quorum in excess of half of the workers involved is excessive, and two thirds "could restrict the right to strike in practice."⁸⁵⁸

A Bulgarian requirement for a majority threshold of more than half of those eligible to vote has been held by the CFA to be 'excessive as it could excessively hinder the possibility of carrying out a strike,'⁸⁵⁹ a restriction on the right to take industrial action considered to be compounded when large numbers of workers are to be balloted.⁸⁶⁰ In that case the Committee requested the government "to take the necessary steps to amend this provision so that account is taken only of the votes cast." In a Direct Request adopted by the CEACR in the same year the Committee of Experts held that states "should ensure that account is taken only of the votes cast and the required quorum and majority are fixed at a reasonable level."⁸⁶¹

In 2000 the UN CtT ESCR expressed concern about an Egyptian law 'denying workers the right to strike without the approval of two thirds of a trade union's membership.'⁸⁶² In 2003 it expressed similar views about the Russian Labour Code imposing 'undue restrictions on the right to strike, by requiring a quorum of two

⁸⁵⁵ See above and 2018 *Compilation* paras 789 & 790, On overall difficulty, as well as the imposition of pre-strike 'test balloting' procedures to allow employers to determine how likely it is that a strike will be sanctioned, see Direct Request (CEACR) C87 Adopted 1998 (Australia), published 87th ILC session (1999).

⁸⁵⁶ 2018 *Compilation* para 809.

⁸⁵⁷ *Ibid*, para 810..

⁸⁵⁸ 1994 ILO General Survey, para 147; 2018 *Compilation* paras 805-808.

⁸⁵⁹ 2018 *Compilation* paras 806 - 808, based on Report No. 316, June 1999, Case No.1989 (Bulgaria), complaint date: 6 October 1998. para 190. The Bulgarian legislation required members and non members to be balloted. At para 806 the *Compilation* additionally cites 357th Report Case No.2968 [Australia 2010] para 225 and 371st report Case No.2988 [Qatar 2014] para 850, instances where the CFA reminded the Governments that procedural requirements should be reasonable and not impose substantial limitations on industrial action and that a requirement that more than half of the workers involved must support the action is excessive.

⁸⁶⁰ The Trade Union Bill TUC Submission to the ILO Committee of Experts 2015 (paras 38 and 39) cited the CEACR Observations of 1998 and 2014 (Bulgaria), to argue that the proposed UK thresholds breached C87.

⁸⁶¹ Direct Request (CEACR) C87 Adopted 1998 (Australia), published 87th ILC session (1999).

⁸⁶² UN CtT ESCR: CO Egypt, E/C.12/1/Add.44 (23 May 2000), para 18.

thirds of the total number of workers and the agreement of at least half of the workers present at the meeting to call a strike,' therefore requiring at least one third of the workforce to vote in support of a strike – imposing an effective majority threshold of one third plus one vote.⁸⁶³

A Guatemalan requirement for 50% plus one of those (other than workers in 'positions of confidence or who represent the employer') of all working in an enterprise to be in favour of any subsequent strike action prompted the CEACR in a 2002 observation to require the Government to amend the legislation to ensure that 'only the votes cast...be counted in calculating the majority, and that the quorum...be set at a reasonable level.'⁸⁶⁴

In 2016 the CEACR noted with approval that a new Bill submitted to the Guatemalan Congress had sought to replace 'the requirement of a majority of all workers in the enterprise, with a requirement of the majority of the workers present at the assembly specially convoked for the strike ballot,'⁸⁶⁵ again indicating that abstentions should not be allowed to influence whether or not a majority can be permitted to sanction lawful industrial action.

The CEACR has stated that although the imposition of a quorum and a requirement that voting be conducted by post are not in principle at variance with Convention 87

'the ballot method, the quorum and the majority required should not be such that the exercise of the right to strike becomes very difficult, or even impossible in practice...If a member State deems it appropriate to establish in its legislation provisions which require a vote by workers before a strike can be held, it should ensure that account is taken only of the votes cast and that the required quorum and majority are fixed at a reasonable level.'⁸⁶⁶

⁸⁶³UN CttESCR: CO Russian Federation E/C.12/1/Add.94 (12 December 2003), para 21.

⁸⁶⁴Observation (CEACR) on Convention 87 – adopted 2002, published 91st ILC session (2003), para 3. The 2012 CEACR General Survey is muddled about this case and appears to mistakenly laud the requirement for a 50% plus one as a requirement for a simple majority, rather than as a majority threshold.

⁸⁶⁵And, incidentally, the elimination of the prohibition on solidarity strikes: 'Legislative issues' in Observation (CEACR) on Convention 87-adopted 2016, published 106th ILC session (2017).

⁸⁶⁶Freedom of Association and Collective Bargaining. International Labour Conference 81st Session 1994, General Survey on the Reports on Convention 87 and 98 by the CEACR, para 170.

In 2016 when considering the UK thresholds imposed by the Trade Union Act the Committee confirmed that it 'has consistently considered that a quorum of 50% is indeed within such limits of reasonableness.'

A quorum of 50%, of course, imposes an effective majority threshold of 25% plus one vote of all those entitled to vote. Any threshold beyond this limit, is, I would argue, *prima facie* unreasonable, a disproportionate restriction on the right to strike, thresholds

'incompatible with the generally accepted principle that the public authorities should refrain from any interference which would restrict the right of workers' organisations to organise their activities and to formulate their programmes, or which would impede the lawful exercise of this right.'⁸⁶⁷

In the UK the Trade Union Act requires a quorum or 'turn out' of 50% of those entitled to vote, and in certain 'important public services' [IPS],⁸⁶⁸ where the majority is in favour of strike action for that majority to comprise at least 40% of those entitled to vote for the strike to be lawful. To sanction a strike where 1,000 workers are entitled to vote, 500 must 'turn out.'

In an IPS of those 500 voting workers 400 must vote in favour – an 80% majority. If 700 vote then there must be a 58% majority. Only if 800 vote (80% of those entitled to vote) will a simple majority suffice to sanction a strike. Clearly the balloting thresholds in an IPS restrict the right to strike more effectively than those in the Russian Federation, and can be said to be a clear breach of Article 8 UNICESCR. However, if that IPS is an 'essential service' then, as is considered in the following section, the restriction on the right to strike is permissible providing satisfactory compensatory measures are set in place.

Moreover, the cases cited above involved the consideration of workplace voting or balloting practices which encourage high levels of participation. In the UK where postal voting ensure low levels of voting the effect of the 40% majority threshold is to make in most circumstances a *de facto* majority requirement of in excess of 50% whenever there is a turn out of less than 80% (see above) so the

⁸⁶⁷ 2018 *Compilation* para 739 – a reference, of course, to Article 3 C87.

⁸⁶⁸ The IPSs are listed rather than defined. For the detail on IPSs see the five sets of 'Important Public Services Regulations 2017': Border Security (No.136); Transport (No.135); Fire (No.134); Education (No.133) and Health (No.132).

CFA is likely to hold the IPS threshold a breach of the Article 3 obligations. They cannot be considered as being aimed 'solely at ensuring respect for democratic rules within the trade union movement.' Nor can they plausibly be said to be reasonable.

The Government claims that the primary intention behind the 40% threshold is to save the public inconvenience, and disingenuous as that claim almost certainly is, it is nevertheless an unequivocal admission that the requirements are not solely intended to promote trade union democracy but instead are intended to make lawful strike action difficult or impossible.

Crucially, votes not cast should not influence the outcome of the ballot, and the thresholds also effectively make votes that are not cast 'no' votes, contrary to the ILO supervisory bodies' interpretation of the application of Convention No.87 to balloting procedures cited above.

One often forgotten – if obvious - aspect of trade union democracy is that those who do not wish to go on strike can and will vote not to go on strike. In binary yes/no ballots votes that are not cast should not be allowed to influence the decision. Moreover in the UK unions are not permitted either to expel or discipline members who ignore a democratic vote and refuse to take industrial action.⁸⁶⁹ As a consequence a UK strike ballot now determines only whether the action proposed is lawful or unlawful, and the quorum and majority threshold arguably therefore serve only to restrict the right to strike and thus be said to be only loosely related to trade union democracy. When the trips and hurdles are surmounted, whether the industrial action takes place at all, and the effectiveness of that action, depends on the inclination of the members, and, of course, the inclination of workers who do not belong to the union,⁸⁷⁰ not specifically on the result of the ballot.

On the question of whether the exercise of the right to strike has become difficult or impossible, recent research has shown that a very substantial proportion of the

⁸⁶⁹Of course, even if they were since the effective end of the post entry closed shop in 1988 dismissal for non membership of a trade union is a prima facie case of automatic unfair dismissal.

⁸⁷⁰Who arguably will generally, almost invariably, if not subject to employer interference, walk out with their colleagues.

strikes that have taken place in recent years would not have received lawful sanction had the thresholds then been in place.⁸⁷¹

Practical experience is as yet comparatively slight - the relevant regulations came into force on 1 March 2017 - but it does appear that the thresholds will make strike action very difficult, if not quite impossible.

An analysis of ballots and industrial action undertaken since that date by Gregor Gall of Bradford University, suggested that the picture likely to emerge is that fewer strike ballots are being held, and that unions are testing the likely outcome with unofficial ballots before deciding to commit to an official ballot. Full voting figures had been released on only thirteen ballots. Nine ballots resulted in support for industrial action with the thresholds satisfied,⁸⁷² while the other four saw similar large majorities in favour of industrial action where 'turn outs' short of the 50% ensured that despite the democratic mandates for action, any subsequent strikes will be unlawful.⁸⁷³

None of these ballots related to essential services, although six were called by the RMT and two by the NUT ballots in support of action in the rail transport and child education sectors. Nevertheless, rail workers, and head teachers and teachers at public sector schools (see the IPS Regulations 2017 above) are deemed to provide Important Public Services, and the combined 50%/40% thresholds applied.⁸⁷⁴

Levels of participation are known to be closely related to the method of voting, so the decision to retain the compulsory postal voting system, and not to permit the electronic voting methods which are known to secure better levels of participation,⁸⁷⁵ further discredits the government's claim to be promoting trade union democracy.

⁸⁷¹R. Darlington and J. Dobson, *The Conservative Government's Proposed Strike Ballot Thresholds: The Challenge to the Trade Unions*, (Liverpool, IER, 2015).

⁸⁷²Three RMT ballots, three UNITE, two NUT and one EIS FELA (Scottish Further Education Lecturers).

⁸⁷³Three RMT ballots, and one UNISON ballot. One of the RMT ballots saw a call for a strike defeated 48%/52% while the proposal for action short of a strike received 65% support. A 'turn out' of 48% undermined the result.

⁸⁷⁴Three of the RMT ballots fell foul at the first hurdle, with a 48% turn out on two occasions and 34% on the third, although the overwhelming majority voted to take industrial action in each ballot. The NUT ballots, and the other RMT ballots fulfilled both the quorum and the majority threshold.

⁸⁷⁵See 'The government should let union members choose how they vote' by The Electoral Reform Society (www.electoral-reform.org.uk).

KD Ewing has suggested that the 40% threshold could be considered 'reasonable,'⁸⁷⁶ within the meaning of the ILO jurisprudence, if electronic voting was introduced, and therefore compatible with Convention No.87.⁸⁷⁷ The ILO Conference Committee has requested the UK government to review voting methods with the social partners in the light of the quorum and the thresholds, indicating that Ewing might well be right.⁸⁷⁸ In the relevant Observation the CEACR noted 'that these changes come within a cumulated content of heavy procedural requirements, including the fact that balloting must be by postal voting only and that secret work place voting and electronic voting is not allowed.' This may indicate that a change of heart by the government on balloting procedures might prompt the Committee to take a more relaxed view of the thresholds. However, I would argue that the ILO jurisprudence is emphatic enough about not allowing abstentions to influence the result of a ballot, and the CEACR has requested 'the government to review this matter with the social partners concerned with a view to modifying the Bill so as to ensure that the heightened requirement of support of 40% of all workers does not apply to education and transport services,'⁸⁷⁹ and since the Act has been passed has requested the UK Government 'take the necessary measures' to that end.⁸⁸⁰

The 50% quorum, the maximum permissible, combined with the 40% majority threshold can thus be said to be lawful only in respect of strike ballots called by workers in essential services. Even with electronic voting, in non-essential sectors the effective requirement for at least 80% of those voting to vote in favour of industrial action could still be said to be excessive – difficult to achieve in practice and consequently unreasonable. Moreover, it could be argued that requiring a majority threshold to be surmounted when a quorum has been met is always

⁸⁷⁶ In the sense that lawful industrial action would no longer 'difficult,' or 'impossible.' Len McCluskey is on record as having stated that UNITE would be 'comfortable' with the new thresholds if electronic voting is permitted (Pete Glover, *Marxist World*, 'Electronic Voting in the Trade Unions', issue 1, April 2016). Glover cited the words used by McCluskey in an 'offer' to David Cameron over the provisions of the TU Bill (*The Guardian* October 2015). It would be inaccurate to suggest that McCluskey would drop his opposition the imposition of the quorum and the threshold if electronic voting was permitted.

⁸⁷⁷ On the confusion of the ILO jurisprudence and the question of what is reasonable in the light of voting procedures see KD Ewing's response to questions from Rishi Sunak MP Cons. Richmond, Yorks, Col 128 Public Bill Committee Trade Union Bill, 15 October 2015.

⁸⁷⁸ ILO 105th Session Geneva 2016 Committee on the Application of Standards at the Conference, Part I, Convention 87 Individual cases, 22 [p87].

⁸⁷⁹ Observation (CEACR) C87 adopted 2015, published 105th ILC session (2016).

⁸⁸⁰ Observation (CEACR) – adopted 2016, published 106th ILC session (2017) C87: 'Follow up to the conclusions of the Committee on the Application of Standards (International Labour Conference, 105th Session, May – June 2016)'

unreasonable, unless the majority threshold permits a simple majority to sanction a vote in favour of action – in which case the threshold is irrelevant. To go beyond that would be to allow votes not cast to affect the result. Of course, if sufficient numbers of those entitled to vote choose not to vote, then the quorum will not be met, and the ballot will be invalid. There is, however, no question that a 50% quorum is within the principles of freedom of association, and the rule that abstentions should not affect the result relates only to the use of majority thresholds.

We can, therefore, draw the following conclusions:

- The Trade Union Act's 40% majority threshold which allows abstentions to affect the result of the ballot, and in practice makes lawful industrial action difficult to achieve in non essential services, is a breach of Convention No.87.
- In the event of electronic or workplace balloting becoming permissible in the UK then, although it may no longer be considered difficult or impossible to take industrial action in 'important public services', the ILO jurisprudence indicates that a majority threshold pegged at a level which permits abstentions to affect the outcome of any ballot, *should* be held by the ILO supervisory bodies to breach Convention No.87. With the 50% quorum requirement in place the effect is to make the application of the majority threshold either unlawful or redundant.
- The 40% majority threshold is lawful only in respect of strike ballots called by workers in essential services, and only then if compensatory mechanisms are set in place.

4) ESSENTIAL SERVICES

These are defined by the ILO as: ‘services whose interruption would endanger the life, personal safety or health of the whole or part of the population.’⁸⁸¹ The police and the armed forces are the archetypal essential services, and they may lawfully be denied the right to organise. Public servants providing essential services, whether employed by the state or otherwise, may not be denied the right to organise, but can be denied the right to bargain collectively and the right to strike. Other workers may be denied the right to bargain collectively and to strike during periods of acute national emergency. In all cases appropriate compensatory mechanisms must be provided. In non-essential, but nevertheless important public services, the right to strike may be restricted to the extent that a minimum service can be lawfully demanded, although this must not be such as to disproportionately blunt the effectiveness of the strike weapon. Longer periods of strike notice to permit arbitration and conciliation are similarly permissible in such circumstances.

Convention 87 Article 9, ILO Constitution Article 19(8), and Convention 98 Article 5, permit states to prohibit the police and armed forces from organizing, bargaining collectively and taking strike action. This license extends to civilians employed in similarly ‘essential’ roles in the civil service and public sector – and occasionally in private firms operating in the public sector. Hence:

CFA 2006 Digest of Decisions (para 572):

‘Recognition of the principle of freedom of association in the case of public servants does not necessarily imply the right to strike’;

Convention No.98 on the right to organise and bargain collectively:

‘This Convention does not deal with the position of public servants engaged in the administration of the State...’ (Article 6);

⁸⁸¹ 2006 *Digest*, para 583.

CFA on Convention No.151 on collective bargaining in public services:

‘All public service workers other than those engaged in the administration of the state should enjoy collective bargaining rights.’⁸⁸²

Compulsory arbitration and regular reviews of terms and conditions are required where collective bargaining and strike action has been restricted;⁸⁸³ all affected must be compensated for by efficient and impartial mechanisms for the resolution of complaints and disputes.⁸⁸⁴ Where such procedures are adopted then, if the parties are required to pay for those services, then those ‘costs must be reasonable’ they must ‘not inhibit the ability of the parties, in particular those with inadequate resources, to make use of the services.’⁸⁸⁵

Questions of ‘mediation’ versus conciliation do not trouble the CFA as long as the body concerned is impartial.⁸⁸⁶ Where strikes are totally prohibited the CFA states that conciliation and arbitration procedures are not appropriate.⁸⁸⁷ Regular statutory reviews of terms and conditions, and the use of comparator trades and professions would appear to be the appropriate approach.

In this context Wedderburn commented that ‘The definition of ‘emergency’ is as much a political decision as anything else,’⁸⁸⁸ and the range of services deemed to be essential by a state requires careful monitoring.

Industries and Services deemed to be essential by the CFA:⁸⁸⁹ Hospitals; electricity and water supply; telephone services; police and armed forces; fire brigade; prison service; school canteen workers and cleaners;⁸⁹⁰ air traffic control. In the

⁸⁸² 2018 *Compilation* para 886, emphasis added.

⁸⁸³ 1994 General Survey para 258. See 2018 *Compilation* paras 816 & 818. Para 817 cites 374th Case No.3084: ‘compulsory arbitration is acceptable in cases of acute national crisis.’

⁸⁸⁴ See 2018 *Compilation* para 768 in relation to a prohibition of strikes where a collective agreement is in force. in relation to compensatory mechanisms for the public servants and essential services, paras 827 & 853. ‘Adequate, impartial and speedy’ and ‘independent’ (paras 856 & 859); ‘provision of joint conciliation procedures and where, and only where, conciliation fails, the provision of joint arbitration machinery’ (para 860).

⁸⁸⁵ 2018 *Compilation* para 862..

⁸⁸⁶ *Ibid*, para 863.

⁸⁸⁷ *Ibid*, para 861.

⁸⁸⁸ KW Wedderburn, ‘Labour Law and Labour Relations in Britain’, *British Journal of Industrial Relations*, 1972, p274.

⁸⁸⁹ 2018 *Compilation* para 840..

⁸⁹⁰ The CFA consider that children should attend school during teachers’ strikes (supervised by a minimum service provision) and expect a square meal be provided, and a clean environment maintained.

latter case any disruptive industrial action at all is, with good reason, regarded as a danger to life.

Industries and services that have been deemed by the CFA *not to be* essential services ‘in the strict sense of the term’ – effectively considered by the Committee to be merely *important public services*:⁸⁹¹

Radio and TV; the ‘petroleum sector’ and the production transport and distribution of fuel;⁸⁹² ports; banking; computing services for state tax services; ‘metal and mining sectors’;⁸⁹³ ‘transport generally’; aircraft pilots; post office;⁸⁹⁴ refuse collection; refrigeration; hotels; construction; agriculture; food supply and distribution; government printing services and education.⁸⁹⁵

A useful example is Case No.3107, a complaint against the government of Canada brought before the CFA by the Amalgamated Transit Union (ATU), Local 113,⁸⁹⁶ last reported on in March 2016. The Toronto bus and road passenger services (the Toronto Transit Commission) had been classified as ‘essential services’ after ‘decades of hard bargaining by the ATU to improve protection and working conditions for its members.’⁸⁹⁷ The Committee stated that:

‘the transport of passengers and commercial goods is not an essential service in the strict sense of the term; however...a minimum service in the

⁸⁹¹2018 *Compilation* para 842. Also included in this category by the CFA were department stores; ‘pleasure parks’; state alcohol, salt and tobacco monopolies; car manufacture and mineral water bottling. While these were justifiably seen not to be essential services their inclusion is not helpful to an illustration of the distinction between what is essential and what are merely important industries and services. It is extraordinary that these services (the salt and water bottling aside) were even discussed in the context of essential services.

⁸⁹²The energy sector is considered non essential by CESCRO Bulgaria, E/C.12/Add.37 (8 December 1999), para 10.

⁸⁹³The UN CttESCR concur: CO Zambia, E/C.12/1/Add.106 (23 June 2005), para 20.

⁸⁹⁴The UN CttESCR concur: CO Bulgaria E/C.12/Add.37 (8 December 1999), para 16.

⁸⁹⁵Although ‘principals and vice principals can have their right to strike prohibited’ (2006) para 588.

⁸⁹⁶ILO. Governing Body 326th Session, Geneva, 10-24 March 2016 [GB.326/INS/12] 377th Report of the Committee of Freedom of Association paras 215-244.

⁸⁹⁷Ibid, paras 218-19. However see ILO. Governing Body 328th Session, Geneva, 23 November – 10 December 2016 [GB.32/INS/14] 380th Report of the Committee of Freedom of Association paras 18-26. Case No.2654 (Canada) relating to *Saskatchewan Federation of Labour v Saskatchewan* [2015] 1 SCR 245. Following the decision of the Canadian Supreme Court the statutory definition of essential services in the State legislation was dispensed with on grounds that it breached the right to strike protected by the Canadian Charter of Rights and Freedoms. In future the social partners will negotiate and between them to decide which services are to be deemed essential and what amounts to a minimal service. Disputes will be resolved at a special tribunal.

event of a strike can be justified...a substantial restriction or total prohibition of strike action would not appear to be justified...⁸⁹⁸

The prospect of economic damage was the impetus for the action taken by the Canadian government, and the union drew the attention of the Committee to the right to strike in the ILO jurisprudence,⁸⁹⁹ and to the established rule that the economic damage caused by the interruption of a service is not relevant to the question of whether a service is deemed to be essential.⁹⁰⁰

Teaching is not an essential service either. As the CFA has stated:

‘the right to strike can only be restricted and even prohibited in the public service...or in the essential services in the strict sense of the term... the Committee considers that workers in education are not covered by the definition of essential services or of the public service exercising the powers of public authority.’⁹⁰¹

The CEACR has held that teachers are not public servants ‘exercising authority in the name of the State,’ thus denying governments the opportunity to argue that the exceptions in C98 and C151 permitting certain public servants to be denied the right to bargain collectively.⁹⁰² The Canadian government has attempted to justify its failure to ratify C98 to the UN CttESCR on the grounds that it would oblige some Canadian states to permit those engaged in providing essential services the right to strike.⁹⁰³ The Committee was unimpressed, and noting ‘that some categories of workers, such as public servants and employees of crown

⁸⁹⁸ Ibid, para 240. The Committee referred to the 2006 Digest paras 522,576,587,607 (2018 Compilation paras 753,826,842,867 and 893).See also 199 General Survey, paras 152- 164.

⁸⁹⁹ The right to strike is ‘an intrinsic corollary to the right to organise protected by Convention 87’: Case No.1954, para 405 [cited in para 230 of Case No.3107]

⁹⁰⁰Case No. 1963, para.230; para 230 of Case No.3107. See also 2006 digest para 592.

⁹⁰¹CFA 272nd Report, Case No.1503 [Peru 1990] paras 116-117, cited in 277th Report, Case No.1528 [Germany 1991] para 285, which refers to the 1985 Digest and the cases cited therein, and points out that ‘this approach is consistent with other instruments adopted on the international level on the issue, in particular clause 84 of the ILO/UNESCO Recommendation concerning the Status of Teachers of 1966’ [para 286]. However, para 844 of the 2018 *Compilation* states that although education is not an essential sector, the CFA ‘has held that principals and vice-principals can have their right to strike restricted or even prohibited.’

⁹⁰² The Committee cited para 130 1994 General Survey, and the CEACR Observation of 2010.

⁹⁰³UN CttESCR: Canada Reply to IssuesE/C.12/CAN/Q/5/Add.1 (27 April 2006), para 1. The Canadian government suggested that although denied the right to strike these workers were free to engage in collective bargaining: ‘while entitled to engage in collective bargaining on a voluntary basis,[they] are excluded from industrial relations legislation.’

corporations, public school teachers and college and university professors are excluded from the right to strike in Canada,' it found that 'the explanation provided by the State party that these workers provide essential services, is not satisfactory under articles 4 and 8 of the Covenant.'⁹⁰⁴

The perceived opportunity to withhold the key elements of freedom of association from teachers and civil servants presented by the ILO 'administration of the state' lacuna has been grasped by numbers of states. In 2001 the UN CttESCR interceded on behalf of South Korean teachers, 'concerned that they are still prevented from participating in collective bargaining and in strikes,'⁹⁰⁵ and in 2009 expressed concern about the ban on unions and strikes in universities,⁹⁰⁶ and the Committee has condemned disproportionate bans on civil service strikes on a number of occasions.⁹⁰⁷ In 2001 the UN CttESCR told the Japanese government that it 'strongly urges' it to repeal and narrow bans on right to strike, and to limit the prohibition of strikes in the civil service 'to those responsible for keeping order,' drawing a distinction between those who keep order and those whose absence may be expensive and inconvenient but not actually dangerous,⁹⁰⁸ recommending 'in line with the ILO, that the State party ensure the right of civil servants and public employees not working in essential services to organise strikes.'⁹⁰⁹ In 2009 it told the South Korean government that it 'recommends...lifting the restrictions imposed on the right of civil servants to join a trade union and to strike in conformity with the comments made by the [ILO] Committee of Experts' in 2001.⁹¹⁰

Although ostensibly following the lead of the ILO the UN CttESCR have arguably contradicted the ILO to extent by finding 'health services' to be non essential,⁹¹¹ and 'communications' non essential,⁹¹² although it seems likely that if called upon

⁹⁰⁴ UN CttESCR: CO Canada E/C.12/CAN-CO/4-5, 22 May 2006, para 19.

⁹⁰⁵ UN CttESCR: CO Republic of Korea E/C.12/1/Add.59, 21 May 2001, para 19.

⁹⁰⁶ UN CttESCR: CO Republic of Korea E/C.12/KOR/CO/3, 17 December 2009, para 19.

⁹⁰⁷ UN CttESCR: CO Benin E/C.12/1/Add.78, 5 June 2002, para 35.

⁹⁰⁸ UN CttESCR: CO Japan E/C.12/1/Add.67, 24 September 2001, para 21.

⁹⁰⁹ *Ibid*, para 48. The Committee has also expressed its dissatisfaction with the restrictions on the right to strike in the Indian civil service, a matter similarly related to uncertain distinctions between essential services and important services: India Concluding Observations E/C.12/IND/CO/5 (8 August 2008), para 23.

⁹¹⁰ UN CttESCR CO Republic of Korea E/C.12/KOR/CO/3, 17 December 2009,, para 19.

⁹¹¹ UN CttESCR CO Bulgaria E/C.12/Add.37, 8 December 1999, para 16.

⁹¹² UN CttESCR CO Zambia E/C.12/1/Add.106, 23 June 2005, para 20.

to consider telephone services specifically the Committee would concur with the CFA.

More puzzlingly the UN CttESCR also consider the fire brigade to be a non essential service: In addition to general restrictions on right to strike in Zambia ‘and in particular, the procedural requirements which make it difficult to effectively exercise the right to strike,’ the Committee expressed equal concern about ‘the broad definition of the concept of ‘essential services’ which exceeds the ILO definition by including fire fighting, sewerage and certain mining operations.’⁹¹³ In 2004 the Committee found Chilean legislation to be similarly ‘too broadly defined.’⁹¹⁴ The Committee has drawn attention to the need for states to be specific about the sectors considered to provide essential services, and in 2008 expressed concern about arrangements in India, and ‘the complete ban on strikes under the Essential Services Maintenance Act which does not prescribe an official list of the essential services that falls under its purview.’⁹¹⁵

As for the UK, the Committee has confined itself to recommending ‘that the State part undertake a thorough review of the new trade union act 2016 and take all necessary measures to ensure that, in line with its obligations under article 8 of the Covenant, all workers enjoy their trade union rights without undue restrictions or interference.’⁹¹⁶ Useful British examples to illustrate the delineation of essential services are prison officers and those employed by HMRC. Only prison officers (some employed by private security firms), and certain customs officers, are prohibited from taking strike action. All in HMRC are engaged in the ‘administration of the state’ but only those engaged in certain roles in border control can be said to provide essential services. The crucial difference is that prison officers and border security are said to ‘keep order,’ a distinction the UK Prison Officers’ Association learnt when they took a case to the CFA in 2004.⁹¹⁷

⁹¹³ Ibid.

⁹¹⁴ UN CttESCR CO Chile E/C.12/1/Add.105, 1 December 2004, para 19.

⁹¹⁵ UN CttESCR CO India E/C.12/IND/CO/5, 8 August 2008, para 23.

⁹¹⁶ UN CttESHR: CO United Kingdom E/C.12/GBR/CO/6 14 July 2016, para 39.

⁹¹⁷ CFA case No.2383 (United Kingdom) – complaint date 20 August 2004, Effect given to the recommendations of the Committee and the Governing body – Report No.38, November 2005, see para 314. The Committee however requested that the government establish the appropriate mechanisms in the private sector to compensate for the

The government may legitimately choose not to engage in collective bargaining with these workers, although they must be permitted to organize, their collective voice must be heard, and compensatory arrangements must be set in place.⁹¹⁸

The ILO also distinguishes between essential and merely important services and industries where minimum service provisions are required. Minimum staff levels – possibly full staffing and a complete prohibition on strike action - will be required in the first category. In the latter category certain ‘necessary staff’ may be obliged to remain at work when a strike is in progress.⁹¹⁹ In some industries the necessary staff would be required from the outset, in others, only if the strike was prolonged. The CFA acknowledges that a strike in a non essential service may if it goes on long enough be legitimately seen as a strike in an essential service,⁹²⁰ with refuse collection being the obvious example.⁹²¹

The unions should, according to the CFA, help define ‘necessary staff,’ and arrange such cover with employers and governments. Strikes cannot, however, be allowed to become ineffective through the imposition of ‘over generous’ minimum staffing.⁹²² In some industries it has been accepted by the CFA that, questions of the importance of service or industry aside, during a strike ‘staff necessary for the safety of machinery and equipment and the prevention of accidents’ might be obliged to remain at work.⁹²³

Failure to co-operate in providing a minimum service cannot justify a court deciding ‘to suspend or revoke a trade union’s legal status.’⁹²⁴ The CFA has held

limitation on the right to strike, and improve the current mechanisms overseen by the Prison Service Pay Review Body. Awards should be binding and the government should ensure that the Body is seen to be impartial and independent (ibid). In Report No.359, March 2011 the CFA ‘noted with regret that little progress had been made’ on implementing its recommendations (para 159).

⁹¹⁸ See also CEACR 1994 General Survey, Para 127.

⁹¹⁹ 2018 *Compilation* paras 865-870. Concerns raised with the CESCR about health workers and nurses being denied the right to strike were assuaged when it was explained that the restrictions on their right to strike were only a requirement for a minimum service to be provided during periods of industrial action (UN CttESCR: Reply to Issues E/C.12/CAN/Q/5/Add.1 27 April 2006 para 8).

⁹²⁰ 2018 *Compilation* para 837..

⁹²¹ Ibid, Para 847..

⁹²² Ibid, paras 866-883. Disputes over such matters to be resolved by an independent body, a definitive ruling to be obtained through a judicial hearing (paras 884 and 885).

⁹²³ Ibid, para 865.

⁹²⁴ Ibid, para 905.

that ‘measures taken by the authorities to ensure the performance of essential services should not be out of proportion to the ends pursued or lead to excess.’⁹²⁵

A requirement for a minimum service provision has been considered justified by the CFA in cases concerning underground railways, over ground railways, ferries to island communities, postal services, banking, the mint, the petroleum industry, refuse collection, education, and road haulage.⁹²⁶ However, while strikes in these sectors ‘might disturb the normal life of the community.’ the CFA concedes that they could not be said to ‘cause a state of acute national emergency’ obliging the state to send in the army, recruit replacement staff or prohibit workers in those sectors from striking to defend their ‘occupational and economic interests.’⁹²⁷ In truly essential sectors a state might be justified in taking such steps.⁹²⁸

The use of the armed forces, or ‘another group of persons’, as substitutes can only be justified for “the operation of services or industries whose suspension would lead to an acute crisis.”⁹²⁹ The UN CttESCR in 2004 noted ‘with concern’ that the Chilean Labour Code ‘provides for the possibility of the replacement of striking workers.’⁹³⁰

We can conclude then, that while workers in the non essential services listed as ‘important public services’ by the Trade Union Act 2016 may be subject to minimum service requirements, and to extended strike notice,⁹³¹ they cannot lawfully have their right to strike restricted by the majority threshold, and therefore:

⁹²⁵ Ibid, para 967.

⁹²⁶ Ibid, paras 886-905.

⁹²⁷ Ibid, para 923 & 924

⁹²⁸ Ibid, para 926.

⁹²⁹ Ibid, para 922.

⁹³⁰ UN CttESCR: CO Chile E/C.12/1Add.105, 1 December 2004, para 19.

⁹³¹ See section 1, p3.

- The Act must be amended to define and list essential services subject to the threshold in accord with its treaty obligations and exclude the education and transport sectors.⁹³²
- Suitable mechanisms must be introduced to compensate for the restriction on the right to strike in the essential sectors where the thresholds apply – tripartite Wage Council style bodies, regularly reviewing terms and conditions of employment and determining the outcome of disputes.

4) Secondary action & political strikes

The opportunity for workers to take secondary, sympathy or solidarity industrial action in the pursuance or furtherance of objectives beyond the improvement of their own immediate terms and conditions of employment should be guaranteed by states. This embraces action taken by workers not in dispute with their immediate employer in support of workers engaged in industrial disputes elsewhere, and actions intended to impress upon governments and employers the economic and social priorities of workers - which would include civil rights protests. Industrial action 'of a purely political character,' however, falls outside of the ILO principles of freedom of association, and the ambit of regional and international economic and social rights instruments, and past form suggests that it is unlikely that any state prohibiting political strikes would be found to have breached the European Convention of Human Rights, or the UN International Covenant of Civil and Political Rights.

The CEACR and the CFA, have long held that where sympathy strikes are concerned 'workers should be able to take such action, provided the initial strike they are supporting is lawful.'⁹³³ In regard to the UK the CFA and CEACR has for years held the prohibition on secondary action in sections 223 and 224 of TULR(C)A to breach C87,⁹³⁴ and the government has long been required 'to take

⁹³² See n. 866 on p247 above for the regulations which currently list 'IPS's where workers are bound by the thresholds.

⁹³³ 1994, General Survey, para 168.

⁹³⁴ Most recently in Observation (CEACR) – adopted 2012, published 102nd ILC session (2013).

the necessary measures to ensure that secondary action and socio economic protest action are not prohibited.⁹³⁵

Nevertheless the CEACR ‘has always considered that strikes that are purely political in character do not fall within the scope of freedom of association.’⁹³⁶ In accord with Hepple and Kahn-Freund’s perceptive 1972 analysis of the UK position,⁹³⁷ the Committee does, however, allow that

‘it is often impossible to distinguish in practice between the political and occupational aspects of a strike.’⁹³⁸

Outside of the public sector, all specifically political action will almost invariably take the form of secondary industrial action, while in the public sector action that is politically motivated is almost impossible to distinguish from that which is occupational.

We saw in chapter two that between 1980 and 1990 the law was changed to prohibit sympathy strikes and ‘blacking.’ In 1980 the government restricted such action to the immediate customers and suppliers of the employer with which the workers were in dispute. The 1982 Employment Act made much secondary action unlawful by narrowing the definition of a trade dispute to cover only a dispute between workers and their immediate employer, and limiting lawful industrial action to that which is undertaken ‘wholly or mainly in relation’ to a trade dispute rather than the previous less specific requirement that the action be merely ‘in connection’ with a trade dispute. In 1989 the CEACR noted that:

‘Taken together, these changes appear to make it virtually impossible for workers and unions lawfully to engage in any form of boycott activity, or ‘sympathetic’ action against parties not directly involved in a given dispute.’⁹³⁹

In 1990 all secondary and solidarity action was unequivocally prohibited.

⁹³⁵ ‘Effect given to the recommendations of the committee and Governing Body’ – Report No. 349, March 2008, Case No.2472 (United Kingdom) – Complaint Date: 16 December 2005. The case related to the law of Jersey, but is, of course, just as applicable to the situation in Great Britain and Northern Ireland.

⁹³⁶ 1994, General Survey, para 165.

⁹³⁷ Chapter 3.

⁹³⁸ Ibid.

⁹³⁹ Observation (CEACR) – adopted 1989, published 76th ILC session (1989).

The CFA anticipates that workers should be able to use strike action to seek ‘solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers.’⁹⁴⁰ So, while the ‘day of action’ against the policies of the first Thatcher administration in the *Express Newspapers* case could certainly be said to be protected by the principles of freedom of association,⁹⁴¹ a consideration of the *BBC* case by the CFA would turn on whether the apartheid policy in South Africa could be said to be of ‘direct concern’ to the technicians.⁹⁴²

Secondary action is of colossal importance in combating the worst excesses of globalization. As Wedderburn observed in 1972 as the US multinationals started to have a serious impact;

‘the flexible power of the multinational employer makes it less than ever appropriate for national systems of labour law to curtail ‘solidarity’ or ‘sympathy strikes and similar industrial action by unions with interests that spread with the movement of capital across frontiers...’⁹⁴³

The waters here have been muddied somewhat by the fact that the CFA has held that laws against boycotts (boycotts or blackings, like political strikes in the private sector, are almost inevitably instances of secondary action) cannot be seen as restrictions of trade union freedom.

Strikes in protest at the outcome of cases brought to determine the legality of such actions also fall outside of the protection afforded freedom of association by

⁹⁴⁰ 2018 *Compilation* para 578. See also General strikes or strikes relating to socio-economic issues and restrictions on civil service strikes – Definitive Report – Report No.378, June 2016 Case No.3111(Poland) – Complaint date: 14 January 2015.

⁹⁴¹ See 2018 *Compilation* paras 780 and 781 for the explicit sanction of a 24 hour general strike intended to persuade a government to adopt policies to raise the minimum wage, decrease prices and reduce unemployment.

⁹⁴² 2018 *Compilation* paras 761: “strikes of a purely political nature and strikes decided systematically long before negotiations take place do not fall within the scope of the principles of freedom of association” and para 762: “...trade unions should be able to have recourse to protest strikes, in particular where aimed at criticising a government’s economic and social policies.”

⁹⁴³ Wedderburn, ‘Labour Law and Labour Relations in Britain’, 1972, *op cit*, p289.

the CFA,⁹⁴⁴ for while protest strikes against certain laws are protected by the ILO jurisprudence, those aimed at judicial decisions, or the judiciary, are not. So protest strikes against judicial activism, decisions like *Rookes v Barnard*,⁹⁴⁵ would not fall to be protected - the prohibition of such strikes would not breach the ILO principles of free association. Arguably, this stance is itself a political 'trade off' or *quid pro quo*:

Trade unions 'without prejudice to the freedom of opinion of their members...should limit the field of their activities to the occupational and trade union fields; the government, on the other hand, should refrain from interfering in the functioning of trade unions.'⁹⁴⁶

Unions are expected to confine themselves to economic and social matters of direct concern to their members as workers, and governments should not intervene in a union's legitimate activity because of an objection to its political affiliation.⁹⁴⁷

The CFA does not sanction laws or other measures brought to bear against wholly political strikes or activities – it merely considers them to be beyond its brief:

'Political matters which do not impair the exercise of freedom of association are outside the competence of the Committee.'⁹⁴⁸

However, much as Hepple and Kahn-Freund saw UK voluntarism permitting in many circumstances strikes which elsewhere would have been considered wholly political and unlawful, the CFA appears to allow that an occupational element in what might otherwise be seen as a political action will be likely to make any attempt to restrict it a concern of the CFA.⁹⁴⁹ A similarly grey area is the use of the 'boycott.'

⁹⁴⁴2018 *Compilation* para 767..

⁹⁴⁵ See chapter 2.

⁹⁴⁶2018 *Compilation* para 721.

⁹⁴⁷ *Ibid*, para 722.

⁹⁴⁸*Ibid* para 314.. This separation of economic and social objectives from politics appears to have its origins in the 35th Session of the ILC in 1952 where the principle adopted was that involvement in politics beyond matters immediately of concern to members was likely to damage the trade union movement.

⁹⁴⁹ 248th Report of the CFA, Case No.1381 (Ecuador 1987), para 412. The CFA cited a 1972 case from its 127th Report, Case No.660 (Mauritania 1971), para 303: 'the prohibition of strikes designed to to coerce the Government, if they are non-occupational in character, does not constitute an infringement of the principles of

‘Blacking’ – declaring an employer to be ‘black’ and instituting a boycott - has proved an important weapon in UK recognition disputes. The potent action taken against DC Thomson in 1952 was a boycott,⁹⁵⁰ and the use of the boycott in the late 1970s to secure union membership agreements notably by the Society of Lithographic Artists, Designers and Engravers (SLADE) proved outstandingly successful.⁹⁵¹ The CFA is noticeably circumspect in its approach to the use of the boycott, and it seems likely that the reason for this is the comparative ease with which this devastating tactic can be employed – workers don’t have to make the sacrifices that a strike, or even a ‘work to rule’, involves:

‘The boycott is a very special form of action which, in some cases, may involve a trade union whose members continue their work and are not directly involved in the dispute with the employer against whom the boycott is imposed. In these circumstances, the prohibition of boycotts by law *does not necessarily* appear to involve an interference with trade union rights.’⁹⁵²

Although couched in cautious terms the CFA is telling us that only certain boycotts will fall outside of the protection of the ILO jurisprudence - in most cases a boycott will fall within the principles of freedom of association. For example, in two Australian CFA cases, one from 2000, concerning ‘boycott prohibitions’ as well as prohibitions on trade unionists calling for sympathy action,⁹⁵³ and another concerning the introduction in 2004 of more severe penalties for engaging in ‘sympathy action and secondary boycotts’,⁹⁵⁴ the CFA held the prohibitions to breach C87. The cautious use of language in the *Digest* indicates that a distinction is drawn between the use of the boycott in a dispute, and activities of unions like SLADE, which on occasions ordered their members to black the work of firms in their industry where there was no actual dispute. The employees in the firms targeted by SLADE were often members of other unions, engaged on contracts

freedom of association..freedom of association in the case of public officials does not necessarily imply the right to strike.”

⁹⁵⁰See chapter 3.

⁹⁵¹ See ‘the Leggatt Report’ of 1979: Andrew Leggatt QC ‘Report of Inquiry into Certain Trade Union Recruitment Activities,’ Cmnd 7706. See also TNA STAT 14/4652 ‘Government report of an inquiry into certain trade union recruitment activities conducted by Andrew Leggatt QC: HMSO involvement’, 1979 which was released to the National Archives in 2005.

⁹⁵² 2018 *Compilation* para 748.

⁹⁵³CFA 320th Report, case No.1963 [Australia 1998]

⁹⁵⁴CFA 353rd Report, case No.2326 [Australia, 2004]

negotiated by collective agreement. The intention was to coerce the employer into requiring those workers into joining SLADE.⁹⁵⁵

The Committee of Experts has been more forthright than the CFA. In 1989 the CEACR stated that although it ‘has never expressed any decided view on the use of boycotts as an exercise of the right to strike,’ it took the view

‘that where a boycott relates directly to the social and economic interests of the workers involved...the boycott should be regarded as a legitimate exercise of the right to strike. This is clearly consistent with the approach the Committee has adopted in relation to sympathy strikes.’⁹⁵⁶

As ever, the European Social Right Committee’s approach to the matter is less nuanced than that adopted by the ILO supervisory bodies. The ECSR holds the blanket ban on secondary action to breach the UK’s obligations under Article 6(4) of the European Social Charter.

In 1991 the Committee noted that ILO CEACR Observations in 1989 and 1991 had recorded that the immunities of trade union officials and members had been eroded over the previous 10 years,⁹⁵⁷ and in 1993 the ECSR noted that ‘significant reductions in the number of working days lost as a result of industrial disputes’ appeared to reflect the new restrictions on the right to strike imposed by the Employment Act 1990 – the complete ban on secondary action, extending to the prohibition on picketing anywhere other than one’s own place of work, and the withdrawal of the immunity for strikes in support of dismissed unofficial strikers.

In Conclusions XIV-I 1998 the ECSR reiterated past criticisms to conclude that the combined effect of the ‘step by step’ legislative war of attrition on the right to strike ‘are such as to constitute a restriction of this right going beyond what can

⁹⁵⁵See Leggatt 1979, *op cit* and K Barlow, *The Labour Movement in Britain from Thatcher to Blair* (Frankfurt am Main, Peter Lang, 1997) pp83-86.

⁹⁵⁶ I have removed the words ‘in either or both of the original dispute and the secondary action, and where the original dispute and the secondary action are not unlawful in themselves’ from this passage because the CFA clearly cannot mean that if secondary action is contrary to domestic law then a secondary boycott is not a ‘legitimate exercise of the right to strike.’

⁹⁵⁷Conclusions XII-I 1991.

be justified under the terms of Article 31 [proportionate restrictions to protect the rights of others]... the United Kingdom is in breach of the Charter’:

‘All forms of picketing (other than at the worker’s own place of work) and other secondary action is unlawful.’

‘Lawful ‘trade disputes’ are narrowly defined making it difficult to ensure that the strike is lawful.’

‘Trade unions may take action only against ‘their’ employer, making it impossible for them to take action, inter alia, against the company which is the true employer, but which may work through an intermediary company.’⁹⁵⁸

‘Strikes are only lawful if they have been approved by a majority of workers, through a secret ballot under very restrictive conditions.’

‘An employer may seek an interlocutory injunction in cases where a strike may be unlawful and that such an injunction can be granted provided the employer can show that there is a case to answer, without the court deciding the issue on the merits.’

The Committee expressed their hope that these matters would be addressed New Labour’s forthcoming White Paper on industrial relations – what became *Fairness at Work*. They were, of course, to be disappointed, and the blanket prohibition on secondary action has become, along with the freedom given employers to lawfully dismiss strikers, a mainstay of article 6(4) Conclusions on UK reports. In 2014 the Committee recalled that in XVII-1(2004);⁹⁵⁹ XVIII-1(2006), and XIX-3(2010) it had

‘concluded that the scope for workers to defend their interests through lawful collective action was excessively circumscribed in the UK....the

⁹⁵⁸ See for example, *Dimbleby & Sons v NUJ* [1984] ICR 386.

⁹⁵⁹ Actually February 2005. The Committee had made much the same criticisms of the same matters before that in Conclusions XVI-1 2003. It ‘banged on’ for years about 235A of TULR(C)A 1992 until it finally learned that the right for 3rd parties to obtain an injunction against industrial action had only been exercised once in the highly unusual *P v NASUWT* [2003] ICR 386(HL).

prohibition of secondary action, the limitation of lawful collective action in s244 TULR(C)A 1992 to disputes between workers and their employer constitutes an interference with the right of workers guaranteed in Article 6(4) of the Charter.⁹⁶⁰

The failure of the Charter and Convention jurisprudence to accord on the question of secondary action in *UNISON v UK* and *RMT v UK* has already been noted. It will, however, be recalled that the Strasbourg court held that 11(1) protects the right to strike, which includes the right to take secondary action, and held that it is the wide margin of appreciation accorded states in industrial relations matters, rather than the 11(2) 'limitation clause,' which permits the UK to impose the blanket ban on secondary action.

Ewing and Hendy, writing in 2011 as the impact of the integrated approach to the new wide interpretation of A11 ECHR in their IER pamphlet *Days of Action The legality of protest strikes against government cuts*, have however, argued that Article 11(2) should permit political strikes.

Their thesis has yet to be tested at Strasbourg, and in the light of the *RMT* case, the labour movement may best be advised to postpone any likely test case until the court starts to indicate that it is prepared to take a more robust approach to UK breaches of its Article 11 obligations.

We can however conclude that, despite the reluctance of the ECtHR to intervene to protect the right to strike in the UK, the position in relation to secondary action is clear:

- The ban on occupational secondary action is an unequivocal breach of the UK's obligation to protect freedom of association.
- While the prohibition of political strikes cannot be said to be a breach of international and regional standards, the failure to guarantee workers the

⁹⁶⁰ Conclusions XX-3 on Article 6(4) 2014.

opportunity to lawfully engage in industrial action to protect their economic and social interests beyond immediately occupational concerns is not only unarguably a breach of the obligation to guarantee freedom of association. Particularly where the prohibition of secondary picketing is concerned it is also a *prima facie* breach of the obligation to guarantee the freedoms of expression, conscience and assembly.

5) Picketing

‘Firmly but peacefully inciting other workers to keep away from their workplace cannot be considered unlawful.’⁹⁶¹ While the police must be allowed to keep order, and enforce the law peaceful persuasion must also be permitted, and the criminal law should not be invoked against those engaged in peaceful picketing. ‘Zero tolerance’ policing is not conducive to good industrial relations, and is inappropriate on picket lines where robust verbal exchanges are to be expected. The freedom of assembly and expression recognized in the UNICCPR and ECHR dictates that numbers of pickets present, providing that the highway is not obstructed, should not be a factor in determining whether pickets be dispersed or restrained, unless the circumstances are such that there is a genuine risk of physical harm or a serious threat to public order.

The rights to freedom of thought, conscience, and expression are guaranteed by Articles 9 and 10 of the European Convention. Freedom of assembly and association are guaranteed by Article 11. All are engaged by UK legislation which restricts the right to picket and to protest beyond that necessary for the maintenance of public order. The specific and discriminatory application of such measures against those participating in industrial disputes will engage Article 14.

Restrictions on picketing are restrictions on the right to strike. Following a complaint brought under the European Social Charter collective complaints procedure against the Government of Belgium, the ECSR warned that a restriction

⁹⁶¹ 2018 *Compilation* para 941.

on picketing which does not violate the rights of others is ‘a restriction on the right to strike itself, as it is legitimate for striking workers to attempt to involve all their fellow workers in their action.’⁹⁶² We saw in the previous section that the prohibition in the UK of secondary picketing was seen by the Committee as one of the factors which led to the conclusion that the UK government is in breach of Article 6(4).

The right to picket – and the right to strike - is guaranteed by Articles 3 and 10 of Convention No.87, and, as noted in the previous section, the UK prohibition of secondary picketing, where the primary action is lawful, is a breach of the Convention. The ILO Committee of Experts has stated on many occasions that ‘restrictions on strike pickets and workplace occupation should be limited to cases where the action ceases to be peaceful.’⁹⁶³ Questions of trespass aside, where the pickets are employed should not be a consideration.

The CFA takes a similar view,⁹⁶⁴ holding that only where there is violence and coercion of non-strikers can the police be justified in intervening,⁹⁶⁵ and the CFA have held that the police and security forces should only act in ‘grave situations where law and order is seriously threatened,’⁹⁶⁶ where there is a ‘genuine threat to public order.’⁹⁶⁷ Two CFA cases brought by Moroccan trade unionists in response to police intervention in industrial disputes in the 1990s, Cases 1691 and 1712⁹⁶⁸ helped establish the basic, simple principle that ‘firmly but peacefully inciting other workers to keep away from their workplace cannot be considered unlawful.’⁹⁶⁹

⁹⁶²European Trade Union Confederation v Belgium [2012] 54 E.H.R.R. SE21, paras 35 and 36.

⁹⁶³ 1994 General Survey, para 174. Cited in ‘ILO Principles concerning the Right to Strike,’ Bernard Gernigon, Alberto Otero, Horacio Guido, (Geneva, ILO, 2000).

⁹⁶⁴ See 2018 *Compilation* paras 930 and 936-941.

⁹⁶⁵ *Ibid*, paras 939 & 940.

⁹⁶⁶ *Ibid*, para 931-933.

⁹⁶⁷ *Ibid*, para 935.

⁹⁶⁸ 299th report CFA 1995 *Complaints against the Government of Morocco presented by UMT Moroccan Labour Union and IUF International Union of Food, Agricultural, hotel, Restaurant, Catering, Tobacco and Allied Workers.*

⁹⁶⁹ 2018 *Compilation* para 939.

The 2006 CFA Digest of Decisions states that: ‘Allegations of criminal conduct should not be used to harass trade unionists by reason of their union membership or activities.’⁹⁷⁰ It goes on to recall that:

‘Measures depriving trade unionists of their freedom on grounds related to their trade union activity, even where they are merely summoned or questioned for a short period, constitute an obstacle to the exercise of trade union rights.’⁹⁷¹

The detention of trade unionists for defending ‘the interests of workers constitutes a serious interference with civil liberties in general...a serious obstacle to the exercise of trade union rights and an infringement of freedom of association.’⁹⁷²

In a recent Spanish CFA case, Case No.3093, the Committee, ‘frequent recourse to criminal proceedings in the area of collective labour relations does not help maintain a stable and harmonious system of labour relations.’⁹⁷³

With regard to South Korea the UN CttESCR in 2009 expressed great concern

‘about the frequent prosecution of workers...and the excessive use of force demonstrated against striking workers, mainly on the grounds of article 314 of the Penal Code regarding ‘obstruction of business.’ The Committee reiterates its concerns that trade union rights are not adequately guaranteed in the State party (art.8)’⁹⁷⁴

In 2001 the Committee had held the Korean stance to be a clear negation of Article 8, and the criminalisation of strike activities ‘completely unacceptable.’⁹⁷⁵ UK law has a surfeit of criminal offences designed to be employed against pickets; the police have wide powers which can be used to disperse pickets, and to justify their arrest. In *Piddington v Bates* [1961] Lord Parker established that a police

⁹⁷⁰ Para 41, which cites para 43 of the 1996 *Digest* (para 88 of the 2018 *Compilation*) and 305th Report, Case No. 1773, para.365; 306th Report, Case No.1884, para.700; and 327th Report, Case No.2018, para.117.

⁹⁷¹ 2018 *Compilation* paras 122 & 139.

⁹⁷² *Ibid*, paras 123,-125, 131 and 135.

⁹⁷³ Para 500

⁹⁷⁴ UN CttESCR: CO Republic of Korea, E/C.12/KOR/CO/3, 17 December 2009, para 20.

⁹⁷⁵ UN CttESCR: CO Republic of Korea, E/C.12/1/Add.59 21 May 2001, para 20.

officer was permitted to use his discretion and make arrests if he believed that it was necessary to do so in order to limit the numbers of pickets present and prevent a breach of the peace.⁹⁷⁶ During the Miners' Strike of 1984-85 the police made full use of these common law powers, and the case provided authority for the arrest pickets on their way to a picket line.⁹⁷⁷ Reliance by both the police and the courts on the Picketing Code of Practice, which states that 'in general the number of pickets should not exceed six at any entrance' (para 56) has meant that the standard maximum number of pickets tolerated for policing and injunctive purposes is frequently only six. While that may be an appropriate limit in certain circumstances, its adoption as a standard requires review in the light of government obligations to guarantee freedom of assembly, association and expression.

The Public Order Act 1986, passed in the wake of the Miners' Strike, provided a wide array of offences, many obviously – if not explicitly - aimed at picketing. Section 14 'Imposing conditions on public assemblies' provided the police with new powers to supervise marches and assemblies. Violence and intimidation, as well as much less serious conduct, was targeted with a number of new statutory offences. Some were based upon old common law offences, and others were wholly new. All convicted of either causing violent disorder (Section 2); affray (Section 3); fear or provocation of violence (Section 4) or harassment, alarm or distress (Section 5) are at risk of very large fines and/or long prison sentences.

This formidable array of offences was augmented in 1994 by the addition of sections 14A, 14B and 14C to the 1986 Act by sections 70 and 71 of the Criminal Justice and Public Order Act, supposedly intended to stop illegal 'raves' but which permit the police to obtain an order to prohibit an assembly on a public road of 20 or more persons. These powers are explicitly referred to in the 2017 Picketing Code of Practice (para 55). A new section 4A offence of causing 'Intentional harassment, alarm or distress' was also added to the 1986 Act by the 1994 Act. Ostensibly implemented to tackling 'stalking' an ancillary intention was clearly to get as close as possible to criminalising peaceful, if forceful, picketing, with those convicted of this summary offence liable to a unlimited fine and up to 6 months

⁹⁷⁶ *Piddington v Bates*, 1 WL 162. In that case the police drew the line at two pickets

⁹⁷⁷ See *Moss v McLachlan* [1985] IRLR 76

imprisonment. It appears that it was an attempt to provide an alternative to section 241 of the Trade Union and Labour Relations (Consolidation) Act 1992.

Section 241 (formerly section 7 of the Conspiracy and Protection of Property Act 1875),⁹⁷⁸ represents the original pre 1980s British approach to the boundaries of peaceful picketing, one which is in accord with the ILO jurisprudence. This carefully drafted piece of legislation – a typically British bid to liberalise by making clear what is unlawful and reining in the common law - attempts to ensure that workers are able to picket lawfully, effectively straddling the line between civil and criminal liability for unlawful conduct on the picket line. The section deals with ‘*Intimidation or annoyance by violence or otherwise,*’ and criminalises actions which go beyond peaceful picketing, like ‘watching and besetting’, behaviour intended to *compel* the victim to take a particular course of action. But because these offences are also torts, ‘certain classes of acts which were previously wrongful,’⁹⁷⁹ in order to secure a conviction, the tort, as an essential element of the offence, must be complete. Therefore the attempt to compel must have been successful,⁹⁸⁰ allowing, when the section is applied as it should be, a distinction to be drawn between robust persuasion and genuinely threatening behaviour. S.241 was last invoked in an industrial context in 2014. In that case a London Underground ‘cover supervisor’ had crossed an RMT picket line and, later that day, had complained to the British Transport Police that one of the pickets, Mr Mark Harding had shouted at him and called him a ‘scab.’ He was initially charged with a public order offence but that was substituted by section 241. Four months later he was acquitted – the supervisor had crossed the picket line and gone into work. Even if there could have been said to have been an attempt to compel, which given the facts is doubtful, it was unsuccessful. The magistrate had no alternative but to acquit.⁹⁸¹

Judicial interventions in the 1890s diminished the liberalising influence of the 1875 Act,⁹⁸² and s2 of the Trade Disputes Act provided the necessary clarification,

⁹⁷⁸There are slight differences between section 7 of the 1875 Act and section 241 – and amendments were made to the old Act between 1875 and 1992 – but they are essentially the same.

⁹⁷⁹Fletcher Moulton LJ in *Ward, Lock & Co Ltd v Operative Printers’ Assistants’ Society* [1906] 22 TLR (CA) 327 at 329. This view was approved by the Court of Appeal after the 1906 Trade Disputes Act in *Fowler v Kibble* [1922] 1 Ch.487.

⁹⁸⁰*DPP v Fidler* [1992].

⁹⁸¹Harding was arrested and held for over 12 hours. See WWW.defendtherighttoprotest.org/rmt-activist-mark-harding-found-not-guilty-an-important-win-for-the-right-to-picket/. See also *Morning Star* 3 June 2014.

⁹⁸²Particularly *Lyons v Wilkins*, an 1896 Court of appeal decision.

providing that 'It shall be lawful for one or more persons acting on their own behalf or on behalf of a trade union' to picket peacefully in contemplation or furtherance of a trade dispute. It has often been argued that s2 of the TDA, and subsequent formulations of the application of the immunities to picketing, provided effective protection from the strict application of the offence of obstruction of the highway.⁹⁸³ A more accurate appraisal would be that:

'It shall be lawful' means in practice that 'the police may permit.'⁹⁸⁴

When one of the leading picketing cases (*DPP v Broom* [1974]) was considered at first instance, the magistrates were of the opinion that pickets were permitted to obstruct delivery vehicles, albeit briefly, in order to communicate information. Understandably this belief was shared by most trade unionists and most police officers - that is what picket lines are for. The Lords, however, held otherwise, and after Labour returned to office in February 1974 serious consideration was given to giving pickets an explicit right to stop vehicles in the legislation which replaced the Industrial Relations Act 1971.⁹⁸⁵ Although the proposal arguably meant no more than the adjustment of the immunity that had been conferred by the 1906 Act to accommodate the age of the motor vehicle, it was vehemently opposed and did not become law. Such a law would have had the virtue of bringing UK law into line with the government's obligations under the ECHR.

The CFA stated in 2007 that:

'It might be very difficult to hold a picket without some obstruction of a path, road, entrance or exit to premises and if these are unlawful...the union could not picket lawfully. It is our view that to give no immunity from such liability runs the risk of breaching the right to freedom of expression in Article 10 or freedom of assembly in Article 11 of the ECHR.'⁹⁸⁶

⁹⁸³ See, for example, Collins, Ewing and McColgan *Labour Law*, 2014, p691. A 1925 circular to Chief Constables by Tory Home Secretary John Anderson, issued in 1926 as *Intimidation and Molestation*, Cmnd.2666, and referred to by the Attlee cabinet in 1947, outlines the interaction of s7 and s2 and specifically states that these do not permit obstruction of highway. The strikers and the police in the case considered in 1947 (the Savoy Hotel dispute) did appear to believe the strikers could obstruct the highway (TNA HO45/25592).

⁹⁸⁴ Chris Ralph, *The Picket and the Law*, 1977, p9.

⁹⁸⁵ TULRA 1974.

⁹⁸⁶ Report No.346 June 2007, Case No.2473 (United Kingdom) [the case concerned Jersey] complaint date 16 December 2005, para 1501.

In the civil courts, in contrast to the application of section 241, it is only necessary for the tort of intimidation to be threatened before interlocutory relief can be obtained. Nevertheless the judiciary have taken account of the provisions of the ECHR to adopt a suitably nuanced approach.

The leading picketing case is *Gate Gourmet London Ltd v T & GWU* [2005].⁹⁸⁷ The report records events during a strike at Heathrow Airport – some of which I was witness to – and as well as a guide to the application of the civil law, the case illustrates the current approach taken by the police in such circumstances. The peaceful persuasion employed by the strikers was robust in the extreme. The police could easily have made arrests for any number of public order offences, and for obstruction of the highway, but they maintained a very low profile.⁹⁸⁸ The judge took into account the pickets’ rights to freedom of expression, assembly and association, and the terms of the injunction granted permitted the picketing to continue, without, it should be noted, restricting the numbers of pickets.

The current cautious approach of the police, and the courts, extends beyond picketing to ‘leverage’ demonstrations related to trade disputes.⁹⁸⁹ In the committee stage of the Trade Union Bill Deputy Chief Constable Hall of the National Police Chiefs’ Council and Steve White Chair of the Police Federation told assembled MPs that:⁹⁹⁰

‘there is no real need for the police to be involved with industrial disputes...we would wish to avoid it if we can.’

‘It would be a travesty if we ended up going back to the days of the 1970s and ‘80s when rightly or wrongly, the police service was seen as an arm of the state.’

The laws nevertheless remain on the statute book should the police and their *de facto* masters in the Home Office choose to return to the industrial and political policing of the 1980s. Workers should not be obliged to depend on the liberal

⁹⁸⁷ EWHC 1889 (QB)

⁹⁸⁸ I saw the pickets on an almost daily basis during the dispute.

⁹⁸⁹ Which, it can be argued, illustrate the artificiality and unworkable nature of the restriction of picketing to the worker’s own place of work, particularly when one considers that the law in the UK still permits pickets to persuade workers employed elsewhere to breach their contracts of employment – the familiar example being that of the lorry driver persuaded not to a cross picket line.

⁹⁹⁰ Public Bill Committee, 15 October 2015 col 93-99.

consciences of judges and police chiefs for the protection of their rights. The 2016 ILO Conference Committee on the Application of Standards called upon Governments to ensure that workers are able to engage freely in peaceful actions *both in law and in practice*, without the risk of legal sanction.⁹⁹¹

The picketing provisions of the Trade Union Act 2016 arguably had their origins in efforts to combat ‘leverage’ protests.⁹⁹² However, in the absence of any real support for very radical restrictions on freedom of assembly to rein these protests in, and in the face of much opposition to the Bill,⁹⁹³ freedom of assembly and association on the picket line were instead further eroded with what the Government could ‘get away with’ in the pragmatist manner of the Tories of the 1980s and 1990s.⁹⁹⁴ The new provisions, requiring the presence of an identifiable picket supervisor armed with a letter of authorisation, are apparently intended, where possible, to effectively define those workers present as unauthorised secondary pickets, and increase the opportunities for employers to obtain labour injunctions.⁹⁹⁵

These new picketing ‘procedural obstacles’ are, however, creating unwelcome publicity for the Government. The interest of the Committee of Experts has been heightened by allegations of police surveillance of trade unionists submitted to it by the TUC, and by the discriminatory nature of restrictions on freedom of assembly aimed only at trade union protestors. Twice now the Committee has requested the Government for information on the handling of the information picket supervisors are required to hand over to the police, its impact on industrial action, and any complaints made about its collation and use. The Committee has

⁹⁹¹Provisional Record No.16, Part 2, 105th Session of the ILC, May-June 2016. See also 2006 Digest of Decisions, para 629.

⁹⁹² See Michael Ford and Tonia Novitz, ‘An Absence of Fairness...Restrictions on Industrial Action and Protest in the Trade Union Bill 2015’ (2015) 44 *ILJ* 522: ‘Huddled around a brazier near the workplace in a dispute about wages, the strikers are pickets; if they march down the road they magically transform themselves into protestors’ (p545) See particularly 545-457.

⁹⁹³ See the House of Commons Library Briefing Paper on the Trade Union Bill, CBP 7297, 7 September 2015 By Doug Pyper on the background to the picketing provisions (section 7.2); B Carr QC; *The Carr Report: The Report of the Independent Review of the Law Governing Industrial Disputes*, 2014; the Government Consultation *Tackling intimidation of non –striking workers*, the outcome of which was published on the day the Trade Union Bill was introduced to Parliament, and R Dukes and N Kountouris 2016, *op cit*, 355-360.

⁹⁹⁴ See chapter two.

⁹⁹⁵ The Bill initially sought to require the picket supervisor to show the letter to any police officer who asked to see it or ‘any other person who reasonably asks to see it’ (Cl.9(6)). As the Act stands, although members of the public have been cut out of the picture, in the event of the absence of such a supervisor, or a refusal to show such a letter to a police officer or the employer, those present become ‘unauthorised’ pickets,’ giving the employer grounds for an injunction, much as if the secondary picketing prohibited since 1980 (see chapter two) was taking place.

also requested ‘any information’ the Government can supply ‘on the blacklisting of individuals engaged in lawful picketing,’ and invited it to comment on allegations of the use of ‘undercover’ police to gather information on trade unionists.⁹⁹⁶

On the basis of the above, UK law should therefore be amended to ensure that:

- Secondary picketing is lawful
- Pickets are permitted to stop vehicles entering and leaving premises in order to communicate information
- Picketing be excluded from the embrace of the s14 Public Order Act 1986 police powers to impose conditions on and prohibit public assemblies.
- The *de facto* general default maximum of six pickets for policing and injunctive purposes is addressed, arguably by changes to the Picketing Code of Practice with specific references to the right to freedom of assembly, association and expression, and by the issue to the judiciary of fresh guidelines by the Lord Chancellor

6) LIABILITY FOR ENGAGING IN INDUSTRIAL ACTION

Workers should incur no legal liability, or any unfavourable treatment, for exercising their right to take industrial action, and they should be permitted to return to their job after a strike has concluded.

We have seen that in the UK not only is there not an effective right to strike, there is no real freedom to strike merely, in certain restricted circumstances, a suspension of tortious liability. As a consequence, a worker engaged in industrial action is still theoretically vulnerable to a claim for breach of contract, and, if unofficial, or unlawful, action is taken, the worker can be summarily dismissed for

⁹⁹⁶ Observation (CEACR) adopted 2018, published 108th Session (2019) on C87, and Observation (CEACR) adopted 2016, published 106th Session (2017) on C87

that breach. Members and officials, as well as workers who are not members of the union or unions involved, are also theoretically vulnerable to claims in tort when unlawful industrial action is procured, and since 1982 trade unions have been vulnerable to such claims *in practice*. So a union engaging, for example, in sympathy or secondary action, or otherwise lawful industrial action, following a ballot in which the requisite majority threshold was not attained, can be held liable in damages for the subsequent losses incurred by the employer.⁹⁹⁷ Liability for contempt of court when the terms of interim injunctions granted in such circumstances are broken is, of course, a related matter, one governed by the criminal law. Such breaches have the potential to attract unlimited fines and terms of imprisonment.

Where dismissals are concerned, the common law position is that strikers can be dismissed *en masse*, or selectively. Statute has, however, intervened, and after the Industrial Relations Act 1971, a selective dismissal in such circumstances became grounds for a claim of unfair dismissal. This area did not escape the attentions of the Thatcher governments, and in 1982 the Employment Act permitted employers to re-engage workers selectively after 3 months. Since 1990 an employer has been able to dismiss a striker engaged in unofficial action for breach of contract in any circumstances (TULR(C) A sections 237 & 238).⁹⁹⁸ In 1999 New Labour introduced 8 weeks of blanket protection for strikers taking official action, extended to 12 weeks in 2004 (TULR(C)A 238A and 238B). The 12 weeks of statutory 'protection' afforded those who engage in official action is no more than the provision of grounds for a claim of unfair dismissal offering only the prospect of a modest financial award should the worker be dismissed for breach of contract during the first 12 weeks of industrial action.

The position in international law is less complex. According to the ILO Committee on Freedom of Association

'The dismissal of workers because of a strike constitutes serious discrimination in employment on grounds of legitimate trade union activities and is contrary to Convention No.98.'⁹⁹⁹

⁹⁹⁷Damages in such circumstances are capped, the maximum fine dependent on the number of members of the union concerned.

⁹⁹⁸See para 49-55 of Report No.277, March 1991, Case No.1540 (United Kingdom) – complaint date 29 June 1990 for an account of the evolution of this legislation.

⁹⁹⁹ 2018 *Compilation* para 957..

The Committee requires ‘root and branch’ reform. It has recorded that it “could not view with equanimity a set of legal rules which: (a) appears to treat virtually all industrial action a breach of contract...(b) makes any trade union or official thereof who instigates such a breaches of contract liable in damages for any losses incurred...and (c) enables an employer faced with such an action to obtain an injunction to prevent the commencement (or continuation) of the unlawful conduct. The cumulative effect of such provisions could be to deprive workers of the capacity lawfully to strike action to promote and defend their economic and social interests.”¹⁰⁰⁰

In 1989 the ILO’s Committee of Experts told the UK Government that it ‘considers that it is inconsistent with the right to strike a guaranteed by Articles 3, 8 and 10 of the Convention [No.87] for an employer to be permitted to refuse to reinstate some or all of its employees at the conclusion of a a strike, lock out or other industrial action...’¹⁰⁰¹ Unimpressed by the ‘protection’ afforded within the 12 week period, the freedom for employers to hire permanent replacements while the workers are on strike, and the rarity of dismissed workers being reinstated or re-engaged after a successful claim for unfair dismissal, the Committee of Experts has made six Direct Requests to the government on the situation in the UK in the last ten years.¹⁰⁰²

The ECSR has since the 1970s ‘consistently considered that the UK was not in conformity with Article 6(4)’ of the European Social Charter because it allows workers to be dismissed for taking industrial action.¹⁰⁰³ In 1993 the Governmental Committee of the European Social Charter, following a series of Conclusions by the ECSR that the UK was in breach of Article 6(4), issued a Recommendation that it amend the law.¹⁰⁰⁴ The Major Government failed to act, and in 1997 a Recommendation by the Committee of Ministers followed.¹⁰⁰⁵ In 2014 the ECSR recalled that in 2010, and in 2006, it had concluded that the loss of employment protection after 12 weeks was ‘arbitrary.’ In 2010 it had not been reassured by the government’s claim that ‘96.5% of all industrial actions last less than 12

¹⁰⁰⁰ 2018 *Compilation* para 960..

¹⁰⁰¹ Observation (CEACR) on C87 – adopted 1989, published 76th ILC session (1989).

¹⁰⁰² The first was in 2008 – Direct Request (CEACR) adopted 2008, published 98th ILC Session (2009) on C87

¹⁰⁰³ Conclusions XII-I 1991.

¹⁰⁰⁴ See the Council of Europe Committee of Ministers Recommendation No. R Chs (93) 3 On the Application of the European Social Charter by the United Kingdom During the Period 1988-89 (12th Supervision Cycle).

¹⁰⁰⁵ Council of Europe Committee of Ministers Recommendation No. R Chs (97) 3 On the Application of the European Social Charter by the United Kingdom During the Period 1992-93(13th Supervision Cycle).

weeks’;¹⁰⁰⁶ in 2006 it had noted that the protection extended only to those engaged in official action.¹⁰⁰⁷

The UN CttESCR, with characteristic bluntness, told the first Blair government in 1997 that

‘failure to incorporate the right to strike into domestic law constitutes a breach of article 8 of the Covenant ...the common law approach recognising only the freedom to strike, and the concept that strike action constitutes a fundamental breach of contract justifying dismissal, is not consistent with protection of the right to strike. The Committee does not find satisfactory the proposal to enable employees who go on strike to have a remedy before a tribunal for unfair dismissal.’¹⁰⁰⁸ In its recommendations it went on to argue that ‘...the current notion of freedom to strike...simply recognises the illegality of being submitted to an involuntary servitude.’

The failure to protect unofficial strikers is arguably more serious than the absence of protection for those few workers who may be engaged in official action after 12 weeks. The number of unofficial actions are unknown, but likely to be few in number – only 101 ‘stoppages’ of any description occurred in 2016 – but they will become increasingly important as the restrictions on the right to strike start to bite. Recently prison officers, unable of course to take official action, have been engaged in a series of unofficial actions, and workers on Southern Rail (subject to the IPS thresholds) were alleged to have taken unofficial action.

Yet the ILO jurisprudence makes it very clear that protection for unofficial action is embraced by the principles of freedom of association. The CEACR considers that UK conformity with Convention No. 87 depends upon the government ‘strengthening the protection available to workers who stage official and lawfully organised industrial action...’,¹⁰⁰⁹ but it emphasises that sanctions for strike action should be possible *only* where the prohibitions in question are in conformity with

¹⁰⁰⁶ Conclusions XIX-3 2010 ‘Consequences of collective action.’

¹⁰⁰⁷ Conclusions XVIII-1 ‘Consequences of collective action.’ The committee also noted without comment that the government had supplied information on *Davies v Friction Dynamics* (see chapter 2) following a request made in Conclusions XVII-1 2005.

¹⁰⁰⁸ UN CttESCR: United Kingdom CO E/C.12/1/Add.19 (12 December 1997), para 11. The proposal resulted in the initial ‘8 week’ rule to protect strikers in official actions in ERA 1999.

¹⁰⁰⁹ Direct Request adopted 2012, published 102nd ILC session (2013).

the principles of freedom of association...’ Even then ‘sanctions should not be disproportionate to the seriousness of the violations,’¹⁰¹⁰ so dismissal, or liability for damages for breach of contract, theoretical or otherwise, may well be argued to be excessive.

A distinction could reasonably be drawn between action taken by workers in defiance of the instructions of their union and workers in poorly organised establishments or sectors where the terms and conditions of employment are not governed by collective agreement. Strikes engaged in by workers in the latter category should prompt government intervention to promote collective bargaining, rather than the dismissals of the workers.¹⁰¹¹ However, the UK approach (Section 237 (2) TULR(C)A) is merely to provide that where no trade union members are involved in the industrial action taken then action cannot be deemed ‘unofficial’ and the workers involved will benefit from the 12 week protected period.¹⁰¹² Of course, in very few instances will industrial action be taken exclusively by workers who are not members of a trade union which represents workers in that sector.¹⁰¹³

A third category of unofficial action is that which is necessarily unofficial because restrictions on industrial action contrary to the principles of freedom of association have obliged the union to denounce it. Examples are the actions taken by workers employed by Southern Rail and by prison officers, arguably the consequence of the effective categorisation of the former as workers providing an essential service and the failure of the government to put in place the required effective conciliation and arbitration mechanisms to compensate for restrictions of the right to strike, both unequivocal breaches of Convention No.87.

While Article 8 (1) of C87 states that:

¹⁰¹⁰1994 General Survey, para 177-8.

¹⁰¹¹Industrial action in such circumstances can arguably be said to be the consequence of government failure to fulfil its obligations under C87 and C98. When Order 1305 (see chapter 2) was in place between 1940-1951 the penal provisions of the order were never used against workers not employed under terms and conditions governed by collective agreement. Section 237 (2) & (6) of TULR(C)A 1992 provides the narrow current version of this approach.

¹⁰¹²Industrial action in such circumstances can arguably be said to be the consequence of government failure to fulfil its obligations under C87 and C98.

¹⁰¹³ See s 237(6).

‘In exercising the rights provided for in this Convention workers and employees and their respective organisations, like other persons or organised collectivities, shall respect the law of the land’

Article 8(2) requires that:

“The law of the land shall not be such as to impair, nor shall it be so applied as to impair the guarantees provided for in this Convention.’

If the prohibitions on industrial action are not in conformity with the principles of freedom of association then unlawful and unofficial action is inevitable. Workers forced to break the law must be protected.

The UK government must therefore ensure that the law is revised so that:

- Workers cannot be lawfully dismissed for taking industrial action under any circumstances.
- Any such dismissals are remedied by reinstatement
- Employers are not permitted to hire permanent replacements for striking workers

7) The Right to Bargain Collectively

States are in practice obliged merely to guarantee the *freedom* for employers and workers to bargain collectively. They are required to promote and encourage voluntary negotiation, rather than recognise a right for workers to bargain collectively. While state compulsion in order to provide workers with an effective right to bargain collectively is contrary to the voluntary nature of collective bargaining states are obliged to promote, it is not a breach of the principles of freedom of association. States are obliged to negotiate with those employed in the public sector on a collective basis. Only public servants with responsibilities for maintaining public order can be denied the right to bargain collectively. When an industry is nationalised, and where privatisation is imposed, states are obliged to ensure that the enterprise concerned recognises the relevant unions for collective bargaining purposes.

The concept of collective bargaining as a wholly voluntary arrangement between workers and employers has meant that state obligations are expressed as obligations to promote and encourage, rather than to recognise the right of workers to choose to bargain collectively, a legacy, I would suggest, of the voluntaristic influence of the British government on the ILO during the crucial years of 1945-1949.

Citing the key phrase in Article 4 of C98 that governments are obliged to ‘encourage and promote the full development and utilisation of machinery for voluntary negotiation,’¹⁰¹⁴ the CFA holds that:

‘The right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association.’¹⁰¹⁵

The Committee has on numerous occasions emphasised the voluntary character of collective bargaining which underpins the industrial freedom of association demanded by the ILO Conventions, the UN Covenants, and the Council of Europe instruments:

‘Nothing in Article 4 of Convention No.98 places a duty on the government to enforce collective bargaining by compulsory means with a given organization; such an intervention would alter the voluntary nature of bargaining.’¹⁰¹⁷

Yet, I would argue that the right to bargain collectively is in practice not one jointly exercisable by employers and workers, as the ILO jurisprudence would have us believe. It is a right relied upon solely by workers, requiring the employer to negotiate with them in good faith, as a combination, ‘in the shadow’ of the threat of industrial action. If that is not feasible then the mechanisms to promote collective bargaining kick in. Effective collective bargaining mechanisms inevitably require an element of state compulsion. While the minimum terms and

¹⁰¹⁴ 2018 *Compilation* para 1231. Article 3 requires the establishment of such machinery.

¹⁰¹⁵ *Ibid*, para 1232.

¹⁰¹⁷ *Ibid*, para 1216.

conditions of employment imposed by sectoral collective bargaining can be said to encourage recalcitrant employers to engage with other employers to engage in collective negotiation with unions and to negotiate bespoke collective agreements at enterprise level, statutory recognition procedures ultimately rely on the power of the state to require a recalcitrant employer to recognise the union or unions concerned. The ILO's Committee on Freedom of Association acknowledges that compulsion may be necessary, and cautions states only that The public authorities should however refrain from any undue interference in the negotiating process.'¹⁰¹⁸

Moreover, the state itself is itself obliged to bargain collectively with those it employs. Obligated to 'encourage and promote' the practice, it has been acknowledged that 'after the Second World War successive government treated the public sector as a "model employer," understood to mean "that government as direct employers could set the standards for employment policy and practice."¹⁰¹⁹

Governments had been bargaining collectively with public servants since the First World War,¹⁰²⁰ and as Heath's Tories acknowledged in their 1968 employment manifesto *Fair Deal at Work* (albeit downplaying the level of obligation on the government):

'[T]he principle that workers should have the right to organise and to "bargain collectively" is incorporated in ILO Conventions 87 and 98. Parliament has recognised this principle in the Acts governing the nationalised industries, and it is indirectly recognised in Acts which oblige employers to observe Fair Wages Resolutions.'¹⁰²¹

¹⁰¹⁸ 2018 *Compilation* para 1317.

¹⁰¹⁹ Howell 2005, *op cit*, p90, citing B Carter and P Fairbrother, 'The Transformation of British Public-Sector Industrial Relations: From "Model Employer" to Marketised Relations,' (2000) 7 *Historical Studies in Industrial Relations*, p123.

¹⁰²⁰ Since the establishment of the Ministry of Labour and the report of the Whitley Committee at the end of WWI (see Howell 2005, *op cit*, pp69-75).

¹⁰²¹ Conservative Party Political Centre, April 1968, pp43-44.

The Labour Relations (Public Service) Convention, 1978 (No.151), in Articles 7 & 8, emphasise that the C98 and C154 obligations apply to ‘public employees.’¹⁰²² As noted above, while civil servants engaged with responsibility for keeping order may be denied the right to bargain collectively, the vast majority of those employed in the public sector may not.

C151 clarifies the provisions in C98 in relation to the public sector. Article 7 uses the familiar unsatisfactory imperative – the obligation is to ‘encourage and promote.’ Nevertheless, where the government is the direct employer I argue that it is *obliged* to engage in collective bargaining unless the workers concerned fall into exempted categories. Public servants have the option of not bargaining collectively but their employer, but the government, required as it is to ‘encourage and promote’ the practice does not have any choice in the matter.

When the Thatcher government attempted to withdraw from collective bargaining with the civil service unions in 1980 – provoking a lengthy and highly expensive dispute – the CFA ruled that while the government had not breached C98,¹⁰²³ it had breached C151.

The European Social Charter’s ECSR has taken a less nuanced approach than the CFA to the right in the public sector, and in a characteristically clumsy pre-1991 statement on the UK civil service dispute it recalled that under the terms of Article 6(2) ‘the rights of collective bargaining can be denied to civil servants.’¹⁰²⁴ In the same set of conclusions it held that the provision of a staff association for the 7,000 GCHQ civil servants famously denied the right to organize on grounds of national security,¹⁰²⁵ brought the restriction within the terms of the Charter’s Article 31 ‘limitation clause’ – contradicting the ILO supervisory bodies which had uniformly held GCHQ to be an egregious breach of C87 [the equivalent of Article 5

¹⁰²²Despite the C98 Article 6 proviso that ‘This Convention does not deal with the position of public servants engaged in the administration of the state’ which permits those with public order responsibilities to be denied collective bargaining.

¹⁰²³An odd decision in the circumstances (see chapter 3).

¹⁰²⁴Conclusions XI-I 1989 Article 6(2), recalling Conclusions III. Only those tasked with the administration of the state may be denied the right to bargain collectively (see above).

¹⁰²⁵See chapter 3. The GCHQ affair was not directly connected with the civil service dispute. That started in 1980 when the government first sought to replace collective bargaining arrangements with a statutory pay review structure. The involvement of GCHQ staff in the ensuing strikes did, however, play a significant part in motivating the government to deny the GCHQ civil servants the right to organise.

of the Charter].¹⁰²⁶ In the watershed year of 1991,¹⁰²⁷ however the Committee revised its opinion to hold that the arrangements in the UK whereby the Secretary of State effectively dictated pay rates ‘nonetheless entails the obligation to arrange for the participation of those concerned through the intermediary of their representatives.’¹⁰²⁸ It would appear now, however, that the Committee’s interpretation of the application of Article 5 and Article 6(2) to the civil service is in accord with that of the ILO supervisory bodies, and the UN CttESCR, excluding only those engaged in the administration of the state from the right to bargain collectively, and only then where satisfactory alternative arrangements have been provided.

In *R v Minister for the Cabinet Office* [2018],¹⁰²⁹ a judicial review of the departmental denial of even a consultation with recognized trade unions over pay was refused. Recognition and a disputed promise did not mean that three unions representing 200,000 civil servants could claim to have a legitimate expectation to be consulted over a pay review.

Clearly UK law and practice falls short of the standards set by Convention 151, and Articles 5 and 6(1) of the Charter.

State owned industries

The CFA merely hold that workers employed in nationalised industries ‘should have the right to negotiate collective agreements.’¹⁰³⁰

The level of obligation is less absolute where state owned ‘nationalised’ enterprises are concerned. In such cases the government controls the purse strings but is not the employer. However, a nationalised firm should arguably be obliged by the memorandum and articles of association, drafted under the

¹⁰²⁶The ECmHR had deemed the case inadmissible, so the two Council of Europe supervisory bodies were roughly in accord.

¹⁰²⁷When, prompted by the ILO’s CEACR, the Committee finally ‘woke up’ to the attack on freedom of association that had been in progress in the UK since 1980.

¹⁰²⁸Conclusions XII-I 1991, again recalling Conclusions III.

¹⁰²⁹EWHC 2746 (Admin).

¹⁰³⁰2006 *Digest*, para 894. Where temporary workers in the public sector are concerned – the Committee had in mind ‘Community Programme’ style initiatives for easing unemployment - the CFA stipulates that they ‘should be able to negotiate collectively’ (2006 *Digest*, para 906). The CESCR has held a Canadian denial of the right for ‘workfare’ workers the opportunity to join trade unions to be a breach of UNICESCR Article 8 (UN CttESCR: Canada, CO EC.12/1/Add.31, 10 December 1998, para 31).

supervision of a government under an obligation to promote and encourage collective bargaining, to recognize and negotiate with the relevant trade unions.¹⁰³¹

Teachers are variously employed by local authorities, school governing bodies, and academy trusts, and health care workers are usually employed by NHS trusts. So while public sector employees, they cannot be said to be employed directly by the government unlike, for example, public sector prison officers, or those working for HMRC.

Where their terms and conditions of employment are directly controlled by government – as is the case with teachers and health care professionals like doctors and nurses - then the government is obliged to bargain with them. Where they are not then I would argue that the government was obliged to ensure that the trust is itself obliged to bargain collectively with its workforce when it transferred responsibility to the trust. The same holds in relation to the private enterprises which took the opportunity to turn a profit by buying up what were previously state owned enterprises, and to firms who have won government contracts to provide previously state run services, whether they be prisons or canteen facilities in government departments.

The TUPE regulations have, of course, performed this function since 1981,¹⁰³² although in the UK, with secondary action unlawful, collective agreements generally unenforceable, and the regulations weakened by recent government responses to ‘employer friendly’ decisions by the CJEU, the position of transferred workers is parlous. As we saw in chapter four, the Acquired Rights Directive was reinterpreted by the court to provide safeguards for businesses,¹⁰³³ and the previously obscure Article 16 of the EU Charter relied upon to allow transferee firms to abandon obligations under collective agreements entered into by the

¹⁰³¹1996 Digest: ‘...a successive government in the same state cannot, for the mere reason that a change has occurred, escape the responsibility deriving from events that occurred under a former government...the new government should take all necessary steps to remedy any continuing effects which the events on which a complaint is based may have had’ (para 18).

¹⁰³² Although the Tories initially excluded six million public sector workers by restricting the regulations to non commercial undertakings until obliged to broaden the embrace of the regulations following C-383/92 Commission v UK [1994] ECR I-2479 (see K Williams and N Johnson, ‘Transferring Employment Between the Public and Private sectors in the United Kingdom: Acquired Rights and Revising TUPE’ (2007) 23 *International Journal of Comparative Labour Law and Industrial Relations* 285).

¹⁰³³The Directive is wholly concerned with workers’ rights and no where in the text is any reference to the rights of employers.

transferor – without the rights of workers under the Charter even being mentioned. With the neoliberal credentials of the CJEU firmly established, and, in the UK, the inability of trade unionists to take solidarity action in support of transferred colleagues,¹⁰³⁴ or to press their concerns prior to the transfer,¹⁰³⁵ the TUPE regulations serve now in most cases only to preserve the terms and conditions of transferred workers for only the first year with their new employer.

Freedom to bargain collectively, by contrast, permits employers to decide whether to allow workers to negotiate with it, or with an employers' organisation to which it belongs, on a collective basis. Where only the freedom is protected, workers are largely dependent on the use of industrial action to persuade the employer to negotiate. The state permits workers to make their demands known, but permits the employer to decline to bargain with the union. Because in the UK only the freedom to bargain collectively is protected, and the freedom to take industrial action is heavily restricted, there is no *effective* right to *effective* collective bargaining. As a consequence the numbers of workers covered by collective agreements are minimal.

I argue, however, that the requirement for states to promote and encourage collective bargaining does demand the effective recognition of a right to collective bargaining which would oblige employers to negotiate with the collective. To hold otherwise would be to return to the similarly artificial individualistic interpretation of freedom of association offered by Dicey and by his neoliberal disciples.

The 2008 recognition by the Strasbourg Court that Article 11 protects the right to bargain collectively, followed by the inevitable acknowledgement of its inseparable sister right, the right to strike, and the subsequent 'backpedalling' evinced in *RMT v UK* [2014] and *UNITE v UK* [2016] to accommodate *prima facie* British breaches of the new wide interpretation of Article 11 freedom of association, have been examined in some detail in previous chapters. It will be recalled that *UNITE v UK*, in which the union argued unsuccessfully that the abolition of last of the Works Councils,¹⁰³⁶ the Agricultural Wages Board, was a

¹⁰³⁴ Sanctioned by the ECtHR in *RMT v UK* (see Chapter 3).

¹⁰³⁵ Sanctioned by the ECtHR in *UNISON v UK* (see Chapter 3).

¹⁰³⁶ See K Arabadjieva 'Another Disappointment in Strasbourg: Unite the Union v United Kingdom' (2017) 46 *ILJ* 289.

breach of the government's Article 11 obligations, illustrates the limits to the right to bargain collectively in the Strasbourg jurisprudence – its subservience in practice to the right to strike, and failure of the provisions European Social Charter, and Convention 98, requiring states merely to 'promote and encourage' wholly *voluntary* collective bargaining, to persuade the court that Article 11 requires the provision by the UK of effective bargaining mechanisms .

The six judges, including the newly appointed British judge, Paul Mahoney, appeared to have been anxious not to alienate the British government. They seized upon the weaknesses of the right, and resurrected the old civil and political/economic and social rights divisions to rein in the possibilities raised by *Demir* and relegate the right for workers to bargain collectively to a freedom to bargain collectively.

While the right to strike, requiring states only to refrain from interference to permit workers the freedom to take industrial action more readily fits in with the traditional negative conception of civil and political rights, and obliged the court in the RMT case to look to the margin of appreciation and the new procedural rules to let the UK 'off the hook,' the positive obligations inherent in recognising an effective right to collective bargaining allowed the court to find simply that:

'the United Kingdom does not restrict employers and trade unions from entering into voluntary collective agreements.'¹⁰³⁷

Despite the right to collective bargaining having been recognised as an essential element of freedom of association, the court held that there was no obligation on states to secure the right:

'even accepting the applicant's submission that voluntary collective bargaining in the agricultural sector is virtually non-existent and impracticable...¹⁰³⁸the European and international instruments to which the

¹⁰³⁷ UNITE V UK, para 59.

¹⁰³⁸ Para 65. Counsel for UNITE, John Hendy, had told the court that the National Farmers' Union refused to bargain collectively with the union, and that of the 350,000 agricultural workers that had previously come within the ambit of the AWB, and had been represented in collective bargaining by UNITE, only a fraction of 1% worked for an employer with 21 or more employees allowing the union to apply to the CAC for recognition. Even if many more

applicant referred, as they currently stand, do not support the view that a state's positive obligations under Article 11 extend to providing mandatory statutory mechanism for collective bargaining...¹⁰³⁹

Disappointing as the ruling is, it must be borne in mind that the ECtHR is effectively a broad civil and political rights 'back stop' to the more comprehensive and nuanced policing of the essential elements of freedom of association undertaken by the ILO bodies, UNCESCR and ESRC. Crucially, neither the court nor the UK government chose to question the status of the Wages Council as a mechanism for promoting and facilitating *voluntary* collective bargaining – a tacit acknowledgement that the provision of minimum terms and conditions through tripartite negotiation cannot be said to amount to state compulsion.¹⁰⁴⁰

Nevertheless a brief reconsideration of 'the European and international instruments' referred to is required to rebut the implication that they are insufficiently emphatic about the obligation to promote collective bargaining. It will be recalled that the full text of Article 6, European Social Charter is set out in chapter 3 (p119). 6(2) requires states:

'[W]ith a view to ensuring the effective exercise of the right to bargain collectively...to promote, where necessary and appropriate, machinery for voluntary negotiations between employers' organisations and workers' organizations...'

Agriculture would be precisely the sort of sector where machinery is 'necessary and appropriate' – so much so that, in the absence of a national minimum wage the Major government was obliged to leave the AWB alone. Without it there

farmers were to employ in excess of 20 employees, the task of bringing tens of thousands of Schedule A1 applications would be expensive and time consuming (see below for consideration of the statutory recognition procedures).

¹⁰³⁹Ibid. Although the government did argue that the National Minimum Wage meant that the AWB was no longer required it was careful not to refer to the reason the last Major government (arguably more radical than any of the Thatcher governments) had retained the AWB – without it the terms and conditions in the sector would have been likely to have plummeted to levels low enough to disgrace an already beleaguered administration.

¹⁰⁴⁰Certainly an indication that the government did not want a ruling on the question, which amounts to the same thing.

would have been a ‘race to the bottom’ in an underpaid and badly organised sector – a potential political embarrassment.¹⁰⁴¹

State acceptance of the right – as opposed to the mere freedom - to bargain collectively, as well as the requirement to promote collective bargaining and establish machinery to that end could scarcely be clearer. The approach of the ECSR has, however, been remarkably cautious when called upon to censure the UK over Article 6 (1) and (2), and this clearly influenced the reasoning in the *UNITE* case – a cynic might suggest that it helped the Strasbourg justify the ruling it wanted to hand down.

The committee prefers to accord more weight to the obligation to guarantee workers the freedom to strike as a means to persuade employers to the bargaining table: Article 6(4), binds the right to strike to collective bargaining. In its first supervisory cycle the Committee held that ‘any limitation to this right to strike connected with the conclusion of new collective agreements could not be considered compatible with the provisions of the Charter’,¹⁰⁴² confirming that 6(4) obliges governments to protect the right of workers to strike in support of recognition for the purposes of collective bargaining in a dispute with both their immediate employer, and in support of workers employed elsewhere engaged in a similar dispute. Similarly the Committee holds that a state in breach of its Article 5 (right to organise) obligations cannot be said in conformity with 6(2). So while the UK government’s brazen breach of its obligation to actively *promote* collective bargaining has largely escaped the explicit censure it arguably deserves, Article 6(4) and Article 5 have served to ensure that its success in undermining the opportunity for workers to bargain collectively by restricting the right to strike has not. It will be recalled that the Committee’s recent condemnation of the UK blanket ban on secondary action was notable for its stridency.

While it is perhaps unfortunate that the ECSR has laid so much emphasis on the role of the right to strike in securing recognition for collective bargaining

¹⁰⁴¹In the *UNITE* case the government argued that the provision of the NMW rendered the AWB redundant. However, a minimum hourly wage is only an aspect of the terms and conditions governed by the AWB. Working time and overtime rates are as important. The abandonment of ‘time and a half’ and ‘double time’ in favour of flat rates and the introduction open ended working days (hence the extraordinary hostility to the Working Time Directive) are an overlooked feature of the reduction in collective bargaining coverage of the last 30 odd years.

¹⁰⁴²Conclusions 1, p183, see Lenia Samuel, *Fundamental Social Rights, Case Law of the European Social Charter*, (Strasbourg, Council of Europe,1997) p.164.

purposes, the ILO supervisory bodies have been less distracted by the reliance of collective bargaining on the freedom to strike.

It will be recalled that Convention No. 154 on Collective Bargaining was not ratified because the Thatcher government did not want to be obliged to promote collective bargaining – something it was, of course, already obliged to do by virtue of Convention No.98, and Article 6(2) ESC, among other treaty obligations. It is also the case that the ECtHR in UNITE took the view that C154 is a ‘technical’ rather than a fundamental Convention.

It is certainly the case that the provisions of C154 are an aid to the interpretation of C98 (and that the ILO categorises it as a technical convention), but it can be argued that C154 is embraced by the 1998 Declaration requiring all states ‘even if they have not ratified the Conventions in question’ to recognize freedom of association and ‘the effective recognition’ of the right to bargain collectively.¹⁰⁴³ It is a fundamental Convention in that it clarifies the obligations imposed by C98 to show the ‘recognition of the right to bargain collectively’ goes well beyond the mere freedom that the ECtHR protects. It demands positive action by states - *effective* mechanisms like the AWB.

The Collective Bargaining Recommendation (No.163) 1981 accompanied C154. The recommendation presents us with the ‘Means of Promoting Collective Bargaining.’ Essentially these are the adoption of ‘measures adapted to national conditions... so that ...representative employers’ and workers’ organizations are recognized for the purposes of collective bargaining’; government training for negotiators; and the provision of information to facilitate collective bargaining.¹⁰⁴⁴

Article 5 of C154 tells us that ‘promotion’ first requires that collective bargaining ‘should be made possible’ [Article 5(2)(a)]. This, of course, is as far as the ECtHR’s unsatisfactory current interpretation of Article 11 ECHR takes us. Yet, where workers are faced with an employer who refuses to negotiate and effective strike action in pursuit of recognition is unlawful, then arguably bargaining cannot be said to be possible.

¹⁰⁴³ ILO Declaration on Fundamental Principles and Rights at Work ,para 2(a).

¹⁰⁴⁴ From paras 2-9 of the Recommendation. That R163 has not been accepted by the UK is irrelevant. This is what the ILO consider to be the promotion of collective bargaining demanded by C98 and A6ESC. Of course the 1999 Schedule 1 recognition procedures and the existence as Acas, unsatisfactory as they are, can arguably be said to support a claim that the UK adheres to the R163 guidelines.

Assuming the ‘level playing field’ provided by the full freedom of association demanded by C87 and C98, and, as a consequence, the natural progression to recognition that full freedom should ensure, Article 5 of C154 then goes on to require that ‘collective bargaining should be progressively extended’ to cover all the matters in a comprehensive list set out in Article 2 of the Convention [Article 5(2)b], and that rules should be set to establish the bargaining procedures [Article 5(2)c]. Conscious that such regulation can be used to stifle the freedom to bargain, the Convention states that the rules must not be such as to hamper proceedings, nor should they be inadequate or inappropriate [Article 5(2)d]. Article 5(2)(e) requires that ‘bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining.’

Clearly the UK falls well short of its obligations in this regard. Acas, as was noted in chapter 3 was stripped of its duty to promote collective bargaining in 1993, the year the Wage Councils were abolished. The nearest the UK has to a set of bargaining rules is the basic collective agreement on hours, pay and holidays that the CAC can – although such a step has very rarely ~~never yet~~ been necessary - impose upon an employer who refuses to recognize a union despite a ‘declaration for recognition’ having been issued under the statutory recognition procedures.

We can conclude therefore that in order to comply with its obligations under the ILO and European Social Charter jurisprudence the UK government must give effective recognition to the right of workers to negotiate collectively. This requires full freedom of association.

- The freedom to take secondary action must be restored
- In poorly organised sectors, mechanisms to promote and facilitate voluntary collective bargaining must be established: modern equivalents of the old Wage Councils should be set up to oblige the representatives of employers and workers to negotiate minimum terms and conditions of employment in these sectors
- Formal bargaining procedures, and properly trained negotiators to facilitate the negotiation of establishment level collective agreements should be provided

To these requirements must be added the needs identified in chapter 3 with regard to inducements made by employers to persuade workers to forgo collective bargaining:

- Workers and trade unions should be able to invoke the law to prevent employers offering inducements to workers to forgo collective bargaining.

8) The Right to Recognition

Where a significant number of workers in a given bargain unit are represented by a trade union the employer the union should be recognised for collective bargaining purposes. Where exclusive bargaining rights are sought, if majority support can be demonstrated by the union concerned then exclusive recognition should be granted. Governments are obliged to promote, encourage, and, where necessary, establish machinery to facilitate voluntary recognition, but compulsory recognition is not prohibited by the principles of freedom of association. Recognition of an employer dominated staff association for collective bargaining purposes cannot be justification for non-recognition of a representative union. Recognition procedures must not exclude any aspect of the employment relationship from collective negotiation.

The ILO supervisory bodies have made state obligations in this often over complicated area plain enough. The CFA:

‘Recognition by an employer of the main unions represented in the undertaking, or the most representative of these unions, is the very basis for any procedure for collective bargaining on conditions of employment in the undertaking.’¹⁰⁴⁵

The CEACR emphasises the voluntary nature of such recognition:

¹⁰⁴⁵2006 Digest, para 953.

‘the public authority should *encourage* employers to recognise trade unions which can prove their representivity.’¹⁰⁴⁶

Government intervention should be restricted to

‘a legal framework and an administrative structure to which they may have recourse on a voluntary basis and by mutual agreement...¹⁰⁴⁷ machinery and procedures should be designed to facilitate bargaining between the two sides of industry leaving them free to reach their own settlement.”¹⁰⁴⁸

However, as already noted, this voluntaristic stance sits uneasily with the practical realities of overcoming employer resistance, particularly in states like the UK which restrict the freedom for workers to take industrial action. All sectoral bargaining systems and recognition procedures inevitably rely on an element of compulsion. It is also worth reiterating my argument that state compulsion does not breach the ILO principles of freedom of association.¹⁰⁴⁹ As the CFA Digest of Decisions puts it, it is not contrary to Convention No.98

‘to oblige social partners, within the framework of the encouragement and promotion of the full development and utilization of collective bargaining machinery, to enter into negotiations on terms and conditions of employment. The public authorities should however refrain from any undue interference in the negotiation process.’¹⁰⁵⁰

Arguably recognition mechanisms should exist only to ensure an ordered and strike free path to the negotiating table. With full freedom of association assured, recognition for collective bargaining purposes should be usual in all but the most exceptional circumstances. However, lawful secondary action has, of course, always been crucial to securing recognition, and without it any procedures geared towards securing voluntary recognition, are hamstrung.

¹⁰⁴⁶ CEACR 1994 General Survey 1994, para 240, emphasis added.

¹⁰⁴⁷ Ibid, para 247, emphasis added.

¹⁰⁴⁸ 1994 General Survey, Para 248

¹⁰⁴⁹ States permitting trade unionists to compel employers to recognise trade unions and conclude a collective agreement do not fall outside the principles of freedom of association (see *Gustaffson v Sweden* ECtHR [1996], *op cit*).

¹⁰⁵⁰ Para 921. Notice only ‘undue interference’ in the actual negotiations is discouraged. See with regard to the European Social Charter *Federation of Finnish Enterprises v Finland* [2007] Case No. 35/2006, a case considered by the ECSR under the Collective Complaints Procedure to be found at www.coe.int ‘Processed Complaints.’.

The CFA holds that:

‘A ban on strikes related to recognition disputes (for collective bargaining) is not in conformity with the principles of freedom of association.’¹⁰⁵¹

The fundamental importance of secondary action to the achievement of recognition was identified – and targeted - by the first Thatcher government: Section 14 of the Employment Act 1982 (now S. 225 of TULR(C)A) expressly placed secondary industrial action engaged in to persuade an employer to recognize a trade union beyond the protection of the statutory immunities, tightening the restriction on lawful secondary action that had been imposed in 1980 when the immunities were narrowed to action against the immediate suppliers or customers of the employer in the primary dispute imposed in 1980.

In 1997 the incoming New Labour government was obliged to restore the full freedom of association lost during 1980-1993, but it did not.¹⁰⁵² Instead it passed the Employment Relations Act 1999 - essentially a handful of union friendly individual rights accompanying the new trade union recognition procedures in Schedule A1 of the Act. The new government withheld the full freedom of association required to secure voluntary recognition agreements but presented the labour movement with a complex and carefully drafted set of regulations ostensibly aimed at facilitating recognition. It is a tribute to the ineffectiveness of the regulations that they have remained intact during the last eight years of Tory dominated governments.

When denied full freedom of association, and the opportunity to take lawful secondary action to require employers to bargain with them in 1971, workers in the UK found themselves compensated with statutory recognition procedures.

However, then the Wages Councils system was intact, voluntary Joint Industrial Councils still existed, and the levels of collective agreement coverage were around 80% and rising. In 1999 coverage was around half of that figure and

¹⁰⁵¹ See 2006 Digest, paras 534 & 535 & 536. The prohibition of strikes in support of the extension of collective agreements to other employers is similarly a breach of the government’s obligation to protect freedom of association (ibid, paras 539-540).

¹⁰⁵² See note 201 above on responsibility of current governments for legislation of past governments in the ILO jurisprudence.

falling. Of the Wages Councils, only the Agricultural Wages Board remained, and the JICs had disappeared.

In the 1970s much would have depended on the attitude of the Department of Employment (strictly speaking power lay with the Secretary of State) which had considerable discretion, much as Order 1305, Order 1376 and the 1959 Terms and Conditions of Employment Act had given the Ministry of Labour a great deal of discretion over what could be said to have been *de facto* recognition. However, the 1971 procedures were part of a bid to replace voluntarism with a new, less volatile, more formal system of industrial relations, and the Act sought to promote collective agreement at establishment level, and there is no reason to believe, that had the 1971 procedures actually been utilised, they would not have been effective.

In contrast, the 1999 procedures were arguably essentially a political gesture to atone for the continuing denial of full freedom of association and the maintenance of a new industrial relations system based on the individual contract of employment, and had been calculated to be ineffective. Compulsory recognition of representative unions,¹⁰⁵³ which would have gone some way towards compensating for the restrictions on freedom of association, was never a realistic hope, and the UK procedures have been described, as ‘semi-voluntary’,¹⁰⁵⁴ coaxing the employer towards voluntary agreement at every stage. If majority support can be demonstrated in a ‘bargaining unit’, the unit either agreed by the parties or determined by CAC, then an employer can ultimately be obliged to negotiate with the union concerned on pay, hours and holidays. Should a collective agreement not be reached then the CAC can impose one – the ‘model’ agreement is legally binding, and few employers have been misguided enough to push the procedures to this point.

¹⁰⁵³Compulsory recognition, as well as being at odds with the voluntary nature of the collective bargaining that states party to the ESC, UNICESCR and fundamental ILO Conventions, is likely to test the ‘good faith’ of the parties – the standard of mutual respect and confidence required by the CFA for effective negotiation (2006 digest paras 934-943). Even an employer determined to take an ‘uncompromising’ stance can be said to negotiate in good faith (2006 digest para 938) but one forced to the negotiating table to face union representatives unable to back their demands with effective industrial action is likely to be both uncompromising and contemptuous.

¹⁰⁵⁴See Sian Moore *Ten Years of Statutory Recognition – A changed landscape for UK industrial relations?* [2010] Sianr.moore@uwe.ac.uk

Governments can by pass or mitigate the ‘rough and tumble’ of free voluntary collective bargaining by choosing to introduce effective statutory recognition procedures which provide a legally enforceable right to collective bargaining. That proposed by the IER Manifesto for Labour Law, for example, would require evidence of majority support, and evidence that 10% of the workers in the bargaining unit in question are members of the union to trigger compulsory recognition, imposing on the employer to bargain with the union on all the terms and conditions of employment. If those thresholds are not reached then each worker should be able to require their employer to bargain in good faith with their particular trade union.¹⁰⁵⁵ This would confer on workers both *a* collective legal right to require the employer to bargain with one union, and an unequivocal individual legal right to bargain collectively, in addition to the *freedom* to bargain guaranteed in practice by full freedom of association.

Here however is the rub; voluntary recognition will almost inevitably lead to a collective agreement which the employer is free to break, contrary to the ILO jurisprudence, which holds that ‘agreements should be binding on the parties’,¹⁰⁵⁶ while compulsory recognition – falling outside the ILO concept of freedom of association - can potentially result in a collective agreement which binds the unwilling employer. Recognition will have the effect also of giving the union consultation rights on redundancies, TUPE transfers, and health and safety matters, compounding the level of state compulsion. But with the opportunity to take lawful industrial action so heavily restricted UK statutory recognition must inevitably have resort to compulsion – without it, weak and ‘employer friendly’ as they are, the procedures would be wholly meaningless.

The relationship of the UK Regulations with the ILO jurisprudence can thus arguably best be described as *dysfunctional*.

UK procedures are arguably unnecessarily geared to securing *exclusive* recognition and incorporate ILO safeguards against trade union monopolies to the detriment of unions obliged to use the procedures to secure recognition. The government is not presented with a binary choice of either exclusive recognition

¹⁰⁵⁵ See Ewing, Hendy & Jones (eds), *A Manifesto for Labour Law: towards a comprehensive revision of workers’ rights*, 2016, paras 3.19-3.21.

¹⁰⁵⁶ CFA 2006 Digest, para 939 – see also paras 940-943.

or non exclusive recognition, but it presents workers with the choice of exclusive recognition or no recognition at all. Trade unions with significant levels of membership among an employer's workforce should be recognized for *non-exclusive* collective bargaining purposes. The current regulations cater for minority unions only in so far as they permit conjoined applications for exclusive rights.

Yet the CFA have held that 'to negotiate a collective agreement at the enterprise level' – not exclusive rights – 'it should be sufficient...to establish it is *sufficiently representative*.'¹⁰⁵⁷ Where the law demands a 50% support threshold for recognition as a bargaining agent,¹⁰⁵⁸ and 'a majority union which fails to secure this absolute majority is thus denied the possibility of bargaining' then 'collective bargaining rights should be granted to all the unions in this unit, at least on behalf of their own members.'¹⁰⁵⁹

The majority ballot threshold is 40% in the UK procedures, ensuring that the ILO jurisprudence cannot be relied upon to argue that rights be granted in this way should produce anything other than a binary 'all or nothing' result. Requiring first evidence of majority support and 10% membership density in a bargaining unit, and then winning a majority in a ballot which includes 40% support from all who are eligible to vote still ensures that it is very difficult to secure the necessary majority,¹⁰⁶⁰ and it will be recalled that this is the figure used in relation to 'important public services' in the Trade Union Act 2016.

Remarkably, if employers choose to voluntarily recognise a non independent staff association (or, of course, an independent union) that recognition will then block all statutory applications, even where the union has majority support. The UK regulations depart radically from their loose approximation to the ILO standards at this point to breach all government treaty obligations in respect of collective bargaining. The obscurely worded para 35(1) which provides this *lacuna* is said to

¹⁰⁵⁷ 2006 Digest, para 957. Emphasis added.

¹⁰⁵⁸ 1994 General Survey, para 240

¹⁰⁵⁹ *Ibid*, para 241.

¹⁰⁶⁰ On the obstacles presented by the para 36 thresholds see Ruth Dukes, 'The Statutory Recognition Procedures 1999: No Bias in Favour of Recognition?' (2008) 37 *ILJ* 236.

have been the price of Rupert Murdoch's support for New Labour in 1997.¹⁰⁶¹ The CAC, in one recent case,¹⁰⁶² ruled that permitting the establishment of a staff association to block a statutory bid by an independent union would be a breach of Article 11 ECHR, and that therefore the procedures must be construed to allow the union's application. The Court of Appeal however ultimately held that the procedures are compliant with the ECHR, and workers must formally derecognise the staff association before the application by the union can be considered.¹⁰⁶³ The decision was arguably a direct consequence of the 2016 UNITE Strasbourg case, the court taking the view that the union in question had not been *denied* the freedom to bargain. The staff association could be derecognised – even if, given the inadequacies of the procedures, and particularly the protections against anti-union strategies and individual victimisation,¹⁰⁶⁴ there was little chance of that happening.

The decision is highly questionable. The CEACR specifically hold that Article 2(2) of Convention No.98 prohibits the establishment of employer dominated staff associations to block attempts by independent unions to gain recognition (paras 228 - 234 CEACR General Survey 1994), while in the context of the limited right to strike in the UK, 35(1) is still arguably a *prima facie* breach of Article 11 ECHR,¹⁰⁶⁵ As well as Article 6(2) ESC and Article 8(a) and (c) UNICESCR.

In a Direct Request in 2012 the CEACR had questioned the position under the recognition procedures whereby the derecognition of a non independent incumbent union, 'the very existence of which is a violation of ILO Convention No.98, Article 2', cannot be made by an independent trade union must be made

¹⁰⁶¹ News International has had a Staff Association since it left Fleet Street for Wapping in 1986. KD Ewing argued that the so called 'Murdoch clause' breached Article 2 of C98 ECHR in 'Trade Union and Labour Relations (Consolidation) Act 1992, Schedule A1' (2000) 29 *ILJ* 267.

¹⁰⁶² *Pharmacists' Defence Association v Boots Management Services Ltd* (TUR1/823/2012).

¹⁰⁶³ *PDA v Boots and Secretary of State for Business Innovation and Skills* [2017] EWCA Civ 66.

¹⁰⁶⁴ On the unsatisfactory, individual nature of these protections, see Alan Bogg, 'Employment Relations Act 2004: Another False Dawn for Collectivism?' (2005) 34 *ILJ* 72. Existing protections had been augmented by the 2004 Act. Bogg made a damning reappraisal of the ineffectiveness of the Schedule A1 protections against anti-union strategies and individual victimisation in the context of statutory recognition in 'The Mouse that Never Roared! Unfair Practices and Union Recognition' (2009) 38 *ILJ* 390. See also KD Ewing, S Moore and S Wood, *Unfair Labour Practices: Trade Union Recognition and Employer Resistance* (Liverpool, IER, 2007).

¹⁰⁶⁵ See Alan Bogg and Ruth Dukes' arguments in 'Article 11 ECHR and The Right to Collective Bargaining: *Pharmacists' Defence Association Union v Boots Management Services Ltd*' (2017) 46 *ILJ* 543

by an individual worker, and that while the derecognition procedure is in train the incumbent union has a right to communicate with the workforce but any union seeking recognition in its place does not.¹⁰⁶⁶ The union should be permitted access to the work place to present its case to the workforce. Article 2 of Convention No.135 of 1971 requires employers to provide ‘such facilities’ as to enable workers’ representatives ‘to carry out their functions,’ and the accompanying recommendation (No.143), at 16(1) states that:

‘Trade union representatives who are not employed in the undertaking but whose trade union has members employed therein should be granted access to the undertaking.’

The 1999 recognition procedures fall short of ILO standards in one other important respect. When obliged to recognise a union only pay, hours and holidays need be the subject of collective negotiation.¹⁰⁶⁷ The CEACR has noted that a common infringement of the autonomy required by C98 is ‘the exclusion of certain matters from the scope of bargaining,”¹⁰⁶⁸ and ‘considers that measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with the Convention...’¹⁰⁶⁹

UK compliance with its obligations to secure employer recognition of trade unions for collective bargaining purposes therefore depends upon:

- The freedom for workers to take secondary action
- The amendment of the statutory procedures to ensure that ‘sufficiently representative’ minority unions are recognized by employers for collective bargaining purposes where no one union has the right to exclusive recognition

¹⁰⁶⁶ Adopted 2012, published 102nd ILC Session (2013). This followed Observation (CEACR) – adopted 2010, published 100th ILC session (2011) on C98 in which the Committee ‘*once again requests the Government to provide its observations*’ on these matters and on the ‘various unfair practices and anti union tactics in the framework of the statutory recognition scheme’ brought to the attention of the CEACR by the TUC and ITUC.

¹⁰⁶⁷ Odd when one considers that they were drafted at the height of Social Europe when so much was expected in terms of workplace negotiation for the implementation of workplace rights that had been negotiated by what was effectively european level collective bargaining.

¹⁰⁶⁸ 1994 General Survey, para 248.

¹⁰⁶⁹ 1994 General Survey, para 250.

- The removal of the ‘Murdoch clause’, Regulation 35(1)
- Access to the workplace for independent trade unions seeking recognition
- The extension of the areas subject to collective negotiation under the statutory procedures to those listed in Article 2 of Convention No. 154

While the failures of the UK government to adhere to its regional and international obligations with regard to the fundamental labour rights identified in this chapter are wide ranging and egregious, the blanket ban on secondary action is arguably the most significant. So fundamental is the freedom to take secondary industrial action in support of the occupational aims of other workers and to bring human rights concerns – whether categorized as civil and political or economic and social rights - to the attention of government, and the wider public, when lawful secondary action is prohibited all labour rights are undermined, both collective and individual.

The fundamental rights stand together and fall together – taking individual rights with them, as we saw during 2013 – 2017 under the fees regime. Not only would there have been little prospect of a Tory dominated government being able to impose a fees regime if workers had enjoyed full freedom of association, but, such is the inter-relationship of the two broad categories of rights, that individual rights depend to large degree on organised labour for their effectiveness. It was noted following the Workplace Employee Relations Survey 1998 that there was no evidence that it was the prospect of being brought before a tribunal which saw employers respecting statutory rights,¹⁰⁷⁰ but that the crucial factor was a trade union presence in the workplace.¹⁰⁷¹ It was noted that since 1980 there had been a shift in the primary role of unions ‘from limiting the obligations placed on employees by employers, towards monitoring the exercise of employers’ obligations towards their employees’,¹⁰⁷² and, by the turn of the century, it was apparent that

¹⁰⁷⁰ Brown et al 1999, *op cit*, p624.

¹⁰⁷¹ *Ibid*, ‘...as in other areas of labour law such as health and safety...statutory rights are more likely to be upheld where trade unions are present’ (p623).

¹⁰⁷² *Ibid*, p 619.

‘the extent to which employers are complying with their legal obligations depends significantly on the presence of active trade unions at workplace and trade union level. The study suggests that collective procedures are the custodians of individual rights.’¹⁰⁷³

Effective collective bargaining is, as we have seen, dependent on the opportunity for workers to take lawful and effective industrial action. Effective industrial relations is similarly dependent. As the blanket ban on secondary action was imposed, step by step, during 1980 – 1990 industrial relations were thrown into disarray. The corner stone of voluntarism had been removed, and workers found themselves unable to hold the government to its obligation to promote collective bargaining through lawful strike action, just as the government found the confidence – for want of a better word - to act in breach of many of its treaty obligations and abandon the rule of law. The prohibition on secondary action (effectively achieved by 1984,¹⁰⁷⁴ although the matter was not explicitly addressed in a statute until 1990), permitted the post Miners’ Strike legislation of 1986 – 1993 to pass on to the statute books without the wave of industrial action which very likely would otherwise have been provoked. When the attack on workers’ rights was renewed after the Tory and Liberal Democrat Coalition government was formed in 2010, the extraordinary 2013 imposition of employment tribunal fees, and the Trade Union Act 2016 went similarly unchallenged, although, after 35 years of declining union membership, and the erosion of the ability of trade unions to enforce solidarity, there is some question as to how effective any ‘days of action’ would have been even if by some miracle the ban on secondary action had been lifted temporarily to permit a lawful general strike.

¹⁰⁷³ Ibid, p 627.

¹⁰⁷⁴ When the Employment Act 1982 came fully into force.

Chapter Six

Benchmarking Individual Workers' Rights – interventions into the ordinary terms and conditions of employment

In this chapter I examine the minimum terms and conditions the Government is bound to guarantee the individual worker in relation to workplace safety, working time, remuneration and dismissal. This first category of rights can be seen as something of chimera - a prime example of the interrelationship of individual and collective rights. Rights to occupational safety and health [OSH] are arguably as easily characterised as civil rights as they are as social or economic rights, falling to be enforced by the individual worker, and by public authorities, as well as by trade unions. Unions work with employers to monitor workplace safety, and there are said to be around 150,000 union health and safety representative in the UK. The issues they raise are sometimes the subject of dispute and negotiation, occasionally necessitating strike action.

While individual workers are able to seek compensation for injury and consequent loss through actions in tort for workplace negligence and breaches of statutory duty,¹⁰⁷⁵ local authorities and the Health and Safety Executive have the overarching responsibility for supervising and monitoring compliance with the law, and investigating workplace accidents and instances of ill health caused by exposure to substances in the workplace, working conditions and working practices.¹⁰⁷⁶ Breaches of health and safety law by employers occasionally invite the ultimate form of collective intervention in the form of criminal proceedings and imprisonment.

Statutory intervention into working time, remuneration and dismissal can arguably be seen as the antithesis of voluntarism, and, as we have seen, UK governments have usually declined to ratify ILO Conventions which demanded such intervention on the grounds that these were matters best left to collective

¹⁰⁷⁵ Almost exclusively the former now that s6 of the Enterprise and Regulatory Reform Act 2013 had amended s47 of the HSWR 1974 to remove strict liability for most breaches of H&S regulations.

¹⁰⁷⁶ For the division of responsibility see www.hse.gov.uk/foi/internationalops/og/og-00073-appendix1.htm, which will show the Health and Safety (Enforcing Authority) Regulations 1998: A-Z guide to allocation.

agreement. Before the age of individualism these rights were, on the domestic plane, exclusively contractual rights. They were the product of *the exercise* of the collective rights and freedoms which were the subject of the previous chapter. It is notable that the first statutory individual rights were rights to minimum notice and to redundancy payments, conferred in an attempt to reduce the incidence of industrial action and can also therefore be seen to be the product of collective action.

As a consequence, although certain obligations relating to fair remuneration and working time had been acceptable to pre-1979 Governments (previously satisfied precisely because ‘the great majority’ of workers were protected by collective bargaining),¹⁰⁷⁷ the majority of the obligations considered in this chapter, imposed by the EU, the European Social Charter and UN Covenant of Economic, Social and Cultural Rights, are obligations which have *evolved*.

Not only have evolving interpretations added to the burden of obligation, but commitments made by Governments in the 1960s and 1970s to the progressive realisation of the Charter and Covenant rights have, with the passage of time crystallised into immediate obligations. Similarly, the individual employment rights imposed by virtue of EU membership were the result of evolution, of ‘ever closer union’ – of developments only very few had envisaged in 1973.

1: The Right to Health and Safety at Work

A ‘comprehensive national policy on occupational safety and health’ is required, policed by an independent and adequately resourced inspectorate to investigate, monitor, and implement enforcement action where substantive general and industry specific technical and procedural standards are breached. An adequate OSH regime will include the provision of adequate pay, daily and weekly rest, holidays, and paid sick leave.

Advice and guidance should be provided employers, but appropriate and dissuasive penalties must be imposed. The reach of the inspectorate should

¹⁰⁷⁷ The government is now in breach of those requirements as a consequence of the withdrawal of collective bargaining. See, for example Article 4(1) in the section on the Charter in chapter 3.

extend into the informal economy, and to domestic workers. It must have the authority to enter workplaces freely and without prior notice.

There must be grievance mechanisms for workers. Treatment, rehabilitation and compensation for those injured must be guaranteed.

Comprehensive reporting systems must be established.

States are required to notify the public of occupational accidents and disease.

‘Whistle blowers’ must be protected.

Just two ILO Conventions impose OSH sectoral, activity, and substance specific obligations on the Government, the Radiation Protection Convention No.115 of 1960, and the Working Environment (Air Pollution, Noise and Vibration) Convention (No.148) of 1977. The vast majority of health and safety workplace rights take the form of duties imposed upon employers as regulations deriving their authority from the European Union treaties which bind the Government. The content of these sectoral, activity, and substance, specific regulations is dictated by a range of EU Directives, augmented by EU Regulations. As we have seen in previous chapters, Directives permit states a margin of appreciation in their application. Where implementation has been inadequate they may be ‘directly effective’ against public authorities. EU Regulations apply almost as if they were domestic legislation, and are said to be ‘directly applicable,’ whether or not states choose to incorporate them in domestic law.¹⁰⁷⁸

The EU Charter of Fundamental Rights reflects the complex European health and safety regime in a necessarily generalised but recognisably individualised form: Article 31(1) states that ‘Every worker has the right to working conditions which respect his or her health, safety and dignity.’ The regime, which places specific obligations on employers in order to secure to this simple entitlement is, however, of considerable complexity.

¹⁰⁷⁸ See P Craig and G de Búrca, *EU Law Text, Cases and Materials* (Oxford, OUP, 2011) p107-8.

The first two OSH Directives were adopted in 1977 and 1978, results of the Social Action Programme launched in 1974.¹⁰⁷⁹ One required workplace notices to indicate particular dangers and the location of safety equipment, and the other governed the use of a category of particularly harmful chemicals. Although overt OSH interventions ceased during 1979 – 1986,¹⁰⁸⁰ two subsequent action programmes undertaken between 1978 and 1986 saw a number of public safety ‘technical’ directives adopted, including, in 1980, a Framework Directive on hazardous agents,¹⁰⁸¹ which spawned three ‘daughter’ directives controlling noise, and the use of lead and asbestos. A fourth unequivocally prohibited the use of a number of highly toxic substances.¹⁰⁸²

The new competence conferred by Article 118a, inserted into the Treaty of Rome by the SEA 1986 (now Article 153 of the TFEU), explicitly extending the reach of the European Community to workplace health and safety,¹⁰⁸³ permitted the adoption in 1989 of the Occupational Safety and Health Framework Directive,¹⁰⁸⁴ and the five basic OSH daughter directives on specific workplace hazards adopted under the authority of Article 16(1) of the Framework Directive. These related to work places and equipment in general, and, more specifically, to personal protective equipment, ‘manual handling’ – safe lifting and carrying - and the use of display screens.¹⁰⁸⁵ A raft of occupation, equipment and material specific Directives followed. Currently there are 19 individual 16(1) Directives in force, including the original five (or revised versions of those five).¹⁰⁸⁶ Beyond those there are the directives less closely related to the provisions of the Framework directive, such as the Working Time Directives, and OSH Directives specifically aimed at protecting workers considered more vulnerable - those employed on fixed term and temporary contracts, and younger workers.

¹⁰⁷⁹ See chapter four.

¹⁰⁸⁰ *Ibid*, on UK resistance to the SAP.

¹⁰⁸¹ Directive 80/1107/EEC. See Barnard, *EC Employment Law*, 3rd Edition pp 541-543.

¹⁰⁸² *Ibid*, p543.

¹⁰⁸³ See chapter 4 for a discussion of QMV, the SEA H&S competence and the overlap with employment matters believed by the UK to require unanimous approval. While OSH measures can be seen as economic measures ensuring ‘a level playing field’ for competition, workplace safety can also be seen to merges with public safety. For example, under the Euratom Treaty the health and safety aspects of ionising radiation were, and continue to be a matter of primary importance. The road haulage driving time ‘tachograph rules’ (see p** below) are also H&S laws which arguably transcend categorisation to become public safety matters.

¹⁰⁸⁴ Directive 1989/391/EEC, closely modeled on ILO Convention No.155 which has not been ratified by the UK

¹⁰⁸⁵ Directives 89/654 – 656 and 90/269 -70.

¹⁰⁸⁶ Listed in an article by Carsten Bruck of Kooperationsstelle Hamburg IFE GmbH, Germany in General Principles of EU OSH legislation on the EU OSH Agency website ‘OSH WIKI.’

The less overtly OSH technical Directives, augmented by EU Regulations, had continued to be adopted and revised during the 1979 – 1986 hiatus, and in 1998 the ‘hazardous agents’ Framework Directive of 1980 and its progeny were subsumed into the new regime. Since then more dangerous substances and associated procedures have been targeted, notably by the REACH Regulations,¹⁰⁸⁷ and by fresh directives like the Carcinogens Directive of 2004,¹⁰⁸⁸ as the focus has shifted on to the causes and prevention of occupational disease, and away from immediate physical workplace safety.

These EU obligations can also be said to be European Social Charter obligations. In the first interpretative statement on Article 3 of the Charter the European Committee on Social Rights holds that in order to fulfil the requirements of Article 3(1), the ‘core’ requirement for states to issue OSH regulations, states must ‘prove that safety and health regulations have been issued for all economic sectors.’¹⁰⁸⁹ A recent Statement of Interpretation on Article 3(1) incorporates a very comprehensive list broadly covering all the areas of EU regulation. These are subject to regular updating. The Committee ‘has at its disposal a very complete set of international technical reference standards which can be of use for defining and listing the main risks and occupations,’ which require protective measures sufficient to comply with 3(1). It promises that it ‘will explain the new areas to which it will turn its full attention each time it examines Article 3.’¹⁰⁹⁰

Article 3(1) can thus be seen to require the UK to adhere to the requirements of the EU OSH regime whether or not it continues to be bound by the EU treaties.

Similarly, the ILO Promotional Framework Occupational Safety and Health Convention No.187 of 2006, ratified by the UK in 2008, requires states to have a national health and safety policy, system and programme in place. In the General comment (No.23) on Article 7 of the United Nations International Covenant on Economic Social and Cultural Rights guarantees the right to just and favourable conditions of work the Committee on Economic Social and Cultural Rights holds that the provision of a ‘comprehensive national policy on occupational safety and health’ is a core obligation of states party to the Covenant.¹⁰⁹¹

¹⁰⁸⁷ Reg (EC) No.1907/2006 concerning the Evaluation, Authorisation and Restriction of Chemicals.

¹⁰⁸⁸ 2004/37.

¹⁰⁸⁹ Conclusions I, 1965-1967 Statement of Interpretation Article 3.

¹⁰⁹⁰ Conclusions XIV-2, [1999] Article 3(1) & Statement of Interpretation (2013) Article 3.

¹⁰⁹¹ Ibid, para 65.

‘Safe and healthy working conditions’ [A7 (b)] require ‘broad participation in the formulation, implementation and review’ of the policies to ensure such conditions. Not only must trade unions be involved, ‘whistle blowers’ must be protected.¹⁰⁹² Comprehensive reporting is a necessity;

‘the policy should promote the collection and dissemination of reliable and valid data on the fullest possible range of occupational accidents and disease, including accidents involving workers while commuting to and from work.’¹⁰⁹³

States have a specific legal obligation to establish ‘notification schemes in the event of occupational accidents and disease.’¹⁰⁹⁴ ‘Under reporting’ is an undisputed aspect of the UK OSH regime, acknowledged even by the Health and Safety Executive,¹⁰⁹⁵ and is an unequivocal breach of the basic regimes required by the Covenant, the ILO, and the European Social Charter. The HSE estimated that in 2016 -17 there had been 1.3 million cases of work related ill health in the UK. Those cases, however, were only the cases where the individuals concerned had worked during the previous 12 months - the long term cases were excluded from the figures. Yet the annual cost in 2015-16 of these new cases alone was estimated to be in the region of 9.7 billion pounds.

There were around 600,000 non fatal workplace injuries in 2016-2017,¹⁰⁹⁶ and the annual toll is estimated to cost the UK 14.9 billion pounds.¹⁰⁹⁷ Yet the HSE records only 137 work place deaths in 2016/17, while 92 members of the public were killed ‘due to work related activities.’¹⁰⁹⁸ These figures mask the true individual

¹⁰⁹² Ibid, paras 26 & 27. The UK protections for whistleblowers are robust enough if highly complex. See recent Court of Appeal cases *Beatt v Croydon Health Services* [2017] EWCA Civ 401; *Royal Mail Group v Jhuti* [2017] EWCA Civ 1632; *Chesterton Global v Nurohamed* [2017] EWCA Civ 979. See also J Ashton, ‘15 Years of Whistleblowing Protection under the Public Interest Disclosure Act 1998: Are We Still Shooting the Messenger’ (2015) 44 *ILJ* 29.

¹⁰⁹³ Ibid, para 28. See Art 1(d) of Protocol of 2002 to No.155 (above).

¹⁰⁹⁴ Ibid para 62.

¹⁰⁹⁵ Steve Tombs and David Whyte, *Regulatory surrender: death, injury and the non-enforcement of law*, (IER 2011) pp 41-45.

¹⁰⁹⁶ HSE : Health and Safety at Work Summary statistics for Great Britain 2017. Numbers of cases are Labour Force Survey figures, while the costs are HSE figures. None of figures take into account road traffic accidents., although it is notable that the second most common cause of death to a worker ,after a fall from a height (28%), is being struck by a moving vehicle (17%). www.hse.gov.uk/statistics/causing/kinds-of-accident.pdf.

¹⁰⁹⁷ Figure from the 2017-18 HSE Annual Report, ‘excluding long latency illnesses’ for 2015-16. Such estimates appear to be very approximate – in the ‘summary statistics for Great Britain 2017’ cited in the preceding note the figure was 5.3 billion.

¹⁰⁹⁸ www.hse.gov.uk/statistics/pdf/fatal_injuries.pdf

and collective cost of failures of workplace safety which ultimately cause the premature death of workers. The TUC has stated that ‘Even by the most conservative estimates 20,000 people die prematurely each year as a result of injury or illness caused by the work they do.’¹⁰⁹⁹ Some consider the figure to be closer to 50,000 per year,¹¹⁰⁰ and it is notable that in their 2017-18 Annual Report the HSE states that there are ‘12,000 lung disease deaths each year estimated to be linked to past exposures at work.’

The workers succumbing to this epidemic of work induced ill health have to be supported. According to the UN Committee on Economic and Social Rights:

‘Paid sick leave is critical for sick workers to receive treatment for acute and chronic illnesses and to reduce infection of co-workers.’¹¹⁰¹

Unfortunately in the UK, because many employers will not pay those who are ‘off sick,’ very many workers are eligible only for Statutory Sick Pay, and Short Term Incapacity Benefit and literally cannot afford to not to go to work. In 2013 the European Committee Social Rights held in the context of the European Social Charter Right to Social Security (Conclusions XX-2), that Statutory Sick Pay and Short Term Incapacity Benefit were ‘manifestly inadequate in the meaning of Article 12(1) of the Charter as they fall below 40% of the Eurostat median equivalised income.’ At the end of the reference period in question (2011) the median figure was 714 Euros, while those workers on short term incapacity benefit or statutory sick pay received approximately 440 and 370 Euros each month (£97 and £81.60 per week). In 2017 the ILO Conference Committee on the Application of Standards discussed the UK’s failure to comply with the Social Security (Minimum Standards) Convention 1952 (No.102),¹¹⁰² with representatives from France, Sweden and Australia noting that British protections were wholly inadequate. The Committee of Experts had found in 2016 that SSP, and Employment & Support Allowance, which is available to the self employed and the very low paid who do not qualify for SSP, fall much below the minimum rate of 45 percent [‘of the reference wage of an ordinary labourer’] guaranteed by the

¹⁰⁹⁹ ‘The Case for Health and Safety’ TUC 7 September 2010 www.tuc.org.uk/research-analysis/reports/case-health-and-safety. The devastating effects of occupational diseases, including workplace induced repetitive strain injury, stress and depression, have arguably long overtaken immediate physical safety as the primary health and safety problems facing ‘first world’ states.

¹¹⁰⁰ See Tombs and Whyte, 2011, *op cit*, p 43.

¹¹⁰¹ *Ibid*, para 30.

¹¹⁰² Individual Case (CAS)-Discussion: 2017, Publication: 106th ILC session (2017).

Convention/Code and concluded that ‘social security benefits in case of sickness, as they are understood and conceived by government, do not permit the United Kingdom to fulfill its obligations under Part III[which concerns sickness benefit] of the Convention/Code as regards the level of benefit.’¹¹⁰³ In a Direct Request the Committee, has asked the Government to explain the reasoning behind the Agricultural Sick Pay scheme. ‘ASP’ is less generous even than SSP, and is paid only to those who have worked with the one employer for 52 weeks,¹¹⁰⁴ in contrast to SSP which is available to all employees outside of the agricultural sector as a ‘day one’ right. Why farm workers are discriminated against in this fashion remains unexplained.

A lesser known right, closely related to the provision of sick leave, is conferred by Article 2(4) of the European Social Charter: Workers engaged in dangerous or unhealthy work are entitled to reduced hours or additional holiday in order to compensate for ‘residual risk.’ In the UK neither the law nor collective agreement guarantee the great majority of such workers this increased ‘down time,’ and, as a consequence in Conclusions XVIII-2 (2007), XIX-3 (2010) and XX-3 2014, the UK was found not to be compliant with 2(4). In its Cycle XXI-3 (2018) report the Government ‘respectfully’ stated that it

‘continues to disagree with the Committee’s conclusions...The UK has a robust framework for reducing risk...the established principles of elimination, reduction, assessment and control of risk... presents the potential for higher levels of risk control than simply focusing on reducing the time of exposure...’

Effectively the government refuses to comply with 2(4). Moreover, its disingenuous argument ignores one of key reasons for the provision of increased rest - the purpose is not merely to reduce risk, but to ‘allow for a reduced accumulation of physical and mental fatigue.’¹¹⁰⁵

¹¹⁰³ Observation (CEACR) – adopted 2016, published 106th ILC Session (2017).

¹¹⁰⁴ Direct Request (CEACR) – adopted 2016, published 106th ILC session (2017), Social Security (Minimum Standards) Convention, 1952 (No.102), United Kingdom (Ratification: 1954).

¹¹⁰⁵ From the statement of interpretation in Conclusions V, 1974-75.

Such a brazen denial of the authority of the Charter, and of the Committee, undermining, as it does, the concept of treaty obligation and the rule of law, is uncharacteristic, tending to be employed where more minor state transgressions are concerned.¹¹⁰⁶ The Government's approach to the vital issue of OSH inspection provides a more representative example of its handling of these matters – it relies on obfuscation and misinformation to disguise non compliance with more fundamental obligations.¹¹⁰⁷

The backbone of any adequate health and safety programme might reasonably be said to be workplace inspection and the enforcement of standards. Compliance with Article 7 of the UN Covenant requires states to undertake adequate inspection and investigation, to make reports, and to impose sufficiently dissuasive penalties on employers who breach OSH standards.¹¹⁰⁸

The UN Committee, as we have seen in previous chapters, relies very much on the provisions of the ILO Conventions and on the work of the ILO supervisory bodies when interpreting state obligations under the Covenant. However, few of the very many Conventions relating to health and safety have been ratified by the UK. As a consequence it is arguable that while the Covenant provides a conduit of sorts, its obligations do not 'feed in' to reinforce the ILO obligations as they do in relation to freedom of association, a matter, it will be recalled, which was considered in the previous chapter.

Where workplace inspection is concerned, however, the position is different. One Convention, ratified by the Attlee government in 1949, the Labour Inspection Convention (No.81) of 1947 requires the UK to maintain a vigorous inspectorate and a rigorous enforcement regime.

C81 is very important. It is a Governance Convention, one of four 'priority' instruments, just one step down from the eight Core Conventions, and it obliges the UK by Article 3 'so far as such provisions are enforceable by labour inspectors':

¹¹⁰⁶ See below in section 2 in relation to workers taking public holidays.

¹¹⁰⁷ See below in section 3 in relation to the minimum wage.

¹¹⁰⁸ UN CttESCR General Comment on Article 7, para 29.

- (a) 'to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work, such as provisions relating to hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters...'

The UK has chosen to give its inspectorates at least some responsibility for all of the matters specifically mentioned in Article 3, although the principal responsibility for HSE and local authority inspectors has always been, and remains, workplace safety. Crucially, Article 10 requires that

'The number of labour inspectors shall be sufficient to secure the effective discharge of the duties of the inspectorate and shall be determined with due regard for (a) The importance of the duties which inspectors have to perform, in particular-

- (i) The number, nature, size and situation of the workplaces liable to inspection;
- (ii) The number and classes of workers employed in such workplaces; and
- (iii) The number and complexity of the legal provisions to be enforced.

By Article 12 (1) 'Labour inspectors provided with proper credentials shall be empowered:

- (a) To enter freely and without previous notice at any hour of the day or night any workplace liable to inspection;
- (b) To enter by day any premises which they may have reasonable cause to believe to be liable to inspection; and
- (c) To carry out any examination, test or enquiry which they may consider necessary...(i) to interrogate, alone or in the presence of witnesses, the employer of the staff or undertaking on any matters...(ii) to require the production of any books, registers or other documents the keeping of which is prescribed by national laws or regulations...'

And, although due regard is given to states allowing inspectors to choose to give warnings and advice, and to issue remedial notices, Article 17 requires that

‘Persons who violate or neglect to observe legal provisions enforceable by labour inspectors shall be liable to prompt legal proceedings without previous warning.’

Article 3(2) of the European Social Charter also requires the effective enforcement of health and safety regulation. In the first interpretative statement on Article 3 the Committee held that states must ensure that OSH

‘regulations are adequately enforced through inspection and civil and criminal sanctions... to safeguard the implementation of the rights to safe and healthy working conditions *in practice*.’¹¹⁰⁹

It has long been established that all government reports to the committee on 3(2) should record

‘the number of visits made by labour inspectorate staff, and the number of enterprises subject to inspection, with a breakdown for the different sectors of activity...number and percentage of workers covered by visits...number of staff employed in labour inspectorates and details of their assignment to the various sectors...this information should be supplied for a period covering the last four years if possible.’¹¹¹⁰

UK Government reports failed to supply these figures. Even the Health and Safety Executive has become markedly coy about revealing the inspection figures, with the ILO’s Committee of Experts noting in 1993 that

‘no later copies of annual inspection reports are available than the Health and Safety Commission Report for 1987-88.’¹¹¹¹

¹¹⁰⁹ Conclusions I, 1965-1967. Statement of Interpretation Article 3.

¹¹¹⁰ Conclusions XIII-I (1990-1991). Statement of Interpretation Article 3(2).

¹¹¹¹ Direct Request (CEACR)- adopted 1993, published 80th ILC session 1993, Labour Inspection Convention 1947 No.81.

When pressed by the European Committee on Social Rights the government did, however, append the HSE 2010-2011 *Annual Reports and Accounts* to its 2012 report,¹¹¹² where, on pages 18-19, it is briefly acknowledged that ‘Approximately 500 hundred proactive inspections were undertaken,’ the first mention of numbers of preventative inspections mentioned in any HSC/HSE report since 2002.¹¹¹³ There is good reason for this reluctance to reveal the numbers of inspections.

The TUC reported in 2010 that in 1999-2000 the HSE Field Operations Division had made 75,272 inspections of workplaces compared with 23,004 in 2008-09.¹¹¹⁴ A 2010 paper from the influential right wing Policy Exchange ‘think tank’ put the figure at 41,496 in 2006-7, ‘around 55,000 in 2004-5, ‘down from over 65,000 in 2002-3’ and 2003-4, estimating the frequency of local authority inspections as ‘not much higher.’¹¹¹⁵ The paper acknowledged that these figures were low in comparison with other EU states, noting that Germany conducted in excess of one million such inspections each year.¹¹¹⁶ It failed to mention that in the UK in the 1970s it was not unusual for the HSE and local authorities to make between them in excess of a million workplace visits each year.¹¹¹⁷

The long term picture in relation to prosecutions is as startling. According to the TUC, prosecutions fell from 1,986 in 2001-02 to 1,090 in 2008-2009,¹¹¹⁸ while the Policy Exchange paper gave a figures embracing both local authority and HSE cases: 2,500 in 1999-2000, described as a ‘high’, and ‘around 1,400’ prosecutions in 2008-9. Steve Tombs and David Whyte state that Inspections by the HSE Field Operations Directorate and by local authority Environmental Health Officers both fell by 69% between 2003 and 2016, while preventative inspections by the latter fell by an astonishing 96%. Improvement notices and prohibition notices imposed

¹¹¹² 32nd Report on the Implementation of the European Social Charter submitted by the Government of the United Kingdom, Articles 3,11,12,13 and 14, 2008-2011, 30 November 2012.

¹¹¹³ Health and Safety Commission Annual Report and the Health and Safety Commission/Executive Accounts 2001-2, p.55.

¹¹¹⁴ Statistics cited by the TUC in their paper ‘The Case for Health and Safety’, September 2010

(www.tuc.org.uk/research-analysis/reports/case-health-and-safety).

¹¹¹⁵ Corin Taylor, *Health and Safety Reducing the Burden*, 2010.

¹¹¹⁶ *Ibid*, p13.

¹¹¹⁷ See Phil James and David Walters, *Health and Safety at Work: Time for a Change*, (Liverpool, IER, 2016, note 47

¹¹¹⁸ TUC,2010, *op cit*.

by the HSE fell by 14% and 35%, and those imposed by local authorities 65% and 28% in the same period. Convictions fell by 60% during 2003 – 2015.¹¹¹⁹

All of these reductions were the direct consequence of cuts in funding, augmented by executive orders issued by the Government and a creeping privatisation programme. In 2009 the ‘Primary Authority Scheme,’ a ‘partnership’ arrangement which entails companies contracting with the local authorities of their choosing and in effect paying that LA to be its health and safety mentor was established. In March 2011 the Department of Works and Pensions declared most sectors to be ‘low risk, introducing its *Good Health and Safety, Good for Everyone* policy,¹¹²⁰ requiring the HSE to ‘concentrate on higher risk areas and on dealing with serious breaches of health and safety regulation. This will mean a very substantial drop in the number of health and safety inspections carried out in the UK.’¹¹²¹ A ‘Fees for Intervention’ [‘FFI’] scheme to charge employers when their failures obliged the HSE to inspect or investigate was announced, and, extraordinarily, an on line ‘self assessment’ programme was to be rolled out for employers operating in the low risk sectors to replace all other than ‘intelligence led’ preventative inspections. ‘Free guidance and advice’ is available from the Health and Safety Laboratory.¹¹²² Should employers choose to buy advice, the HSL offers ‘paid for services such as training consultancy and bespoke research’, and private health and safety consultants – the HSL offers training- can also be called upon to assist with ‘in house’ inspections.

It was envisaged that the HSE would reduce preventative inspections by 11,000, one third of the 33,000 inspections made during 2010-11, and this has been achieved. Only 23,472 inspections were made in 2013-14, 20,200 in 2014-15 and 18,000 in 2015-16.¹¹²³ The target of a one third reduction in inspections by local

¹¹¹⁹ From an unpublished draft of IER document 2017 by Tombs and Whyte.

¹¹²⁰ *Good Health and Safety, Good for Everyone; The next steps in the Government’s plans for the reform of the health and safety system in Britain*, DWP, 21 March 2011.

¹¹²¹ *Ibid*, p3.

¹¹²² Health and Safety Laboratory, ‘Enabling a Better World,’ *About Us*, www.hsl.gov.uk/about-hsl

¹¹²³ James and Walters p15. The 2013-14 figure is credited to HSE 2015 *Health and Safety Statistics: Annual Report for Great Britain 2013/14*, and the 2015-16 figures to the *Health and Safety Executive Annual Report and Accounts 2015/16*.

authorities was exceeded. Preventative inspections fell from 118,000 in 2015-16 to 5,400 in 2014-15.¹¹²⁴

Phil James and David Walters estimate that according to government projections for 2020, 'HSE's funding will staggeringly have fallen by more than 60% over the period from 2004/05.'¹¹²⁵ Where local authorities are concerned the funding picture is necessarily more complex, but just as dramatic. The number of inspectors fell by 30% between 2009 and 2015, while

'in many local authorities these inspectors now carry out no enforcement on workplace health and safety whatsoever...'¹¹²⁶

Reading the government's 2017 report to the European Committee of Social Rights, one would not suspect that such a massive retreat had taken place. Without troubling the Committee with statistics the Government explains that the HSE's current approach 'accommodates the need for inspectors to target key risks and take proportionate action...inspection is concentrated on the higher risk industrial sectors...However, employers in any sector who under perform in any health and safety may still be visited.'¹¹²⁷

Extraordinarily, in 2018, the Committee, seemingly satisfied with the Government's reassurances, still holds the UK to be compliant with Article 3(2) (Conclusions XXI-2 2017, published January 2018).¹¹²⁸ Working under the 1961 procedures, and thus ostensibly reliant on the Government's version of events, this sustained de-regulatory campaign has not been revealed to the Committee 'on the record.' Referring the Government report it stated that

'there have been several government reviews of health and safety...These found no case for radically altering the existing legislation, with the HSE said merely to have 'revoked and amended legislation to make the legal

¹¹²⁴ James and Walters, p15. They credit these figures to 'HSE 2014'.

¹¹²⁵ James and Walters, p24.

¹¹²⁶ Ibid.

¹¹²⁷ 36th National Report on the implementation of the European Social charter submitted by the Government of the United Kingdom, Cycle XXI-2 (2017), 11 January 2017. P.2.

¹¹²⁸ The finding is 'pending' receipt of information on the possible under reporting of occupational disease in Northern Ireland.

framework for health and safety clearer by removing unnecessary burdens...'¹¹²⁹

Thus with a few words a radical withdrawal of workplace inspection unarguably in breach of Article 3 is passed off as if it were a matter of administrative streamlining. There is, however, at least some indication in the Conclusions that members of the Committee might be conscious that the government are not being entirely frank with them:

'The Committee notes from the HSE's Annual Report and Accounts 2014/15 that the number of HSE staff...was 2,454 on 31 March 2015 and 3,183 on 31 March 2013...The Committee asks that the next report provide detailed information on the new system, particularly with regards to the number of labour inspectors.'

Article 3(1) provides the basic requirement for states to issue health and safety regulations 'against most of the risks provided in the international technical reference standards,'¹¹³⁰ and protection must be extended to *all workers in all sectors*. Consequently the committee held the failure to provide OSH protection for domestic workers (see chapter 7, section 2 on 'domestic servitude'), and to the effect of s3(2) of the Deregulation Act 2015, which removes the self employed from the ambit of the Health and Safety at Work Act 1974 if their activities pose no risk to other workers and members of the public, to be breaches of Article 3(1).

Although the Committee did not refer to it, a Statement of Interpretation from the 1970s states the case for covering the self employed:

'there is no impossibility in imposing a duty of self protection...no one would suggest punishing workers for injuring themselves...it will normally be in their own interests to have their position defined by regulations.'¹¹³¹

¹¹²⁹ This was in relation to 3(1) and the necessity to issue H&S regulations, rather than supervision 3(2), although, of course, the requirements are inextricably intertwined.

¹¹³⁰ From the Statement of Interpretation on 3(1) Conclusions XIV-2

¹¹³¹ Conclusions IV (1972-1974) Statement of Interpretation Article 3(1). The stance of the Committee differed from that of the Governmental Committee, the status of the self employed in relation to H&S having been disputed in the late 60s and early 70s .

Given the ‘tsunami’ of deregulation during the reference period (2012-2015) the focus on this legislative gesture arguably highlights the ineffectiveness of the reporting system more than it does UK non compliance with Article 3(1).¹¹³²

So, despite the complexity of the EU health and safety regime – even arguably *because of* the EU regime – businesses in the UK have largely been left to their own devices where compliance is concerned. Yet this failure to enforce has not triggered EU infraction proceedings, the EU principle of effectiveness having apparently been usurped that of subsidiarity,¹¹³⁴ with member states in practice afforded a very wide margin of appreciation in enforcing the health and safety directives. A sceptic might be tempted to suggest that this another example of the the unofficial EU principle of business friendly pragmatism in action – states are left to do very much as they please as long as it can plausibly claimed that the Directives have been implemented. This can have paradoxical effects. For example, we have seen that in contrast to the UK Germany rigorously enforces its health and safety laws. Germany was nevertheless subject to infraction proceedings after it had by law explicitly excluded firms employing 10 or fewer workers in certain sectors from the reach of some of the EU derived health and safety regulations. Had it simply withdrawn from inspection or enforcement in the manner of the UK, then it seems unlikely that the Commission would have taken an interest.

Yet the EU Commission acknowledges that workplace inspections are crucially important, and that preventative inspection is the cornerstone of the health and safety edifice:

‘legal requirements combined with inspection are major reasons explaining why establishments develop occupational safety and health policies and take relevant action. Inspections can indeed contribute to a true prevention culture.’

¹¹³² Of course, the UK has not ratified the 1996 Revised Charter nor has it signed up to the Collective Complaints Procedure (see chapter 3 and chapter 8).

¹¹³⁴ See para 106 of the Supreme Court tribunal fees UNISON judgement (*R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51): ‘the procedural requirements for domestic actions must not be “liable to render practicably impossible or excessively difficult” the exercise of rights conferred by EU law’, citing *Impact v Minister for Agriculture and Food* [2008] C- 268/06 ECR I-2483, para 46 as an example.

The Commission noted the ‘tangible impacts of inspections...in terms of a reduction on injury rates following inspection’ and ‘a decrease in the rate of severe injuries’ where employers received numbers of OSH inspections and infractions were penalised. It lamented the fact that the frequency of inspections varied considerably across the member states.¹¹³⁵ In a 2004 paper the Commission had cited ‘the only empirical study as regards health and safety at work’ - which was conducted in the UK - and found that the overwhelming majority (80%) of employers were interested in Health & Safety only to pass inspections and avoid legal liability.¹¹³⁶

The ILO’s Committee of Experts is, however, less relaxed about failures to monitor workplace health and safety.

A spate of Observations on the UK and C81 followed three Direct Requests made during the early 1990s as concerns were raised by the TUC about the withdrawal of inspections in the late 1980s.¹¹³⁷ In a fourth, in 1995, the Committee of Experts, adopted in relation to Article 18 of the Labour Inspection Convention, ‘hit the nail on the head’, stating that it

‘regrets the reluctance on the part of HSE to enforce legislation arising from EC (EU) Health and Safety Directives. According to the TUC unless an employer knows that prosecution is likely in cases of health and safety offences, large sections of industry will fail to adopt a positive approach...’¹¹³⁸

¹¹³⁵ The 2017 Communication by the Commission on ‘Safer and Healthier Work for All – Modernisation of the EU Occupational Safety and Health Legislation and Policy’ (Brussels 10 January 2017 COM (2017) 12, p16-17).

¹¹³⁶ COM (2004) Commission of the European Communities, 5 February 2004, p.15. See also COM (2014) 332; Communication on an EU Strategic Framework on Health and Safety at Work 2014-2020.

¹¹³⁷ A Direct Request in 1993 mentions a 1988 Observation ‘following comments as to the decline in the numbers of inspectors and inspection visits made by the Trades Union Congress’ Direct Request (CEACR)- adopted 1993, published 80th ILC session.

¹¹³⁸ Among other matters, information was requested on the abolition of the Works Councils; the fact that the TUC had reported ‘that only safety, health and welfare at work are subject to inspection,’ that the government had failed to show that the number of inspectors is sufficient to discharge their duties, and TUC allegations that firms could only expect an inspection every 7 years on average (Direct Request – adopted 1995, published 83rd ILC session (1996).

Three more Direct Requests have been adopted since, in 2000 – also in relation to the Observation adopted in the same year - 2003, and 2009, again following an Observation. However only the Direct Requests of 1993 and 1995, and the 2013 and 2016 Observations, out of the six adopted between 2000 and 2016, can be said to have made the Committee’s dissatisfaction with UK deregulatory non-enforcement abundantly clear.

The 2013 Observation, adopted after the CEACR had information on workplace inspection in the wake of the 2011 ‘launch of the ‘Good Health and Safety, Good for Everyone’ programme,’ citing concerns that Articles 2,3,5,10,11,13,17,18,22 and 23 of C81 had potentially been breached or were likely to be breached. Information was requested on the targeting of workplaces for inspection, whether unions and employers organisations were consulted on such selection, whether self assessment in low risk sectors was voluntary or mandatory, and whether ‘underperformance in the area of OSH’ in workplaces left to monitor their own compliance could be picked by the inspectorate. Detail on the impact of these measures, and the new FFI scheme, on the identification of infractions, the numbers of accidents and the incidence of occupational disease was also requested.¹¹³⁹

Following an unsatisfactory response by the Government, the 2016 Observation adopted a more confrontational tone. Concerns reported to the Committee in 2013 by the TUC were reiterated;

‘workplaces identified with lower safety risks do not necessarily have a lower incidence of cases of occupational disease, and that they should therefore not be categorised as low risk.’¹¹⁴⁰

The Committee, stated that it considered ‘it important that certain, often vulnerable, categories of workers...are not excluded from protection,’ due to this targeting. It wanted more information than it had required in 2013; statistics on the number of inspections, especially in SMEs, the numbers of infringements detected, the numbers of inspectors and the budget allocations since 2011, and more information on the targeting criteria. The CEACR ‘also once again requests that the Government provide information on the means used by the labour

¹¹³⁹ Observation (CEACR) – adopted 2013, published 103rd ILC session (2014).

¹¹⁴⁰ Observation (CEACR) – adopted 2016, published 106th ILC session (2017).

inspectorate to detect underperformance in the area of OSH of workplaces that are currently not expected to be subject to inspections,' and seeks reassurance that workplace whistle blowers be assured confidentiality in their dealings with the HSE.

With regard to 'self assessment' as a preventative measure it held that 'on line risk assessment' in conjunction with advice from the HSL is acceptable as long as it is 'complementary to' and not a replacement for labour inspection. Self assessment programmes require monitoring with 'dissuasive sanctions' imposed for false claims, and 'once again requests that the Government provide information on whether the use of self assessments in workplaces not subject to inspection is voluntary or mandatory.' It asked the Government to indicate whether self inspection data 'are fed into the inspection programme process and to indicate that all workplaces remain liable to inspection by the labour inspectorate.' The Committee is 'cranking up' the pressure on the Government.

A failure by the Government to fund the inspectorate sufficiently undermines effective enforcement, and the Committee asked for more detail on the reliance of the HSE on funds raised through the FFI. The Committee has requested information 'on any measures by the Government to avoid potential damage to the reputation of the HSE concerning impartiality and independence.' The FFI scheme, which the Government proposes to expand, is, like the Primary Authority scheme, seen by many as a step towards privatisation.

The CEACR is focused on the HSE and has yet to come to grips with either the withdrawal of inspection by Local Authorities or the Primary Authority scheme. The same is true of the European Social Charter's ECSR, although the scrutiny of the ECSR is, as we have seen, is considerably less intense than that of the Committee of Experts.

Nevertheless, confrontations between both Committees and the UK government appear to be looming, although there are indications that the Government is at least starting to reconsider its position, it having announced in February 2018 as part of its Industrial Strategy that:

‘For the benefit of firms, workers and the public interest we need to develop a more proactive approach to workplace health.’¹¹⁴¹

While parts of that strategy have been implemented as improved employment protections for those engaged on ‘atypical’ contracts,¹¹⁴² as yet been no fresh OSH initiatives have been announced, and it must therefore be concluded that:

- Preventative workplace inspection in the UK is wholly inadequate.
- Substantive standards are not enforced.
- Statutory sick pay, short term incapacity benefit and the employment and support allowance are inadequate.
- Workers engaged in hazardous work exposed to ‘residual risk’ should be guaranteed reduced hours or longer periods of leave.
- UK reporting and notification arrangements are inadequate. The under reporting of deaths, injuries, disease has become accepted. Those suffering long term ill health as a result of working conditions and practices should be recognized in the figures.
- Self employed workers and domestic workers should be given afforded OSH protection - protection must be extended to *all workers in all sectors*.
- These shortfalls, and the use of ‘on line risk assessment’ and private Health & Safety consultants in the place of preventive inspections, in all but severe and high risk sectors, are unequivocal breaches of C81, Article 3(2) of the European Social Charter and Article 7 of the UN Covenant on Economic, Social and Cultural Rights.
- The impartiality and independence of local authority inspection is undermined by the Primary Authority Scheme, and that of the HSE is threatened by the expansion of the Fees for Intervention scheme and privatization. These initiatives are prima facie breaches of C81 and Article 7 UNICESCR.

¹¹⁴¹ HM Government Industrial Strategy: *Good Work, A response to the Taylor Review of Modern Working Practices*, February 2018, p.12.

¹¹⁴²See chapter 7.

2: Working Time

Workers should be guaranteed a maximum *average* 48 hour working week (calculated over a 17 week reference period), with an absolute cap of 60 hours. A 20 minute break is required after 6 hours work, and workers must be given a minimum of 11 hours ‘daily’ rest. 48 hours of continuous ‘weekly’ rest is required after a maximum of 12 days continuous work. A 40 hour week is the maximum *average* for night work, and there is an absolute cap for hazardous or especially stressful work, of 8 hours per night. The Night work reference period, and the definition of hazardous work must be determined by collective agreement.

These limits can be varied to suit the needs of a particular industry or seasonal changes in work loads by collective agreement at sectoral or enterprise level if compensatory rest is provided to bring the averages to within the requisite limits. The 17 week reference period may be extended to 26 weeks – 52 weeks in some cases - to accommodate the needs both of workers and employers by ensuring that compensatory rest serves to reduce the average week to no more than 48 hours.

Individual workers, other than mobile transport workers, are permitted to elect to ‘opt –out,’ and make a voluntary and informed decision to relinquish their entitlement to a limit on the hours worked.¹¹⁴³

Clear and robust safeguards must be implemented to prevent these opt outs from effectively undermining the purpose of the Directive and the Regulations.¹¹⁴⁴

A record must be kept of the workers who elect to dispense with the weekly protections, of the hours they work, and of any health and safety concerns raised

¹¹⁴³ The original 1993 Directive and the amended 2003 Directive.

¹¹⁴⁴ EU competence where working time is concerned is justified by Article 137(1) TEU. It is a health and safety measure, although it would be disingenuous to pretend that it is not also a social entitlement. It has been pointed out that to permit workers to surrender a right to health and safety is absurd. While it is noticeable that in transport, where over tired workers can cause catastrophic accidents (see below), no opt-outs are permissible, it is the case that very many workers permitted to waive their entitlement to the 48 week have killed and injured themselves and others after becoming over tired. For a raft of evidence on these matters and much more see Hazards Magazine ‘Work schedules and work hours’ at www.hazards.org which provides a mass of links to evidence on the threat to health of long hours and cases where workers have been killed or injured through be required to work excessive hours.

in connection with their work. A record must be kept of the breaks taken by all workers.

States should be progressing towards an ideal standard of a maximum 40 hour week for all workers.

5.6 weeks of paid annual holiday must be provided.

The ‘great majority’ of workers must be permitted to take public holidays with pay. Those obliged to work should be paid a premium or be compensated with extra leave, as well being given time off equivalent to that lost on the public holiday.

The 40 hour week, worked over 5 days, has been the internationally accepted ideal since the 19th Century. The ILO Forty Hour Week Convention 1935 (No.47), which came into force in 1957, is a declaration of approval of ‘the principle of a forty hour week’ for states which choose to ratify the Convention.¹¹⁴⁵ This is the benchmark target states are urged to aim for when, as for example the European Social Charter requires, they are obliged to ‘provide for reasonable daily and weekly working hours’ on an incremental basis in accord with improvements in workplace efficiency, with ‘the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit.’¹¹⁴⁶ The UN Committee on Economic, Social and Cultural rights is more specific:

‘The Committee is aware that many States parties have opted for a 40 hour week and recommends that States parties that have not yet done so take steps progressively to achieve this target.’¹¹⁴⁷

While 40 hours is the target, the ILO Convention No.1 on Hours of Work 1919, reflects the fundamental international norm:

¹¹⁴⁵ C47 Article 1(a).

¹¹⁴⁶ European Social Charter Article 2(1) – a paragraph which has yet to be ratified by the UK (see chapter 3).

¹¹⁴⁷ General Comment on Article 7 (2016), paras 35 and 37.

‘The working hours of persons employed in any public or private undertaking or branch thereof, other than an undertaking in which only members of the same family are employed, shall not exceed eight in the day and forty eight in the week...’ Extensions to the working day must be subject to collective agreement, but ‘the average number of hours worked per week, over the numbers of weeks covered by any such agreement shall not exceed forty-eight.’¹¹⁴⁸

While the UK has not ratified this Convention, it is required to conform to the broadly similar terms of the EU Working Time Directive, which stipulates that:

‘Account should be taken of the principles of the International Labour Organisation with regard to the organisation of working time, including those relating to night work.’¹¹⁴⁹

The following ILO Conventions, along with C1 and C47, represent all of those which have imposed, or continue to impose, state obligations on the management of working time. None of the Conventions listed have ever been ratified by the UK:

Hours of Work (Industry) Convention 1919 (No.1); Weekly Rest (Industry) Convention, 1921 (No.14); Night Work (Bakeries) Convention, 1926 (No.20); Hours of Work (Commerce and Offices) Convention, 1930 (No.30); Hours of Work (Coalmines) Convention 1931, (no.31); Hours of Work (Coalmines) Revised Convention, 1935 (No.46); Forty Hour Week Convention, 1935 (No.47); Reduction of Hours (Glass Bottle Works) Convention, 1935 (No.49); Reduction of Hours (Public Works) Convention, 1935 (No.51); Holidays with Pay Convention, 1936 (No.54); Reduction of Hours of Work (Textiles) Convention, 1937 (No.61); Hours of Work and Rest Periods (Road Transport) Convention, 1939 (No.67); Night Work of Young Persons (Non Industrial Occupations) Convention, 1946 (No.79); Night

¹¹⁴⁸ Articles 2, 2(b) and 5 (2). See also the Weekly Rest (Industry) Convention 1921 (No.14); Hours of Work (Commerce and Offices) Convention 1930 (No.30); Weekly Rest (Commerce and Offices) Convention 1957 (No.106); and Hours of Work and Rest Periods (Road Transport) Convention 1979 (No.153). None of these Conventions have been ratified by the UK.

¹¹⁴⁹ Para 6 of the preamble to Directive 2003/88/EC.

Work (Women) Revised Convention, 1948 (No.89); Night Work of Young Persons (Industrial) Convention, 1946 (No.90); Weekly Rest (Commerce and Offices) Convention,, 1957 (No.106); Holidays with Pay Convention (Revised), 1970 (No.132); Hours of Work and Rest Periods(Road Transport) Convention, 1979 (No.153); Workers with Family Responsibilities Convention, 1981, (No.156); Night Work Convention, 1990(No.171), and the 1990 Protocol to the Night Work (Women) Revised Convention, 1948.

However, the UN Committee on Economic, Social and Cultural Right's General Comment on Article 7 of the Covenant draws so heavily on the Conventions to fill in the detail of the Covenant obligations on working time - the Committee relies on them exclusively - that it cannot reasonably be denied that it is a conduit for the provisions of the unratified Conventions. Consequently UK courts and tribunals would not, so would seem, have any option other than to interpret working time law in the light of the Conventions, although judges, seldom refer to either the Conventions or the ILO jurisprudence, still less the Covenant and the findings of the UN Committee.

The Covenant could, in theory, operate to effectively entrench the substance of the EU Working Time regime in the unlikely event of a 'no deal Brexit.' More realistically, if the WTR were challenged by fresh primary legislation the ILO and Covenant standards could be cited in Parliament as the minimum requirement for any domestic working time regime. As we have seen, the 'progressive realisation of the right to just and favourable conditions of work using maximum available resources,' does not allow for a paring back of existing rights. A retreat would be an unequivocal breach of international law.¹¹⁵⁰

The provision of minimum standards of daily and weekly rest, and holiday entitlement is a core obligation under the Covenant.¹¹⁵¹ A 40 hour week is the benchmark.¹¹⁵² The basics are as follows:

¹¹⁵⁰ UN CttESCR General Comment on Article 7 (2016) para 50, citing General Comment No.3 (1990) on the nature of States parties' obligations.

¹¹⁵¹ UN CttESCR General Comment No.23 on the right to just and favourable conditions of work, para 65.

¹¹⁵² UN CttESCR General Comment No.23 on the right to just and favourable conditions of work, para 2.

Daily hours: 'General daily limit' to be laid down in legislation - eight hours before overtime, with a 'reasonable' maximum which includes overtime.¹¹⁵³ 'Exceptions should be strictly limited and subject to consultation with workers and their consultative organizations.' Where 8 hours is exceeded, compensatory rest should intervene to bring the average day down to 8 hours or less. Any 'on call' requirements 'need to be taken into account.'¹¹⁵⁴

Daily rest breaks: Legislation is required to ensure adequate rest periods with specific reference to night work, nursing mothers, workers undergoing medical treatment, and those operating machinery which poses potential hazards.

Weekly rest: At least one day in seven, with 48 hours 'preferable as a general rule to ensure their health and safety.'¹¹⁵⁵ The days off should correspond to the traditional days of rest.¹¹⁵⁶

Annual leave: 3 weeks paid leave - eclipsed by the 5.6 weeks required by the EU. The pay must be 'normal' pay, the qualifying period, no more than 6 months, at which point the worker can take 'paid leave proportionate to the period of employment,' periods of illness cannot be deducted for the purposes of calculating compliance with the qualification period.¹¹⁵⁷ Part timers must be given the same leave on a pro-rata basis.¹¹⁵⁸ Payment in lieu of holiday is not permitted, nor can workers 'voluntarily' relinquish leave. The question of when leave can be taken is left to 'negotiation between worker and employer'.¹¹⁵⁹

The European Union regime originated with the 1993 adoption of the Working Time Directive, which was implemented by the UK in 1998.¹¹⁶⁰ This directive, and subsequent consolidatory and complementary directives, now provides the core

¹¹⁵³ Ibid, para 36.

¹¹⁵⁴ Ibid, para 35.

¹¹⁵⁵ Ibid, para 39.

¹¹⁵⁶ Ibid.

¹¹⁵⁷ Ibid, para 41.

¹¹⁵⁸ Ibid, para 42.

¹¹⁵⁹ Ibid, para 43.

¹¹⁶⁰ Directive 93/104/EC. This has now been replaced by Council Directive 2003/88/EC, a codification of the general regime which has since been augmented by directives relating to particular sectors initially excluded from the WT regime, principally Directive 2002/15 covering road transport.

of the domestic working time regime. While in implementing Article 7(d) of the UN Covenants states are said to ‘have flexibility in the light of the national context, they are required to set minimum standards that must be respected and cannot be denied or reduced on the basis of economic or productivity arguments,’¹¹⁶¹ and the directives provide these minimum standards. Unfortunately, as I will show, the UK approach has been to deny or dilute them at every opportunity, although Diceyan concerns for the freedom of workers to work long hours,¹¹⁶² rather than economic arguments, tend to be cited to justify the diluted domestic regime.

The principal tool of evasion in the UK regulations is the individual ‘opt-out’ from the 48 hour week,¹¹⁶³ initially transposed into the domestic regime only by the UK,¹¹⁶⁴ but increasingly finding favour in states where objections have been raised to the limit the Directive places on work in which long periods are spent on ‘stand by.’¹¹⁶⁵

The UK goes further than it should, by in practice permitting employers to require workers to sign an opt-out as a condition of recruitment.¹¹⁶⁶ Such a requirement is a breach of the Directive, although one that has yet to be challenged, either in a domestic court or tribunal, or by the Commission.

Although this surrender of OSH protection can subsequently be withdrawn by a worker,¹¹⁶⁷ it requires considerable self confidence - and perhaps confidence in

¹¹⁶¹ Ibid, para 34.

¹¹⁶² *The Sun*, 16 December 2017: ‘SHACKLES COME OFF. British workers set for post-Brexit overtime boom as ministers plot to scrap EU limits.’ The paper told readers that ‘A Sun analysis suggests that the current limit could cost some families £1,200 in lost pay....’

¹¹⁶³ See Article 22 of the 2003 directive and ‘Miscellaneous Provisions’, specifically Article 1 (a)-(d) of those provisions. For a discussion of the directive see ‘Opting out of the 48 hour week: employer necessity or individual choice?’ Barnard, Deakin and Hobbs (2003) 32*ILJ* 223. The 48 hours includes overtime work, but annual leave and sick leave should not be included in the calculation.

¹¹⁶⁴ According to the Commission, in its 2003 Communication, COM (2003) 843, 30 December 2003, (para 2.2.1.1.), although it is said that Ireland did the same but dropped the opt out shortly afterwards.

¹¹⁶⁵ Following CJEU decisions (*SIMAP* [2000] C-303/98 ECR I-7963; *Jaeger* [2003] C-151/02 ECR I-8389, *Dellas* [2005] C-14/04 ECR I-10253 and most recently *Ville de Nivelles v Matzak* [2018] Case C-518/15, which held that ‘on call’ time to be held as working time (but not necessarily paid working time) other states adopted the opt out provisions, a matter referred to in the Commission Communication COM (2003) 843, 30 December 2003, at 2.2.2 (see the text above).

¹¹⁶⁶ See “The Return of the Long Hours Culture” TUC 2008 www.tuc.org.uk/extras/longhoursreturn.pdf

¹¹⁶⁷ Workers have of course to be informed that they have that right - terminable at between 7 days and 3 months notice according to the terms of the ‘agreement’ (Reg 5 of the 1998 Regulations). The ECJ has held that the opt out can only be agreed to by a worker ‘with full knowledge of all the facts’ (*Pfeiffer* [2004] C-397/01 ECR I-8835).

the anti detriment provisions of the regulations and unfair dismissal ‘protection’ - to tell an employer that they are exercising their right not to be obliged to work more than an average of 48 hours in a 7 day period.¹¹⁶⁸ Moreover, those workers who do not enjoy the protection of a vigorous trade union will very likely not be aware that such a withdrawal is not a breach of contract, and will believe themselves bound.

The EU Commission issued a Communication in 2003,¹¹⁶⁹ arguing that the recruitment requirement undermines the principle of free consent on which the legitimacy of the opt-out depends, and which the directive demands;

‘if the opt-out agreement must be signed at the same time as the employment contract, freedom of choice is compromised....’¹¹⁷⁰

The Communication concerned itself with the 1993 Directive, and its extension to other sectors under Directive 2000/34/EC. Nevertheless, the observations referred to here are pertinent to the 2003 directive, and the amended UK regulations.

The Commission also observed that the Directive requires a record to be kept of the hours worked by workers who work in excess of the 48 hour average, in contrast to the UK regulations which require only that a record is kept of the decision to opt out.¹¹⁷¹ Compliance is also compromised by the failure of the regulations to require employer to make a record of breaks taken by all workers. In the characteristically diplomatic language of the Commission the communication goes on to state that ‘the way the Directive is transposed into national law, it could in practice prevent the workers in question benefiting from certain rights laid down in the Directive.’¹¹⁷²

¹¹⁶⁸ This is distinct from the measurement of compliance which relates to an average of 48 hours over a four month (17 weeks) ‘reference period.’

¹¹⁶⁹ COM (2003) 843, 30 December 2003.

¹¹⁷⁰ It would arguably be possible for a worker refused employment in these circumstances to rely directly on the terms of the directive in a claim against a public authority, or, invoke horizontal direct effect against a private employer by requiring the tribunal refer to the directive in interpreting the provisions of the regulations, although the low level any potential award appears to have discouraged any such claim being made.

¹¹⁷¹ As a result of amendments to the regulations made in 1999.

¹¹⁷² COM (2003) 843, 30 December 2003, para 2.2.1.2.

The Commission is right, although during the 15 years since its observations were made there has been no suggestion of infraction proceedings being brought. The Regulations are arguably a ramshackle accommodation with the requirements of EU membership, rarely enforced by the public authorities given that task. In practice workers find themselves either unable or discouraged from enforcing their rights under the Directive.

While tribunal claims for breaches of the rest break, daily and weekly rest, holiday entitlements and compensatory rest can be made, only modest amounts of compensation are awarded. Such claims tend to be made after employment has been terminated, as a claim ancillary to one attracting more worthwhile compensation. Awards are made at the discretion of the tribunal according to ‘equity and the substantive merits of the case,’¹¹⁷³ and are rarely sufficiently dissuasive. For example, in *Miles v Linkage Community Trust* [2008],¹¹⁷⁴ the EAT upheld a tribunal’s decision to award no compensation to a claimant who had succeeded in a claim for a breach of Reg 24 of the WTR governing daily rest because he suffered no pecuniary loss, and there was ‘no culpable default’ on the part of the employer, who was confused by the complexity of the WTR.¹¹⁷⁵ Such is the inadequacy of the enforcement regime employers sometimes prefer to continue to breach the regulations even after a tribunal has found against them.¹¹⁷⁶

Extraordinarily, while a dismissal because a worker insisted on his or her rights under the WTR will be deemed automatically unfair, and subjecting a worker to a detriment for the same reason is also actionable,¹¹⁷⁷ the Working Time Regulations do not provide standing for workers to bring a tribunal claim to either compensate a worker for being compelled to work in breach of the 48 hour limit, or to oblige an employer to adhere to the 48 hour limit.¹¹⁷⁸

¹¹⁷³ “...having regard to” the default of the employer and the loss to the worker (Reg.30(4)(a) and (b).

¹¹⁷⁴ UKEAT/0618/07/DA

¹¹⁷⁵ Ibid, paras 11 & 12 and 30-34.

¹¹⁷⁶ Arguably the ‘commodification’ of the rights and of breaches of the rights.

¹¹⁷⁷ Provided by ERA 1996 ss101A and 45A. The EAT held in *Miles* (para 11) that the WTR did not permit compensation for injury to feelings alone. In contrast, in *South Yorkshire Fire & Rescue v Mansell* [2018] UKEAT 0151 17 3001, fireman who suffered a detriment for asserting their WTR rights in breach of ss45A and 48 ERA 1996 were given such an award.

¹¹⁷⁸ Although if there has been no opt out criminal penalties are a theoretical possibility (Reg 4(2)).

While a claim for breach of contract was successful in the High Court in *Barber v RJB Mining*, after employees had been obliged to work in excess of the WTR limits,¹¹⁷⁹ the case does not amount to a precedent.¹¹⁸⁰ The remedy was merely a declaration that there had been a breach of Reg.4(1), which had been held by the court to be an implied term of the contract of employment. While the miners were held to be entitled to cease working until their average fell to within the 48 hour average, the judge, noting the potential financial damage such a ‘walk out’ could inflict, refused to grant the injunction that the miners sought to restrain the employer from ‘forcing’ them to work. Any detriment or dismissal that followed the exercise of their right to cease work would therefore have seen the employee ‘protected’ only by the prospect of a compensatory award under section 45A or 101A ERA 1996,¹¹⁸¹ rather than by the additional and dissuasive threat of criminal liability.¹¹⁸²

While the judiciary is traditionally reluctant to grant injunctive relief in such cases, tribunals are able only to grant interim relief only in very limited circumstances, and breach of contract claims can be brought to tribunal only after the employment relationship has terminated. Workers still under contract must go to the County or High Court. Those obliged by financial circumstance to enforce their rights at tribunal are obliged to resign before bringing a claim. An additional problem is that tribunal claims for breach of contract are subject to a ceiling of £25,000.

Nevertheless, *Barber* must have come as something of a surprise to those responsible for the implementation of the WTD. New Labour’s draftsmen had sucked as much of the substance out of the right to a 48 hour week as it could and it appears that they had not considered that Article 4(1) could be seen as an implied term of the contract of employment. The WTRs were intended to have been monitored on an ‘employer friendly,’ rather than adversarial basis, with employers arguably intended to be largely free to do as they pleased.

¹¹⁷⁹ *Barber v RJB Mining* [1999] ICR 679.

¹¹⁸⁰ In *Sayer v Cambridgeshire County Council* [2007] EWHC 2029 (QB) the High Court held that a breach of statutory duty could not amount to a breach of contract (Tamara Lewis, *Employment Law, an adviser’s handbook*, 11th Ed, p 127 n.288).

¹¹⁸¹ *Barber* p686.

¹¹⁸² The judge stated that he made his ruling conscious of the fact that the miners had brought the case as a negotiating tactic. The case was bankrolled by the miners’ union NACODS a union which had proved reluctant to commit to the 1984-5 Miners’ Strike.

Enforcement of the 48 hour average is the responsibility of the HSE and local authorities (Reg 28(2)).¹¹⁸³ The HSE failed to intervene over the breaches considered in *Barber* obliging the miners to litigate,¹¹⁸⁴ the ‘arms length’ nature of its role, and conciliatory nature any likely intervention is flagged on both the HSE and Gov.UK websites - they direct parties to Acas as a first point of contact for all working time matters. Only when Acas have failed to diffuse any dispute will they contemplate informing a local authority or the HSE. HSE Working Time Officers are ‘reactive.’ They don’t inspect, they respond to complaints. Those complaints are ‘prioritised,’ and investigated initially by ‘non visit methods’ – by a telephone call to the employer, when advice and guidance is given. Thus there is no incentive for employers to comply with regulations until and unless approached by Working Time Officers.¹¹⁸⁵ Enforcement action is almost unheard of.

The HSE is also responsible for overseeing the use of forms of collective agreement used to vary the application of the WTR to groups of workers. The approach taken here similarly undermines the impact of the right to protection.

Article 17 of the WTD permits worker rest entitlements,¹¹⁸⁶ the Article 8 general ‘daily’ night work limit of 8 hours,¹¹⁸⁷ and the general 48 hour average [Article 16(b)], to be varied by collective agreement at enterprise, national, or sectoral level, to tailor them to the needs of a particular industry, or for with particularly busy periods of work. Article 17(2) requires compensatory rest to be provided to ‘rebalance the books,’ and an extended reference period of up to 6 months may be necessary in to accommodate the extra rest, and bring the overall weekly average down to 48 hours (Article 19). So, while there is ample scope for derogation, a relaxation of the working time rules requires collective agreement, and, as would be expected where such agreement is sought, compensatory arrangements must be made.

¹¹⁸³ HSE ‘for schools, hospitals, factories etc’, local authorities ‘for retail, catering, offices and leisure etc’ (Tamara Lewis, *Employment Law, an adviser’s handbook*, 10th edition, para 4.92).

¹¹⁸⁴ There was no explanation as to why the HSE did not investigate or prosecute in the report of the case.

¹¹⁸⁵ The Working Time Regulations 1998: Guidance on the Legislation for Working Time Officers and their Managers Flowchart: www.hse.gov.uk/foi/internalops/ocs/001-099/1_6-apedices/ap6.pdf See also the reluctance to take enforcement action evinced in ‘Dutyholder and strategic factors to be taken into account when determining the enforcement conclusion following non-compliance with the working time regulations’: www.hse.gov.uk/foi/internalops/ocs/001-099/1_6-apedices/app3.htm. The number of WT officers is unknown, but the total number of ‘inspectors, visiting officers and regulatory compliance officers’ was 1,058 on 31 March 2018, down from 1,106 in 2016 (HSE Annual Report 2017-18).

¹¹⁸⁶ Articles 3, 4, & 5; periodic rest breaks, daily rest and weekly rest.

¹¹⁸⁷ Capped at 8 hours, and which cannot be the subject of an individual opt out.

In *Barber*, the employer's negotiations with the union, NACODS, had failed, so there was no such agreement in place permitting the employer to require the miners to work beyond the 48 hour week. Had individual workers voluntarily 'opted out' then the employer could have obliged those particular workers to work, unless and until the opt out was withdrawn. But the individual opt out is a supposedly informed choice, one made independently, which cannot, by definition, be a substitute for a collective agreement permitting a variation of the WTR protections. Consequently, where a union is not recognised employers are permitted by the regulations to use 'Workforce Agreements' to impose the working patterns they require on particular shifts, or categories of workers – even, in practice, on the entire workforce.

Article 18 of the WTD provides for member states to 'lay down rules' for 'the application of that Article [17] by the two sides of industry' where 'there is no statutory system' or 'specific legislative framework.'¹¹⁸⁸ On that basis the UK, under Schedule 1 of the Working Time Regulations, permits enterprise and workplace level 'Workforce Agreements' to effectively 'rubber stamp' the employer's preferred arrangements where no pre-existing collective agreement is in place. Copies of the agreement (valid for up to 5 years) and written guidance (or verbal guidance if the employer might reasonably think that is what is required), must given to all the workers affected. No other body receives a copy. The employer decides on how many 'workforce representatives' are necessary and organises a secret ballot so that the affected workers may vote for the candidates. The workers don't actually vote on whether to accept the WA, they merely select the representatives who will validate the WA - the agreement requires the signature of the representatives to become effective. Where 20 or fewer workers are concerned the WA can be signed by *either* the representatives of the workforce or by the majority of the workforce. Such arrangements are arguably amount to no more than an administrative chore for HR, and this is not the quality of agreement required by the Directive. Moreover, both the Directive, and the regulations require compensatory entitlements be provided. Were a workforce to genuinely agree to sacrifice statutory rest to accommodate the needs of the employer it would require longer holidays, or longer weekly rest periods when extra daily hours are agreed to, or shorter days when breaks are reduced or dispensed with. But this is not how these agreements were intended

¹¹⁸⁸ Article 17 in the 1993 directive. This accords with the approach taken in such circumstances since *Commission v UK*[1994] C-383/92 ECR I-2479 since when the UK was obliged to set up consultation arrangement with representatives in collective redundancy cases where the employer does not recognise a trade union.

to work. The regulations were intended to minimise the impact of the Directive on managerial prerogative. There is very rarely any negotiation, yet negotiation is what is required by the Directive.¹¹⁸⁹

The concept of compensatory rest has, along with the concept of the regulation of working time as a justiciable matter, been allowed to fade out of public consciousness. In *Jaeger* the CJEU held that in ‘exceptional cases where it is not possible for objective reasons to grant’ periods of compensatory rest, member states must ensure that ‘the workers concerned are afforded appropriate protection,’¹¹⁹⁰ and it seems likely that, if pressed, the UK Government would argue that the UK OSH regime does afford ‘appropriate protection,’ much as it did when justifying its breach of Article 2(4) of the European Social Charter.¹¹⁹¹ But we have yet to find out because the Government has not been challenged by the Commission, while at home obfuscation and muddle have served to bury the issue.

‘Compensatory rest’ is defined on the Gov.UK site only in relation to the postponement of the 20 minute statutory break required after 6 hours of work. There is no reference to either to compensatory rest, or night work in the Gov.UK brief on ‘Maximum weekly working hours,’ although the 26 week reference period for trainee doctors and 52 week reference period for off shore oil workers are cited as examples of jobs with different reference periods. In contrast there is plenty of information on opting out of the 48 hour week.¹¹⁹²

The implementation and enforcement of the WTD is, I would argue, eminently challengeable. In *Max-Planck –Gesellschaft v Shimizu* [2018],¹¹⁹³ the ECJ held that

¹¹⁸⁹ ‘...collective agreements or agreements concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of industry at lower level.’ Where there is ‘no statutory system’ for such agreements, or where there are such systems and it is lawful, then it is permissible for derogations to be negotiated “at the appropriate collective level” (Article 18 of the 2003 Directive).

¹¹⁹⁰ *Jaeger*, 2003, *op cit*, paras 94 and 97 (cited by Barnard in *EC Employment Law*, 2006, p594).

¹¹⁹¹ See above. It will be recalled in that instance that the Government was able to misrepresent the reason for the protection. That the *Jaeger* exception applies only to ‘exceptional cases’ where ‘objective reasons’ for a failure to provide compensatory rest are raised would not be likely to trouble the Government. A plausible argument is sufficient.

¹¹⁹² ‘Rest breaks at work’ and Maximum weekly working hours’.

¹¹⁹³ EU C-206/874 6 November 2018. The court held that workers are able to carry annual leave entitlement over from one year to the next if the employer has failed ‘diligently’ to give the worker the opportunity to take that leave in the year it should have been taken.

as the right to leave in the WTD is incorporated in the Charter (Article 31(2)), derived from the 1989 Community Charter on the Fundamental Social Rights of Workers and the European Social Charter, mentioned in TFEU Article 151,¹¹⁹⁴ protected by ILO C132 (which, as we have seen, the 2003 directive requires account to be taken of by states),¹¹⁹⁵ it is ‘an essential principle of EU social law’.¹¹⁹⁶ As such the court held it, in effect, to be directly horizontally effective between private parties, as well as directly vertically effective against public authorities. If the relevant domestic law cannot be read in a way which is consistent with the directive it must be disapplied.¹¹⁹⁷

While failures to provide compensatory rest, or to keep records of workplace agreements are criminal offences, prosecutions are unheard of. Even if aware of the regulations, the individual worker, very likely seeing restrictions on working time as restrictions on earnings, would tend not to be disposed towards reporting their employer. Besides, esoteric matters like, for example, the requirement to provide compensatory rest for workers undertaking five 12 hour night shifts every week are unlikely to be widely understood at Acas (which is where workers with unresolved concerns about working time are directed by the on line government advice), let alone by the workers concerned. An employer unlucky enough to hear from Acas will receive only advice, and if that is ignored the employer may be subject to a conciliatory approach from the HSE or local authority. As a consequence many employers who do not recognise a trade union see no need for Workplace Agreements.

The European Commission, referring to research undertaken on their behalf by Barnard, Deakin and Hobbs which was published at the end of 2002,¹¹⁹⁸ stated that Workplace Agreements were ‘rarely used’ in the UK. I would suggest that the reality is that such agreements were commonly relied upon before it had become

¹¹⁹⁴ Ibid, para 70.

¹¹⁹⁵ Ibid

¹¹⁹⁶ Ibid para 69.

¹¹⁹⁷ Ibid, para 81. See also *Wuppertal v Bauer and Willmeroth BroBonn* (C -208:871 also 6 November 2018). That case saw a similar approach taken in respect of the unused leave of a deceased worker held to have been owed to his estate.

¹¹⁹⁸ EU Commission communication p7, citing Barnard et al, *The use and necessity of Article 18.1(b)(i) of the Working Time Directive in the United Kingdom*, Final Report, December 2002, p.114.

generally understood that the Regulations were subject only to notional enforcement. A subsequent *ILJ* journal article, based upon the Commission paper, refers to a 2001 study of 20 selected employers,¹¹⁹⁹ three of which had used Workplace Agreements to exploit the derogations, and to *The Warwick Pay and Working Time Survey*, which found that Workplace Agreements were relied on by a significant number of the 300 employers who were questioned.¹²⁰⁰

Crucially, however, it appears that after 2000 interest in formal avoidance of the regulations faded,¹²⁰¹ and the 40 interviews conducted on behalf of Barnard *et al* in the last half of 2002, three years after the regulations came into force, indicate that by where there was no collective agreement in place employers were relying almost exclusively on the individual opt out. Yet, as already mentioned, the opt out is supposedly an informed choice made by independently by the individual. A blanket imposition of the individual opt out is clear evidence of employer interference. Moreover, collective agreement is what is required when collective variations on the application of the regulations are imposed.

Nevertheless, the use of the individual opt out in this way is exactly what one would expect in the circumstances. Even where five day shifts of 12 hours duration (common in warehouses and factories which run 24 hours a day) are worked as a matter of routine, the use of the opt-out would suffice as gesture sufficient to convince the workforce in a non unionised workplace that their employer is doing it 'by the book.' No need, of course, under the regulations, to keep a record of breaks taken and hours worked, although, as we have seen, that is requirement of the Directive. Keeping a record of the opt-out signed by each worker would likely be sufficient to convince the local authority or HSE, of the absence of *Miles* style 'culpable default' of the breach in the unlikely event of their taking an interest in the hours worked in a particular firm.

That this *laissez faire* attitude to the Working Time Regulations was a calculated government policy appeared to be confirmed when the working time regime was extended to the transport sector by the 2002 Road Transport Working Time

¹¹⁹⁹ Neathey and Arrowsmith, 'Implementation of the Working Time Regulations', EMAR Series 11 (DTI,2001).

¹²⁰⁰ *Ibid*, p.230.

¹²⁰¹ *Ibid*, p.231.

Directive,¹²⁰² and the 2005 Road Transport (Working Time Regulations). Just as cash strapped local authorities and the beleaguered HSE were given responsibility for enforcing the general Working Time regime, what is now known as the Driver and Vehicle Standards Agency – a public sector body that was being cut to the bone long before ‘austerity’ kicked in - were given responsibility for enforcement of the 2005 regulations.¹²⁰³

Lorry drivers’ working time has long been governed by the ‘tachograph (the digital ‘spy in the cab’) rules’ – the Drivers’ Hours Regulations.¹²⁰⁴ A driver can work up to six consecutive days, putting in up to 13 hours a day for four of those days, and between 13 and 15 hours on two of those days, a maximum of 82 hours.¹²⁰⁵ Weekly rest requirements will then allow no more than 5 days’ work the following week. It is the driver, not the employer, who is risking a fine or imprisonment if caught out on the road breaching the regulations.¹²⁰⁶

That was the case up until 2005. Now the tachograph rules are must operate within the overarching more restrictive limits on working time imposed by the Working Time Regulations, effectively relegating the ‘tacho’ rules to the governing of driving hours and daily work. The WTR impose an *absolute* cap of 60 hours on a week’s work, and require that the driver works no more than an average of 48 hours per week, calculated over a 17 week, or 26 week reference period. The directive does not allow individual opt-outs or negotiated variations. A breach of the WTR is, of course, a criminal offence. However, unlike the general WT regulations which provide sanctions only against the employer, both the employer and the driver may be prosecuted.¹²⁰⁷ Nevertheless, the absolute cap is routinely broken in the road haulage industry. Many employers ignore it because the WTRs are very rarely enforced.¹²⁰⁸

¹²⁰² Directive 2002/15/EC

¹²⁰³ The other specialist agencies given responsibility for the enforcement of WTRs in a particular industry are the Civil Aviation Authority, the Maritime and Coastguard Agency, Office for Nuclear Regulation and Office of Rail and Road (for the rail industry).

¹²⁰⁴ Currently governed by Regulation (EC) No. 561/2006.

¹²⁰⁵ Driving time is subsumed by these working time limits. Essentially they are permitted to drive for up to 9 hours a day. On two days a week they can extend driving time to 10 hours. After 4 and a half hours driving they must take a 45 minute break.

¹²⁰⁶ Although an employer’s connivance with such breaches can result in a prosecution.

¹²⁰⁷ Schedule 2, reg 17(1).

¹²⁰⁸ Reg. 10 requires employers to inform employees of the requirements of the regulations. I have many years experience of driving vans and LGVs for many different employers and, other during the period that the transport WTRs were announced and introduced - before the industry realised that the regulations were not enforced - they were scarcely mentioned.

More remarkably still, the government connived with the Road Haulage firms to create the ‘period of availability’ [‘POA’] permitting employers to deduct inactive time when the driver’s working time is calculated. The driver, although being paid, and responsible for many hundreds of thousands of pounds worth of vehicle and freight – who may have ‘clocked on’ only half an hour earlier - *is deemed to be no longer working*. Employers unprepared to run the – albeit minimal – risk of ignoring the WTR while demanding long hours of their drivers will often now press drivers to record every significant period when vehicles are not being driven or unloaded as a ‘period of availability.’ There is a switch on the tachograph which, when activated, records a POA on the driver’s ‘digicard’. Working time is thus reduced considerably.

The POA scheme offends against common sense.¹²⁰⁹ More significantly, it is at odds with the interpretation of the 2003 general WT directive by the ECJ in *Dellas*.¹²¹⁰ In that case the court held that there was no intermediate category between rest and working time - ‘The fact that on-call duty includes some period of inactivity is thus completely irrelevant...’¹²¹¹ The Court of Appeal in *Gallagher v Alpha Catering Services [2005]*,¹²¹² a case concerning airport lorry drivers who, their employers claimed, when waiting in their vehicle for fresh instructions were taking rest breaks, held that even if retrospect the workers had enjoyed an uninterrupted period without being required to work it did not amount to a rest break, and was work time, unless they knew at the start of the period that it they would not be required to work for a specified period.

The 2002 Directive requires penalties for breaches of the WTR to be ‘effective, proportional and dissuasive,’¹²¹³ yet the Secretary of State for Transport chose instead to implement a regime of improvement and prohibition notices to be issued by the Driver and Vehicle Standards Agency to recalcitrant employers before a prosecution is contemplated. No prosecutions against employers have been brought under the regulations. Drivers found to be breaching the regulations are, in theory, subject to a system of penalties, although prosecutions are vanishingly rare, occasionally taking place following very serious road

¹²⁰⁹ Even business lunches are deemed to be working time under the 2003 WTRs (See Gov.UK ‘Maximum weekly working hours’ 2: ‘Calculating your working hours.’)

¹²¹⁰ 2005, *op cit*.

¹²¹¹ *Ibid*, para 47 [see Barnard, *EC Employment Law*, above, p588].

¹²¹² IRLR 102

¹²¹³ Article 11, Directive 2002/15/EC (above).

accidents when working hours are subject to close scrutiny. There is little new in this approach. Drivers of vehicles under 3.5 tonnes have long been subject to the little known GB Domestic Drivers' rules which are similar to the tachograph rules LGV drivers are compelled to observe. The rules are not enforced.

This potential liability ensures that drivers are discouraged from drawing attention to breaches of the regulations by employers, and the fact that they are unable to enforce the 2005 regulations against their employer in the employment tribunal serves to make doubly sure that the wheels keep turning uninhibited by the Road Transport Working Time Directive.¹²¹⁴ While Reg. 32 of the 1998 WTR provide that a worker dismissed for refusing to work in breach of the regulations is to be regarded as unfairly dismissed, no such protection is afforded to drivers. Instead, in such circumstances, they are obliged to report their employer (and, in effect, themselves) to the DVSA.¹²¹⁵ If dismissed or subject to some other detriment as a consequence, they must avail themselves at tribunal to the 'whistle blowing' protections afforded by the Public Interest Disclosure Act 1998 and the Employment Rights Act 1996.¹²¹⁶ An attempt was made by a trade union to challenge what they politely described as this 'legislative oversight' through judicial review.¹²¹⁷ The Court of Appeal, presided over by Lord Justice Elias,¹²¹⁸ held in essence that the Directive had given the Government sufficient leeway to allow it to neutralise the intended effect of the Directive, and to permit it to treat the restrictions on working time wholly as duties imposed on drivers rather than as entitlements.¹²¹⁹

¹²¹⁴ Reg.30.

¹²¹⁵ The DVSA, formerly VOSA, has effectively usurped the role of the police where the monitoring of driving time, work time, driver qualification and vehicle loading road worthiness is concerned. Understandably drivers prefer to keep contact with the DVSA to a minimum.

¹²¹⁶ See para 26 of the URTU case (below), and *Underwood v Wincanton plc* [2016] UKEAT/0163/15/RN. In this case the EAT ruled that the 'whistle blowing' provisions protected drivers thought by management to be unduly particular about the roadworthiness of their vehicles, and who were denied the opportunity to work overtime as a consequence.

¹²¹⁷ *Unite Road Transport Union v Secretary of State for Transport* [2013] EWCA Civ 962.

¹²¹⁸ See particularly para 45. The Union's barrister, John Hendy, had referred to the failure in the implementation of the Drivers' Hours Regulations to allow access to tribunal where breaches of the regulations occurred. This appears to have encouraged Elias to muddy the waters by drawing the 'tachograph rules' into his analysis of the WTR, and his judgment makes it clear that he doesn't understand how the two sets of regulations are supposed to interact.

¹²¹⁹ The case was an unsuccessful attempt by URTU to apply for a judicial review of the implementation of the EU Directive, focusing on the failure, in the subsequent regulations, to permit drivers to bring a complaint that their rights under the directive had been breached. The wider breaches of the directive I have referred to were not raised in the case.

Where working time is concerned, UK regulation and practice can then, without risk of lapsing into hyperbole, be said to be a travesty of EU law. The UK's record can also be said to amount to a breach of Article 2 of the European Social Charter.

In a recent complaint to the ECSR provoked by the labour law 'reforms' imposed on Greece by the Troika, *Greek General Confederation of Labour (GSEE) v Greece* [2017],¹²²⁰ the lack of effective regulation in the wake of the enforced retreat from sectoral bargaining was held to be a breach of Article 2. Conformity with the Charter requires working time regulations 'to prevent daily or weekly working hours from being unreasonable' by 'providing for adequate safeguards' and 'reference periods of a reasonable duration for the calculation of the average working time.' Noting the terms of the WTD (Directive 2003/88/EC), the Committee observed that employees in Greece 'could be required to work up to 78 hours per week [13 hours x 6 days]...clearly too long to qualify as reasonable within the meaning of Article 2(1) of the 1961 Charter.'¹²²¹ The Committee also held that compliance with the Charter requires that

'the maximum duration of work must also operate within a precise legal framework which clearly delimits the scope left to employers and employees to modify, by collective agreement, working time.'

The 1998 Statement of Interpretation on Article 2 states that compliance requires 'supervision by an appropriate authority,' to ensure that 'maximum daily and weekly limits...must not be exceeded, in any event.'

The chaotic position in the UK outlined in previous paragraphs is arguably a more blatant breach of Article 2(1) – or it would be if the UK had ratified that paragraph. As we saw in chapter 3, UK commitment to voluntarism meant that back in 1962 the Macmillan Government felt that it could not ratify 2(1).

Nevertheless, Article 7(d) UN Covenant on Economic, Social and Cultural Rights, demands, as I have shown above, much the same clarity and certainty in similarly requiring states (and drawing on the plethora of ILO working time conventions in doing so) to impose 'reasonable limitation of working hours,' and 'to set

¹²²⁰ Complaint No.111/2014 (see www.coe.int 'Processed complaints').

¹²²¹ Para 154. *CGT v France*, Complaint No.55/2009 [2010] (see www.coe.int 'Processed complaints') was cited as authority for the breach of the WTD to be seen as a breach of 2(1).The Committee noted the findings by the OECD on the unsuitability of work intensification as an anti-crisis measure (paras 155 and 156).

minimum standards that must be respected and cannot be denied or reduced on the basis of economic or productivity arguments,' so the fact that 2(1) of the Charter has not been ratified is arguably of little consequence.

Indeed, such is the enormity of the calculated failure of the UK government to limit working time that the UK can arguably be said to breach the Article 3(2) Charter requirement for 'the enforcement of' OSH 'regulations by measures of supervision,' the half century long commitment to the provision of 'just conditions of work,' and 'safe and healthy working conditions,' as aims of policy on those grounds alone.¹²²²

Significantly for the UK's famously flexible workforce the ECSR holds that flexible working practices require more, rather than less, rigorous labour inspection regimes,¹²²³ and the UK might also arguably be said to be in breach of the obligations examined in the first section of this chapter imposed by ILO Convention No.81 on Labour Inspection. In its monumental efforts to make the WTD 'employer friendly' it appears to have breached Articles 3, 10, 12 and 17 of C81

Such, however, are the limitations of the 1961 Charter's reporting system, and, perhaps, the disinclination of British trade unionists to present pertinent comments on the government reports presented to the committee, or to make complaints to the ILO Committee of Experts,¹²²⁴ that these are matters which have yet to be commented upon by either the ECSR or the ILO. Conclusions XX-3 in 2014 was the last point in the reporting cycle when working time breaches were identified by the ECSR:

Article 2(2): There is no legal right to paid public holidays in the UK – they are included in the 5.6 weeks (28 days) required by the Working Time Directive. This is a breach of the Charter (see also Conclusions XIX-3 2010, XVI-2 2006 & XVIII-2 2002). 'Adequate compensation' for those obliged to work on a bank holiday manifested as extra time off in lieu or enhanced pay might secure compliance, but the Government has yet to show that 'the great majority' of workers are allowed

¹²²²European Social Charter 1961, Part 1, paras 2 and 3.

¹²²³Conclusions XIV-2, 1998.

¹²²⁴That said, the TUC are careful about choosing the cases they present to the ILO committees, and they are not short of grounds for complaint.

to enjoy these holidays or receive adequate compensation if they do not.¹²²⁵ This failure is, of course, also a breach of the parallel requirements of Article 7 of the UN Covenant.¹²²⁶

The Government attempted to explain itself to the ECSR in its December 2017 report for Cycle XXI-3 (2018), arguing that ‘inevitably some people are required to work on bank and public holidays...they will still be entitled to 5.6 weeks leave.’ As for adequate compensation:

‘the rate of pay and circumstances in which work may be performed is a matter for individual contracts.’

Article 2(3): In Conclusions XIX-3 (2010), and XVIII-2 (2007) it was found that British workers who were ill or injured during their holiday were not entitled to compensatory leave. In a statement of interpretation on 2(3) in 1989-1990 it had been established that this was a breach of the Charter.¹²²⁷ However, although the Working Time Regulations have not been amended, the recent cases *NHS Leeds v Larner* [2012] and *Sood Enterprises v Healy* [2013],¹²²⁸ have established that employers must provide compensatory leave in such circumstances,¹²²⁹ and that the law therefore conforms with both EU Working Time Directive (2003/88/EC) and Article 2(3) in this regard.

Article 2(5): In Conclusions XIX-3 (2010), and XVIII-2 (2007) the ECSR found that the UK was not in conformity with 2(5), on the grounds that in many circumstances it is possible to postpone weekly rest periods and to work *in excess* of 12 days consecutively - also a *prima facie* breach of Article 7 of the UN Covenant. The most recent Government report essentially argues that uninterrupted 12 day work periods are exceptional, and that Article 17 of the

¹²²⁵ Article 33(1) of the Charter permits Article 2 to be implemented by collective agreement, with implementation ‘treated as effective if their provisions are applied through such agreements or other means to the great majority of the workers concerned, and 33(2) similarly permits the use of legislation ‘if the provisions are applied by law to the great majority of the workers concerned.’

¹²²⁶ General Comment on Article 7, para 45. ‘Adequate compensation’ is less under the Covenant: Workers required to work should receive at least their normal remuneration plus compensatory leave of the same duration.

¹²²⁷ Conclusions XII-2.

¹²²⁸ IRLR 825 CA and IRLR 825 CA

¹²²⁹ Following *Stringer v HMRC* [2009] C-520/06 ECR I -179 and *Pereda v Movilidad SA* [2009] C-277/08 ECR I-8405.

WTD permits them where they are necessary for business continuity or where unforeseen circumstances have arisen. It cites the recent CJEU case, *Marques Da Rosa*,¹²³⁰ to argue that when 12 work days are sandwiched between two 48 hour rest periods then that amounts to two six day work periods with one rest day each, rather than one 12 day period of work, and that the UK – where some 84% of workers enjoy Sunday as a rest day - is therefore compliant.¹²³¹ This argument misses the point. As the Statement of Interpretation in Conclusions XIV-2 states, while two days rest after 12 consecutive days work is within the bounds of 2(5), it is *the maximum*, and when 12 days are exceeded the Charter is breached.

We can therefore conclude from the evidence presented above that the UK government has connived with employers to evade the rights conferred by the Directives and the Regulations. Legislation emptied of substance cannot be said to provide the clear regulation that supranational treaty obligation requires, and therefore the required re-regulation must at least ensure that:

- Fixed minimum standards which must be respected and cannot be reduced on the basis of economic or productivity arguments are set in place.
- The detail of working time regulation is agreed by collective agreement at establishment, sectoral or national level.
- The individual opt out cannot be imposed on work forces as a substitute for genuine collective agreement
- ‘Workforce agreements’ are withdrawn.
- Employers are not permitted to require new recruits to opt out as a condition of service.
- The 48 hour week is enforced by HSE, local authorities and DVSA.
- Individual workers, including mobile workers, are able to enforce their rights easily and inexpensively.
- In the absence of the power to grant injunctive relief at tribunal and the reluctance of judges to do so in the higher courts, powers sufficient in practice to compel employers to adhere to the 48 hour week should be

¹²³⁰ [2017] Case C-306/16 ECR

¹²³¹ Cycle XXI-3 (2018)

conferred, and punitive awards meted out to persuade employers that it would be uneconomic to break the law.

- Employers are required to make a record of working time all breaks taken by workers
- Public holidays are guaranteed and not 'rolled up' as part of the 5.6 weeks per year, and that when they are worked premium compensatory rates are paid.

3: Wages

Not only is a 'living wage,' providing a decent standard of living in the region where the worker and the worker's family resides, necessary, but a 'fair wage' must be paid one which compensates adequately for the difficulty, skill, insecurity, 'residual risk', and other relevant factors inherent in the work undertaken: Equal remuneration should be provided for work of equal value.

A minimum wage of 60% of the net average is required. However, if the minimum wage is between 50% and 60% of the average, and if it can shown that the wage secures a decent standard of living, then that minimum can be considered adequate.

The minimum wages of 16 to 18 year olds must not be more than 20% less than the 60% of the net average adult wage.

Overtime work must be paid at a premium by law, not merely practice.

Deductions from wages must not be permitted where workers are on low wages. Deductions cannot be sanctioned by the contract of employment alone. They should be governed either by law or by collective agreement, and must not be permitted to reduce the net wage below that which is required to secure an adequate standard of living for the worker and the worker's family.

Compliance with the European Social Charter Article 4(1) requirement for 'Decent Remuneration' demands 'remuneration such as will give workers and their

families a decent standard of living.’ States must ‘recognise the right to remuneration such as will give them and their families a decent standard of living.’

Similarly the UNICESCR requires, by Article 7(a) (ii), that workers be assured ‘A decent living for themselves and their families.’ The UN Committee interprets remuneration to include allowances, and benefits in kind like health insurance and child care facilities.¹²³² The minimum wage is a ‘core obligation’ of the Covenant.¹²³³ It should be ‘indexed at least to the cost of living.’¹²³⁴ Arguments that minima must be pitched low to ensure high levels of employment cannot justify an NMW pitched below the ‘decency threshold,’ and ‘freezes’ in times of economic crisis must be temporary and subject to frequent review.¹²³⁵

Obviously minimum wage levels should be pitched at a level which provides a decent living for the worker and the worker’s family *within a particular region*. Housing costs are particularly variable and, of course, the availability of affordable housing is crucially important to those on low wages. It is also the case that a minimum hourly rate does not set a minimum income, and that even an income which provides a decent living may not be a ‘fair wage’ reflecting the skill, danger, difficulty, training, or job insecurity implicit in that work.

The UN Covenant, by Article 7 (a)(i), requires ‘fair wages’ for workers. The UN Committee’s 2016 General Comment on Article 7 states that ‘For the clear majority of workers, fair wages are above the minimum wage,’¹²³⁶ and arguably the principal of ‘equal pay for work of equal value’ not only applies to undervalued work undertaken by women, but embraces a broader obligation to secure a fair wage.¹²³⁷

¹²³² Ibid para 7.

¹²³³ Ibid, para 65.

¹²³⁴ Ibid, para 21.

¹²³⁵ Ibid, para 21.

¹²³⁶ Ibid, para 10.

¹²³⁷ Ibid para 11.

From 1930 until 1985 the UK was obliged by ILO Convention No.26 to establish sectoral bargaining machinery in badly paid poorly organised sectors:

‘Each member which ratifies this Convention shall take the necessary measures, by way of a system of supervision and sanctions, to ensure that the employers and workers concerned are informed of the minimum rates of wages in force and that wages are not paid at less than these rates in cases where they are applicable.’¹²³⁸

The UN Committee holds that Article 7 requires that minima ‘should apply systematically, protecting as much as possible the fullest range of workers’ and it is suggested that it might ‘differ across sectors regions, zones and professional categories,’¹²³⁹ effectively advertised, implemented and enforced ‘with penal or other sanctions.’¹²⁴⁰ The provision of fair wages arguably inevitably requires collective bargaining, and it will be recalled that sectoral collective bargaining is about the provision of minimum levels of remuneration in the manner described by the UN Committee.

Given the reliance on the market in the UK it is unsurprising that, since Conclusions XII-I (1991), the European Social Charter’s European Committee on Social Rights has consistently found that the UK fails to conform to the requirements of Article 4 (1). The provision of the statutory NMW in 1998 failed to secure compliance. In 2014 (Conclusions XX-3), it noted that the NMW remains below 50% of the gross average wage and is ‘manifestly unfair’, failing to ‘secure a decent standard of living.’ Citing the EUROSTAT 2012 data the ECSR noted that average earnings were £35,883.09 (gross); £26,934.10 (net), while the NMW for those over 21 was £12,048 (gross), some 39.4% of the average gross.

The hourly minimum wages for young people are unequivocally inadequate. The Government is in breach of Article 7(5): Right of children and young persons to protection – Fair pay. The ECSR concluded in 2014, as it had in Conclusions XIX-4

¹²³⁸ Article 4, Minimum Wage Fixing Machinery Convention, 1928. Ratified by the UK in 1929, it came into force in 1930.

¹²³⁹ Ibid, para 23.

¹²⁴⁰ Ibid, para 24.

2011, that the ‘minimum wage of young workers is not fair.’ As of April 2018 those rates are:

Under 18: £4.20.

18-20: £5.90.

21 – 24, the National Minimum Wage: £7.38.

25 + ‘The National Living Wage’: £7.83.

The difference between the NMW for adults and 16 to 18 year olds should not exceed 20%,¹²⁴¹ calculated, of course, with the base reference taken as an adult minimum which is compliant with Article 4(1).¹²⁴² Although it is not a question that the Committee has considered, it is certainly arguable that the lower rates for 18 to 24 year olds are completely unjustified discriminatory breaches of both Article 4(1) and 7(5).

In 2011 the Committee had considered the apprentices’ NMW,¹²⁴³ then £2.68 per hour compared with an adult NMW of £6.31 to be ‘acceptable.’ However, the Conclusions II (1971) Statement of Interpretation on 7(5) requires a minimum of one third of the NMW, or the particular adult ‘starting rate’ for the job, which means that, paradoxically, in almost every instance that the required figure can either be very substantially higher than the minimum or substantially lower. The rate should rise to two thirds in the last year of the apprenticeship.

UK Apprentices younger than 19, or in the first year of their apprenticeship, are entitled to a minimum of £3.70 per hour. Those who are 19 or over and have completed the first year of their apprenticeship are entitled to the NMW for their age. In 2015 the ECSR requested information on the terms of apprenticeships ‘and requests confirmation that the allowance is gradually increased during the apprenticeship period...In the meantime, the Committee reserves its position on this point.’ However, if one takes the view that the UK rates should be no less

¹²⁴¹ Conclusions XVIII-1, 2006, Albania

¹²⁴² Conclusions XII-2, 1989, Malta. For the hourly rate required to secure compliance see below.

¹²⁴³ For what constitutes an apprenticeship in this context see Reg.5 of the NMW Regulations 2015.

than a third of the rate of the fully qualified adult tradesman, incremental increases in hourly pay based on the NMW are an irrelevance, and the Committee appears to be muddled about the application of 4(1) and 7(5) to apprentices.

Those younger workers aged over 18 not in an apprenticeship must be paid an hourly wage of not be less than four fifths of the adult rate. Consequently, as a first step towards securing for younger workers the hourly rates they are entitled to (setting aside the argument that we ought to be discussing overall remuneration rather than hourly pay) the Government must set an adequate minimum wage.

The government report (for the period 2009-12 to which conclusions XX-3 2014 relates) stated that according to the Low Pay Commission the gross NMW was 52.8% of the gross median wage and 41.1% of the gross average wage. The Governmental Committee had been told by its UK representative

‘that the Government sought to ensure that the NMW remained around 51% of gross median earnings and that, as it was not designed as a living wage, it had to be considered in the context of the state benefits available.’

Rather undermining that argument, in 2016 the minimum wage for those over 25 was rebranded as the National Living Wage. Referring to the obligation of the government to provide ‘full information’ on the changes in the reference period, seemingly nettled by what looks very like obfuscation in the report and in the information offered by the representative of HM government, the ECSR asked the government for information on ‘net values of both minimum and average wages and, where applicable, direct taxation, social security contributions, the costs of living and earnings related benefits.’

The ECSR recalled that 4(1) compliance ‘a decent standard of living... requires a wage at or above half of the net average,’ and where the NMW is between 50 and 60% of that figure governments must provide the ECSR with evidence that that wage does provided such a standard of living.¹²⁴⁴ The net wage, calculated after

¹²⁴⁴ In *Greek General Confederation of Labour (GSEE) v Greece, 2017, op cit*, the Committee recalled ‘that to be considered fair within the meaning of Article 4(1), the minimum or lowest net remuneration or wage paid in the labour market must not fall below 60% of the net average wage...after deduction of taxes and social security contributions’ (para 187). ‘Fair’ in this context must be taken to mean ‘compliant.’

tax and NI deductions, but not other types of insurance or pension schemes, includes bonuses and gratuities, and, 'in principle', payments in kind.¹²⁴⁵ Unfortunately, in its 2018 report the Government declined to give the committee what was asked for, preferring to fill the report with a great many only tangentially relevant statistics, charts and graphs. The NLW was said to be 56.4% of the gross median hourly rate, the figure for April 2016,¹²⁴⁶ and the Committee was told that the Government 'has an established policy to set the NLW rate such that it reaches 60% of median earnings by 2020.'¹²⁴⁷

As the ONS cited a median figure of 58% in March 2018, they at least appeared to be on target. Nevertheless the median is the wrong figure – the Government have selected the wrong target. 60% of the mean average is what is required for unequivocal compliance.

The recently published provisional results from the 2017 Office for National Statistics Annual Survey of Hours and Earnings give a mean weekly gross for full time workers of £662.50, and a median of £550.40.¹²⁴⁸ For the basic wage the mean gross is £631.60 and the median £517.50.¹²⁴⁹ The mean hourly pay rate excluding overtime is £16.97, while the median £13.94.¹²⁵⁰ The mean of the basic hours worked was 38.1, while the median was 37.5.¹²⁵¹

The NLW, for a 38 hour week pays a net £7.03 per hour after tax (£267.38 a week),¹²⁵² while the average basic wage for an average 38 hour week pays £13.25 per hour after tax (£503.56 a week). The NLW is 53% of the net average wage.

Calculated on the basis of 38 hours worked a week, the NLW, 53% of the average net wage, provides a take home of approximately £267.38.

¹²⁴⁵ In the UK gratuities cannot be included in the calculation to assess whether a wage complies with the minimum, nor can payments in kind. 'Overtime' pay can.

¹²⁴⁶ 37th National Report on the implementation of the European Social Charter, Cycle XXI-3 (2018), December 2017. The report states that the Low Pay Commission provided the percentage.

¹²⁴⁷ *Ibid*, p9 & p10.

¹²⁴⁸ Total Table 1.1a.

¹²⁴⁹ Total Table 1.3a

¹²⁵⁰ Total Table 1.6a

¹²⁵¹ Total Table 1.10a

¹²⁵² Like all subsequent tax calculations in this section this figure has been reached by using the on line HMRC tax calculator and the tax code 1185L.

The next step is to assess whether £267.38 per week is sufficient to provide a decent living.

The Joseph Rowntree Foundation holds that the Minimum Income Standard is a gross salary of £17,934 for single people, while a couple with two children require between them at least £40,762. A single parent with one child requires £29,601.¹²⁵³ By comparison, the NLW provides an annual gross of £15,879.24.

If each of the couple earns half of the £40,762 then their total net pay will be £663.14 each week. The single parent on £29,601 will take home £452.14. The parents in these scenarios are assumed to be supported by tax credits which will pay each of the households 'up to £2,010' per year.¹²⁵⁴ This will amount to a little less than £39 extra each week, so in essence the foundation is saying that the decency threshold requires a net income of £700 each week for a couple with two children and £500 for a single parent with one child. The net MIS for a single person on the gross of £17,934 PA, is £299.56 each week, so we can say that £300 per week is the decency threshold for a single person.

The ONS tells us that in 2017 the average outgoings for a family of four, including housing, was £741, and that the average outgoings for a single householder with no children was £347 each week. Reflecting the comparative poverty of single parent families, where the household contained one adult and one child average outgoings were £336. In households where there were one adult and two children, that sum was £421 per week.¹²⁵⁵

So, we can safely say that the NLW is not sufficient to provide a decent standard of living. 60% of the net average wage, as required by the European Social Charter, expressed as an hourly rate as it would appear in an advertisement for a job, is:

£10.18 per hour before tax and NI is deducted. The minimum hourly rate for young adults should therefore be £8.14.

¹²⁵³ See, *A Minimum Income Standard for the UK in 2017*, by Matt Padley and Donald Hirsch, Joseph Rowntree Foundation, 2017, p.12. The research on which the authors rely was conducted by the Centre for Research in Social Policy at Loughborough University and the Family Budget Unit at the University of York.

¹²⁵⁴ See GOV.UK 'Working Tax Credit.'

¹²⁵⁵ Office for National Statistics: *National Living Wage earners fall short of average family spending*, 28 March 2018.

In terms of weekly take home pay, and therefore as minimum wage for a 38 hour week the National Living Wage should be:

£328.11.

The yearly take home pay would be just over £17,000. Expressed as a yearly gross the NLW would be:

£20,115.68

Whether that is sufficient to provide a decent standard of living, and the Joseph Roundtree Foundation and ONS averages suggest that it is not, is questionable.

The key figure for the purposes of the Charter used to be 68% of the gross average wage, which would have seen the required hourly rate pitched at £11.54 and hour and a yearly gross £22,803.04. In the statement of interpretation in Conclusions XIII-3(1992-1993) it had noted that the 'poverty threshold' for the OECD was pegged at 66% of average disposable income per head and a Council of Europe study pitched the 'decency threshold' at 68%.¹²⁵⁶

In 1984, as the Government contemplated the legality of the abolition of the Wages Councils, a Department of Employment brief noted that there was

'nothing new about allegations that we are breaching the Charter's fair remuneration provisions. The LPU [Low Pay Unit] often allege that the UK is in breach of these provisions because many workers receive less than two-thirds of average pay.'¹²⁵⁷

This changed in 1998, with the statement of Interpretation on Article 4(1) in Conclusions XIV-2 (1998), which justified the revision of the benchmark average primarily on the grounds that the old figure was selected in an era when each family would normally have just the one 'bread winner,' and when the Charter states were comparatively homogenous. The impression given was that 'take

¹²⁵⁶ Studies on the appropriation of resources (OECD) July 1976 and 'Methods of Defining Decent Remuneration', JP Daloz, Council of Europe (1977).

¹²⁵⁷ TNA LAB 13/2969.

home' pay must now provide a decent living for the individual worker, but not necessarily the family. Subsequent statements by the Committee however have firmly stuck to the requirement for the individual wage to provide a decent living for the worker and family, and arguably the better view is that in very rich states like the UK it may be that one wage may not extend to cover what some may regard as essentials for a family while still falling within the bounds of 4(1). Nevertheless, it rather looks as if the burgeoning numbers of single parents have been forgotten, and a fresh statement of interpretation would be welcome.

Minimums of £11.54, and perhaps as much as £15 per hour in London and the south east,¹²⁵⁸ would be of particular help to the average single parents cited by the ONS (above), the more so if they are permitted by *genuine* tax credits to keep more of their income. Benefits, whether in cash or in kind, even when disingenuously described as 'tax credits,' cannot be said to be an element of pay for those in work, and cannot be taken into account when assessing compliance with 4(1).¹²⁵⁹

Of course, an unenforced minimum wage, whether high or low, is worthless. The Government has taken pains to reassure the Committee that the national minima are 'enforced by the Government who have the power to inspect employers,' and oblige those evading their responsibilities to pay arrears 'and to pay a further financial penalty.' It stated it was committed to an enforcement programme, was running a 'name and shaming' scheme, and doubling the maximum fines 'from 100% to 200% of the arrears owed to the worker, up to a maximum of £20,000 per worker.'

The latest list of 179 'shamed' employers found by HMRC to have been paying less than the minimum wage reflects some 9,200 workers reimbursed £1.1 million in underpaid wages, and fines of £1.3 million handed down to their employers. The press release accompanying the list boasts that the scheme has 'Since 2013...identified more than £9 million in back pay for around 67,000 workers,

¹²⁵⁸ The Living Wage Foundation campaigns for a 'real living wage' of £10.20 in London, and £8.75 elsewhere, modest demands that can be seen as an attempt to start to wean employers off the effective subsidies they have long received from Government in the form of benefits paid to those in poorly paid full time work.

¹²⁵⁹ Had tax credits actually been credits which meant less or no liability for tax and NI and reduced PAYE deductions at source then they arguably could have been.

with more than 1,700 workers fined a total of £6.3 million.’¹²⁶⁰ Citing a figure the Government provided in its report to the ESRC, the press release states that the ‘government has also committed £25.3 million for minimum wage enforcement in 2017 to 2018.’

Unfortunately all this is very far from the triumph it is presented as. The 179 employers issued with a ‘notice of underpayment’ are a very small proportion of the many thousands of employers who pay less than the minimum hourly rate, and the figures disguise both the size of the problem and the inadequacy of the Government’s response.

In 2016/17 some £10,999,647 worth of underpayments relating to 98,594 workers were identified, the vast bulk of the employers being permitted to ‘self correct,’ and to promise to repay their workers without being issued with a notice of underpayment, or having to pay any sanction – or being named and shamed. In 2014-15 £3,291,300 in underpayments were identified, involving 26,318 workers, and in 2015-16 the figures were £10,281,200 and 58,080.

These increases do, however, reflect the increasing amount of money being spent on detection. The Low Pay Commission were told by HMRC that funding rose from £8 million in 2013/14, to 13 million in 2015/16, then to £20 million in 2016/17, ‘and will rise again to £25 million for the three years from 2017/18 onwards... There are now 399 enforcement officers, up from 237 in 2015/16.’¹²⁶¹ HMRC have to monitor the wages of 2.3 million workers and it estimated that it will be required to deal with 3.3 million workers by 2020 if the minimum rises to 60% of the median as is proposed,¹²⁶² so these officials face a considerable task.

Another manifestation of this increasing interest in labour inspection was the appointment of a Director of Labour Market Enforcement in 2017.¹²⁶³ This man, David Metcalfe, is now responsible for coordinating the efforts of the Gangmaster and Labour Abuse Authority, the Employment Agency Standards Inspectorate, the

¹²⁶⁰ 9 March 2018: *Nearly 200 employers named and shamed for underpaying thousands of minimum wage workers*, Press Release GOV.UK..

¹²⁶¹ *Low Pay Commission: Non-compliance and enforcement of the National Minimum Wage*, September 2017, paras 3.3 and 3.4.

¹²⁶² *Ibid.*, para 1.6.

¹²⁶³ *Low Pay Commission Non-compliance and enforcement of NMW*, (above), para 3.5.

Health and Safety Executive and the HMRC National Minimum Wage and Living Wage enforcement team.

Metcalf is also obliged to present an ‘annual strategy’ to government, and Business Secretary Greg Clark boasted in December 2018, in response to Metcalf’s May 2018 proposals, that the budget for minimum wage enforcement will be £26.3 million in 2018-19. He announced that ‘We have accepted the case for the state taking responsibility for enforcing a basic set of core rights (including holiday pay) for the most vulnerable workers.’ This is a remarkable step for any post 1979 government to have taken. Clark also promised to ‘consider the case for a single enforcement body.’¹²⁶⁴ Having evidently done some very quick thinking, the government stated in its December 2018 Good Work Plan that an enforcement agency is to be established early in 2019.¹²⁶⁵

The new agency will have a lot to do. The Low Pay Commission published a report in September 2017 citing the Annual Survey of Hours and Earnings which estimated that between 305,000 and 579,000 workers are underpaid.¹²⁶⁶ Even without considering the ‘invisible’ workers in the black economy, this is almost certainly a considerable underestimate. The Commission noted, for example, that 70,867 of the 98,594 underpaid workers who came to the attention of HMRC in 2016-17 worked in the retail sector, which according to the ASHE survey ‘accounts for just 15 per cent of underpaid workers.’¹²⁶⁷ The LPC states that:

‘We estimate that there may be over 100,000 underpaid workers across the education, professional, scientific and technical activities, manufacturing construction and the arts. And yet there have been just 3,000 [such] workers identified in these sectors in HMRC’s cases in 2016/17.’¹²⁶⁸

¹²⁶⁴ UK Labour Market Enforcement Strategy 2018/19: Government Reponse by the Department of Business, Energy and Industrial Strategy and the Home Office Dec 2018, Ministerial Foreword.

¹²⁶⁵ *Good Work Plan*, HM Government December 2018, pages 10, 39 & 42.

¹²⁶⁶ *Low Pay Commission: Non-compliance and enforcement of the National Minimum Wage*, (above). That very approximate figure is thought to fall by up to 50% 3 to 6 months after new minima are set. The figures were provided by the Annual Survey of Hours and Earnings which is based on 1% of PAYE records in April of each year. The ASHE survey, which provides a snap shot of workers in the formal economy was compared with the Labour Force Survey household figures. Self reported through the whole year, they have ‘value as an indicator of trends’ and reveal the ‘seasonal’ variation. The diagram makes the position clear.

¹²⁶⁷ *Ibid*, para 3.3.

¹²⁶⁸ *Ibid*, para 3.14.

Closely related to the failure to pay the minimum wage is the failure of employers to pay premium overtime rates. This, however, is due to the absence of a legal obligation to make such payments, and it is the Government which is culpable.

Article 4(2) of the European Social Charter requires increased remuneration for overtime work. In conclusions XIX-3 (2010), and in XX-3 (2014), the ECSR found that the UK is not in conformity with 4(2) because such premiums are not guaranteed in law. The statements of interpretation on Articles 2(1) on working time, and on 4(2) in Conclusions XIV-2 of 1998, also require overtime to be either paid at a higher rate, or for ‘additional time off to replace increased remuneration.’¹²⁶⁹

It is very common in the UK for overtime to be paid at the same rate as the contracted hours, blurring the divide between the hours the worker is contractually bound to work and consequently the question of whether the worker is required to work extra hours. During the years of post war voluntarism collective agreement invariably secured increased remuneration in such circumstances, usually ‘time and a half’, before and after the contractual core hours during the week and on Saturdays - ‘double time’ on Sundays and bank holidays. Those employers which did not recognise a union usually found themselves obliged to do the same, but as the numbers of workers covered by collective agreement have dwindled overtime premiums have tended to be reduced or phased out. Yet enhanced overtime rates can make a vast difference to take home pay, and, moreover, flat rates leave employers reliant on threats, less favorable treatment, and inadequate basic pay to motivate their staff to work – the carrot is replaced with a stick.

Legislation, labour inspection and sufficiently dissuasive penalties are required, and if the Government is serious about cracking down on failures to pay the minimum wage then, at no extra cost to the taxpayer they can require employers to pay overtime rates and oblige them to repay premiums that have not been paid.

Civil penalties, as advertised by the naming and shaming initiative, are one means of imposing a sanction quickly and cheaply and ensuring that workers are paid

¹²⁶⁹ The leave must be longer than the time worked: see European Council of Police Trade Unions (CESP) v France, Complaint no. 57/2009, [2010]. See also *CFE – CGC v France*, 2000, *op.cit.*

what they are owed, while ‘leaning on’ employers to provoke self correction cheaper still, but criminal prosecutions very likely lead to unprompted self correction. The Director of Labour Enforcement recommended in May 2018 that all workers be provided with a right to a pay slip detailing, for hourly paid workers, the hours worked, the hourly rate, and information on the NMW.¹²⁷⁰ While the right of *all workers* to a pay slip is to be implemented into law in April 2019, when the Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) Order 2018 comes into force, there will be no obligation to include information on employment rights which is unfortunate.¹²⁷¹ Such a pay slip would be likely to prove invaluable in promoting self correction. Moreover, all the employer will be obliged to do for hourly paid workers is to state the number of hours worked, and the aggregate pay, so some awkward questions about overtime rates may be avoided.¹²⁷² The Gov.UK guidance does, however, point out to employers that: ‘Alternatively, to increase transparency the employer may show the hours broken down by the different pay rates...Either option is permissible.’¹²⁷³

The Low Pay Commission noted that only 13 successful criminal prosecutions for non payment of the statutory minimum wage have been mounted since 2007. Acknowledging that they are expensive, and can disrupt repayments, the Commission argues that

‘prosecutions that are well publicised could have a powerful deterrent effect. We recommend that the Government looks to increase the number of prosecutions and publicise those that take place.’¹²⁷⁴

¹²⁷⁰ Currently s.8 of the Employment Rights Act requires only that employees be furnished with ‘an itemised pay statement’ showing the gross, net, the particular deductions made (see s.9), and ‘where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment.’

¹²⁷¹ United Kingdom Labour Market Enforcement Strategy 2018 to 2019, Government response, Department for Business, Energy & Industrial Strategy and Home Office December 2018, paras 29 and 30.

¹²⁷² Oddly the government states that it accepts the recommendation for all workers to be entitled to payslips and accepts both that the total hours and the hourly rate should go on the slip (ibid, para 29), but defends the absence of a demand for an hourly rate in the regulations ‘because providing a breakdown of hours according to different rates of pay would have only a minimum impact in driving National Minimum Wage Compliance’ (para 30). The government also rejected Metcalf’s long term recommendation that employers be required to provide HMRC with information on ‘hours and hourly earnings...in Real Time Information data returns’ (para 31).

¹²⁷³ Payslips: Guidance on legislation in force from April 2019 requiring employers to include additional information on payslips, Department of Business, Energy & Industrial Strategy December 2018, p6. The government claims that ‘up to 300,000 workers who are currently not receiving a payslip will now receive one and up to 1.6 million employees who are not receiving hours on their pay slip will now receive this information.’

¹²⁷⁴ *Low Pay Commission: Non-compliance and enforcement of the National Minimum Wage*, September 2017, para 5.11.

Business Minister Andrew Griffiths considers the list of the 179 businesses ‘shamed’ for failing to pay the minimum wage to be a powerful deterrent in itself, ‘a sharp reminder to employers to get their house in order.’ Certainly the reputations of the nationally known firms listed were tarnished. Apparently less brazen than smaller firms when it comes to exploiting vulnerable workers, all the breaches by the big employers took the form of some sort of deduction from wages. Some were occasional deductions, like the cost of the uniform, others made more regular deductions - the Marriot Hotel chain was found to have routinely taken money from low paid workers on late shifts to cover accommodation and taxis home.¹²⁷⁵

Yet, remarkably, not all deductions which bring wages below the statutory minimum in this manner are unlawful. The NMW Regulations 2015 permit deductions for accommodation (which must be provided for a whole 24 hours) of up to £5.08 per day.¹²⁷⁶ Unlimited deductions made to repay advances on wages, accidental overpayment, ‘purchase of shares and securities’ and goods and services are not classed as ‘reductions’ and are permitted by the Regulations. More remarkably still, as long they are sanctioned by contract, deductions for ‘misconduct’ are also not classed as reductions, and can be made regardless of whether the effect is to reduce the hourly rate to below that required by the Regulations.¹²⁷⁷

This requirement for contractual authorisation is in accord with the basis of the right of workers ‘not to suffer unauthorised deductions’ (s13& 14 ERA 1996),¹²⁷⁸ which governs deductions which are not classed as ‘reductions’ for the purposes of the calculation of the NMW.¹²⁷⁹ Deductions for cash and stock shortages where ‘retail transactions’ are undertaken can be made simply because there is a cash or stock shortfall if the contract permits it,¹²⁸⁰ regardless of the culpability or innocence of the worker (s.17 & 19). Regulation 12 (2) (a) of the NMW

¹²⁷⁵ See *The Guardian*, 9 March 2018 & *Low Pay Commission: Non-compliance and enforcement of the National Minimum Wage*, September 2017., See the chart at para 2.11, figure 6.

¹²⁷⁶ Reg.16.

¹²⁷⁷ These are not treated as deductions - see Reg. 12 (2) NMW Regs 2015. With regard to goods and services they are deductions if purchased ‘to comply with a requirement imposed by the employer in connection with the worker’s employment.’

¹²⁷⁸ Which also authorises deductions to rectify overpayment and recoup advances, and deductions authorised by public authorities like the Child Support Agency

¹²⁷⁹ By s13 (5) ‘a variation of the contract does not operate to authorize the making of a deduction.’

¹²⁸⁰ A ‘retail transaction’ is far more than the sale of an item in a shop. Among other matter, it covers the provision of financial services and transactions conducted between workers in an undertaking.

Regulations specifically states that such deductions are not treated as reductions for the purposes of the NMW. They are at least limited to 10% of the payment on any 'pay day (s18(1) & 19 (4)),' although this can be significant sum, particularly for those paid on a monthly basis. The employer has 12 months from the time any shortfall is discovered to make a deduction and, most worryingly, s22 permits an employer to deduct from the final installment of wages to make good retail transaction shortfalls without the application of the 10% 18(1) restriction.

In 2014 the ECSR found that in the UK 'situations may exist in which the wage left after all authorized deductions is not sufficient to ensure the workers' and their dependents' subsistence,' a breach of Article 4(5) – 'limits to wage deductions'. Under the Charter deductions must not be left to individual 'negotiation' but to legal instruments.¹²⁸¹ They can only be made 'in circumstances which are well defined in a legal instrument – by law, regulation, collective agreement or arbitration award (see Conclusions V, relating to 1974-75). Any such deductions must be subject to reasonable limits and should not *per se* result in depriving workers and their dependents of their means of subsistence.'¹²⁸²

The most recent conclusions followed an invitation by the Committee of Ministers' Deputies for the UK to report by October 2015 on repeated findings of non compliance for lack of information since 1998. Sufficient information was provided to permit the Committee (Conclusions XXI-1, 2016), to find that the UK was not in conformity with 4(5).¹²⁸³

Even where wages are not reduced to below the NMW level the reliance on contract and written agreement rather than collective agreement or legal instrument amounts to a breach of the Charter:

'Article 4(5) of the Charter implies that the determination of deduction from wages should not be left at the disposal of the parties to the

¹²⁸¹ See Conc.XIV-2(1998) and XVI-2(2003) XVIII-2(2007), XX-3 (2014) &XXI-1 (2016).

¹²⁸² Conclusions XI-1(1991), Greece.

¹²⁸³ Although not mentioned last set of Conclusions, the Deductions from Wages Regulations 2014 sit uneasily with Charter and Covenant rights to fair remuneration. These limit the recovery of under paid wages to the past two years (see also chapter 7 on domestic servitude), in an unsuccessful (see *King v Sash Windows Workshop C-214/16*) attempt to limit the money which will be recoverable as more worker challenge self employed status and reclaim unpaid WTD holiday money (see chapter 7, section 3)

employment relationship...possibilities to forfeit, assign or attach the wage are often too extended, and could deprive workers paid the lowest wages and their dependents of their means of subsistence.'

The current UK regime was introduced in the Wages Act 1986 which replaced the Truck Act 1896. It was classic piece of Thatcherism: it made it easier for employers to lawfully deduct from wages; it removed the threat of criminal liability for unlawful deductions, and it made workers responsible for enforcing the law.¹²⁸⁴ _

So, we can conclude that not only should a wage providing a decent standard of living for that worker and the worker's family be guaranteed, but a 'fair wage' is required. It is difficult to see how this can be achieved without the reintroduction of sectoral collective bargaining, and the provision of Wages Council style minima, so we must conclude therefore that:

- Sectoral minimum wages are required, with minimums set for each category of job based on an 8 hour day, and a 40 hour week, rather than an hourly rate.
- The minimum wage should be at least 60% of the mean net wage.
- The wages of 16 to 18 year olds must not be more than 20% less than the adult minimum.
- Overtime work must be paid at a premium by law, not merely practice.
- Deductions should be sanctioned by law or collective agreement, and not left to the supposed 'individual negotiation' which – the 10% limit on deductions for cash and stock shortages during employment aside - is essentially what Sections 13 – 22 ERA 1996 permits.
- Deductions must not reduce the net wage below the level of 60% of the average net wage.

¹²⁸⁴The relevant ILO Convention had been denounced when the 10 year 'window of opportunity' presented itself during the first Thatcher government. The Protection of Wages Convention 1949, No.95, came into force in September 1952 and after the due notice (one year) was denounced in September 1983 (see chapter 3).

4: Rights on the Termination of Employment

Workers should be given ‘reasonable notice’ on the termination of the contract of employment.

Protection against arbitrary or unfair dismissal is required: ‘The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.’

Workers should have their terms and conditions of employment protected on the transfer of an undertaking from one employer to another.

The European Social Charter Statement of Interpretation in Conclusions IV, 1972-1974 states that compliance with Article 4(4) requires employers to be obliged to provide reasonable notice of termination and established that the question of whether notice was reasonable or not hinged largely on length of service. In every reporting cycle since Conclusions VI (1979) the UK has not been held not to be in conformity with the Charter. The minimum notice requirements are inadequate for those workers who have been employed for less than 3 years.

In the UK at least one week of notice is required after one month of employment. After two years of continuous employment with an employer one week is added to this minimum. Thereafter, for every year of continuous employment, another week is added to the required notice period, until, after 12 years, the ceiling of 12 weeks is reached.¹²⁸⁵ Compliance with 4(4), ‘reasonable notice’ is achieved after three years of employment when 3 weeks’ notice of termination is required.

In the absence of adequate statutory minima, negotiated minima may secure compliance, and in Conclusions XIX-3(2010) the Committee had requested ‘negotiated’ examples of minimum notice periods in employment contracts. In response the UK Government merely noted (in its 2009-12 Report) that there had been no change in the legislation during that period, that the ERA 2006 had

¹²⁸⁵ Employment Rights Act 1996 S. 86(1).

‘strengthened’ notice rights for both full and part timers, and that 86(1) of the ERA 1996 provides a minimum of 1 week for each year of service. Very likely the Government preferred not to draw the Committee’s attention either to the comparative absence of collectively negotiated notice periods, or to the very large payments made in lieu of notice negotiated by the very well paid in ‘individual contracts of employment,’ and to the statutory minima relied on when such contracts are imposed upon those effectively denied the right to negotiate collectively.

In Conclusions XX-3 2014 the Committee reminded the Government of the detail of the obligations imposed by 4(4), directing it to Conclusions XIII-4(1996) relating to Belgium. As ever, when faced with obfuscation and evasion the Committee started ‘digging,’ requesting potentially compromising information on notice periods for those working a ‘probationary period’, workers on fixed term contracts, and notice periods for civil servants. A more pertinent enquiry could be made into the absence of statutory notice rights for those in an employment relationship who accorded only ‘worker’ status, a matter that the Committee has yet to raise with the Government.

With regard to the ILO standards, the Termination of Employment Recommendation (No.119) of 1963 can arguably be said to have marked the start of serious contemplation of the question of the implementation of unfair dismissal protection in the UK, which led to the Industrial Relations Act 1971 protections.

However, the recommendation was not adopted by the UK, and the ILO Convention No.158 of 1982 (accompanied by recommendation No.166 which replaced No.119) on the Termination of Employment has not been ratified.¹²⁸⁶ Nevertheless, the ILO Governing Body’s ‘Working Party on Policy Regarding the Revision of Standards’ found in 2001 that ‘legislation in the United Kingdom was generally in conformity with the provisions examined of Convention No.158. In the consultations, however, the United Kingdom reported on obstacles to

¹²⁸⁶ The accompanying Recommendation, No.166, while a valuable guide to best practice, is of rather lesser influence on the interpretation of Article 6.

ratification with reference to Article 2 (scope of applications and exclusions), Article 4 (valid reasons for dismissal), and Articles 11-12 (due notice and income protections).¹²⁸⁷ However, the relevant survey had tackled the 'general obstacles' to 11 and 12 together and the UK had cited problems only with the requirement for 'a reasonable period of notice.'¹²⁸⁸ Income protection was evidently not seen as a barrier to ratification.

Of course, in UK law, a dismissal made in breach of notice requirements, is deemed 'wrongful dismissal,' and those denied the correct period of notice by their employer can secure compensation at tribunal to restore them to the position they would have been in had the employer complied with the terms of contract, whether express or implied by statute. Rarely, however, are the sums of money involved significant for ordinary workers. Of considerably more significance for the great majority of workers is the statutory protection against arbitrary or unfair dismissal.

Yet New Labour saw Article 4 as a problem. That requires no more than that

'The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.'

That a New Labour Government should balk at a commitment to retain the unfair dismissal protections, and regard something so easily achievable, and *reasonable*, as the provision of adequate notice as unpalatable might be considered remarkable.

Its objection to Article 2 makes more sense however. That Article delineates those who may be excluded from protection, and its rejection suggests that the unstated concern of the Government was that Article 2 and Article 4 would require the provision of those with worker status the right not to be unfairly dismissed, and ratification of Article 11 require those workers the right to

¹²⁸⁷ 280th Session, March 2001, Short Survey on the Termination of Employment Convention 1982 (No.158) para 78.

¹²⁸⁸ *Ibid*, para 27 and note 46.

reasonable notice. The desire to retain the UK workforce's famous 'flexibility' appears to have had a powerful influence on New Labour's stance on the Convention.

Article 2(1) of C158 states that the Convention 'applies to all branches of economic activity and to all employed persons,' but permits the exclusion of workers under fixed term contracts of employment,¹²⁸⁹ or those employed to carry out a specific task of uncertain duration, as well as those who have not completed a qualifying period or an employer's probationary period, and workers 'engaged on a casual basis for a short period' [Article 2 (2)(a) –(c)]. Other categories workers may be excluded following consultation with the organisations of the relevant employers and workers if adequate compensatory measures 'at least equivalent to the protection afforded under the Convention' are provided [Article 2 (4)&(5)]. The exclusion in the UK of agency workers, of many of those on 'zero hours contracts',¹²⁹⁰ and, indeed, all of those with 'worker' status, other than genuine entrepreneurs, from unfair dismissal protection would undoubtedly be a breach of Article 2. Bound as most of these workers are by contracts intended to secure their personal services over the long term, none of the workers in these categories can reasonably be said to be 'casuals.' While states are given opportunity to exclude such workers from protection, this requires collective agreement, and the provision of compensatory rights, matters which, as we have seen, have never been to the taste of those in Government since 1979.

While the UK has not ratified the Convention, the UN Covenant on Economic Social and Cultural Rights can be said to be an explicit conduit for its provisions.

The UN Committee on Economic, Social and Cultural Rights holds that Article 6 - the 'right to work' guarantee - requires states to take appropriate steps to safeguard the right to work, a duty which includes the provision of workers with 'the right not to be deprived of work unfairly.'¹²⁹¹ C158 is explicitly said by the Committee to provide to delineate Article 6 – the Convention 'defines the lawfulness of dismissal in its article 4 and in particular imposes the requirement to

¹²⁸⁹ See chapter 7.

¹²⁹⁰ See chapter 7..

¹²⁹¹ UN Committee on Economic Social and Cultural Rights General Comment on Article 6, 2006, para 4.

provide valid grounds for dismissal as well as the right to legal and other redress in the cases of unjustified dismissal.¹²⁹²

A breach of the Convention can consequently be seen to be a breach of the Covenant. It can therefore confidently be argued that the Government is obliged to extend employee protections, including the right not to be unfairly dismissed and to receive redundancy pay, to those of worker status.

The use, since 1998, of worker status to exclude an increasingly large section of the workforce which, but for a supposed lack of mutual obligation would be seen to be unequivocally engaged under a contract of employment, from various significant workplace protections, notably unfair dismissal, is considered in the next chapter.

‘TUPE’ protections

Prior to the implementation of the first incarnation of the Acquired Rights Directive (‘ARD’), in 1977,¹²⁹³ as the Transfer of Undertakings (Protection of Employment) Regulations 1981,¹²⁹⁴ the transfer of a business, or part of a business (as opposed to a transfer of effective ownership through the purchase of a majority shareholding in a limited company), from one employer to another meant that the transferor terminated the contract of employment. The transferee was only a potential new employer. If sufficient notice was given there could be no claim for wrongful dismissal. If a claim for unfair dismissal was brought then very likely a tribunal would find that the dismissal was fair by reason of redundancy, or ‘some other substantial reason.’ Any workers subsequently taken on by the new employer had no statutory guarantee that the terms and conditions of employment they enjoyed in their old job would be respected.¹²⁹⁵

The ARD altered completely the position under the common law. It requires states to protect the terms and conditions of employment (Article 6(1)) ‘where there is a transfer of an economic entity which retains its identity,’ a definition which embraces any public or private ‘organised grouping of resources’ whether

¹²⁹² *Ibid*, para 11.

¹²⁹³ Directive 77/187.

¹²⁹⁴ The directive was one of the progeny of the 1974 Social Action Programme (see chapter 4).

¹²⁹⁵ See Barnard, *EC employment Law*, 2006 pp 620-621.

operating for gain or not (Article 1(b) & (c)).¹²⁹⁶ While the domestic regulations were for a long time confined to commercial undertakings, following enforcement action by the Commission in 1994,¹²⁹⁷ TUPE rights were extended to transfers of undertakings of a non commercial nature, although public authority administrative reorganisations, continue to remain outside the scope of both the ARD and the TUPE regulations. Contractual variations which breach the regulations are held by the TUPE regulations to be void, while dismissals are held to be automatically unfair.

The Directive was revised in 1998,¹²⁹⁸ and consolidated in 2001.¹²⁹⁹ In 2006 New Labour, obliged to replace the 1981 Regulations to accommodate the changes, took the opportunity to clarify the position where ‘outsourcing’ took place,¹³⁰⁰ ensuring that most business transfers unarguably engaged TUPE protection. The clarification provided employees with more than the minimum level of protection required by the new Directive.¹³⁰¹ In 2013 a BIS TUPE Consultation took place, a manifestation of the then current Tory preoccupation with the alleged ‘gold plating’ of EU rights. However, while the regulations were subsequently amended, the changes were not as radical as some had anticipated.¹³⁰²

Full advantage, however, was taken of recent CJEU rulings in *Werhof v Freeway Traffic Systems* and *Alemo Herron v Parkwood Leisure*,¹³⁰³ which had concerned the post transfer influence of collective agreements on workers’ contracts.

¹²⁹⁶ Those without employee status can be denied TUPE protection (see ADR Article 1(d) and 2).

¹²⁹⁷ *Commission v UK* [1994], following *Dr. Sophie Redmond Stichting v Bartol* [1992] IRLR which concerned the transfer of a drug rehabilitation unit.

¹²⁹⁸ Directive 98/59/EC. TUPE had also been amended in 1994 in response to *Commission v UK* [1994], the case brought by the Commission which obliged the UK to breach the gap in information and consultation arrangements where employers did not recognise trade unions. This was the origin of the ‘worker representatives’ encountered in relation to collective redundancies, I&C consultation, working time consultation and TUPE consultation (see chapter four).

¹²⁹⁹ Directive 2001/23/EC.

¹³⁰⁰ Where for example, a catering firm contracts with a manufacturing firm to take over the factory canteen, or a specialist ‘logistics’ firm takes responsibility for the work formerly undertaken by the firm’s ‘in house’ transport department. Since 2006 such transfers have been called Service Provision Changes [‘SPCs’]. For more detail see J. McMullen, ‘Service Provision Change under TUPE: Not quite what we thought’ (2012) 41 *ILJ* 471, and ‘The Developing Case Law on TUPE and Service Provision Change’ (2016) 45 *ILJ* 220.

¹³⁰¹ Article 8 permits member states to ‘introduce laws, regulations or administrative provisions which are more favourable to employees.’

¹³⁰² See chapter 2.

¹³⁰³ C-499/04; ECR I -2397 and C-426/11; EU:C:2013:521

Under the terms of the ARD

‘the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry...’¹³⁰⁴

While implicitly assuming that such agreements are legally binding, which is very seldom the case in the UK, the provision nevertheless ensures that the terms of collective agreements must transfer over. Consequently, whether or not the new employer subsequently decides to disregard that agreement, it ensures that the transferee will be bound to continue to honour those terms apt for incorporation in the individual contracts of employment of the transferred staff.¹³⁰⁵

However, *Werhof*, and *Almo Herron*, saw the effective reinterpretation by the court of the ARD to accommodate Article 16 of the EU Charter of Fundamental Rights, a provision which reflects the right of businesses to autonomy under the *Acquis*.¹³⁰⁶ This was something of a surprise, because the uncomplicated Directive is very clearly concerned solely with conferring rights on employees. By virtue of these cases transferees may now insist on adhering to the collectively agreed terms as they were immediately before the transfer, and to refuse to follow changes negotiated after the transfer, despite the fact that the Directive requires observance ‘on the same terms.’

The 2014 TUPE Amendment Regulations reflected these rulings, adopted this ‘static’ approach,¹³⁰⁷ in addition allowing the transferee to initiate ‘harmonisation’ negotiations after one year after the transfer. This accords with Article 3 (1) of the Directive which allows states to limit protection for collective agreements to one year. The right to renegotiate relates only to terms and conditions derived from the collective agreement, and the revised terms must be no less favourable overall than those which were enjoyed before the transfer.

¹³⁰⁴ Article 3(3) ADR.

¹³⁰⁵ See *Ford Motor Company v AUEFW* 2 QB 302 [1969], and s179 TULR(C)A 1992 for the legal position of collective agreements in the UK..

¹³⁰⁶ *Werhof v Freeway Traffic Systems GmbH* [2006]C-499/04, was a German case in which the CJEU invoked A11 ECHR to hold that requiring the transferee to adhere to a collective agreement to which had not been party to breached its right to negative freedom of association. *Alemo Herron v Parkwood Leisure* [2013] C-426/11 saw the court apply the same reasoning to deny UK ex local authority workers transferred to Parkwood Leisure to benefit from changes to terms and conditions of employment effected by collective negotiation between their union and the local authority under the terms of the collective agreement in force when they were transferred.

¹³⁰⁷ See *Whent v Cartledge* [1997] IRLR 153(EAT) for the previous ‘dynamic’ approach taken by the tribunals.

Nevertheless, in such circumstances an employer is likely to offer inducements to withdraw from collective bargaining which may infringe a worker's Article 11 ECHR right to freedom of association, falling foul of the ECHR's ruling in *Wilson and Palmer*, and s.145B of TULRCA.¹³⁰⁸

The Amendment Regulations 2014 have also it more difficult for a worker to bring a successful claim for unfair dismissal or prevent an unauthorised contractual variation from being imposed. These revisions are *prima facie* breaches of the terms of the ARD.

Permissible dismissals for an 'economic, technical or organizational [ETO] reason entailing changes in the workforce,' related to any transfer (essentially equivalent to redundancy dismissals or dismissals 'for some other substantial reason' under the unfair dismissal regime) had previously been strictly restricted to circumstances where a change was made in the numbers employed, or to the roles of employees. The ARD, by Article 4 (1) stipulates that

'The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal...this provision will not stand in the way of dismissals that may take place for economic, technical or organizational reasons *entailing changes in the workforce.*'

The 2014 amendments have widened the ETO exception to embrace circumstances where there is a change to *where* the work is performed [Reg.7(2)], wholly changing the character of the ETO exception - shifting the location of the workplace might affect the workforce but it is not a change *to the workforce itself*. This breaches the terms of the Directive.

Moreover, Article 4(1) makes it clear that ETO exceptions apply only to dismissals not to contractual variations. Despite this, the TUPE regulations have always applied the ETO exceptions to variations, and the 2014 amendments extend the wider ETO exceptions to contractual variations. TUPE specialist solicitor Richard Arthur argues that the view of the Government appears to be that as the ARD

¹³⁰⁸ Richard Arthur, *TUPE 2014*, IER, 2014, p 46-7. It might of course be argued that if the static approach is taken then a withdrawal from collective bargaining has already taken place and the inducements are merely to agree to change the terms of the contract.

expressly permits the ETO exceptions for dismissals it must implicitly permit it for variations, a qualification 'to the apparent rigid policy statement of the rule in [the leading precedent] *Daddy's Dance Hall*,' that has never been discussed, let alone endorsed, by the European Court.

This too is a *prima facie* breach of the terms of the Directive.

Following this key 2014 TUPE revision, in the absence of a pre-existing mobility clause, or the reservation of a *Bateman v ASDA* contractual right to make unilateral variations,¹³⁰⁹ a fresh requirement connected with the transfer for an employee to work in a different location, which would previously have been held to be void will very likely be held to be enforceable. Similarly a dismissal for a refusal to change workplace will not be automatically unfair, but very likely held instead to be an ETO dismissal.

Constructive dismissal is arguably explicitly endorsed by the Directive as a remedy where such a substantial change in working conditions is imposed. Article 4(2) of the Directive provides that:

'If the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or the of the employment relationship.'

Dismissal and contractual variation are thus closely linked – a variation may result in a dismissal.

However, showing that a dismissal, express or constructive has been made in breach of the regulations has been made more difficult. Since the 2014 amendments, the TUPE Regulations have required a dismissed worker who has not been shown by the employer to have been dismissed for an ETO reason to persuade a tribunal that, on the balance of probabilities, the transfer is 'the sole or principal reason for the dismissal.' Previously it merely required that the sole or

¹³⁰⁹ See F Reynold QC and J Hendy QC, 'Reserving the Right to Change Terms and Conditions: How Far Can the Employer Go?' (2012) 41 *ILJ* 79.

principal reason for dismissal be 'connected with' the transfer - a subtle but hugely important, difference (Reg.7).

Similarly, in relation to variations of the contract, the 2014 amendments have revised the 2006 Regulations so that the worker must now show that the transfer is the sole or principle reason for the variation. Previously the variation was void if 'the sole or principal reason for the variation is connected with the transfer' (Reg 4). Variations which would have previously been held to have been void as in breach of the regulations are now permissible. Yet Richard Arthur has pointed out that the CJEU has never 'viewed it as essential that the transfer be the sole or main reason for the variation in order for the variation to be void,' and that the court refers variously to a mere 'connection with' a transfer, or the transfer being 'the reason' for a variation.¹³¹⁰ Given that a claim for constructive unfair dismissal is expressly endorsed as a remedy, this view of the nature of the relationship required between the transfer and the variation must arguably apply equally to the relationship between a dismissal and the transfer.

These revisions were justified by the Government on the grounds that it brought the UK regime closer to the ARD, but instead appear to contradict the European Court's interpretation of the Directive. Article 8 of the Acquired Rights Directive permits member states to 'introduce laws, regulations or administrative provisions which are more favourable to employees.' It does not permit restrictions of the ARD rights. While the stripping of legislative 'gold plate' is permissible, the Government, apparently emboldened by the approach of the European Court in *Werhof* and *Almo Herron*, have ground away at the substance of the right conferred by the Directive.

In the light of the above the Government is therefore required to:

- Extend the minimum period of notice guaranteed workers with between one month and three years' service to three weeks.

¹³¹⁰ Arthur (above) p42-3. He cites the very well known precedent, *Foreningen AF Arbejdsledere I Danmark v Daddy's Dance Hall* [1988] C-324/86 and *Martin v South Bank University* [2004] C-04/01.

- Confer the right to statutory notice on those with 'worker' status.
- Confer a right not to be unfairly dismissed on those with 'worker' status.

It is also required to amend the TUPE Regulations 2006:

- to ensure that inducements to withdraw from collective bargaining breaching Article 11 ECHR cannot be made where employers attempt to negotiate 'harmonisation' measures after a relevant transfer.

Solely in terms of EU law the government can also be said to be required to amend the TUPE regulations to:

- Withdraw the extension of the ETO exception to dismissals made in relation to a change in where work is carried out.
- Withdraw the application of the ETO exceptions to cases of contractual variation which have not resulted in a dismissal.
- Engage the TUPE protections in cases where principal reason for any variation or dismissal is *connected* with the transfer.

We saw in chapter five that the approach taken by Governments since 1979 with regard to collective rights and freedoms has been largely one of non compliance with regional and international standards. Freedom of association has brazenly been restricted in breach of supranational obligation. Instead of promoting collective bargaining and representation as they are required to do, successive administrations have sought to isolate workers.

Where individual rights are concerned the picture is, as I have shown in this chapter, one of apparent compliance undermined by a failure to implement rights effectively, or, where state intervention is required, a failure to enforce the law. Labour and workplace inspection programmes have been wound down to the extent that employers are able to breach the law with relative impunity.

In the unlikely event of an employer being called to account, penalties for those found to be breaking the law are insufficiently dissuasive, and remedies for workers weak, or non existent. Ostensible compliance masks a failure by the state to enforce the law, and where the state has passed responsibility for enforcement

on to the individual worker by means of litigation, 'commodification' has permitted employers to pay the worker off with an inadequate settlement or award and to continue to breach the law. So, while those individual rights are on the statute book, the protection they confer can be said to be largely illusory.

Membership of the European Union has, I argue, both obliged, and permitted, the Government to adopt this strategy. While the Thatcher and Major administrations of 1979 – 1997 overtly resisted European 'interference' as best they could, New Labour, arguably just as hostile to effective employment protections, took the more subtle approach of welcoming the European employment rights they had committed to in their 1997 manifesto while taking care to drain those rights of substance. This approach, (although the Tories during 2010-2016 were overtly hostile to employment protection) has been maintained ever since. As I have emphasised in previous chapters, while the Commission and the CJEU are rigorous in requiring the implementation of EU legislation into black letter domestic law, in practice member states are permitted a very considerable margin of appreciation in making those rights effective. This has, in effect, seen a tacit endorsement of the UK policy of non-enforcement, and has meant that it has fallen to others to remind the Government of its obligations to workers under the EU treaties, and legislative instruments. Trade unionists have played a key role, while the supervisory bodies of the UN instruments, the European Social Charter, and – especially - the ILO, have been instrumental in drawing attention to the arguably calculated ineffectiveness of UK employment rights. Government policy of attrition and emasculation might arguably be said to have reached its peak with the unlawful imposition in 2013-17 of the tribunal fees regime. That it was UNISON which brought the case once again shows us the close relationship of collective and individual rights. A swathe of individual rights were effectively withdrawn from a vast section of the workforce, and it was left to a trade union to win them back, the claim of the collective being rejected at the High Court and Court of Appeal before its appeal was allowed by the Supreme Court.¹³¹¹ Those seeking justice for discriminatory treatment at work particularly affected by the unlawful fees regime, and it is the protections for those workers that I now turn.

¹³¹¹ *R(on the application of UNISON) v Lord Chancellor* [2017] UKSC 51

Chapter Seven:

Benchmarking: Rights to Equal Treatment

In this chapter I consider the position of the government in relation to obligations to eliminate discriminatory treatment in the workplace.

1: EQUALITY – Civil rights in the workplace.

Again we encounter rights which might be more satisfactorily seen as collective rights - as civil rights demanded by sections of the population - but which have been conferred by the government as individually exercisable rights.

This area of the law is dominated by the directly effective Article 157(1) of the Treaty of the European Union, and by the associated Directives which provide the substantive detail of the requirements of the EU principle of non-discrimination. The demands of EU membership are mirrored, reinforced, and occasionally augmented, by parallel obligations deriving from the entire 'spectrum' of rights instruments:

'Non discrimination is at the heart of all work on human rights. It is a cross cutting human rights norm that is invoked in all the human rights treaties.'¹³¹²

The key principle is that of equal treatment, and that equal remuneration is required for work of equal value.

Broadly speaking, less favourable treatment in the course of recruitment, in the workplace, and even after the termination of employment, connected with race, ethnicity, class, religion, national origin, gender, sexual orientation, social origin, age, or disability, is prohibited other than in instances where there is a genuine requirement for discrimination.

¹³¹²*Human Rights Indicators A Guide to Measurement and Implementation*, UN Human Rights, Office of the High Commissioner, 2012, p13.

Where a seemingly neutral workplace policy indirectly disadvantages a protected category of workers, then, unless this indirect discrimination can be objectively justified, it is prohibited.¹³¹³

The state is required to provide effective legal mechanisms to oblige employers to take a non discriminatory approach to recruitment, remuneration and promotion, and to determine of the difficult questions which arise when workers make allegations of unlawful discrimination, and to secure adequate redress.

As with occupational safety and health, there is what might best be seen as a collective right to the provision of information on progress. While the obligation to protect against discrimination is immediate, in practice protection ‘kicks in’ over time, driven by promotion – including positive discrimination programmes – education, and enforcement. Progress, and, by implication the efficacy of the mechanisms to secure substantive rights, must be measured and reported.

The EU Charter of Fundamental Rights presents an uncomplicated, seemingly ‘open ended’, picture of the protections supposedly demanded by membership of the European Union. Article 21(1) states that discrimination on grounds ‘such as sex, race, colour, ethnic or social origins, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.’ However, not all of these characteristics have been protected by European law, and the use of the phrase ‘such as’ indicates that Article 21 arguably does no more than signal EU approval of anti discrimination protections which are not demanded elsewhere in the *acquis* to provide a ‘lynch pin’ for those seeking protection for characteristics not specifically identified in EU law.

That Article 23, which emphasises the significance of gender equality to the EU, states ‘[e]quality between men and women must be ensured in all areas including employment, work and pay,’ makes apparent the difference between extensive protection in the treaties and the directives and mere inclusion in the 21(1) list.

¹³¹³ On which see S Fredman ‘Recent Cases: The Reason Why: Unravelling Indirect Discrimination’ (2016) 45 *ILJ* 231.

The demands of the *acquis*, and the heavy hand of the European Court have now, however, arguably largely eclipsed domestic initiatives, and the UN and Council of Europe in the sphere of workplace equality.

Even the ECtHR has largely been relegated to the fine tuning of law based on the requirements of EU membership in the few employment anti-discrimination cases which, UK domestic remedies having been exhausted, have gone on to be considered in Strasbourg. ECHR Article 14 and Article 2(1) ICCPR merely prohibit discrimination in the protection of the rights and freedoms they require states to guarantee, which, of course, include the rights to freedom of expression, conscience and religion, and the right to a private and family life, matters occasionally falling to be considered as employment cases.¹³¹⁴

Protocol 12 of the ECHR, drafted specifically to address the limitations of Article 14 and adopted in 2000,¹³¹⁵ has yet to be ratified by the UK. Article 1 of the protocol guarantees citizens that: ‘The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as....’ before setting out a list clearly based on Article 23 of the EU Charter.¹³¹⁶ Ratification would arguably add substance to the requirements of the EU regime, and eclipse the role of the very easily satisfied Commission in relation to infringement. Gaps in both the *acquis* and UK law would very likely rapidly be filled in response to, or merely the threat of, a pillorying at Strasbourg.

We have seen in previous chapters that equal pay for equal work was initially demanded by the EEC by Article 119 of the Treaty of Rome, protection subsequently augmented by the Equal Treatment Directive of 1975. That Directive interpreted Article 119 to embrace the terms of the ILO Equal Treatment Convention No.100 (1952) which espouses ‘the principle of equal remuneration for men and women workers for work of equal value,’¹³¹⁷ and European Social

¹³¹⁴ Two early UK cases, *Ahmad* [1982] 4 EHRR and *Stedman* [1997] 23 EHRR, saw the ECtHR convey the message that it saw those complaints about workers being obliged to work on religious days of rest as contractual matters, and the court has taken an only slightly less sceptical approach in more recent religious discrimination cases - see *Eweida, Chaplin, Ladele and McFarlane v UK* [2013] ECHR 37. In *Redfearn v UK* [2013] ECHR 1878 (see below), however, it took a serious view of UK failures to address workplace discrimination on grounds of political opinion, and the government was obliged to change the law.

¹³¹⁵ CETS No.177

¹³¹⁶ Protocol 12 to the ECHR, Article 1.

¹³¹⁷ See Articles 1 and 3 of C100, and also the ILO Equal Remuneration Recommendation 1951 (No.90), paras 4-5. Bob Hepple in *Race Jobs and the Law in Britain* in 1968 (see chapter 3) stated (p.26 n.2) that in 1966 a government TUC-CBI working party had been set up to examine the possible ratification of Convention No.100: ‘The CBI prefer

Charter Article 4(3), which requires states to undertake ‘to recognise the right...to equal pay of equal value.’¹³¹⁸ This is now the substance of Article 157(1) TFEU.

The 1997 Treaty of Amsterdam permitted the EU to legislate on discrimination more generally,¹³¹⁹ much as the Single European Act had given competence for health and safety legislation, and two anti-discrimination directives were subsequently adopted, one on race and ethnic origin,¹³²⁰ the other a ‘Framework Directive’ on equal treatment in employment and occupation.¹³²¹ These complemented the seminal mid 1970s directives to oblige member states to legislate to protect against discrimination in the workplace on grounds of religion and belief, sexual orientation, disability and age. Of course, the UK had long had protections against discrimination related to race in place, and, unusually, the Major government had, of its own initiative, passed laws conferring an element of protection for disabled workers.¹³²²

Existing UK protections against discrimination on grounds of race, nationality, skin colour, ethnicity, sex and disability were consequently augmented by regulations adopted in 2003 on discrimination on grounds of religion and belief and sexual orientation, revised disability regulations, and, in 2006, by the Age Discrimination Regulations. The adoption of the 2006 Recast Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation coincided with the 2006 Equality Act and the imposition of a public authority duty to promote gender equality.¹³²³

The 2010 Equality Act consolidated the various Acts of Parliament and the associated regulations, and closed the perceived gaps between the domestic

the more limited provisions of the Treaty of Rome which require equal pay for the same work, to those in the ILO Convention which insist on equal pay for work of equal value.’ in 1967 the government announced that although it accepted the principle of equal pay for equal work it could not yet ratify Convention No.100 because ‘the present position of the UK is not full in accordance with the detailed requirements of the instrument’ (725 HL Debs, cols 178-9).

¹³¹⁸ Article 4(3) has yet to be ratified by the UK.

¹³¹⁹ Currently Article 21(1) TFEU.

¹³²⁰ Directive 2000/43/EC

¹³²¹ Directive 2000/78/EC ‘establishing a general framework for equal treatment in employment and occupation.’

¹³²² The result of years of domestic lobbying - see Mike Oliver, ‘Rewriting history: the case of the Disability Discrimination Act 1995’ (2016) 31(7) *Journal of Disability and Society*.

¹³²³ S.84 of the 2006 Act. While the Directive was ostensibly a consolidation of existing requirements, and was treated as such by the UK government (see Burri and Prechai: *The Transposition of Recast Directive 2006/54/EC*, EU Commission, 2009, particularly A McColgan’s section on the UK) the preamble of the directive placed considerable emphasis on the importance of state led promotion.

regime and the requirements of the EU, and while inevitably imperfect, UK equality protections can arguably be said to be broadly compliant with the EU regime. As noted in previous chapters, broad compliance is all that is required by the Commission, and it is notable that even the imposition of tribunal fees and the 'cliff edge' reduction in discrimination claims during 2013-17 did not provoke the Commission into taking action.

Member states are, in practice, afforded a very wide margin of appreciation, and the invocation of infringement proceedings sees liberal administrations risking being cast as illiberal, while nationalist administrations risk being perceived of as weak, and in thrall to Brussels. Moreover, if penalty payment and lump sums become payable, governments stand accused of throwing huge amounts of tax payers' money away. The political calculation is a simple one and, as a consequence, the required legislation is on the statute books. Indeed, so ostensibly comprehensive are UK protections that, as we have seen, the Blair and Brown New Labour governments were confident enough to sign up to the Optional Protocols to permit individual complaints to be submitted to the supervisory committees of the UNCEDAW the UNICRPD.

The problem, however, is arguably with the ineffectiveness of imposing equality through the provision of individually exercisable rights. For example, the House of Commons Women and Equalities Committee recently published a report on 'Older people and employment.'¹³²⁴ Evidence presented to the Committee made it apparent that despite the government's boast of 'strong protection' against discrimination both Acas and the EHRC had found that despite high levels of discrimination against older people, individual rights were not being exercised.¹³²⁵

Similarly, we saw in chapter two, that while the Race Relations Act 1968 had implemented the protections required by the UN Convention on the Elimination of All Forms of Racial Discrimination, by the early 1970s it was realised that those measures were not proving effective. As a consequence, after the Race Relations Act 1976, claims were brought against employers by the individual worker at industrial tribunals. Yet, forty years on, workplace racism is rife. In the

¹³²⁴ House of Commons Women and Equalities Committee Fourth Report of Session 2017-19.

¹³²⁵ Ibid, paras 23-30.

2017 TUC report *Is racism real?*,¹³²⁶ a survey of more than 1,000 black or minority ethnic workers, 37% of those surveyed reported that they had ‘been bullied, abused, or experienced racial discrimination’ at work, 19% believed themselves to have been denied training or promotion on discriminatory grounds, and 43% had felt unable to report these matters to their employer. Remarkably, ‘[d]irect managers were most likely to be the main perpetrators...’¹³²⁷

It would appear that the provision of individually exercisable employment rights has been insufficient to impose equal treatment in the workplace.

Among the key recommendations to the government in the TUC report, which included prohibiting ‘regular use’ by employers of the atypical work arrangements I consider in this chapter, it was proposed that the government ‘legislate to ensure that companies and businesses employing more than 50 people publish a breakdown of employees by race and pay band.’¹³²⁸

This, and much more, is required of the UK government by Article 7 of the UN Covenant on Economic, Social and Cultural Rights.

In contrast with the relaxed approach of the Commission, the familiar sounding requirements of the UN Covenant for governments ‘to ensure the equal right of men and women to the enjoyment’ of all the Covenant rights,¹³²⁹ and to secure the Article 7 ‘right of everyone to...Fair wages and equal remuneration for work of equal value without distinction of any kind,’¹³³⁰ are augmented by other requirements.

The text of Article 7(b) states that only ‘seniority and competence’ can be taken into account when promotion is considered, while the 2016 General comment by the UN Committee of Economic Social and Cultural Rights on Article 7 refers to ‘equal opportunity for merit based promotion,’ the committee holding that this ‘requires the analysis of direct and indirect obstacles to promotion’ and

¹³²⁶ A report about the experiences of black and minority ethnic workers-polling findings’, available at publications@tuc.org.uk

¹³²⁷ Ibid, p4. See Table 3 on p16.

¹³²⁸ Ibid, p28.

¹³²⁹ Article 3.

¹³³⁰ The 2016 ‘General Comment’ by the UN CttESCR on Article 7 states that non-discrimination is a ‘core obligation’ under the Covenant (para 65).

‘initiatives to reconcile work and family responsibilities, including affordable day care facilities for children and dependent adults’ backed by ‘appropriate sanctions applied in the event of non-compliance’ by employers.¹³³¹

Crucially this entails ‘reporting requirements designed to assess whether targets have been met,’ the results of which should show ‘progressive decreases in the differentials between rates of remuneration for men and women for work of equal value.’¹³³² States are obliged

‘to introduce quotas or other temporary special measures to enable women and other members of groups that have experienced discrimination to reach high level posts and provide incentives for the private sector do so...as well as mechanisms to assess systematically the level of the minimum wage, fair wages and the gender pay gap...’

Such initiatives are said to be ‘specific legal obligations,’ to be implemented and monitored through gender pay gap mechanisms, and complemented by dialogue - information and consultation mechanisms.¹³³³

‘Particular attention is needed to address occupational segregation by sex...States parties must take measures to address traditional gender roles and other structural obstacles that perpetuate gender inequality.’¹³³⁴

Arguably this is, in effect, a requirement for sectoral intervention by the government to promote equal treatment.

Direct Requests have been made by the ILO’s Committee of Experts for reports on progress towards the equal remuneration pledged by the Government in Articles 1 and 2 of C100 an almost annual basis since 2003. By 2009 these were focusing on the provisions of the Equality Bill in 2009, while the related Observations were usually based on comments on the application of the Convention made by the TUC.

¹³³¹ Ibid, para 32. Para 62 emphasises that such initiatives are ‘specific legal obligations’ to implemented and monitored through gender pay gap mechanisms and complemented with dialogue I&C mechanisms.

¹³³² Ibid, para 15.

¹³³³ Ibid, para 62.

¹³³⁴ Ibid, para 47.

Ultimately, as we have seen, the 2006 Equality Act imposed a Public Sector Equality Duty, and the Section 149 revision of the duty in the Equality Act 2010 required (by the EA 2010 (Specific Duties) Regulations 2011) Government departments to set equality objectives and publish information on progress.

In the ‘List of issues with regard to the consideration of the periodic reports,’ compiled in 2012, but considered by the Committee on the Elimination of Discrimination against Women in 2013, information on voluntary gender equality reporting and ‘on measures undertaken to reduce the gender pay gap in both the public and private sectors was requested.’¹³³⁵ In reply the government claimed that ‘good progress’ was being made, and boasted that s 159 of the Equality Act had served to permit positive action in certain, albeit very restricted, circumstances, and that it was in the process of giving tribunals the power to request equal pay audits. It also stated that the voluntary ‘Think, Act, Report’ initiative on workplace inequality covered one million workers.¹³³⁶

While S139A of the EA 2010 did give tribunals the power to order equal pay audits following a successful equal pay claim, and the EA 2010 (Equal Pay Audits) Regulations 2014 did subsequently come into force, very little appears to have been achieved, or published, as a result of any of these measures. The ‘Think, Act Report’ scheme has largely been forgotten.

In 2016 the Government received yet another ILO Direct Request,¹³³⁷ the Committee of Experts on this occasion seeking information on these measures and on other efforts to narrow the gender pay gap as measured by the Office of National Statistics during April 2015-April 2016.

Section 78 of the 2010 Equality Act, had provided that ‘Regulations may require’ those employing 250 or more employees to provide ‘gender pay gap information,’ and it was finally brought into force until August 2016. The Equality Act 2010 (Gender Pay Gap Information) Regulations followed in April 2017.

¹³³⁵ CEDAW/C/GBR/Q/7 Committee on the Elimination of Discrimination Against Women, 25 October 2012, considered at the 57th Session 8-26 July 2013, para 16.

¹³³⁶ CEDAW/C/GBR/Q/7/Add 1 Committee on the Elimination of Discrimination Against Women, 5 February 2013, considered at the 57th Session 8-26 July 2013. Paras 130-132.

¹³³⁷ Adopted by the CEACR in 2016, published 2017.

Employers are now required to report gender specific overall mean and median levels of hourly pay and bonuses, and the proportion of females and males in each 'quartile' (25%), of their pay hierarchy. The figures, and any gender pay gap they reveal, are published both on the employer's own web site and the Gov.UK site. Employers are encouraged to submit narratives, and 'action plans' setting out proposals to close any GP gap that the statistics reveal.

Although there are no sanctions for failing to submit a report (despite s.78 allowing for fines of up to £5,000), it has been argued that the potential damage to the employer's reputation should serve to ensure that all but the most recalcitrant of employers will co-operate, and that, where unions are recognised by the employer, the s 181 TULR(C)A 1992, right to secure information for negotiating purposes and the right of recourse to the CAC, should secure compliance.¹³³⁸ However, ostensible compliance is very different from the provision of accurate figures. Labour has called for the 'GPR' regime to be backed by an effective bespoke enforcement regime, and the current Prime Minister, has taken pains to ensure that she is perceived to be personally committed to closing the 'GPG,' a wholly uncharacteristic step for a Tory leader. Such is tremendous publicity generated by the reporting scheme, it seems likely that it will be extended and given 'teeth.'

Many believe that having surveyed and rectified gender inequalities, and very likely reaped the benefit, employers will likely be better disposed towards to applying a similar analytical approach to other protected characteristics. While that may be over optimistic, there can be little doubt that the figures will serve to assist unions in collective bargaining negotiations, and that collective negotiation at sectoral and enterprise level arguably offers the best means by which pay inequality can be tackled, perhaps bolstering the political case for a return to the use of the collective agreement as the primary means for setting the terms and conditions of employment. Certainly the figures bolster the political case for positive gender discrimination.

We have seen that the UN Covenant on Economic, Social Rights demands positive action to eliminate gender inequality, Article 2 UNICCPR requires states to 'respect and to ensure' the rights in the Covenant 'without distinction.' While

¹³³⁸ Thanks to Caroline Underhill of Thompsons Solicitors

positive steps, by virtue of the definition of ‘ensure,’ are clearly required,¹³³⁹ positive discrimination would appear to unambiguously breach those simple terms; temporarily favouring long disadvantaged groups in recruitment and promotion and, at the level of the individual, treating one less favourably than the other purely because of a protected characteristic, is to ensure equality in the long term by guaranteeing rights *with* distinction.

However, where gender equality is concerned the position is different. Manfred Nowak, in his *CCPR Commentary*, points out that Article 3 on gender equality goes further than the negative anti-discriminatory provisions of Article 2, to require states ‘to ensure the equal rights of men and women.’ Although Nowak fails to discuss positive discrimination or - to use the American phrase - ‘affirmative action’, he cites the Human Rights Committee as emphasising in 1981 that compliance requires positive steps in the form of ‘affirmative action designed to ensure the positive enjoyment of rights. This cannot be done simply by enacting laws.’¹³⁴⁰

Proportionate infringements of both Articles may be made to facilitate progress towards a legitimate goal, and it is certainly arguable that the Covenant sanctions such policies in the furtherance of gender equality. Where other protected characteristics are concerned the position is less clear.

The European Committee on Social Rights, in considering the gender equality provisions of Article 1(2) of the European Social Charter, ‘has further recommended that contracting parties encourage employers to recruit and train women for jobs hitherto pre-dominantly occupied by men and to introduce positive action to rectify unsatisfactory employment situations.’¹³⁴¹ In an early interpretation of 4(3) the Committee took the view that its role was to determine whether a state had ‘taken adequate steps’ towards guaranteeing equality ‘the nature of which is left to the State’s own judgement.’¹³⁴²

¹³³⁹ Nowak, UN Covenant on Civil and Political Rights *CCPR Commentary*, 2005, pp37-39.

¹³⁴⁰ Nowak p.80. Human Rights Committee General Comment 4/13.2.

¹³⁴¹ Conclusions XII-5 1994-1995 Statement of Interpretation Article 1-2 and 4-3.

¹³⁴² Conclusions III Statement of Interpretation Article 4(3) 1970-1971

The chief barrier to the use of positive discrimination schemes in the UK is, paradoxically, commonly perceived to be the EU principle of non-discrimination.¹³⁴³ This is wrong. The chief barrier is the UK government. Positive sex equality initiatives have been accommodated by the EU, and two key cases illustrate the retreat from a comparatively strict stance to the recognition of the necessity to permit proportionate promotional measures: *Kalanke* [1995],¹³⁴⁴ and *Lommers* [2002].¹³⁴⁵

Positive action is permitted to alleviate the disadvantage experienced by those with other protected characteristics. Article 5 of the equal treatment directive of 2000 specifically states that the principle of equal treatment does not prevent states from ‘maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin,’ and the framework directive adopted in the same year, states ‘that the principle of equal treatment shall not prevent’ positive action to secure ‘full equality in practice’ for those disadvantaged on grounds of “religion or belief, disability, age or sexual orientation as regards employment and occupation.”¹³⁴⁶

Despite these ‘green lights’ the approach of the government has been cautious.

S.69 of the Equality Act 2010 effectively allows for positive gender discrimination policies in relation to the ‘defence of material factor’ in direct and indirect discrimination, providing that ‘the long term objective of reducing inequality between men and women’s terms of work is always to be regarded as a legitimate aim.’ Therefore, arguably, as long as any measure to that end is held to be proportionate, then it will be held to be objectively justified.

¹³⁴³ Equality clauses and requirements for contractors to employ a certain proportion of disadvantaged minorities under procurement conditions in government or local authority contracts, are also perceived to potentially engage EU competition law. While such clauses are not *prima facie* unlawful, there is arguably a belief that the application of such provisions will be seen to favour domestic firms, and public authorities appear to prefer not to risk a potential legal challenge – which is why they are almost unknown in the UK. See C Barnard, ‘To Boldly Go: Social clauses in Public Procurement’ (2016) 46 *ILJ* 208, 213-215.

¹³⁴⁴ Case C-450/93 ECR I-3051.

¹³⁴⁵ Case C-476/99 ECR I-2891. For an examination of this complex area embracing both ECHR and CJEU cases, see pp 38-50 of *The Concepts of Equality and Non-Discrimination in Europe: A Practical Approach*, by C. McCrudden and S. Prechal, European Network of Legal Experts in the Field of Gender Equality, European Commission, November 2009.

¹³⁴⁶ Articles 7 & 1.

Sections 158 and 159 of the Equality Act 2010 permit limited positive discrimination where an employer reasonably considers that persons with a protected characteristic are at a disadvantage or that such people are under-represented in a particular role. S.158 permits ‘encouraging’ and ‘enabling’ applications in such circumstances.

Section 159 deals specifically with recruitment and promotion, permitting ‘tie breaker’ discrimination in favour of otherwise equally matched candidates, only if the employer does not have a policy of favouring individuals with the particular protected characteristic, and where the ‘action in question’ is a proportionate means of achieving the desired result. Should these requirements not be fulfilled then the employer will be vulnerable to a claim for unlawful discrimination. The exception here is positive action taken in relation to disability, age, and social status or origin. Being able bodied is not a protected characteristic and employers are free to choose to adopt a policy requiring all recruits and applicants for promotion be disabled, and section 13(3) of the Equality Act 2010 specifically permits more favorable treatment of a disabled person. A directly discriminatory policy in a fixed term contract scheme aimed at providing career opportunities for young people, as considered by the European Court in *Abercrombie and Fitch Italia v Bordarno* [2017], was found to be proportionate and therefore permissible, and as we have seen, social origin is not a protected characteristic. As a consequence there is, in law at least, arguably nothing to stop employers from choosing to recruit only from among, for example, the suitably qualified *alumni* of inner city comprehensive schools.¹³⁴⁷

The absence of European protections for discrimination because of social class or origin is, however, not a matter to be celebrated, and can arguably be held to account for the inadequacies of UK protections afforded victims of domestic servitude.

¹³⁴⁷ Overtly recruiting only those educated at public schools would very likely be deemed indirect racial or religious discrimination.

Domestic servitude

As I have shown in chapter four, the government will almost certainly have no option but to retain the workers' rights demanded of EU members, whatever the future relationship of the UK with the EU.

Such is the resilience and comparative power of EU obligation, that we find what I argue is the most significant instance of a failure to confer the anti discrimination protections required by supranational obligation in what is effectively the EU's equality and human rights 'blind spot.'

Despite the inclusion of 'national minority' in Article 21(1) of the EU Charter, there is a gap in the *acquis* where protection against discrimination on grounds of nationality is concerned. The requirement for states to guarantee the free movement of workers forbids discrimination against citizens from other EU states,¹³⁴⁸ obviating the necessity for further protections for foreign nationals to protect the single market, and state arrangements for permitting non EU nationals to work are beyond the competence of the EU. 21(2) states that 'within the scope of application of the Treaties, and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited,' and although the Charter states that discrimination on grounds of social origin and birth 'shall be prohibited' no directives have been adopted to that end.

The lack of EU obligation has arguably permitted the UK government fail to protect adequately those working under conditions of domestic servitude. The victims in these cases have almost invariably been singled out for discriminatory treatment because of their nationality and social class.¹³⁴⁹ Compliance has thus not been seen to have been inevitable - the prospect of being forced into legislating by the Commission and the ECJ in a blaze of unflattering publicity has not been raised, and therefore the government has not acted. There are not yet

¹³⁴⁸ The free movement of workers, one of the sacrosanct four freedoms, forbids discrimination against citizens from other EU states, and although anti-discrimination measures to protect non EU nationals in employment exist they apply only to long term residents and certain categories of highly qualified worker (see Craig & De Burca, *The Evolution of EU Law*, 201, p621- 622).

¹³⁴⁹ Working as a volunteer in North Kensington Law Centre in the Employment Unit during 2011-12 I interviewed a number of such victims. Employers routinely kept the passports of their employees and told them that if the police found them on the street without ID they would be arrested.

any EU directives prescribing how the problem of domestic servitude should be tackled.

Article 5 of the EU Charter, reflecting Article 4 ECHR, prohibits slavery, servitude, and trafficking, but it is not the lack of state prohibition that is the problem, it is the inadequacy of positive protections.

The government is nevertheless required by other treaty obligations to extend specific protection to these unfortunate workers, who, whether ‘trafficked’ or not, have found themselves isolated in a foreign land, denied the collective safeguards of adequate state protection and the support of a trade union.¹³⁵⁰

The UK has not ratified the ILO Domestic Workers Convention 2011 (No.189), and despite highly publicised legislative initiatives like the Modern Slavery Act 2010, and the new offences (noted by the ECSR in 2012), s41 of the Asylum and Immigration (Treatment of Claimants etc) 2004, and the Coroners and Justice Act 2009 s713. In 2016 it ratified the 2014 protocol to the Forced Labour Convention No. 29 of 1930, but neither instrument is particularly relevant to domestic servants,¹³⁵¹ and the Home Office Gangmasters and Labour Abuse Authority, empowered by the Police and Criminal Evidence Act 1984 to investigate instances of modern slavery, show little interest in domestic servitude.¹³⁵² There are only 36 fully trained Labour Abuse Prevention Officers in the UK, and they conducted approximately 180 operations in 2017-18.¹³⁵³ The GLAA employs only 104 full time staff in total.¹³⁵⁴

¹³⁵⁰ A good account of domestic labour and international labour standards is to be found in V Mantouvalou, ‘Servitude and Forced Labour in the 21st Century: The Human Rights of domestic Workers’ (2006) 35 *IJL* 395

¹³⁵¹ The protocol is declaratory and very general while the Convention (ratified by the UK in 1931) is concerned almost exclusively with the use of compulsory labour by the state.

¹³⁵² The Home Office class domestic servitude, sexual exploitation and labour exploitation as modern slavery, estimating between 10,000 and 13,000 victims, but seem primarily concerned with the latter and in issuing licenses to labour providers in agriculture, horticulture, shellfish gathering, food processing and packaging (see HM Govt. United Kingdom Labour Market Enforcement Strategy 2018/10, Director of Labour Market Enforcement David Metcalf, Presented to Parliament pursuant to Section 5(1) of the Immigration Act 2016, May 2018, pages 4 & 6.

¹³⁵³ United Kingdom Labour Market Enforcement strategy 2018to 2019: Government Response, Dept. Of Business, Energy and Industrial Strategy and Home Office, December 2018, paras 97-100.

¹³⁵⁴ HM Govt. United Kingdom Labour Market Enforcement Strategy 2018/10, Director of Labour Market Enforcement David Metcalf, Presented to Parliament pursuant to Section 5(1) of the Immigration Act 2016, May 2018, p6 of the Executive Summary.

Protection must be extended to victims whether or not they are in the UK legally.¹³⁵⁵ In March 2017 the UN CttESCR made a statement on the ‘Duties of States towards refugees and migrants under the UN Covenant on Economic Social and Cultural Rights making it clear that ‘irregular migrants’ must also enjoy the protections of the Covenant rights. Different treatment must be justified as lawful, proportionate and as made towards a legitimate end.¹³⁵⁶

According to the Committee’s General Comment No.20 (2009) on non-discrimination, particular attention must be directed to the difficulties of asylum seekers and undocumented workers in securing their rights,¹³⁵⁷ and General Comment No.23 (2016) on Article 7 ‘just and favourable conditions of work’ emphasised the vulnerability of migrant workers to adverse working conditions.¹³⁵⁸

The ‘right to work’ guaranteed by the UK government under the terms of the European Social Charter and UN Covenant embraces a prohibition on forced labour as well as placing an obligation on the government to ensure that workers with ‘protected characteristics’ are not subject to less favourable treatment. The Charter thus obliges the UK government to tackle domestic servitude. Unfortunately the government has not been entirely frank with the ECSR. In Conclusions XX-1 2012 in relation to Article 1(2), the committee noted that they had been reassured by the Government that:

‘In the United Kingdom foreign national domestic workers are entitled to change employers in the event of abuse. If they notify the competent authorities, victim assistance and support will be granted to them. The government also plans to undertake a study to find ways to prevent modern slavery among this group of workers.’

The terms of the Domestic Workers’ Visa were changed in 2012 *preventing* migrant domestic workers from changing employers when in the UK. Previously domestic workers could switch employers without breaching the terms of the visa

¹³⁵⁵ See *Hounga v Allen* [2014] below.

¹³⁵⁶ Duties of States towards refugees and migrants under the International Covenant on Economic and Cultural Rights, para 3.

¹³⁵⁷ *Ibid*, para 7.

¹³⁵⁸ Para 13, and para 47(e) of the 2016 General comment.

– after 2012 they could not. The permission to work is awarded the employer not the worker, and any prospective new employer has to seek a new visa, making it far more difficult in practice for vulnerable workers brought in from overseas to escape from abusive employers.¹³⁵⁹ This caused a storm of protest,¹³⁶⁰ and as of April 2016 domestic workers who had accompanied their employer into the UK were permitted to change employers without a fresh application being made. However, those who entered the UK before 2012 were given 12 month visas; now they are given 6 months, serving as a disincentive for a new employer to take them on. Although overseas domestic workers ‘found to be the victim of slavery or human trafficking can apply for an extension of stay on that basis,’¹³⁶¹ there can be little doubt that those with abusive employers remain in a parlous position.¹³⁶²

We saw in chapter six that domestic workers in the UK do not have the benefit of the occupational health and safety protection afforded other employees. The case for a comprehensive inspection system to safeguard not only the health and safety of such workers, but to ensure that their terms and conditions of employment are lawful, is, however, irrefutable. The government is obliged to act. In its 2016 general comment on Article 7 UNICESCR the UN CtTESCR stated that it obliged states to protect ‘against abuse, harassment and violence,’ to provide

¹³⁵⁹ The well respected UK refuge organisation KALAYAAN which specialises in domestic servitude cases made a submission in collaboration with Anti-Slavery International to the Committee on the Elimination of Discrimination against Women, stating that as a consequence the UK had regressed from its previous position and was therefore in breach of the recommendations in the CEDAW 2008 concluding observations (14 September 2012, pre-session submission for the 55th session). The 2013 concluding observations failed, however, to mention the matter.

¹³⁶⁰ See V Mantouvalou, ‘A Right to change Employer for Overseas Domestic Workers,’ Oxford Human Rights Hub, 18 January 2016 ohrh.law.ox.ac.uk/a-right-to-change-employer-for-overseas-domestic-workers/; see also, House of Commons Briefing Paper No.4786, 13 May 2016 ‘Calls to change overseas domestic worker visa conditions’ by Melanie Gower.

¹³⁶¹ See the Home Office guidance for immigration staff: *Domestic workers in private households*, 24 March 2017.

¹³⁶² On the vulnerability of these workers and the great dangers they face see V Mantouvalou, ‘Am I Free Now? Overseas Domestic Workers in Slavery,’ (2015) 42 *Journal of Law and Society* 329.

‘decent working conditions...and ensure adequate means of monitoring domestic work, including through labour inspection, and the ability of domestic workers to complain and seek remedies for violations.’¹³⁶³

Unfortunately the only realistic chance of a remedy for workers in most instances is an employment tribunal claim.¹³⁶⁴ However, no more than two years of unpaid wages can be recovered at tribunal,¹³⁶⁵ and claims must be brought within 3 months of act or breach complained of, a requirement which traumatised victims, often wholly unaware of their rights, unable to speak English and initially even unaware that their erstwhile employer has broken the law, may sometimes struggle to comply with. While tribunals have the discretion to extend this period it would be uncontroversial to argue that the time limits should be automatically extended to claimants alleging to have been employed under conditions of domestic servitude.

There has been a discernable judicial reluctance to acknowledge the often exceptional nature of these cases,¹³⁶⁶ and there can be little doubt that the existing legal mechanisms are inadequate. The criminal nature of the treatment meted out to these workers cannot readily be compensated for through claims to recover unpaid wages, for breaches of the Working Time Regulations, and the failure to provide a written statement of the particulars of employment, although uncapped awards for discrimination have arguably proved effective as recompense and as a means of punishing and deterring perpetrators. Claims of unfair dismissal are also quite usual in such cases, but their use underlines the ‘stop gap’ nature of employment protection rights in such circumstances: Absurdly, having escaped from domestic servitude, a victim seeking to claim

¹³⁶³ Para 47.

¹³⁶⁴ Civil litigation at the County or High Court, or a compensation order following the criminal conviction of the employer are the alternatives. Evidential difficulties mean that the police are notoriously reluctant to investigate domestic servitude cases, and while legal aid for civil litigation is available, it is not readily obtainable.

¹³⁶⁵ Following the Deduction from Wages (Limitation) Regulations 2014.

¹³⁶⁶ The Court of Appeal in *Hounga* (a particularly unpleasant domestic servitude case) found for the employer after she had raised the defence of illegality (Ms Hounga had been ‘trafficked’ into the UK as an illegal immigrant and was aware that she had no right to work). Fortunately, however, the Supreme Court overturned that ruling on grounds both of the only peripheral relevance of the illegality to the case and public policy (*Hounga v Allen* [2014] UKSC 47). See A Bogg and S Green, ‘Rights Are Not Just for the Virtuous: What Hounga Means for the Illegality Defence in the Discrimination Torts,’ (2015) 44 *ILJ* 101.

constructive unfair dismissal must show that she has been employed by their abuser for the two year qualifying period before a tribunal will consider her claim.

In Conclusions XX-2 2013 the ECSR stated that:

‘In its last conclusion (Conclusions XIX-2) the Committee reiterated the fact that domestic workers are excluded from any type of inspection of the labour inspectorate is a matter of concern as they are considered a vulnerable category of workers. Therefore, and having also regard to the *Siliadin v France* judgment of the ECtHR [the 2005 trafficking and domestic servitude case which arguably first drew widespread attention to the problem] the Committee asked whether any supervision of this category of workers by the public authorities is foreseen.’¹³⁶⁷

There is not, and the UK justifies inaction on the grounds that the extension of OSH protection to these workers would be an intrusion into the privacy of the employer – not ‘proportionate or practical’ - so there is little prospect of any domestic inspection regime, OSH related or otherwise, being implemented under a Tory government, despite the fact that the ECSR considers the absence of OSH protection including the absence of inspections to be an unequivocal breach of the European Social Charter.¹³⁶⁸

However, the prospect of an occasional unannounced visit from a labour inspectorate is a small sacrifice of individual freedom, one very likely to improve the working conditions of thousands of these isolated workers, and, moreover, save hundreds from the threat of physical harm.¹³⁶⁹

Social Class and Political Opinion

We have seen that the problem of domestic servitude is essentially one of employers singling out workers for exploitation on the basis of their social class as well as their nationality and that the weakness of British protections, in the face of multiple treaty obligations requiring effective intervention, can arguably be

¹³⁶⁷ See OSH in section 1 of chapter 6.

¹³⁶⁸ Conclusions XXI-2, December 2017, published January 2018.

¹³⁶⁹ As domestic servants staff are not embraced by OSH ILO C81 on Labour Inspection would not appear to have been breached.

attributed to the failure of the EU to require states to legislate to prohibit such discrimination. That gap in the *acquis* has also, of course, meant that less overtly criminal discriminatory workplace practices relating to social origin and social class are permitted in the UK.

No specific protection for workers against arbitrary discrimination because of political opinion was provided in the UK until the Religion and Belief Regulations 2003 were amended by the Equality Act 2006 to ensure compliance with the equal treatment Directive 2000/78/EC (above) which requires non religious beliefs to be protected.

The ILO Discrimination (Employment and Occupation) Convention No.111 of 1958, which effectively extended C100's gender based requirements 'without distinction' to embrace all protected characteristics, and was ratified by New Labour in 1999,¹³⁷⁰ requires the Government to implement protection against discrimination on the basis of social origin or political opinion.¹³⁷¹ In 2005 the Committee of Experts referred to the draft Equality Bill (which became the 2006 Act), and requested that the government 'keep it informed on the progress of the draft law and whether it will include social origin as a prohibited ground' of discrimination.¹³⁷² In 2006 the Committee again asked about legal remedies for those experiencing such discrimination, characteristically pushing its effective demands further – 'not simply with regard to unfair dismissal but also with regard to access to employment and vocational training.'¹³⁷³ It reiterated that request in 2009, this time specifically urging the government to include appropriate measures in the Equality Bill.

¹³⁷⁰ Adopted 1958, came into force in 1960, ratified by the UK in 1999. 'Discrimination' under the Convention is 'any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'. Article 1(2): 'Any distinction, exclusion or preference in respect of a particular job based on inherent requirements thereof shall not be deemed discrimination.' Article 2 States must 'declare and pursue a national policy designed to promote by methods appropriate to national conditions and practice, equality of opportunity...with a view to eliminating any discrimination...' Article 3 (b) educational programmes. Article 3(c) "...repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy.'

¹³⁷¹ Article 1(1)(a).

¹³⁷² Direct Request adopted 2005, published 95th session (2006), para 4.

¹³⁷³ Direct Request adopted 2006, published 96th session (2007), para 4. Article 1(3) specifically refers to the application of the Convention to such training.

Section 1 of the Equality Act 2010 subsequently required public authorities to have ‘due regard’ for addressing and reducing socio-economic disadvantage when making policy decisions. Unfortunately, ‘Section One’, as it has become known, has yet to come into force.¹³⁷⁴ Nor have the closely related provisions in s.9 of the Act permitting a minister to introduce secondary legislation address the ‘caste’ discrimination encountered in some South Asian communities.¹³⁷⁵

In 2011 the ILO Committee of Experts, noting that the UN Committee on the Elimination of Racial Discrimination had raised the matter of caste discrimination in employment in the UK,¹³⁷⁶ asked the government to ‘invoke section 9(5)(a) of the Equality Act so that caste based discrimination, which is a manifestation of discrimination based on social origin, and also to take steps to ensure effective protection against discrimination based on political opinion.’¹³⁷⁷

By s.97 the Enterprise and Regulatory Reform Act of 2013 the responsible Minister was obliged to amend the Equality Act to address caste discrimination within the race provisions; to deem it unlawful, unlawful in certain circumstances, or formally to decide not to include it from the anti-discrimination regime. Previously the position was that the minister ‘may’ take such steps.¹³⁷⁸ The matter remained unresolved until July 2018, when the decision was taken by the government *not to* make caste status a protected characteristic. Very likely it was decided that on balance legislating on this sensitive issue would damage the electoral prospects of the Conservative Party, although the case of *Chandok v Tirkey* [2014],¹³⁷⁹ in which discrimination on grounds of caste was held to potentially fall within the ambit of less favourable treatment on the grounds of

¹³⁷⁴ See chapter two.

¹³⁷⁵ See para 49 of the Explanatory Notes, which state that the caste system is closely related to the traditional occupations of endogamous groups.

¹³⁷⁶ CERD/C/GBR/CO/18-20, 14 September 2011.

¹³⁷⁷ Direct Request adopted 2011, published 101st session (2012).

¹³⁷⁸ The relevant provisions are at s.9(5) of the Act both in the original and in the post 2013 version. The decision to address the matter in the race provisions of the Act is an interesting one because it is unquestionably a form of socio-economic discrimination. It is notable that the government excludes teachers in Northern Ireland from protection against religious discrimination, which might similarly be seen to be a blind eye turned to discrimination for pragmatic reasons – an intervention would be likely to cause too much political trouble (See Observation 2014, published 104th ILC session 2015).

¹³⁷⁹ UKEAT/ 0190/14/KN. See ‘Different Routes for Protecting Caste Discrimination: *Chandok v Tirkey* (2017) 46 *ILJ* 406.

ethnic origin, was the basis of the government's argument that there was no need to legislate.¹³⁸⁰

Tirkey was however, a typical domestic servitude case. The claimant, who spoke very little English, had worked at least 18 hours a day, seven days a week for four and half years.¹³⁸¹ She was not allowed out on her own, or to talk to other people.¹³⁸² She earned £1340 in her best paid year, nothing at all in her worst.¹³⁸³ Uneducated, and from a low caste, she was selected in India by her employers for the purpose of exploitation. As is usual in such cases, the central claim was one of discrimination because of race, which, of course embraces nationality and ethnicity.

The question of caste was only raised because it was unnecessarily, included in the statement of claim, and the respondents had sought to have it struck out.¹³⁸⁴ When the respondents appealed to the EAT the EHRC intervened, taking the opportunity to seek a definitive answer, doubtless with a view to the possibility of the case going on the Court of Appeal. The judge, the President of the EAT, however, having been 'taken to seven Treaties, Conventions and UN reports,' and invited to interpret the Equality Act in the light of those instruments, refused 'to resolve academic disputes.'¹³⁸⁵

¹³⁸⁰ *Caste in Great Britain and equality law: a public consultation. Government consultation response*, July 2018: "Given the EAT judgment in *Tirkey v Chandhok*, we consider that it is likely that anyone who believes that they have been discriminated against because of caste could bring a race discrimination claim under the existing ethnic origins provisions in the Equality Act 2010...we will keep any new cases of caste discrimination that come before the courts under review to ensure that the principles established by the *Tirkey v Chandhok* judgment are upheld. Should there be any question that the established case law is under challenge...we will consider whether government should intervene (pp14-15).

¹³⁸¹ *Tirkey v Chandhok* (ET) Case No. 340074/2013 Paras 57 – 59,

¹³⁸² *Ibid*, paras 111-122.

¹³⁸³ *Ibid*; see the 'Schedule of Amounts Underpaid under National Minimum Wage Act 1998' attached to the tribunal report.

¹³⁸⁴ Unusually, the UN ICERD was referred to in the amended version of the claim (para 6 of the EAT judgment). That instrument requires states to prohibit discrimination on grounds of 'descent,' and it was argued that as the framework directive on which the 2010 Act drew was based on the principles of the Convention and that therefore 's13 EA 2010 must be taken to prohibit caste discrimination.' This inclusion of ICERD seems to have led to its inclusion in section three of Doug Pyper's House of Commons Library Briefing Paper No.06862, 3 August 2018 'The Equality Act 2010: caste discrimination,' where he states that the CEDAW provisions oblige the government to prohibit caste discrimination. No regional or international instrument are mentioned in the government's consultation response.

¹³⁸⁵ From the *Tirkey* EAT judgment 'Post Script.'

Presciently noting ‘that there may yet be no formal introduction of ‘caste’ as a separate, and separately defined species of the genus which is race,’¹³⁸⁶ the judge was prepared to rule only that if Ms. Tirkey ‘proves facts which – whether colloquially or accurately – could be described as ‘caste considerations’ come within the heading ‘ethnic or national origins’ in 9(1)(c) she will succeed in her claim.’¹³⁸⁷

However, while caste status may in specific cases be said to equate with ethnicity, in most instances caste discrimination is arguably simply discrimination because of social class, wholly unrelated to ethnic origin. *Tirkey* changed nothing at all. For years most domestic servitude cases have routinely, if unsatisfactorily, been based on a claim of race discrimination, claims which, while they should succeed even when the employer is of the same race and nationality of the victim (as is usually the case, although judges have occasionally failed to uphold such claims), would be considerably strengthened if it could be augmented with a claim of discrimination because of social class.

Arguably, *Tirkey* was a spurious justification for politically motivated inaction. There is no logical reason why social origin should not be deemed a protected characteristic,¹³⁸⁸ but political realities, social attitudes, and the complexity of the British class system arguably make it very unlikely that it will take its place along with the other characteristics protected in the Equality Act. Discrimination on grounds of social class is perhaps so rife in the UK that, like age discrimination (direct age discrimination is still permissible if it can be said to be a proportionate means to a legitimate end), discriminatory treatment of the disabled (employers are only required to come to a ‘reasonable accommodation’ with their needs),¹³⁸⁹ and race and sex discrimination in the 1950s and 1960s, it might almost be said to be considered acceptable.

The implementation of Section One of the Equality Act would at least be a step in the right direction. Moreover, it would be politically acceptable to a government sensitive to accusations of ‘political correctness’ and to electorally compromising criticism - it would have the virtue of allowing the Government to claim, if not

¹³⁸⁶ *Ibid*, para 52.

¹³⁸⁷ *Ibid* para 53.

¹³⁸⁸ See the work of Prof. Sonia Blandford of UCL on this, and her book *Born to Fail? Social Mobility: A Working Class View* (Melton, Woodbridge, 2017).

¹³⁸⁹ Because these are permitted by Directive 2000/78/EC.

wholly convincingly, that it has complied with C111 ‘by methods appropriate to national conditions and practice.’

The implementation of Section One is, however, unlikely to have little real impact on arbitrary discrimination in the workplace - it must be borne in mind that Section One was drafted under New Labour, past masters at producing legislative gestures empty of substance. And an individual would not, of course, be able to bring a claim against a public authority for a breach of the Section One requirement. An application for judicial review would be the only available course of action.

In terms of impact on employment law, other than perhaps encouraging public authorities to extend section 158 and 159 style ‘positive action’ (see above) to social class,¹³⁹⁰ it would have little effect. Too much depends on the attitude of central Government: The Explanatory Notes on Section 1 in the Act refer to the need for departmental partnership with local authorities and NHS bodies to formulate ‘the sustainable community strategy for an area’ (para 23), and require that public authorities will be obliged to ‘take into account guidance by a Minister of the Crown when deciding how to fulfill the duty’ (para 25). Section 2 of the Act, however, places much power with the devolved governments, with Welsh and Scottish Ministers free to remove the para 25 requirement (para 29).

Arguably a truly progressive government would simply legislate to outlaw discrimination on the grounds of social class, and any administration relying on cautious provisions of Section One would be equally cautious in the provision of the paragraph 25 guidance.

In 2014 the government was asked by the ILO’s Committee of Experts for information on the progress it was making in combating workplace discrimination based on social class and political opinion. The committee also specifically asked about measures implemented to tackle caste discrimination.

While noting the adjustments to the unfair dismissal rules following the decision of the ECtHR in *Redfearn v UK*,¹³⁹¹ and the scope for recognizing a political opinion

¹³⁹⁰ Despite the fact that, if implemented, s1 will not make social origin a protected characteristic.

¹³⁹¹ *Op cit.* The ECtHR found that the qualifying period for unfair dismissal breached the government’s Article 11 obligations to protect workers from discrimination on grounds of political opinion. The court effectively held that

as a philosophical belief under the provisions of the 2010 Act, the Committee asked for reassurance that discrimination on the basis of social origin and political opinion was being adequately monitored, and information on how protection against such discrimination ‘is ensured in practice.’¹³⁹²

The practical reach of protection is simple enough to grasp; an individual dismissed because of political opinion can bring a ‘day one’ claim for unfair dismissal, while one dismissed because of social origin would have to have had worked for that employer for two years before having the opportunity to bring a claim. In both cases discrimination manifesting itself as less favourable treatment short of dismissal would not be actionable unless social origin could be presented as ethnicity,¹³⁹³ or political affiliation be presented as philosophical belief, engaging Article 9 ECHR,¹³⁹⁴ and the Religion or Belief Regulations.¹³⁹⁵

While the Government has yet to reply, it would be uncontroversial to argue that this restricted standing for those discriminated against for their political opinions or their social origins, or social status, falls short of what is demanded by C111.

We can conclude that the UK is broadly compliant with substantive regional and international standards on anti-discrimination. The failure to promote and enforce effectively are the chief weakness of the UK anti-discrimination regime, and although that weakness cannot be plausibly be said to be a breach of treaty obligations incumbent upon the government, I have shown that:

this breach would be resolved by a ‘day one right’ to bring a claim of unfair dismissal on political grounds or a free standing law against discrimination on such grounds (para 57). The government settled for the former alternative and inserted s108(4) in the ERA 1996 removing the qualifying period if the reason or principal reason ‘for the dismissal is or relates to the employee’s political opinions or affiliations.’

¹³⁹² Direct Request adopted 2014, published 104th session (2015).

¹³⁹³ As was the case in *Chandok v Tirkey* (above).

¹³⁹⁴ As was arguably the case in *Grainger v Nicholson* [2010] EAT IRLR 4 where a fervent advocate of action against climate change was held to have a belief which passed the tests of being one worthy of respect in a democratic society; and which embraced a substantial aspect of human life while attaining a certain level of cogency, seriousness and importance.

¹³⁹⁵ The 2003 regulations were amended by the Equality Act 2006 to ensure compliance with the Equal Treatment Directive 2000/78 which, unlike the 2003 regs, required non religious beliefs to be protected.

- Gender pay gap reporting should be extended to cover those with other protected characteristics.
- Positive discrimination initiatives, as far as they are compatible with the EU principle of non-discrimination, should be implemented.
- Explicit and effective protections against discrimination on the basis of social origin, and political opinion should be implemented.
- The problem of domestic servitude should be addressed by specific legislation.

And that

- The homes of those employing domestic servants should be subject to inspection to confirm that the terms and conditions of employment, and living and working conditions are, adequate.

2: 'Family Friendly' Rights: Maternity, Paternity, Parental Leave, and Flexible Working Arrangements.

There are a mass of international and regional rights provisions related to family rights and work. Most relate to working time, permitting parents to take time off, or to initiate a re-negotiation of their contract of employment in order to fulfill parenting duties or to care for disabled or elderly family members without being disadvantaged.

States must provide all workers, including the self employed, with a total of least 14 weeks of paid continuous maternity leave, at least 6 weeks of which should be taken after the birth. Pay should be pitched at a level which ensures that a mother or primary adopter 'can maintain herself and her child in proper conditions of health and with a suitable standard of living.' When past pay is taken into account she must be paid at least two thirds of her previous income.

States must provide protection against dismissal for a reason connected to pregnancy and maternity,¹³⁹⁶ and any dismissal for unrelated reasons should be suspended during the period of leave.

¹³⁹⁶ Article 10.

States must ensure that the worker can return to work in the same role.

While rights to maternity and nursing leave can arguably best be seen as civil rights, as fundamental human rights in the context of labour relations, wider entitlements to take parental leave might best be described as social rights.

The Preamble of the UN Convention on the Elimination of Discrimination Against Women:

‘The state parties to the present convention,

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognised, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women...’

Although maternity and nursing rights are grounded in gender equality, and, arguably more so than other working time rights, also grounded in occupational health and safety, the societal changes referred to in this 1979 text have started to see them outgrow their origins, as more men elect to take the lead role in child care.

In the UK up to 52 weeks of maternity leave can be taken. The right to take that leave is well protected. Claims of unlawful detriment and unfair dismissal can be made against employers who disadvantage or dismiss a worker for a reason connected with her pregnancy, which, if successful, will attract a financial award. In theory, if not in practice, reinstatement or re-employment is available as a

remedy for unfair dismissal.¹³⁹⁷ Sex discrimination claims, both direct and indirect, as well as claims for direct pregnancy or maternity discrimination, attracting, thanks to membership of the EU ‘uncapped’ awards (see chapter 2), may be made against employers in such circumstances.

Maternity and nursing leave

The 39 weeks of *paid* Statutory Maternity Leave – the first 6 weeks of which is ‘earnings related Statutory Maternity Pay’ [SMP], and pays eligible individuals 90% of their previous average net pay - can be shared with a partner, and deemed ‘Statutory Shared Parental Pay’ [StSPP] under the Shared Parental Leave [SPL] regime.¹³⁹⁸ SPL is restricted to two partners during the year following the birth or adoption,¹³⁹⁹ and is not, for example, available to a single parent to share with the child’s grandmother. Earnings related SMP cannot be passed over to the non nursing partner, so, although after the first two weeks following the birth (covered in any case by ‘ordinary paternity leave’ which allows both partners to be absent from work without sharing SML or SMP), all available leave can theoretically be shared, the remaining four weeks covered by earnings related SMP will only be likely to be shared if the husband is paid an enhanced parental leave rate by his employer, and earns a similar sum to the wife. The weekly sum of SMP after the first six weeks reverts to the statutory £140.93 (which is also the rate for paternity pay). A further 13 weeks of unpaid leave can be taken, bringing the available ‘shareable’ leave up to 50 weeks.

That there is considerable opportunity for employees to take maternal and parental leave is beyond question.¹⁴⁰⁰ The opportunity to take leave that is

¹³⁹⁷ Very few of those who seek reinstatement or re-engagement are successful, see pp 24-26 of *Access to Justice: Exposing the Myths*, by Andrew Moretta, 2016.

¹³⁹⁸ Following the Children and Families Act 2014 paternity and adoptive leave, other than the one or two weeks of paternity leave available to the non nursing partner, were effectively subsumed into the shared parental leave system and governed by the Statutory Shared Parental Pay Regulations, permitting the nursing partner to pass on 50 weeks of the 52 weeks maternity or adoptive leave available. See G. Mitchell ‘Encouraging Fathers to Care: The Children and Families Act 2014 and Shared Parental Leave’ (2015) 44 *ILJ* 123.

¹³⁹⁹ Adoptive parent are protected by the Paternity and Adoptive Leave Regulations 2002, and the available 52 weeks (50 of which can be shared) of adoptive leave has the same pay structure, comes within the ambit of the Shared Parental Leave scheme, and is similarly protected by rights not to suffer an unlawful detriment or be unfairly dismissed for taking that leave.

¹⁴⁰⁰ On SMP and SPL generally see 479-486 of G James ‘Family –friendly Employment Laws (Re)assessed: The Potential of Care Ethics’ (2016) 45 *ILJ* 477.

adequately paid, however, is restricted to those mothers and male primary adopters who take first six weeks of maternity leave. Those 6 weeks apart, only employees of firms which 'enhance' the statutory entitlements,¹⁴⁰¹ or choose to pay those electing to take what would otherwise be unpaid parental leave can expect to receive adequate pay during these periods of leave.

Those on SMP have to make do with the £140.98 mentioned above, or 90% of their average weekly net pay if that sum is less than £140.98. The shared 'StSPP' pays slightly more - £153.98 per week. The 13 weeks' additional maternity leave attracts no SMP or StSPP.

Workers treated by HMRC as self employed fare even less well. Although Article 7 of the UNCESCR requires that '[s]elf employed female workers should benefit from maternity insurance on an equal basis, with other workers,'¹⁴⁰² in the UK Maternity Allowance is available for the self employed or those who were not employed for sufficient time before the birth/adoption to be eligible for SMP. The allowance pays the usual £140.98. If the individual has earned insufficient money or has worked for less than 6 months in the previous 66 weeks they are eligible for only £27 per week. The Shared Parental Leave regime is similarly less accommodating to atypical workers. Where both partners have been employed for 6 months, and have satisfied the earnings requirements, both are entitled to SPL and to Statutory Shared Parental Pay. However, if one of the partners is not employed – is self employed, or of 'worker' status - an agency or casual worker - or unemployed, then the couple may take advantage of SPL and Statutory Shared Parental Pay only if certain hurdles relating to PAYE work undertaken by that worker in the last year can be surmounted. If not, then SPL is not available, nor is it if both partners are not employed. The unemployed and 'genuinely' self employed who do not provide personal service apart, all workers should have equal opportunity to take adequately paid parental leave, and a distinction based on the payment of Class II National Insurance contributions should not be made.

¹⁴⁰¹ SMP and OPL is paid for by the state; small firms receive a full reimbursement and larger firms receive 92% of what they pay employees..

¹⁴⁰² 2016 General comment by UN CttESCR para 47. The committee cited the Committee on the Elimination of discrimination against Women, communication No.36/2012, *Blok et al.v. The Netherlands*, views adopted 17 February 2014.

It is the inadequacy of ordinary SMP, paternity pay, and StSPP which is the 'sticking point' when the compliance of the UK regime with international and regional standards is considered.

UK law does not appear to accord with the Directive. Article 8 of the Pregnant Workers Directive requires workers to be paid at least the rate that they would receive should they be off work through sickness. The default position for sick pay in the UK is the £89.35 per week employers can currently recoup from the government under the statutory sick pay scheme after 4 days' sickness,¹⁴⁰³ a sum held to be 'manifestly inadequate' by the European Committee of Social Rights. Nevertheless, this 'floor' appears to have been taken by the Government as license to guarantee pregnant and nursing workers only marginally less derisory sums.

Where an employer is contractually bound to pay an employee their full basic wage during a period of absence due to ill health, it could be legitimately expected that under the terms of the Directive the same would apply to pregnancy and maternity absences. However, unless the contract says otherwise, there is no legal requirement for an employer who continues to pay the employee normally during sick leave to enhance the statutory sum during maternity leave. This is arguably an inadequate implementation of the directive.

To go beyond EU standards: the requirements of CEDAW are very general, and, most obviously in relation to the requirement merely to 'encourage' social services to provide childcare, the bar is set remarkably low, presumably to accommodate less developed countries.¹⁴⁰⁴

Article 10(2) UNICESCR is more specific and requires the government to ensure workers receive 'paid leave or leave with adequate social security benefits' for a 'reasonable period before and after childbirth.' Given the close attention paid to ILO standards by the ECSR, we arguably must look to the ILO Conventions and recommendation for an indication of what is adequate and reasonable.

¹⁴⁰³ For employees who gross £113 or more per week.

¹⁴⁰⁴ CEDAW Article 11 (2).

The UK failed to ratify the ILO Maternity Protection Convention (No. 3) of 1919, and the 1952 revised version of that Convention (No.103). It did, however, ratify the Social Security (Minimum Standards) Convention (No.102) of 1952, which, where maternity leave is concerned,¹⁴⁰⁵ binds the UK to the provision of at least 12 weeks maternity leave. Pay ‘in respect of suspension of earnings resulting from pregnancy and confinement’ [Article 50] is subject to less exact, rather complex, antiquated guidance, with Article 65 telling us that ‘the persons protected, or their breadwinners, are arranged in classes according to their earnings, their previous earnings may be calculated from the basic earnings of the classes to which they belonged.’ Essentially the payment rates for UK maternity benefits would, in the 1950s, 60s, 70s and early 1980s, have had to have been a minimum of either 45% of the wage average skilled manual male employee engaged in non electrical machine manufacturing (Article 65), or 45% of the average unskilled male labourer engaged in the same business (Article 66), depending on past earnings of the husband, or if unmarried, the mother. Although the Convention attaches a UN Economic and Social Rights Committee list of employment sectors (dating from 2006) from which it might in some instances be possible to derive regional averages, the modern benchmark applicable to the UK might better be sought elsewhere.

Article 4(1) of the Maternity Protection Convention (No. 183), of 2000, requires states to provide maternity leave of not less than 14 weeks, and for that period to include a period of 6 weeks compulsory leave after the birth of the child (4(4)). All leave should be paid ‘at a level which ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living’ (6(2)). Where past earnings are taken into account in calculating the sum to be paid, then the mother should receive at least two thirds of her previous income (6(3)). The accompanying Recommendation (No.191) requires states to ‘endeavour to extend’ the 14 weeks in Article 4 to 18 weeks.

Unfortunately the UK government has yet to ratify the Convention, and the Recommendation remains unadopted.

¹⁴⁰⁵ Part VIII Articles 46-52.

A Statement of Interpretation on Article 8 of the European Social Charter which followed the state reports for 1970-71 held that Article 8(1) requires states to provide at least 12 weeks maternity leave to mothers in paid employment, and be 'adequately compensated' during that period, entitlements considered by the Committee to be 'of such capital importance' that they 'ought to be guaranteed by law.'¹⁴⁰⁶ Any steps to effect dismissal during this period are suspended, a breach of Article 8(2) although where fixed term contracts are used it has been acknowledged that the contract may expire 'during the period from the time she notifies her employer...until the end of her maternity leave,' and misconduct may justify dismissal.¹⁴⁰⁷ The 12 weeks required by 8(1) relates to leave before and after birth – 6 weeks is the post natal minimum.

Earnings related pay or benefit must be at least 70% of salary, while non earnings related benefit must be at least '50% of median equivalised income calculated on the basis of the Eurostat at-risk-of-poverty threshold value,'¹⁴⁰⁸ which, according to the 'At-risk-of-poverty threshold-EU-SILC Survey' was a very modest disposable income of 9,022 Euros in 2017,¹⁴⁰⁹ or about £7,794. Specifically assessing UK compliance, the Committee, in Conclusions XX-4 2015 Article 8(1) held that:

'The situation in the United Kingdom is not in conformity with Article 8(1) of the 1961 Charter on the ground that the standard rates of Statutory Maternity Pay, after six weeks, and Maternity Allowance are inadequate.'¹⁴¹⁰

Noting the statistics on the 'take up' of maternity leave – as we have seen, mothers can choose to take up to 52 weeks 'SML' - the ECSR has asked whether discriminatory pressure is applied to persuade mothers to return to work early.

¹⁴⁰⁶ Conclusions III 1970-1971 Statement of Interpretation Article 8(1)..

¹⁴⁰⁷ 2018 Digest of the Case Law of the European Committee of Social Right, Council of Europe 2018, p117

¹⁴⁰⁸ Ibid, p 116. The Digest wrongly cites the statement of interpretation on 8(1) in Conclusions XX-4 2015 – the 70% and 50% figures are cited in the UK 2015 Conclusions.

¹⁴⁰⁹ Eurostat: ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tessi014&plugin=1 No 2018 figures are available.

¹⁴¹⁰ See also p114, European Social Rights Committee, Activity Report 2015. Although the ECSR was obliged to ask the Government 'whether the minimum rate of maternity benefits' reached the 50% poverty threshold, it had drawn the same negative conclusion in XIX-4 2010, and XVII-2 2006. However, the Committee has long held that it is 'inadvisable to make any absolute definition' of what is or is not adequate (see, for example, Conclusions I, 1965-1967, Statement of Interpretation, Article 8(1)).

Questions were raised in Conclusions XIX-4 2010 after it had been noted that leave was compulsory only for two weeks after the birth of the child (4 weeks for factory workers). The government had informed the ECSR that in practice almost all workers took the six weeks leave – the leave covered by the earnings related SMP referred to above.

Parental leave & family friendly flexibility

Despite the statutory protections, it does appear that discriminatory pressures are applied. While it is well understood that there is a right to paid maternity leave for 6 weeks, workers are often ignorant of the opportunity to take or to share up to one year of maternity leave, and of their right to take paternity and parental leave.

Very likely this is due to the fact that these rights are of comparatively recent origin, and after that after an initial flurry of publicity, because only the well paid could take such leave their existence failed to lodge in the public consciousness. The first post nursery age initiative was the Parental Leave Directive of 1996 which was incorporated by New Labour into the Maternity and Parental Leave Regulations 1999.¹⁴¹¹

New Labour were generous with unpaid leave entitlement, going beyond what is required by the Directive. The Employment Act 2002 extended maternity leave, introduced paternity and adoption leave, and all leave entitlements were subsequently extended by the Work and Families Act 2006.

The Tory dominated Coalition grudgingly implemented the pointedly named Parental Leave (EU Directive) Regulations 2013,¹⁴¹² which permit employees to take up to 18 weeks of unpaid parental leave for each child under 18, up to a maximum of four weeks in any year. That is the current position. The usual detriment and dismissal provisions to protect those exercising the right apply. However, those wishing to take the time off must either be prepared to live off their savings for the duration, or have an employer who is willing - or contractually bound - to pay them during their absence. Those in low paid work

¹⁴¹¹ The directive was adopted under the Social Protocol and was subject to John Major's social chapter 'opt out.'

¹⁴¹² Implementing Directive 2010/18/EU.

are thus effectively denied these rights, and those of worker status are denied the right to request unpaid parental leave.¹⁴¹³

Moreover, many of those employees aware of the existence of these rights, believe that their employer would respond negatively and disadvantage them in some way if they chose to take the available leave. A 2017 TUC survey of low paid parents examining attitudes to flexible work, maternity and paternity leave and pay, and unpaid parental leave,¹⁴¹⁴ found that very many 'employers take a punitive rather than a supportive approach to workers who need time off or adjustments for family reasons.'¹⁴¹⁵

The so called family friendly rights were found to have had little beneficial impact on the lives of these workers, the report on the survey finding that 'workplace culture...does not reflect the modern attitudes of young parents,'¹⁴¹⁶ with men facing particular employer hostility when they attempted to reconcile work and parenting commitments.¹⁴¹⁷ Of those surveyed, 58% felt that 'they know little or nothing about what rights they have at work to help them balance work with childcare.'¹⁴¹⁸ This lack of awareness is not restricted to those in low paid work. In a 2017 poll of 1,500 working parents undertaken by a law firm, it was found that 45% did not know of the amount of unpaid parental leave they could take, 49% of the fathers, and 32% of the mothers had not heard of unpaid parental leave. Take up of such leave was 25%, and only 6% had taken shared parental leave.¹⁴¹⁹

¹⁴¹³Which would arguably appear to be an inadequate implementation of the directive. In the 'purpose and scope' of the Framework Agreement on Parental Leave (Revised) it is said to apply 'to all workers...who have an employment contract or employment relationship,' and states are not permitted to exclude workers 'solely' because they 'are persons with a contract of employment or employment relationship with a temporary agency' (Cl.1(2) &(3)).

¹⁴¹⁴*Better jobs for mums and dads*, TUC, 2017.

¹⁴¹⁵ *Ibid*, p4; an example was cited of a 'line manager deliberately making last minute shift changes making childcare more difficult' in response to a request for help with managing hours for that purpose (p8). See 'Vindictive behaviour from employers' p23-24, also p 26-27; p39.

¹⁴¹⁶ *Ibid*.

¹⁴¹⁷ *Ibid*, 'Employers are not keeping up with the changing attitudes of young fathers', p24-25.

¹⁴¹⁸ *Ibid*, p9. See 'Lack of Awareness of employment rights and concerns around exercising their rights,' p26-27.

Also p34-35.

¹⁴¹⁹ www.crosslandsolicitors.com/site/hr-hub/unpaid-parental-leave-employee-ignorance-and-cost-to-parents. The TUC paper proposed that awareness of the existence of such rights be raised by initiatives aimed variously at businesses and workers, arguing that workplace culture had to change, emphasis being laid upon the role of trade unions, in particular the need for them to negotiate family friendly workplace policies with employers *Better jobs for mums and dads*, p15, and 'What are trade unions doing to support young parents?' p28-29, (also p46-47).

However, employer hostility and ignorance are arguably eclipsed by low pay. Information about the right to leave isn't 'getting around' because the right is, in effect *illusory*. Taking unpaid leave was found by the TUC to be 'unfeasible' for the low paid.¹⁴²⁰ Their report proposed that unpaid parental leave be paid and renamed 'childcare leave', with the right to paid leave extended to those with adult dependent relatives.¹⁴²¹ Although the TUC failed to address the question of the adequacy of ordinary SMP and StSPP, the proposal that the unpaid leave at least be paid at the rate of the national wage can be assumed to extend to the pay of those taking leave during the first year of parenthood.

These financial limitations would, of course, be less of an issue if parents were able to access cheap child care and employers were required to permit workers with young children to adapt their hours and shift patterns to accommodate those responsibilities. In the last 'List of issues' raised in response to the most recently published UK state report the UN Committee on the Elimination of Discrimination against Women asked for 'detailed information about measures in place to ensure a high rate of employment for women while addressing the reported gap between the demand for and supply of affordable high-quality childcare.'¹⁴²²

The government reply placed emphasis on the increased numbers of women in employment, and on 'extending the right to request flexible working to all employees ...developing a new system of shared parental leave so that parents can choose how best to share caring responsibilities.'¹⁴²³ Where child care was concerned, however, all the government was able to tell the Committee was that there was a new entitlement to '15 hours of free education and care per week for 3 and 4 year olds (which is being extended to cover around 40% of 2 year olds),' and there was now a right to 'extended help with childcare costs to those working under 16 hours for the first time.'¹⁴²⁴

¹⁴²⁰ Ibid, p10. See also p38.

¹⁴²¹ Ibid, p13 -14 & 44-46.

¹⁴²² CEDAW/C/GBR/Q/7 Committee on the Elimination of Discrimination Against Women, 25 October 2012, considered at the 57th Session 8-26 July 2013, para 16. See Article 11 CEDAW above, particularly (3).

¹⁴²³ CEDAW/C/GBR/Q/7/Add 1 Committee on the Elimination of Discrimination Against Women, 5 February 2013, considered at the 57th Session 8-26 July 2013, para 138.

¹⁴²⁴ Para 140.

The opportunities to agree to work arrangements which will help workers to cope with family responsibilities – so called ‘flexible working’ – are equally limited in the UK, matters not helped by the seeming willingness of politicians and employers to conflate working arrangements suitable for students with the requirements of family ‘bread winners.’ The TUC, in the 2017 report referred to above, found that rather than allowing workers to schedule work around family responsibilities, flexible working for the low paid tended to manifest itself as agency and zero hour which disrupted lives as changed hours, assignments and shift patterns at short notice.¹⁴²⁵ The UK Government has recently [February 2018] chosen to reveal that it ‘recognises the real issues that one sided flexibility can cause for working people and their families,’ and claimed to be ‘committing to provide a right to request a more predictable contract for all workers, including those on zero hours contracts and agency workers.’¹⁴²⁶ While a ‘right to request’ has, in such circumstances, the potential to be of considerable value,¹⁴²⁷ so far all such initiatives have offered no more than a very modest protection against victimization for those who make such requests.

Family friendly flexible working is arguably the polar opposite of agency, or zero hours work.¹⁴²⁸ While it is, to a degree, about matters like employers being prepared to accommodate workers obliged to leave work early to take a child to the dentist, it is essentially about providing *certainty or worker choice* as to when work starts and finishes, and a willingness to negotiate changes in fixed hours of work when family responsibilities change. The UN CttESCR hold that: ‘Flexible working arrangements must meet the needs of both workers and employers, and in no case should they be used to undermine the rights to just and favourable conditions of work,’¹⁴²⁹ a statement which might arguably best be said to sum up Government obligations in respect of workers with family responsibilities.

¹⁴²⁵ Ironically the right to request flexible working is restricted to employees, and this excludes agency workers, and very many zero hours workers. Even for employees qualifying periods for rights are a barrier to accessing rights when they are in low paying roles with a high ‘churn.’

¹⁴²⁶ HM Government Industrial Strategy: *Good Work, A response to the Taylor Review of Modern Working Practices*, February 2018,p.16. Emphasis added.

¹⁴²⁷ See the Zero Hours Bill 2014, below.

¹⁴²⁸ Although no doubt many of those working under such contracts come to amicable arrangements with agencies and employers, agencies are not under any formal obligation to consider flexible working arrangements. Although they pay their temporary staff wages they are able to claim that they are not the employer. Firms engaging workers on zero hours contracts similarly ‘demutualise’ the employment relationship to the extent that it can also be argued the workers are not employed and that consequently the ‘employer’ is under no obligation to consider requests for flexible working. This ambivalent status potentially excludes the host of rights which are denied those without employee status.

¹⁴²⁹ General Comment on Article 7 (2016), para 46.

Well paid individuals, valued by their employer, are far better placed to negotiate flexible working arrangements. The less well paid – the negotiation of their individual contract of employment a fiction - are very likely to be told that if they don't like the work they can go elsewhere. These rights, negotiated as they were by the social partners, were intended to be negotiated collectively, not by the individual, and arguably the failure of the Government to protect freedom of association examined in the previous chapter has effectively served to undermine the right to request genuinely family friendly flexible working.

The Part Time Workers' Directive, considered in greater detail at the start of the next section, was adopted in 1997,¹⁴³⁰ and as well as a measure to protect those workers from less favourable treatment, has been said to have been intended as a first step in a campaign to promote flexible work,¹⁴³¹ focusing principally on the removal of administrative and legal barriers to part time arrangements.

As far as giving workers the right to work reduced hours the Social Partners' Framework Agreement, which the Directive implements,¹⁴³² requires only that 'employers give full consideration' to requests to transfer 'to part time work that becomes available in the establishment.'¹⁴³³ The 2010 Parental Leave Directive – which also implements a Framework Agreement - is similarly equivocal requiring only states ensure 'that workers, when returning from parental leave, may request changes to their working hours and/or patterns for a set period of time. Employers shall consider and respond to such requests, taking into account both employers' and workers' needs.'¹⁴³⁴

¹⁴³⁰ Directive 97/81/ EC, issued to the UK as Directive 98/23 /EC.

¹⁴³¹ See Mark Bell, 'Achieving the Objectives of the Part-Time Work Directive? Re-visiting the Part-Time Workers Regulations', (2011) 40 *ILJ* 254. A more accurate assessment would be that the Framework Agreement was to be the first of a series on flexible working. Para 12 of the preamble to the Part Time Directive states that: 'Whereas the social partners wised to give particular attention to part-time work, while at the same time indicating that it was their intention to consider the need for similar agreements for other flexible forms of work.' However, the Framework Agreement which the directive implemented goes no further than apply the principle of non discrimination to the treatment of part timers, and to "assist the development of opportunities for part time working on a basis acceptable to employers and workers" by merely guiding member states towards requiring employers to accommodate workers who wished to work on a part time basis (see the preamble to the Framework Agreement).

¹⁴³² The Directive essentially enacts the Agreement.

¹⁴³³ Clause 5(3)(a). Similarly a request for extra hours or full time work is only required to be considered 'should the opportunity arise' (Cl..5(b)).

¹⁴³⁴ Clause 6(1). The Parental Leave Directive also implements a Framework Agreement concluded by the Social Partners.

These provisions were clearly drafted with western European levels of collective agreement in mind, where such requests will usually either be made on the worker's behalf by a recognised trade union, or with the support of that union. In the UK, in the context of an industrial relations landscape dominated by the individual contract of employment, and individual rights enforceable through litigation rather than negotiation, substantive rights are required to achieve the same end.

The Employment Act 2002 introduced the right to request flexible working arrangements into domestic law – embracing requests for part time hours - for the employed parents of young or disabled children. The right was extended to those caring for adult disabled people in 2007, and to all children up to the age of 17, following the Work and Families Act 2006. Since the Flexible Working Regulations 2014, implemented by the Coalition, all employees have the right to request flexible working arrangements. Employers may refuse requests for such arrangements on grounds that include cost, or the impracticability of recruiting additional staff or undertaking a reorganisation, or on any plausible grounds whatsoever.¹⁴³⁵ It is no more than a right to ask for different hours or to work elsewhere – perhaps to a workplace near a school, nursery, hospital, or to work from home. The difference between an ordinary request and a formal written request under the legislation is that the employer must deal with the request in a reasonable manner, and respond within 3 months.¹⁴³⁶ If the request is turned down, then an alternative to a tribunal claim, if both parties agree is to go to Acas arbitration. In either case, if the employee is successful, the consequences are limited to the employer being obliged to reconsider the request and pay a maximum of 8 weeks' pay (subject to the ERA 1996 s227 cap).

In 2002 these provisions were memorably dismissed as 'sound bite legislation',¹⁴³⁷ and the phrase remains apt 16 years on.¹⁴³⁸ Female workers have sometimes successfully claimed that a post natal refusal by an employer to permit a shift to part time hours amounted to indirect sex discrimination, but tribunals

¹⁴³⁵ Employment Rights Act 1996 s. 80(G)(1)(b)

¹⁴³⁶ Oddly the request must be for a permanent change, and the TUC proposes that a request for a temporary change should be permitted ('Better jobs', *op cit*, p14).

¹⁴³⁷ In particular by Lucy Anderson in 'Sound Bite Legislation: The Employment Act 2002 and New Flexible Working 'Rights' for Parents,' (2003) 32(1) *ILJ* 37.

¹⁴³⁸ See p40 of 'Better jobs' (*op cit*), for some opinions of the weakness of the right from low paid workers.

have tended to take the view that it is for the employer to decide whether or not a post is suited to a part time or 'job share' approach,¹⁴³⁹ making the supposed objective justification for an insistence on full time hours an essentially subjective one. However, this approach, even if successful, will not secure a part time contract, merely an award which is unlikely to be adequate compensation, and will not, in any case, be an option for a male worker.

Whether or not these inconsequential rights accord with EU requirements is questionable – although not a question likely ever to be considered by the ECJ. The Part Time Work Framework Agreement requires that employers should, 'as far as possible,' institute 'measures to facilitate access to part time work at all levels of the enterprise.'¹⁴⁴⁰ While UK law can – at a push - perhaps plausibly be said to oblige employers to consider requests from employees for part time hours, there is no requirement for employers to take the active and wide ranging positive measures this phrase appears to demand.

To conclude: The UK is largely compliant in the provision of maternity and parental leave required by regional and international rights instruments. However:

- Statutory Maternity Pay and the Maternity Allowance are inadequate.
- 14 weeks *paid* leave should be provided, with 6 weeks as the post natal minimum. The earnings related Statutory Maternity Pay should continue beyond the existing 6 weeks, paid at either 70% of previous net average wages, or whatever sum provides a disposable income of approximately £10,000 per year, or other sum required to maintain a mother and child in good health when housing, food and heating costs have been covered.
- All workers: employees, 'workers,' and the 'genuinely' self employed providing personal service, should have equal opportunity to take

¹⁴³⁹See AC Davies, *Employment Law*, (Harlow, Pearson, 2015) p282.

¹⁴⁴⁰ Clause 5 (3)(d) Directive 97/81/EC.

adequately paid parental leave. A distinction based on the payment of Class II National Insurance contributions should not be made.

- The right to request 'flexible' working hours should be extended to those with worker status.
- All such requests should be made through a trade union as part of the collective bargaining process.

3: Rights for Workers with 'Atypical' Working Arrangements: Part Time, Zero Hours Contracts Fixed Term, and Agency Contracts.

'Flexible working arrangements must meet the needs of both workers and employers, and in no case should they be used to undermine the rights to just and favourable conditions of work.'¹⁴⁴¹

Part time work

Those engaged in part time work are frequently not afforded the terms and conditions of employment *pro rata temporis* enjoyed by their full time colleagues. This is a problem that both the EU and the ILO have attempted to address.

We saw in the last section that the Social Partners, at the instigation of the European Commission, negotiated a Framework Agreement on Part Time Work in a bid to make it more likely that workers in member states would be able to elect to work on a part time basis, confident that they would not lose acquired rights. This was intended as a first step towards the implementation of wider, genuinely flexible, working arrangements in member states,¹⁴⁴² one taken shortly after the ILO had adopted Convention 175 and Recommendation 182 on Part Time Work.

¹⁴⁴¹ UN Committee on Economic Social and Cultural Rights, General Comment on Article 7 (2016), para 46. On the need for the law to keep up with these increasingly typical new forms of employment relationships see MJ Walton, 'The Shifting Nature of Work and its Implications' (2016) 45 *ILJ* 111, and Sir Brian Langstaff, 'Changing Times, Changing Relationships At Work...Changing Law?' (2016) 45 *ILJ* 131.

¹⁴⁴² Council Directive 97/81/ EC, issued to the UK as Council Directive 98/23 /EC. See Jeffery 'Not Really going to work? Of the Directive on Part time Work, 'Atypical Work' and Attempts to Regulate It,' (1998) 27 *ILJ* 193, 1998.

The Part Time Workers' Directive was the first of the Directives to be negotiated by the Social Partners under the social protocol, (the second of the social chapter Directives implemented by New Labour), and although neither the Framework Agreement, nor any other part of the Directive mentions the ILO, the text of the agreement makes it apparent that the Social Partners had paid close attention to ILO Convention No.175 on Part Time Work, and to the accompanying Recommendation No.182, particularly Article 9 of the former, and Articles 17 and 18 of the latter.

All three instruments place considerable emphasis on promoting a voluntary shift towards to flexibility, with the preamble of C175 expressly referring to 'the relevance for part time workers of the provisions of the Equal Remuneration Convention 1951, the Discrimination (Employment and Occupation) Convention 1958, and the Workers with Family Responsibilities Convention and Recommendation 1981.'

However, the Directive confers few substantive rights, and, in essence, C175 obliges signatory states to initiate a programme of protection, with the phrase 'measures shall be taken' serving as the principal imperative, and Article 18 indicating that a subsequent 'revising' Convention will supersede C175.

The Directive was adopted in 1998, and Convention No.175 came into force the same year, perfectly timed, one might suppose, to assist New Labour in realising its rather vague policy aim of securing 'flexicurity' for Britain's workers.

C175 however, remains unratified and the first Blair administration, in drafting what became the Part Time Workers (Prevention of less Favourable Treatment) Regulations 2000, achieved only what has been described as a 'partial and incomplete implementation' of the directive.¹⁴⁴³ The Department of Trade and Industry's Regulatory Impact Assessment estimated that fewer than 7% of all part-time workers would benefit directly from the regulations.¹⁴⁴⁴

¹⁴⁴³ Mark Bell, 'Achieving the Objectives of the Part-Time Work Directive? Re-visiting the Part-Time Workers Regulations,' (2011) 40 *ILJ* 254.

¹⁴⁴⁴ According to Aileen McColgan in "Missing the point? The Part-time Workers (Prevention of Less Favourable Treatment) Regulations (2000) 29 *ILJ* 260.

In most circumstances, claimants relying on the regulations require a real and closely comparable full time colleague, an often insurmountable obstacle to a successful claim.¹⁴⁴⁵ Discrimination is, in any case, permitted where the employer can show an ‘objective justification’ for the imposition of less favourable terms and conditions of employment of part time workers.¹⁴⁴⁶

It is difficult to escape the conclusion that the regulations were deliberately intended to be of little use. However the Directive, little more a guide to what employers and trade unions should aim at when facilitating part time work, and leaves so much discretion to the member state that it cannot be claimed that the implementation was inadequate. No complaints were raised by the TUC, the Commission did not instigate infringements proceedings of its own volition, or in response to any other complaint, and the regulations remain as they were when they entered into force in 2000.

The Directive was meant as one element of a drive towards the provision of more flexible work by employers and trade unions rather than as an instruction from Brussels to confer individual rights on individual workers. Had the UK ratified C175,¹⁴⁴⁷ a step which would have accorded with New Labour’s ostensible enthusiasm for protecting atypical workers, and its initial interest in ratifying ILO Conventions after the hiatus of the Thatcher and Major years, then there can be no doubt that the ILO’s Committee of Experts would have pressed the government to revise the Regulations on many occasions during the past 18 years, and if trade unions had, in 1997, wielded the influence that they possessed 20 years before there can be little doubt that the regulations would have taken a different form.

¹⁴⁴⁵ Reg.2(4). Unless the claimant shifted from full to part-time working arrangements, or has returned to the same job following a brief absence. See below for the need for a real comparator as an obstacle to justice in equality cases.

¹⁴⁴⁶ Reg. 5. Although the House of Lords introduced a more generous approach in *Matthews v Kent and Medway towns Fire Authority* [2006] 2 AER 171. ‘Objective justification’ for a denial of PT status drew the interest of the CEACR and it asked the government to provide examples of such justifications and asked how the UK ‘addresses indirect discrimination against part time workers’ (Direct Request adopted 2002, published 91st ILC session 2003).

¹⁴⁴⁷ It came into force in 1998.

The government is, however, required by Part 1(4) of the 1961 European Social Charter to ensure as an aim of policy that 'All workers have the right to a fair remuneration sufficient for a decent standard of living,' and by Article 4(1) to 'recognise' that right. Additionally, Article 7 the UN Covenant on Economic, Social and Cultural Rights requires the government to ensure for workers 'fair wages' and 'A decent living for themselves and their families.'

This arguably means that part time workers should be given parity with the terms and conditions of employment as their full time colleagues.

As shall become apparent, these requirements are effectively the basis of my arguments that the government is required to confer protections for atypical workers. Atypical work contracts, by no means unknown in the 1970s, were used much more after 1979, as the unions became weaker. Working families started to require two incomes, and it became easier for employers to hire workers on exploitative terms. Although the ILO responded, the UK was no longer signing up the supranational protections, so the obligations incumbent on the government are limited.

The sparse nature of specific obligation in this area means that the obligations can realistically be considered no more than a 'political springboard' – as a justification for enacting effective legislative protection.

Worker status

Calculated ineffectiveness was arguably one element of New Labour's strategy to render the new EU employment rights as 'employer friendly' as possible. The other key element of that strategy had been set in place within months of New Labour's May 1997 election victory – 'worker' status.

The new intermediate status limited the reach of the social chapter. Rather than simply extending the legal definition of an employee to align with the EU definition of a 'worker,'¹⁴⁴⁸ to give all those undertaking work personally

¹⁴⁴⁸It must be emphasised that EU law recognises only a binary divide between workers (a term synonymous with 'employee') and the self employed. The self employed 'offer goods or services on the market, workers merely offer their labour to one (or, on rare occasions, more) particular employer(s)' (para 46 AG's Opinion in the *Dutch*

employee protection, a new category of employment status was created – that of a ‘worker.’ The new category embraced employees, and those in an employment relationship denied employee status on grounds of lack of mutual obligation but excluded those who, while providing a personal service, were deemed to be self employed under the common law tests:¹⁴⁴⁹

Section 230(3) Employment rights Act 1996:

‘In this Act ‘worker’...means an individual who has entered into or works under....(a) a contract of employment (b) any other contract...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 client or customer of any profession or business undertaking carried on by the individual.’

Now there were three tiers of employment status: employee, worker and self employed.

This new intermediate status ensured that existing domestic protections were not extended to those workers not deemed to be employees and that, where the notoriously vaguely drafted EU protections could plausibly be said to embrace only employees, ‘workers’ could also be denied their benefit along with those workers taxed as self employed whose *de facto* employer are able to claim that the individual in question is ‘genuinely self employed’.

As well as limiting the reach of employment protections, ‘worker’ status provided a new legal foundation for previously ambivalent variations on the employment relationship. Those employed under the ‘precarious’ work arrangements which had become increasingly popular with employers during the previous 15 or so years prior to 1997, principally agency and zero hours contracts, arrangements

Musicians Case [2014] C-413/13). The ‘false self employed’ (like the Dutch Musicians) fall into the category of worker, along with employees, and the question as to whether an individual is a worker or is self employed must be assessed on a case by case basis (ibid, para 84). On the Dutch case see pp 193-196 V. de Stefano, ‘Non –Standard Work and Limits on Freedom of Association: A Human rights Based Approach’ (2017) 46 *ILJ* 185.

¹⁴⁴⁹The classic common law tests of control, whether tools are supplied etc, were laid down in *Readymix Concrete v Ministry of Pensions and NI* [1968] 2 QB 497, and applied recently by the Supreme Court in *Pimlico Plumbers v Smith* [2018] UKSC 29 where it was confirmed that Mr Smith was a worker.

which laid claim to the lack of mutual obligation inherent in genuine casual work, continued to be denied the key protections afforded employees but could now be said to have ‘worker’ status.

Although I would argue that it is questionable as to whether the British three tier approach to the categorising workplace relations should have excluded self employed workers providing a personal service to a small pool of clients/employers from the EU protections,¹⁴⁵⁰ it cannot realistically be claimed that British manipulation of worker status to minimize the impact of the social chapter is a breach of EU law.

Nevertheless, it is arguable that the creation of this ‘twilight’ intermediate status has upset the effective delineation of self employment and employment for the purposes of employment protection, given exploitative arrangements a spurious legitimacy, and consequently undermined the provision of just and favourable conditions of work, and to fair remuneration sufficient for a decent standard of living. The most notorious of these arrangements is the ‘zero hours contract.’

Zero hours contracts

Employers generally use such contracts to enable them to dispense with labour quickly and at minimum cost during quiet periods, to summon additional labour at busy times at very short notice, and to avoid paying over time rates to their core retinue of conventionally employed staff.¹⁴⁵¹ Many such workers, paying tax and NI on a PAYE basis and working hours, often indistinguishable from colleagues working contractually agreed full time hours, are denied full time or part time contracts of employment on, I would argue, the almost invariably artificial premise that their relationship with the employer is not one of mutual obligation. Others are paid a gross sum, without tax and National Insurance deductions, on the pretence that they are self employed.

¹⁴⁵⁰In the *Dutch Musicians Case* [2014], *op cit*, ‘self employed’ musicians working for small pool of employers were held to be workers entitled to bargain collectively, and, of course, to the EU employment rights (cf the Deliveroo application for union recognition, considered below).

¹⁴⁵¹On the characteristics of such contracts see Z Adams and S Deakin, *Re-regulating Zero Hours Contracts* (Liverpool, IER, 2014) pp3-24.

‘Reduced hours contracts’ [RHCs], closely related to ZHCs, similar in effect, and often called ZHCs, guarantee a core of hours. In such circumstances, whatever the terms of that contract may say, there will arguably always be mutual obligation and employee status. These arrangements are, I would suggest, potentially more abusive than ‘true’ zero hours contracts, with workers finding themselves obliged, whether contractually or otherwise, to work when and wherever the employer requires, the bounds of obligation tested only by those unafraid of losing a regular, if minimal, core income.

These contracts are undoubtedly a form of part time work, although the necessity for a ‘comparable full time’ employee or worker for a successful claim to be made under the Part Time Regulations means that few employed under such contracts are able to enjoy the protection conferred by the Regulations. But to describe such arrangements as ‘part time’ would be to give them an undeserved legitimacy.

‘Labour is not a commodity’ is the cornerstone principle of the ILO, but these contracts unequivocally treat workers as such. Yet, as Keith Ewing has pointed out, while these contracts are clearly inconsistent with the most fundamental of ILO principles, ‘there is no international standard dealing expressly with ZHCs.’¹⁴⁵² Ewing does, however, argue that the ILO Decent Work Agenda of 1999, and the Declaration on Social Justice and a Fair Globalisation of 2008, commit the UK not only to protection from the obligation to work excessive hours, but to tackle these ‘new problems about *shortage* of hours, *allocation* of hours and *regularity* of hours.’

Similarly, the general ‘aim of policy’ in Part I of the 1961 European Social Charter to ensure, *inter alia*, that ‘All workers have the right to a fair remuneration sufficient for a decent standard of living,’ expanded upon, as we have seen, in Article 4(1),¹⁴⁵³ prohibits states from sanctioning contracts of employment which do not guarantee a decent basic wage. The policy aim to ensure ‘just conditions of work’ would also appear to demand minimum hours, as well as a curb on excessive hours.

¹⁴⁵² KD Ewing, John Lovett Memorial Lecture, University of Limerick 3 March 2016: ‘Decent Work, Effective Labour Law and Zero Hours Contracts.’

¹⁴⁵³ *ibid.* Ewing cited 4(1) in his speech.

The same can be said of the UN Covenant on Economic, Social and Cultural Rights. We have seen that UNICESCR requires by Article 7 'fair wages' and 'A decent living for themselves and their families,' and that Article (d) requires that states guarantee 'reasonable limitation of working hours,' which can be said to demand government ensures for workers reasonable certainty as to when shifts will start and finish, and reasonable notice of changes. The UN Committee's most recent set of Concluding Observations expressed concern about the 'negative impact' on workers' Article 7 rights of 'the high incidence of part time work, precarious self employment, temporary employment and the use of "zero hour contracts"' in the UK, which, it noted 'particularly affect women.'¹⁴⁵⁴

The Zero Hours Contracts Bill 2014, sought a politically acceptable solution to the problem, and showed that it was possible to reconcile the need for flexibility with the need of the workers for reasonable certainty, and thus fulfill the fundamental requirements of the Covenant and Charter.

It defined ZHCs as contracts which fail to give guaranteed working hours, or by which the worker is expected to be available for work for a period of time which amounts to 20% or more of any guaranteed working time. Written notice was to be given of any minimum hours, and of the times they were to be worked, before the worker was hired. When non guaranteed hours were to be worked 72 hour notice was required, with the same notice period required for cancellation. Work undertaken with less notice would entitle the worker to 150% of the normal rate, while a cancellation would have entitled the worker to be paid as if the work had been undertaken. In all other respects ZHC workers were to be treated equally with workers on regular contracts, with ZHC workers entitled to request 'fixed and regular' employment, and employers able only to refuse 'where there are compelling business reasons to do so.' Where ZHC workers had been employed continuously for 12 weeks employers would have been obliged to take them on; where discontinuously, if employed for at least 12 weeks in a reference period of 26 weeks, then they would also have been required to hire them on a 'permanent', full time basis. The weekly hours under the new contract would be equal to the week when they worked most hours under the ZHC. The usual detriment and dismissal protections for such requests aside, ZHC workers would also have enjoyed the full protection of the unfair dismissal legislation, with continuity of employment maintained despite weeks when no work is provided.

¹⁴⁵⁴Concluding Observations on the 6th Periodic Report, 2016, para 32.

Nevertheless, as is the invariable fate of a Private Member's Bill which does not enjoy the support of the Government, it failed to make it on to the statute book. However, superbly drafted as the Bill was, I would argue that the comparatively complex rights in the Bill are incompatible with low paid work. Moreover, while the provision of individual rights may be a politically acceptable solution, they are not likely to be an effective solution, given the reluctance of workers to exercise those rights. It seems likely that ZHC workers will, for obvious reasons, generally be more reluctant than other workers to fall out of favour with their employer, be therefore less likely to litigate, and to prefer to tolerate insecurity until a better job presents itself.

The government has been guided on the use of ZHCs by the findings of the anodyne Taylor *Good Work Report* of 2017,¹⁴⁵⁵ and its response to Taylor, the White Paper *Good Work* was predictably cautious.¹⁴⁵⁶ The paper indicated that little was likely to change, but in contrast to the irrelevant prohibition of 'exclusivity clauses' in ZHCs, by the Coalition in 2013,¹⁴⁵⁷ it at least signaled an awareness on the part of the May Government that it had to curb the worst excesses of these contracts.

Good Work revealed that the Government was planning to give 'all workers a right to request a contract with more predictable and secure working conditions.'¹⁴⁵⁸ While this could have portended the provision of the robust 'right to request' incorporated into the ZHC Bill, the government's December 2018 *Good Work Plan*, has revealed that the right will amount to no more than the provision of the protection currently afforded those requesting flexible working arrangements, and will be subject to a 26 weeks qualifying period.¹⁴⁵⁹

¹⁴⁵⁵ *The Taylor Review of Modern working Practices*, July 2017. On the Taylor Review see K Bales, A Bogg, and T Novitz "'Voice" and "Choice" in Modern Working Practices: Problems With the Taylor Review,' (2017) 47 ILJ 46.

¹⁴⁵⁶ HM Government Industrial Strategy: *Good Work, A response to the Taylor Review of Modern Working Practices*, February 2018.

¹⁴⁵⁷ S.139 Small Business, Enterprise and Employment Act 2013 inserting s.27A into ERA 1996. Exclusivity clauses were arguably unenforceable before s.139, and, perhaps more significantly, they are irrelevant to situations where the worker is either offered work, or the worker is not offered work at all. Few workers or employers would be inclined to litigate over such an arrangement even if ostensibly bound by an overarching contract.

¹⁴⁵⁸ *Good Work*, 2018, *op cit*, p16.

¹⁴⁵⁹ *Good Work Plan*, HM Government December 2018, p7 & p13.

The Government had asked ‘the Low Pay Commission to consider the use of higher minimum wage rates for workers on zero hour contracts,’¹⁴⁶⁰ but in *Good Work Plan* it reported that the Commission ‘does not endorse the proposal.’¹⁴⁶¹ The one firm pledge the Government made in *Good Work*, to confer on *all workers* the right to request a written statement of contractual terms, and for employers to be obliged to provide *all workers* with pay slips, the hourly paid being provided with detail on the hours worked,¹⁴⁶² has however been fulfilled.

The Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) Order 2018 and the Employment Rights (Miscellaneous Amendments) Regulations 2019 were duly laid before Parliament in February 2018 and December 2018 respectively. From April 2020 all workers will have the right to a pay slip,¹⁴⁶³ and to a written statement of the particulars of employment - rights currently only afforded employees.

On the same date the Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 that right will make the written statement a ‘day one’ entitlement, additionally requiring employers to set out ‘normal working hours, the days of the week the worker is expected work and whether or not such hours or days may be variable, and if they may be how they vary or how that variation is to be determined.’¹⁴⁶⁴ Contractual rights to leave, pay, and sick pay are also required, and workers must be given details of any ‘probationary period’ or training entitlement.¹⁴⁶⁵

The same statutory instrument will extend the ‘holiday pay reference period’ mooted in *Good Work* ‘to help ensure atypical workers receive the holiday pay they are entitled to,’ from 12 weeks to 52. The government also announced that it intends to ‘extend the time required to break a period of continuous service’ to four weeks to allow more employees to access employment rights, although the

¹⁴⁶⁰ Press release 7 February 2018: *Millions to benefit from enhanced rights as government responds to Taylor review of modern working practices*. From the Department for Business, Energy and Industrial Strategy, Prime Ministers’ Office, 10 Downing Street, The Rt Hon Greg Clark MP and the Rt Hon Theresa May MP.

¹⁴⁶¹ *Good Work Plan 2018*, op cit, p16.

¹⁴⁶² *Good Work 2018*, op cit,, p32.

¹⁴⁶³ See Chapter 6 for detail on payslips.

¹⁴⁶⁴ Section 3(c)(i),(ii) and (ii).

¹⁴⁶⁵ See the gov.uk Press release, 17 December 2018: ‘Largest upgrade in a generation to workplace rights – getting work right for British workers and businesses.’

required SI has yet to be laid before Parliament. Remarkably, we now see a Tory government 'gold plating' EU employment rights.

Unfortunately these legislative gestures, while welcome, and perhaps likely to make it less easy for employers to exploit those in precarious employment, are arguably insufficient to clear the government of the charge of breaching the European Social Charter and UN Covenant.

In contrast, the Labour Party envisages taking a less piecemeal approach to tackling the problem, one which will unquestionably secure such compliance. In points one and two of its '20-point plan for security and equality at work' in its 2017 manifesto, it proposes to:

'1. Give all workers equal rights from day one, whether part-time or full time, temporary or permanent...2. Ban zero hours contracts – so that every worker gets a guaranteed number of hours each week.'

Restricted hours contracts are to be tackled by giving workers the right, after 12 weeks of work, to a contract guaranteeing them "reflecting the hours" actually worked during that period,¹⁴⁶⁶ a proposal taken from the 2014 Bill.

Dependent entrepreneurs & bogus self employment

If Labour's proposals are implemented then worker status would, of course, be abolished at a stroke. Such a return to a binary divide for employment protection purposes, would have the virtue of giving so called 'dependent entrepreneurs,' victims of the ill defined delineation between 'workers' and the 'genuinely self employed,' the employment protections currently restricted to employees, and bring an end to the succession of cases where such workers have had to wrest recognition of worker status from a reluctant *de facto* employer. The government pledged to address this problem in its 2017 White Paper *Good Work*, but has so far done nothing.

The two principal protections those of worker status enjoy are the right to a minimum wage and the right to 28 days paid holiday each year. Consequently exploitative *de facto* employers will usually prefer staff taxed as if they were self

¹⁴⁶⁶ *For the Many Not the Few*, Labour Party Manifesto 2017, pp.47-48.

employed (as many workers are) to believe themselves to be ‘genuinely self employed’ for the purposes of employment protection, and thus resist ceding worker status.

We are not discussing the proprietors of back street ‘sweat shops’ here. Multiple and individual claims brought by Uber taxi drivers,¹⁴⁶⁷ and by couriers working for Addison Lee,¹⁴⁶⁸ Hermes,¹⁴⁶⁹ Excel,¹⁴⁷⁰ City Sprint,¹⁴⁷¹ and Royal Mail subsidiary eCourier,¹⁴⁷² all saw the firms concerned having, in effect, to concede worker status to the claimants.

Deliveroo came to a ‘six figure’ financial settlement with 50 of its former couriers who claimed that they had been paid less than the minimum wage and denied paid holidays in breach of the Minimum Wage and Working Time Regulations.¹⁴⁷³ Another courier firm, DPD, gave its 6,000 franchisees worker status, and settled with those who, backed by the GMB, had brought claims for unpaid holidays, as part of its public relations efforts following the death of one its franchisees.¹⁴⁷⁴

Deliveroo, however, having paid off those of their riders who had sought worker status, continue to insist that their couriers are genuinely self employed, apparently encouraged by their successful resistance to a bid by the Independent

¹⁴⁶⁷ See *Uber v Aslam and others* UK EAT/0056/17/DA, upheld by the Court of Appeal 19 December 2018 [2018] EWCA Civ 2748.

¹⁴⁶⁸ *Gascoigne v Addison Lee* Case No 2200436/2016 [2017] (See also the *Guardian*, 2 August 2017); *Lange and others v Addison Lee* Case No. 2208029/2016 [2017]; *Evans v Addison Lee* Case No: 2206003/2017[2017]; *Brennan v Addison Lee* Case No 3328857/2017 [2018].

¹⁴⁶⁹ ‘Revealed: delivery giant Hermes pays some couriers less than living wage. Investigation by *the Guardian* finds some self employed contractors taking home less than £6 per hour’, *the Guardian*, 18 July 2016. Employment tribunal cases followed: *Churchill v Hermes* Case No.1401782/2016 [2017]; *Leyland and Others v Hermes*, Case No.1800575/2017 [2018] (see also *The Guardian* 25 June 2018); *Docherty v Hermes* Case No.2302053/207 [2017]; *Marsh v Hermes* Case No. 1801288/2017 [2017]; *Gold v Hermes* Case No. 3327034/2017 [2017].

¹⁴⁷⁰ *Boxer v Excel Group Services Ltd*, Case No: 3200365/2016 [2017] (See also *theGuardian* 24 March 2017).

¹⁴⁷¹ *Dewhurst v City Sprint*, Case No. 2202512/2016. (See also the *Guardian* 6 January 2017).

¹⁴⁷² Royal Mail settled the case, pledging to review its classification of its ‘eCouriers’ as self employed (*the Guardian*, 12 May 2017).

¹⁴⁷³ *The Guardian* 28 June 2018

¹⁴⁷⁴ *The Guardian*, 26 March 2018. The firm would fine drivers who failed either to report to work or to send a substitute van and driver. As a result Mr. Don Lane missed a series of hospital appointments to monitor his diabetes, and he collapsed while at work (see *the Guardian*, 5 February 2018). The £150 per day fine, would, of course, be ‘on top’ of the income forfeited.

Workers' Union of Great Britain for recognition under the statutory recognition procedures, discussed in chapter five.¹⁴⁷⁵

Labour proposes to change the law so that a worker is presumed to be an employee unless the employer can show otherwise, and to impose 'punitive fines on employers not meeting their responsibilities,'¹⁴⁷⁶ so recalcitrant firms like Deliveroo will be obliged to conform.

Interestingly, sectoral bargaining is cited as another measure which will assist the self employed, suggesting a widening off the embrace of employment status beyond the present intermediate worker status and into 'genuine' self employment where the individual in question is providing a personal service. Labour has, however, been careful to leave its options open where atypical employment is concerned:

'Labour recognizes that the law often struggles to keep up with the ever-changing new forms of employment and work, so we will set up a dedicated commission to modernize the law around employment status.'¹⁴⁷⁷

The party's specific and unequivocal pledges to abolish worker status and ZHC would nevertheless see the UK unquestionably compliant with the EU definition of employment, and compliant too with the ILO, European Social Charter, and UN Covenant obligations listed above to ensure that 'flexible working arrangements' 'meet the needs of both workers and employers,' and meet the requirement that 'in no case should they be used to undermine the right to just and favourable conditions of work.'¹⁴⁷⁸

I would argue that the Labour Party is adopting the correct policy, although I suggest that a simple prohibition of RHCs would be more effective than permitting an application after 12 weeks for a contract reflecting the hours worked.

¹⁴⁷⁵ The cases are the CAC hearing, *IWUGB and Rooffoods T/A Deliveroo* TUR 1/985(2016) 14 November 2017, and the judicial review of that decision, *R (On the Application of the IWUGB) v CAC and Rooffoods Ltd, t/a Deliveroo* [2018] EWHC 3342 (Admin).

¹⁴⁷⁶ Presumably they mean to fine those firms which continue to insist their staff are self employed.

¹⁴⁷⁷ *For the Many not the Few*, The Labour Manifesto 2017, p51.

¹⁴⁷⁸ Article 7 UNICESCR General Comment No.23 on the right to just and favourable conditions of work, para 46.

Fixed Term Contracts

Fixed term employment contracts are generally used by employers to avoid employment protections, and hence can arguably be said to undermine 'just and favourable conditions of work.'

Employment for a series of contractually limited terms could theoretically permit an employer to extend any probationary period indefinitely, which, as the ILO Committee of Experts puts it, is 'a period of insecurity which should not be unduly prolonged.'¹⁴⁷⁹ However, in the UK, with the failure to renew such a contract amounting to a dismissal for the purposes of a claim for unfair dismissal, that insecurity can be overstated - just as the security of tenure provided by a so called 'permanent contract' can be overstated.

Nevertheless those employed on such contracts have frequently been subject to discriminatory treatment on other grounds, a problem addressed by EU Directive 99/70/EC, another directive based on a framework agreement reached by the social partners under the social protocol. The Directive was implemented by New Labour as the Fixed Term Contracts (Prevention of Less Favourable Treatment) Regulations in 2002.

As well as prohibiting less favourable treatment, the regulations make any fixed term arrangement which extends beyond four years 'permanent', *unless* the employer is able to cite 'objective grounds' for the denial of such status, a caveat which has limited the effectiveness of what would otherwise arguably have been a very robust safeguard, successfully balancing 'flexibility' with the employee's need for security.¹⁴⁸⁰ It is uncontroversial to argue that the regulations fail to provide the minimum demanded by the Directive. Protection is restricted to employees - yet the directive applies to the wider class of workers who have an 'employment relationship.' As with the part time regulations 'live' comparators are required where discrimination is alleged. Aileen McColgan has argued that this is inconsistent with the Directive,¹⁴⁸¹ which states that if a suitable

¹⁴⁷⁹ ILO General Survey by the Committee of Experts on Convention No.158 and Recommendation No.166: *Protection Against Unjustified Dismissal*, International Labour Conference 82nd Session 1995, para 38.

¹⁴⁸⁰ Regulation 8.

¹⁴⁸¹ In 'Fiddling While Rome Burns?' (2003) 32 ILJ 194.

comparator cannot be found then recourse will be made to ‘national law, collective agreement or practice.’ In 2003 she argued that the use of hypothetical comparators is well established in English law, and S.71 of the Equality Act 2010, although working on a fixed term contract is, of course, not a protected characteristic, makes this argument still more persuasive.

Employees who no longer work for the employer in question cannot be used as comparators.¹⁴⁸² McColgan tells us that the Regulatory Impact Assessment took the view that the Regulations will benefit only 1%-3% of fixed term employees according to the TUC’s figures, and an only marginally more generous 2%-5% by the DTI’s figures.

Such is the calculated ineffectiveness of the regulations that in *Webley v Department of Work and Pensions*,¹⁴⁸³ fixed term 51 week contracts,¹⁴⁸⁴ calculated to prevent the workers qualifying (it was just one year between 1998 and 2011) for unfair dismissal protection, were held not to be a breach. Of course, after four years of 51 week contracts the regulations merely require the employer to show ‘objective grounds’ for refusing to take the workers fully on to the books.¹⁴⁸⁵ The regulations do, however, give fixed term workers the right to receive notice of any ‘permanent’ vacancies¹⁴⁸⁶ arising – so workers stand to be awarded an inconsequential sum should they be brave or foolhardy enough to bring a claim against an employer who failed to advertise a vacancy on the staff notice board.

Arguably, in order to comply with the stand off between ‘just and favourable’ terms and flexibility, the correct compromise would be for workers to be required

¹⁴⁸² Reg 2(2) McColgan points out that this is in conflict with the ECJ decision in *Macarthys v Smith*¹⁴⁸² where a woman claiming to have been discriminated against on the grounds of her sex was permitted just such a comparison and suggests that: ‘If the purpose of the Regulations is to avoid discrimination against fixed-term workers they ought, it might be thought, to apply in the case where an employer chooses to replace permanent workers with fixed-term workers employed on lesser terms and conditions.’

¹⁴⁸³ [2005] IRLR 288.

¹⁴⁸⁴ The UFD qualifying period was one year, and by s.95 ERA 1996 a failure to renew a fixed term contract is a dismissal within the meaning of s.98.

¹⁴⁸⁵ Regulation 8.

¹⁴⁸⁶ Regulation 3(6).

to be offered a ‘permanent’ contract after a year, with no scope for ‘objective grounds’ for refusal.

Agency Contracts

In contrast to the other ‘social chapter’ directives, the last of the EU instruments protecting those in atypical work, the Temporary Agency Work Directive,¹⁴⁸⁷ was a comparatively anodyne compromise adopted after the social partners, and, subsequently, the Council of Ministers had failed to come to agree on effective protection for workers.¹⁴⁸⁸ As such it was less of a challenge to New Labour’s drafting team. The Agency Workers Regulations 2010 came into force in 2011 under the Coalition government, and while perhaps less brazenly undermined than the fixed term and part time regulations they nevertheless arguably fell short of the requirements of the Directive. While none of the social chapter regulations issued by New Labour were challenged by the unions, the 2010 Regulations were the subject of a complaint, lodged by the TUC with the Commission in 2013.¹⁴⁸⁹

That complaint was about the use of the ‘Swedish Derogation’ in the UK regulations to deny agency workers parity with conventionally employed colleagues.¹⁴⁹⁰ However, in December 2018 legislation was placed before Parliament, which will, as we have seen, not only confer on all workers, including agency workers, rights to pay slips, and to a written statement of the particulars of employment, but will abolish the Swedish Derogation as of 6 April 2020.¹⁴⁹¹

The TUC’s complaint did not, however, question the failure of the government to require agencies to treat their workers as employees. Something of a ‘doubled edged sword’ in terms of worker protection, not only does the Directive seek to protect agency workers from discriminatory treatment, it obliges states which had

¹⁴⁸⁷ Directive 2008/104/EC

¹⁴⁸⁸ For comment on the Directive see Countouris and Horton, 2009, *op cit.*

¹⁴⁸⁹ See ‘www.eurofound.europa.eu/fr/publications/article/2013/trade-unions-in-tussle-over-agency-work-directive’.

¹⁴⁹⁰ See, the TUC 2018 Report on the Swedish Derogation: *Ending the Undercutters’ Charter; Why agency workers deserve better jobs.*

¹⁴⁹¹ Agency Workers (Amendment) Regulations 2019. This is of particular interest in relation both to the Commission’s cautious approach to invoking infringement proceedings where labour matters are at issue and ‘Brexit’ - for while complaints normally take no more than a year to be investigated by the Commission the TUC’s complaint is still pending some five years after it was first lodged.

previously prohibited ‘temping’ agencies to embrace their use, thus, in theory, providing benign and comparatively secure flexible working opportunities, and scope for employers to reap the benefits of access to a ‘stand by’ workforce which it could draw on in busy periods and discard when not required. Article 2 of the Directive attempts to do oblige states to achieve this very delicate ‘flexicurity’ balance ‘by *recognising temporary agencies as employers.*’

The UK Regulations fail to do this. Agency staff remain of indeterminate status, neither employed by the agency nor by the agency’s client, and consequently enjoying, like many engaged under ZHCs, only those protections afforded ‘workers.’

It also appears that the Regulations are being ignored by many agencies and agency workers are simply not making tribunal claims to enforce their rights. The lack of claims is very likely due to a combination of a lack of awareness of the legal position, and the fact that it is considerably easier simply for an agency worker to ‘move on’ than to bring a tribunal claim in order to win an award of a few hundred pounds. During the tribunal fees regime of 2013-2017 claims under the Agency Workers’ Regulations were almost non-existent. The government has, however, pledged that it will legislate to oblige that agencies will have to issue workers with a ‘key facts page’ setting out rates of pay and what is expected of them, and what they can expect of the agency.¹⁴⁹²

In addition, the government promises to ‘increase state enforcement protections for agency workers where they have pay withheld or unclear deductions made by an umbrella company,’ so the numbers of the Employment Agency Standards Inspectorate inspectors will be increased, and EASI’s brief will be extended to cover umbrella companies.¹⁴⁹³

¹⁴⁹² See *Good Work Plan* p32.

¹⁴⁹³ See p10 of *Good Work Plan*. Umbrella companies are book-keeping firms which purport to be the agency worker’s employer. They invoice the agency for the worker’s time, and take a cut of the worker’s gross pay. The remainder is paid to the worker on a PAYE basis, with tax and NI going to HMRC. The worker sends the umbrella company all possible receipts for work-related expenses, which the company then sets against their own corporation tax liabilities. The firm then passes the saving back to the worker. Better-paid workers, often engaged in agency work with NHS Trusts, will use such companies as employers and will use more sophisticated, more dubious avoidance measures. The firm will invoice the agency and the money will go to an off-shore trust which will pay no corporation tax and which will pass on the worker’s salary, minus commission, disguised as a never-to-be repaid loan.

Despite these long overdue employment protections and the very welcome expansion of state intervention by the EASI (in 2017-18 EASI made only 145 visits detecting 636 infringements),¹⁴⁹⁴ there is still the outstanding question of the provision of the extraordinarily 12 week long qualification period before workers can rely on the protection of the regulations. The three month wait for protection relates to each 'assignment' so, of course, it is very easy for agencies to simply shift them to another assignment to ensure that they are never able to claim parity.

Therefore, to ensure government compliance with the European Social Charter, the UN Covenant and the EU Fixed Term and Agency Directives:

- Part time workers should be afforded genuine parity with full time colleagues
- ZHC& RHC contracts should be prohibited.
- Worker status should be abolished.
- A clear statutory delineation between self employed and employed status should be supplied.
- The protection of the Fixed Term Contract Regulations should be extended to all but the genuinely self employed (which of course would be the result of abolishing worker status).
- After a one year the worker should automatically be deemed to be on a 'permanent' contract.
- Hypothetical and 'ex-worker' comparators should be permitted for the purposes of fixed term protection claims
- Agency workers should be acknowledged to be the employees of the agency.
- Parity of wages and working conditions under the Agency Workers' Regulations should be 'day one' rights.

50 years of individually enforced rights have arguably done surprisingly little to address inequalities. Workplace inequality is arguably rife *because of the manner in which anti discrimination rights fall to be enforced*. Tackling inequality on a case

¹⁴⁹⁴Employment Agency Standards (EAS) Inspectorate Annual Report 2017-2018.

by case basis is arguably to deliberately fail to address the issue effectively, much as employer by employer recognition agreement is a glacially slow way of securing collective bargaining for all workers. The sectoral bargaining mechanisms which must be set up to promote and facilitate collective bargaining would appear ideally suited to the collation of pay gap information and for the implementation of the appropriate positive action to address underrepresentation of workers with protected characteristics – with the ‘fine tuning’ achieved by establishment level bargaining backed by individual rights tailored so as not to undermine the role of the trade unions.

Initiatives like the reducing the implicit evidential hurdles in discrimination cases and ‘uncapped’, and therefore potentially punitive and dissuasive awards, are important, but individual claims arguably merely treat the symptoms of inequality as they flare up rather than imposing equality. The approach is, I suggest, inappropriately individual and adversarial. While individual workers must be permitted to bring discrimination claims, protection for workers sharing protected characteristics arguably calls out for an overarching collective approach.

Equality rights are suited to enforcement by the state and by trade unions on behalf of those workers affected. In Sweden, for example, cases are reported to the Discrimination Ombudman, and settled by the Ombudsman, by the relevant trade union, or interested NGOs on behalf of the worker or workers affected, if necessary by taking the employer to court. Inequality is thus more readily and more frequently challenged. Nevertheless, individual workers have the option of bringing their own claim.¹⁴⁹⁵

It appears that in the UK, where the equality regime only started properly to evolve in 1975, that successive governments have been at pains to ensure that it developed almost purely individualistic construct. Bereft of the requisite collectivist element it has consistently failed to deliver the society of equals we have been promised for the past 50 years.

¹⁴⁹⁵See the section on Sweden (p98) by A Numhauser-Henning in *The Transposition of Recast Directive 2006/54/EC* by the ‘European Network of Legal Experts in the Field of Gender Equality,’ compiled by S Burri and S Prechal, 2009.

Chapter Eight: Conclusion

In this chapter I draw together the key shortfalls in UK collective labour law and practice identified in previous chapters, and the principal arguments presented in those instances where it has been necessary to make a case that there has been a failure to protect workers in accord with supranational obligation.

I show what *must* be done by the UK government to ensure compliance with international law to ensure that workers are able to exercise their right to have their terms and conditions of employment negotiated by their trade union, and to ensure that the required floor of individual employment rights on which that collective bargaining may build are in place.

I show too what *could* be done by a future government, within the limits of international and regional obligation, to secure protections for the individual, to extend and entrench protection for the full freedom of association, and for the raft of individual employment rights, that the government is bound to guarantee.

Full freedom of association and the individual human rights paradigm

In previous chapters I have shown that the key jurisprudential pillar on which the justification for the denial of workers the opportunity to bargain collectively relies, *the individualistic human rights paradigm*, is an artificial, unsatisfactory and discredited approach to interpreting the embrace of the right to freedom of association.

For hundreds of years the ruling classes ensured that they were able to bargain as they pleased, while those they employed were liable to be punished by law if they attempted to negotiate with their masters.

They justified their use of legislation and the manipulation of the common law to defend themselves against the claims of their servants on the grounds that the law had to defend the individual against the tyranny of the majority. The 'tyranny of the state' was conflated with the demands of the working classes for the

opportunity to bargain as a collective to provide the rationale for the effective entrenchment of the protection for the interests of employers in English law.

When, in the late 19th Century and early 20th Century, after a series of confrontations, crises, and adjustments, employers were forced to permit the working classes to bargain with them, trade unions and industrial action were decriminalized. Continuing judicial resistance to ceding workers the opportunity to bargain collectively saw Parliament extend the supposed privilege of certain immunities in respect of civil liabilities. Workers were not, however, given any 'positive' legal right to bargain and the new freedom conferred by these statutory immunities remained highly vulnerable. Indeed so fragile was the freedom that had been conferred, workers can be said to have enjoyed full freedom of association for only a few of the years between the seminal Trade Disputes Act of 1906 and the end of World War Two.

The post Second World War era however, saw the apparent 'entrenchment' of the newly restored freedom to bargain collectively in the United Kingdom by means of a series of treaties which effectively obliged states to recognise that the right to bargain collectively was a fundamental human right. The key ILO, Council of Europe and United Nations texts acknowledged that the protection by states of freedom of association necessarily entailed the maintenance of conditions under which workers are able to negotiate as a collective with their employers, and with their governments. No primacy was afforded the rights of the individual in relation the protection of freedom of association. The UN Covenant on Civil and Political Rights, and the European Convention on Human Rights both utilised the provisions of ILO Convention 87 on freedom of association and the right to organise as a 'floor' to the protections conferred on workers. Both instruments must, therefore, be said to require states to secure the full freedom of association demanded by Convention No.87.

This was not a case of obligation being imposed on the United Kingdom. On the contrary, the British government played a central role in negotiating and drafting these texts, and collective bargaining under conditions of full freedom of association became the 'lynch pin' of the post war recovery, not just in the UK, but across the whole of Western Europe. Arguably the UK sought in effect to impose the basis of the British industrial relations on the 'free world' by ensuring

as best it could, that it bound itself only to protect existing British labour standards.

As citizens of a dualist state, British workers were given positive rights only in the sense that the government was, and remains, obliged under international law to respect the terms of these treaties. Because the UK government was, in almost all circumstances, ratifying instruments with which the UK was broadly compliant, British workers were given no more than the legitimate expectation that their government adhere to the full freedom of association conceded them in the post war era, as well as to any evolution of the protections conceded through the changing interpretation of these 'living instruments' by the various supervisory bodies.

Unfortunately workers rely in such circumstances on government for the rule of law. While that was sufficient in the 1940s, 50s, 60s and 70s, following the assumption of the leadership of the Conservative Party in 1975 by a libertarian cabal, and the election of the first of a series of 'neoliberal' Tory governments in 1979, the British government set about not merely abandoning their obligation to promote and protect collective bargaining, but actively legislating to reduce the incidence of collective bargaining. The principal architect of the post war compromise was now seen to be seeking, wherever and whenever it was possible, to isolate British workers and return them to a reliance on the terms of the individual contract of employment.

The British government had since 1973 been obliged by virtue of membership of the European Union to implement a series of employment protection directives, and although this stream of largely anti gender discrimination law was at odds with the deregulatory programme of the 1980s, implemented as they were as individually exercisable rights enforceable at tribunal, they came to characterise the new individual approach to industrial relations. However, the emergence of the EU Social Protocol marked the limit of Tory forbearance. John Major's government fought tooth and nail to avoid being obliged to implement the Working Time Directive as a health and safety measure, and negotiated the famous UK 'opt out' of the raft of collectively negotiated employment directives popularly known as the 'Social Chapter.'

Following this Tory ‘neoliberal revolution’ of 1980 – 1993, the dust was allowed to settle over the debris of British voluntarism and the collective bargaining mechanisms. The election of New Labour in 1997 saw British acceptance of the Social Chapter, but the new regulations were pared down to – at best - the bare minimum required by the directives. The rights that were provided were enforceable - if they were enforceable at all - almost exclusively by the individual, and the heavily compromised role of the state in enforcing the Working Time Regulations was undermined further by the progressive financial starvation of the Health and Safety Executive and Local Authorities.

While neoliberal antipathy to the trade unions was largely held in check during the New Labour years, and the Liberal Democrats served to stay the hands of their Tory coalition partners 2010 – 2015, by failing to restore full freedom of association the leading figures in these centrist parties were as culpable as the neoliberals of the Thatcher and Major eras.

Following the working majority achieved by the Tories in the 2015 election the Tories returned to fray in 2015-2016 with what became the Trade Union Act 2016. This savage opening salvo in what appeared to be a renewed assault on collective bargaining, the intention being said to have been to finish the work of destroying the trade unions, was not, however, followed up.

The Act passed into law in May 2016, and came into force in 2017 (although the principal provisions of the Act have effectively been rejected by the devolved Welsh Assembly), but the Tories have said little or nothing about the trade unions since David Cameron’s resignation in the aftermath of the catastrophically ill judged Referendum on EU Membership of June 2016.

The nationalist wing of the Tory Party, having first been delighted to find that they had got what they wished for, have isolated themselves as Parliament, and the majority of Tory MPs, have become conscious of the fact that, realistically, in the wake of the 2016 vote they have a choice of two alternatives:

Staying in the EU (if that can be sanctioned by a fresh referendum), or striking a deal with the EU 27 (possibly as a member of EFTA and the European Economic Area) which entails the continued observance of EU regulation, including the employment rights which Cameron had pledged to ‘repatriate.’

As the vast majority of Parliamentarians, and the majority of Tory MPs, cannot countenance taking a very hazardous economic gamble and ‘crashing out’ of the EU without a deal to escape EU regulation and the reach of the CJEU without a deal that the ‘hard core’ neoliberals are in favour of, Tory dreams of Britain as an ‘off shore sweat shop,’ able to negotiate free trade deals on whatever terms it chooses with the likes of the US and China, have faded away. A ‘no deal’ exit from the EU to trade on WTO terms now seems a very unlikely prospect.

The significance of this to workers’ rights is that Tories are engaged in a civil war, and the government is teetering on the verge of collapse, while the Labour Party, ready to assume power, or to take the leading role in a coalition, is pledged to restoring full freedom of association denied British workers since the mid 1980s.

With that freedom, and respect for the rule of law restored, all else arguably falls into place:

Collective bargaining coverage can be rebuilt, and individual statutory employment rights can be allowed to once again become the floor to collectively negotiated employment protection that they were intended to be when implemented by Tory and Labour governments during 1963 - 1975.

Inadequately implemented EU rights can be revitalised by the ‘social partners’ – the employers and trade unions who negotiated them at European level had been expected to implement them into domestic law and practice. Previously blunted and commodified as individually exercisable entitlements, anti-discrimination *civil rights* can be enforced collectively, by trade unions or by the state, while sectoral bargaining mechanisms can provide the opportunity to close gender and race pay gaps comparatively rapidly and effectively. In the long term, however, this requires the effective ‘entrenchment’ of those rights and freedoms, and by a return to the broad cross party consensus on the value to society of collective bargaining seen during 1945 – 1975. Whether the UK ultimately leaves the EU or not, the Conservative Party now seems irrevocably split, with the libertarian right likely to become marginalised and discredited, and the pragmatic rump of the party coming to an accommodation with the shift of the political centre ground to the left. Broad agreement on the value of collective bargaining by the *old* liberal elements at Westminster, the moderate Tories, the Liberal Democrats and the

vestiges of New Labour in the revitalised socialist Parliamentary Labour Party, seems more likely than it has ever been since the late 1970s.

Benchmarking: Secondary & Solidarity Action and Collective Bargaining

It has been argued that the prohibition of secondary action is the distinguishing characteristic of a modern liberal democratic government, while in a social democracy secondary or sympathy action will almost inevitably be protected.¹⁴⁹⁶ This might be said to go some way towards accounting for the seemingly gratuitous inclusion of such ban in the Industrial Relations Act 1971 by the Heath government which proved so damaging to the attempted post Donovan, 1969 - 1973 adjustment of the reconciliation of labour and capital.

Nevertheless, the antipathy of the right for secondary action can scarcely be said to be an insurmountable obstacle to cross party agreement. It will be recalled that the Churchill, Eden, Macmillan and Home administrations of 1951 – 1964 were able to govern without giving in to the temptation to butcher the *Siamese Twins* of freedom of association in that particular fashion.

The opportunity for workers to take lawful secondary, sympathy or solidarity action, whether in the form of a 'blacking' or 'boycott', or strike, is an indispensable element of full freedom of association. Secondary action cannot be separated from industrial action taken against an identifiable immediate employer any more than the individual elements of freedom of association can be separated from the collective elements.

When workers enjoy full freedom of association all else falls into place: Not only does secondary action allow workers to apply extra bargaining leverage in trade disputes, it provides the necessary solidarity to bargain effectively across national borders, to influence government policy on economic and social matters, and to oblige employers to recognize trade unions for the purposes of collective bargaining. When workers in the UK were deprived of the opportunity to take

¹⁴⁹⁶By Nicola Countouris of University College London at the conference held in honour of Keith Ewing at King's College London in September 2018.

lawful secondary action voluntarism collapsed.¹⁴⁹⁷ The ability for workers to take secondary action secures *voluntary* trade union recognition rather than legally imposed recognition - the *freely negotiated* collective agreement demanded by the ILO jurisprudence, the European Social Charter and UNICESCR. Without the opportunity to take lawful secondary action reaching freely negotiated collective agreement becomes much more difficult, and maintaining employer compliance with what is almost invariably an otherwise unenforceable agreement is similarly difficult.

Secondary action is arguably the *primary* tool with workers secure the solidarity necessary for effective collective bargaining with their immediate employer. It is for that reason that the Trade Disputes Act 1906 carved out immunity in tort for all industrial action in all disputes 'between employers and workmen or between workmen and workmen, which is connected with the employment or non-employment, or the terms of employment, or with the conditions of labour, of any person.'¹⁴⁹⁸

The protection by a state of the freedom for workers to engage in secondary action to oblige a recalcitrant restaurant owner to come to collective agreement (which took the form of a boycott by trade unionists employed by suppliers) with a trade union was endorsed by the European Court of Human Rights even before the court had been able to bring itself to acknowledge that the freedom to bargain collectively was an essential element of freedom of association, and was still largely fixated with the primacy of the individual, in *Gustafsson v Sweden* [1996].

The limit to the protection afforded secondary action is arguably reached, both in terms of the ILO jurisprudence, and broad political acceptability, when trade unionists 'black' or 'boycott' the work of third parties in an effort to oblige those employers to require their staff to join that particular union, as was the practice of SLADE in the late 1970s. That does not, of course, mean that such action must be prohibited.

¹⁴⁹⁷ Following the Trade Disputes Act 1927 employers abandoned collective agreements during the great depression and the high unemployment that characterised the early and mid 1930s; following the Industrial Relations Act 1971 industrial chaos reigned. The imposition of the second, and most major of the three stage prohibition of secondary action, in 1984 (following the Employment Act 1982) was of crucial importance in bringing the Miners' Strike to an end in 1985. The defeat of the miners was a watershed moment for the neo liberal revolution of 1980 – 1993 – the period during which voluntarism was destroyed in the UK.

¹⁴⁹⁸ Trade Disputes Act 1906 S 5(3).

Laws prohibiting industrial action in aid of securing union membership can today plausibly be defended by governments on the grounds that such laws are necessary to ensure state compliance with the line of ECtHR Article 11 cases which followed *Young James and Webster*, and the re-interpretation of Article 5 of the European Social Charter to embrace a right of non-association.¹⁴⁹⁹

It nevertheless remains the case that compulsory trade union membership can still be a permissible 11(2) infringement of the individual right of non-association (see *Sorensen and Rasmussen v Denmark*). It will be recalled that 11(2) was the basis of case prepared by the Callaghan government against the claims of *Young James and Webster*, a defence subsequently to be dropped by Thatcher's Solicitor General in a bid to oblige the court to consider the supposed negative right of disassociation, and arguably one made all the more persuasive given that the ILO jurisprudence permits compulsory membership which is not imposed by law.¹⁵⁰⁰

Agency or union shops, however, imposed either by law or through agreement are a wholly legitimate means of promoting collective bargaining which require no one to associate against their will.

Unfortunately such arrangements have been explicitly prohibited in the UK since 1984. It is also the case that, while employers are prohibited from offering inducements to workers to persuade them to abandon collective bargaining, governments and employers may deny non members certain privileges granted members. Governments are required to promote collective bargaining, permitting, for example, tax incentives for members, and for employers who themselves promote trade union membership, and employers may legitimately deny non members privileges negotiated by a union for its members.

Macmillan's Tories embraced collective bargaining. The last Macmillan administration was the first of the Council of Europe governments to ratify the European Social Charter in 1962, to accept as 'the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realised...'

¹⁴⁹⁹But not with the ILO jurisprudence which prohibits only compulsory trade union membership imposed by law.

¹⁵⁰⁰It is also the case that British Rail then employed around 225,000 workers, and it was arguable that restricting them to a choice of one of 3 unions was not unreasonable in the circumstances.

What followed included a requirement for the government to secure for workers the rights to just conditions of work, health and safety, and to join unions ‘for the protection of their economic and social interests.’ More specifically the Tories pledged to aim to ensure that:

‘All workers have the right to remuneration sufficient for a decent standard of living for themselves and their families,’ and that

‘All workers and employers have the right to bargain collectively,’ reiterating the requirements of ILO Convention 87, the UN and Council of Europe civil and political instruments, and, of course, ILO Convention 98 on the right to organise and the right to bargain collectively.

This is a clear requirement for all workers and employers, both collectively and individually, to be guaranteed the unequivocal right to bargain collectively. That was part one of the Charter, the programmatic element. Fifty six years on that pledge has arguably crystallised into an immediate requirement.

Part two of the Charter saw the UK government agreeing to be bound ‘to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreement,’ and to ‘recognise’ a right to strike.

That right to strike can only be restricted by ‘obligations that might arise out of collective agreements previously entered into,’ a qualification which would permit the compulsory arbitration Order 1305 ‘strike ban’ of 1945 – 1951,¹⁵⁰¹ (which like its successor Order 1376, can be said to have obliged recalcitrant employers to bargain), but which does not permit the current prohibition of secondary action imposed by stages in 1980, 1982 and 1990, or the procedural ‘trips and hurdles’ erected during 1984- 1993, and augmented in 2016.

The Macmillan government committed the UK to maintain the then current standards of UK protection for freedom of association. Similarly, the Wilson government ratified the UN Covenant on Economic, Social and Cultural Rights in

¹⁵⁰¹It was in place after 1945 on the understanding that if either the TUC or the employers’ groups wished for it to be rescinded the government would oblige.

1976 - arguably the high point of such protection – to pledge successive British governments to ‘undertake to ensure...The right of trade unions to function freely,’ explicitly employing the evolving terms of ILO Convention 87 as a floor to those rights. Consequently when we talk of UK non compliance we are not talking of a failure to reach standards, whatever was agreed about ‘aims of policy’ and ‘progressive realisation’ half a century ago. We are talking of a retreat, and a withdrawal of protection is more than a mere *prima facie* breach of the treaties, and of international law. It is effectively an *automatic* breach.

The compliance of the UK with most of the Articles of the European Social Charter was secured through voluntarily negotiated collective agreements at establishment and sectoral level, and by the provision of collectively agreed minima by the tri-partite Wages Councils. When collective agreement ceased to secure those rights for the ‘great majority’ of workers, the UK ceased protect a swathe of the employment rights allegedly guaranteed by the ratification of the Charter, and retreated from the provision of workers with the ‘fair wages,’ ‘decent living,’ and ‘safe and healthy working conditions’ required by Article 7 of the UN Covenant.

The Wages Councils, and the Joint Industrial Councils established by employers and unions in better organised sectors, were complemented by the Macmillan government’s 1959 *erga omnes* legislation which allowed the customary terms of collective agreements in industries not covered by a Wages Council to be extended to workers employed on inferior terms.¹⁵⁰² This, along with the Tory statutory recognition procedures of 1971 – 1974, and the Labour procedures which were in place during 1975 – 1980, was the collective bargaining machinery which promoted establishment level bargaining in the UK.

The post 1979 Tory administrations destroyed these mechanisms. The first Thatcher Government repealed the *erga omnes* legislation and repealed the Fair Wages Resolution of 1946 which required firms contracting with the government come to collective agreement with their employees and abolished the statutory recognition procedures. They then clipped the wings of the Wages Councils, narrowing the range of the minimum terms and conditions of employment they

¹⁵⁰²S8 of the Terms and Conditions of Employment Act 1959, replacing Order 1376 compulsory arbitration which had been withdrawn in 1958.

imposed, and abolishing them in sectors they deemed to no longer to require them.

They withdrew from collective negotiation with those employed directly by the Government, and ensured with a series of laws against strikes that lawful and effective industrial action to secure recognition for the purposes of collective bargaining, to permit effective negotiation, and to dissuade an employer from breaching a collective agreement is either difficult or impossible.

Legislative interference with the freedom of trade unions to bargain and strike is potentially justifiable where the workers affected are providing essential services, and effective compensatory pay review mechanisms are set in place, or where the intervention promotes trade union democracy. But British restrictions on trade union autonomy are not restricted to essential services, and have little to do with democracy.

The basic requirement for a strike ballot apart, these restrictions have unequivocally been imposed in order to provide employers with comparatively firm grounds on which to base an application for a labour injunction to halt an impending action, and to give the employer time to take legal advice and make practical preparations - should such an application be unfeasible or unsuccessful, they delay, and therefore weaken the effectiveness of the proposed industrial action. Almost all applications for injunctions hinge now on whether the union has successfully negotiated the procedures. Only very rarely do courts hear arguments about the reach of the economic torts, and judges have long ceased 'discovering' fresh tortious liability.

Trade union democracy had arguably ceased to be any concern of the Government in 1988 when it became unlawful for trade unions to expel or discipline members for failing to participate in industrial action - itself an illegal restriction of union autonomy. This had effectively been the administration of the *coup de grace* to the basis of British collective industrial relations. Post-entry union membership agreements ceased to be operable that same year, while fresh post entry union membership and union shop agreements had effectively been prohibited in 1984. Membership and employability were now wholly separate matters. Workers could no longer be dismissed for refusing to join a union or to refusing to pay the equivalent of the subscription to a charitable fund. Whatever

the outcome of a strike ballot, workers could, if they chose to cross a picket line, report for work without risking formal sanction. The solidarity necessary for collective action had been fatally undermined by the provision of a series of individual rights.

Nevertheless the Tories continued to insist that they were making lawful interventions in order to promote trade union democracy, and pressed on with their attack on collectivism. Fresh legislative assaults were made on trade union freedom in 1990. The removal of Acas's duty to promote collective bargaining in TULRA 1993 made it very clear that the individual rights conferred in that Act to permit members to challenge decisions taken by their union were intended to undermine collective bargaining rather than promote trade union democracy.

2016, of course, saw the Cameron government's valedictory Trade Union Act imposing the balloting thresholds; tighter procedural balloting and notice rules; fresh restrictions on the freedom to picket; restrictions on trade union funding and campaigning, as well as sweeping new powers for the investigation of union affairs by the Certification Officer, with the trade unions being obliged to fund the newly expanded office of the CO.

Benchmarking: 'Individual' Employment Rights

Where occupational health and safety is concerned, a matter, like the rights to bargain and to strike, more readily defined as a human or civil right than as an economic or social right, the picture is of less brazen, but no less deliberate attacks on workplace rights. The approach here has been to withdraw collective supervision by the state and by trade unions and to isolate the individual worker. Ostensible compliance disguises what closer examination reveals to be legislation deliberately drafted so that it is ineffective - a dilution of the standards, a failure by the state to enforce the law, and a reluctance to permit those individual workers obliged to enforce their rights by means of litigation to do so easily and effectively. The withdrawal of legal aid, restrictions on the opportunity for litigants in industrial injury cases to recover the costs of legal advice and

representation, and the necessity now for workers to show that the employer has been negligent for damages for workplace injuries to be secured have served to protect the interests of the employer and undermine the rights of the worker.

The very comprehensive substantive European Union OSH requirements are backed by similarly detailed European Social Charter standards, and by the UNESCR core requirement for states to provide a 'comprehensive national policy on occupational safety and health.' Nevertheless, labour and workplace inspection programmes are inadequate, remedies for OSH breaches weak or non-existent, and penalties are insufficiently dissuasive rendering much of this protection illusory. Sick pay and the relevant benefits are inadequate, workers engaged in inherently hazardous work are not given the compensatory leave they are entitled to, and self-employed and domestic workers are excluded from protection.

Successive governments have been careful to avoid the scrutiny of the ILO Committee of Experts by largely avoiding ratifying ILO OSH Conventions. Crucially however, the Attlee government ratified the 'priority' Labour Inspection Convention No.81 of 1947, and the Committee of Experts has, since government policy was first drawn to its attention by the TUC in the late 1980s, been able to harry the government over withdrawal of preventative inspection, the habitual under-reporting of work-related accident and disease, and the questionable independence of the HSE. The political springboard to a recognition that the problems of workplace health and safety require collective solutions – state intervention and collective negotiation rather than individual litigation – arguably lies with reminding Parliament of the obligations of ILO Convention No. 81, of the real extent and cost of work-related injury and disease, and of the case for a programme of ratification of the raft of ILO OSH Conventions.

ILO obligations to manage working time have also been avoided. While this has allowed the government to escape the direct attention of the Committee of Experts, the EU Working Time Directives, requiring states to take account of the relevant ILO Conventions, and the reliance of the UN Committee on the Conventions in the interpretation of Article 7 of the Covenant, has meant that ILO

influence in this sphere has proved inescapable. The Covenant and the Conventions arguably provide a 'backstop,' independent of that proposed in the EU withdrawal, sufficient to prohibit any post Brexit legislative challenge to existing UK provisions, and arguably the basis of a case for revising the inadequately implemented and only notionally enforced working time regulations – the product of what I show to be a calculated government policy to neutralise the directives.

Less covert denials of working time entitlements – the refusal of the government to ensure that workers have the right to paid public holidays or to adequate compensation if they are not, and permitting workers to postpone weekly rest so that more than 12 consecutive days are worked – are, while less scandalous than New Labour's deliberate sabotage of the WTDs, evidence of the brazen refusal of the government to accept the binding supra national obligation of the ECSR where the more ordinary contractual terms are at issue.

There is an extreme, very likely politically led, reluctance to accept 'foreign' intervention into the ordinary contract of employment. This becomes more overt in relation to working time when holidays and rest days, rather than working hours are at issue, and very likely accounts for the vehemence of Tory loathing for the Working Time Directives. European Social Charter and UN Covenant requirements to ensure that overtime work must be paid at a premium by law, and for a worker to be guaranteed a decent standard of living and a 'fair wage' have been ignored along with the benchmark calculations for the provision of the minimum hourly rates for the last 40 years. These matters were the province of the Wages Councils, and remain eminently suitable for sectoral collective bargaining mechanisms; to return to the tri-partite negotiation of these matters would be to overturn the cornerstone of the neo-liberal revolution.

Similarly, rights to equal treatment, arguably better seen as a civil rights to be enforced collectively by the state or by NGOs, have been blunted by being conferred by individually exercisable economic or social entitlements. Adequately advised employers know approximately what a breach will cost them, and will pay the worker off accordingly – one by one, rather than being called to account once

by the state or a trade union and forced to mend their ways. Tribunal fees as well as a failure to oblige employers to pay any compensation awarded served to advance this *commodification* of rights, and, to secure the effective withdrawal of those rights for the majority of the workforce.

The protection of civil rights requires collective solutions, and sectoral arrangements arguably hold out the best hope for employing the information garnered by the Equality Pay Audits and Gender Pay Gap Reporting. State intervention in the form “ of temporary special measures” to permit states ‘to address traditional gender roles and other structural obstacles that perpetuate gender inequality,’ recommended by the UN Committee on Economic, Social and Cultural Rights, the UN Human Right Committee and the European Committee of Social Rights can best be achieved through sectoral tri-partite bargaining arrangements. Although these bodied tend to be preoccupied by gender inequality, there is no reason why the ‘structural obstacles’ to those sharing other protected characteristics cannot be overcome by positive discrimination, particularly now that the bounds of the EU anti discrimination regime, previously cited as the chief barrier to such a programme, are loosening. While the principal gap in the comparatively robust UK anti- discrimination regime is the failure to adequately protect discrimination on grounds of political belief, social origin and social status, it is questionable as to whether addressing those shortfalls of protection through existing anti-discrimination mechanisms would be politically feasible.

The glaring inadequacies of the ‘social chapter’ protections for fixed term and agency workers, reliant as they are on the terms of the relevant EU directives, rather than on other supra national standards, arguably can perhaps no longer be said to fall short of the benchmark standards of the Directives. The TUC was complicit in New Labour’s programme of their implementation, and consequently only the Agency Workers’ Regulations, on which the unions and the New Labour government were unable to come to agreement, and which ultimately came into force under the Coalition government, have been the subject of a complaint presented by the TUC to the Commission.

While that matter is still pending, it can safely be argued that there is no prospect of enforcement action being brought by the Commission, still less of a ruling by the ECJ. States have been afforded a very wide margin of appreciation in implementing EU employment rights, and the Commission appears loathe to call states to account for even very obvious failures of regulation. If that bird did not fly with the massive expansion of the EU in the first decade of this century, it has certainly flown now.

The questionable introduction of 'worker' status by New Labour in 1997 to limit the impact of the EU 'social chapter' employment protections can similarly be said now to be beyond any challenge through the EU mechanisms.

Addressing what is effectively a mechanism to permit *de facto* employers to evade tax and the embrace of workplace protections through 'disguised employment' or 'bogus self employment,' and the provision of adequate protection against discriminatory treatment of atypical workers, including those on abusive zero or restricted hours contracts, arguably requires fresh legislation and unqualified legal rights to equal treatment, collective agreement and an effective system of labour inspection. While there is cross party consensus that *something needs to be done*, and the Tories have recently made a few legislative gestures towards reining in the use of these abusive contracts, only the Labour Party has pledged to prohibit them. Arguably, however, there can be said supranational obligation sufficient to provide the requisite political springboard for consensus. While the ILO Labour Inspection Convention No.81 cannot be said to *require* the UK to monitor the terms and conditions of employment through an inspection regime, the European Social Charter and UN Covenants do oblige governments to ensure fair remuneration, just conditions of work, and a decent standard of living, Article 7 of the UN Covenant additionally requiring states to guarantee the 'reasonable limitation of working hours.' Moreover it has been convincingly argued that the ILO Decent Work Agenda and the Declaration on Social Justice and a Fair Globalisation signed up for by New Labour require the government to tackle these 'new problems about shortage of hours, allocation of hours and regularity of hours.'

The Calculated Abandonment of The Rule of Law

The full significance of the UK government's record of breach, abandonment, obfuscation and evasion in relation to supra national labour standards and supervision should not be underestimated. It is a deliberate breach of the Rule of Law. For a state that demands the adherence of its citizens, and other states, to the rule of law its position is wholly and unarguably untenable.

Lord Bingham, that most famous of Supreme Court judges observed in his posthumously published 2011 book *The Rule of Law* that

‘international law comprises a distinct and recognisable body of law with its own rules and institutions, it is a body of law complementary to the national laws of individual states, and in no way antagonistic to them; it is not a thing apart; it rests on similar principles and pursues similar ends; and observance of the rule of law is quite as important on the international plane as on the national, perhaps even more so. Consistently with this, the current Ministerial code, binding on British ministers, requires them as an overarching duty to ‘comply with the law including international law and treaty obligations.’¹⁵⁰³

The rule in international law is *pacta sunt servanda*, reiterated in Article 26 of the 1969 Vienna Convention on International Treaties:

‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’ The UK is in breach of that fundamental rule. In the seminal Strasbourg case *Golder v United Kingdom* [1975] it was accepted by the Government,¹⁵⁰⁴ the Court, and the dissenting judges, that the terms of the 1969 Vienna Convention reflected the generally accepted principles of international law.¹⁵⁰⁵ The 1969 Convention is not retrospective,¹⁵⁰⁶ and did not come into force until 1980, but nevertheless the UK Government acknowledged, as it had when it

¹⁵⁰³ Tom Bingham, *The Rule of Law*, 2010 (Penguin Books Edition 2011), p110.

¹⁵⁰⁴ ECHR 1.

¹⁵⁰⁵ *Ibid*, para 29.

¹⁵⁰⁶ Article 4 & 28.

had signed it in 1970, and ratified it in 1971,¹⁵⁰⁷ that it laid down state obligations in customary international law on states party to the European Convention, and to other treaties which predated the Vienna Convention.

That this post 1979 abandonment of the rule of law has been ideologically led is not disputed. Successive administrations have cited their commitment to a 'flexible labour market,' and to 'jobs' – to emasculated trade unions, to the supposedly individually negotiated contract of employment, to low levels of statutory regulation, and to low pay.

Economic research has long confirmed that employment protection, whether provided by collective solidarity or statute, does not impact upon levels of employment. Although evidence supporting the government's case is available, most of the evidence points the other way. Daniel and Stilgoe's *The Impact of Employment Protection Laws*, a very comprehensive survey published in 1978,¹⁵⁰⁸ concluded:

'There was very little sign in our findings that employment protection legislation was inhibiting industrial recovery or contributing to the high level of unemployment by taking on new people...there was no sign of employment protection legislation having had a greater tendency to inhibit smaller firms from decreasing or increasing the size of their workforce...'

Andrew Glyn, Dean Baker, David Howell and John Schmitt in their 2003 paper, *Labour Market Institutions and Unemployment: A Critical Assessment of the Cross-Country Evidence* stated that

'Our results suggest a yawning gap between the confidence with which the case for labour market deregulation has been asserted and the evidence that the regulating institutions are the culprits. It is even less evident that

¹⁵⁰⁷ Article 2 (b) of the 1969 Convention states that 'ratification,' 'acceptance,' 'approval,' and 'accession,' mean in each case the international act so named whereby a state establishes on the international plane its consent to be bound by a treaty,' and by 2(f) a 'contracting state' is defined as 'a State which has consented to be bound by the treaty, whether or not the treaty has entered into force', the term 'party' being substituted when the treaty has come into force (Article 2(g)). Similarly Article 11 states that consent to be bound 'may be expressed by signature... ratification" etc. Articles 11 -17 cover this. Article 18 obliges states from defeating 'the object and purpose of the treaty before it enters into force.'

¹⁵⁰⁸ Policy Studies Institute, June 1978.

further weakening of social and collective protections for workers will have significant impacts on employment prospects.’¹⁵⁰⁹

Simon Deakin and Prabirjit Sarkar, in a research paper published in 2008 concluded that stronger dismissal laws had impacted positively on employment and productivity in France and Germany. In the USA, slightly stronger protections had a marginally negative impact on employment rates but boosted productivity, while they found ‘No relationship, either positive or negative between employment or productivity and employment regulation in the UK.’¹⁵¹⁰

One might ask why, if the Government wished – whether out of misguided but genuine concern for ‘flexibility’ and ‘jobs,’ or in order to return the wealth re-distributed since 1945 back into the hands of the owners of capital - to pursue industrial policies contrary to its regional and international treaty obligations, it did not simply lawfully denounce, abrogate or otherwise withdraw from those commitments. The obvious answer is that, on balance, it was considered disadvantageous to take such a step:

Following a handful of Strasbourg rulings adverse to the United Kingdom in the early 1970s, as the Commission and the Court assumed more power the Heath Government had contemplated withdrawing the right of individual petition (Article 25), and ceasing to accept the ‘compulsory jurisdiction’ of the Court (Article 46). These then ‘optional articles’ fell to be renewed in January 1974. In the face of considerable domestic pressure to renew, a senior civil servant in the Foreign and Commonwealth Office had reflected the consensus in Government when he had suggested that ‘our best course would be to renew for the shortest period which is compatible with the maintenance of our international good name and which would be defensible in the country,’¹⁵¹¹ an argument which encapsulates not only the approach taken to the evolution of the Strasbourg jurisprudence until 1998, when the optional articles ceased to be optional, but also to that taken to international and regional treaty obligations relating to

¹⁵⁰⁹ Oxford University Discussion Paper Series No.68, August 2003.

¹⁵¹⁰ *Assessing the Long-Run Economic Impact of Labour Law Systems: A Theoretical Reappraisal and Analysis of New Time Series Data*, CLPE Research Paper 30/2008, Vol. 4 No.6.

¹⁵¹¹ TNA FCO 41/1110, note by an official in the Western European Department 23 October 1973.

industrial relations more generally after 1979. The neoliberal administrations of the past 40 years elected to comply with those obligations only as far they were considered to be compatible with the maintenance of the UK's international prestige and influence, and with their grip on power.

While in November 1980 Thatcher's cabinet had noted of the evolving Strasbourg jurisprudence that 'the time might come when a judgment was so damaging to the Government as to be unacceptable,' it decided to renew acceptance of individual petition and compulsory jurisdiction for a further five year period.¹⁵¹² Non renewal was said to be incompatible with a cautious manifesto commitment to 'discuss a possible Bill of Rights,' but of more significance was the threat to the UK's international and regional standing. The cabinet felt that it would be seen as an implicit acknowledgement that the UK was breaching human rights in Northern Ireland, and would lose them the 'tactical advantage' they considered that they held over the Soviet Bloc in the sphere of human rights.

They would also be out of step with the rest of Western Europe. 15 of the 20 Convention signatories recognised the right to individual petition, and 17 accepted 'compulsory jurisdiction,' and of the member states of the European Community all but France accepted Article 25, and every state accepted Article 46. Consequently the cabinet believed that to fail to renew UK acceptance would draw criticism from the other states, and undermine the UK's position in the Community.¹⁵¹³

The cabinet believed too that evading the jurisdiction of the Strasbourg Court would make it difficult to defend the UK's failure to ratify the optional protocol of the UN International Covenant on Civil and Political Rights.

So, while the Government could lawfully have renounced these often politically inconvenient obligations, to have done so would have had collateral effects which it wished to avoid.

¹⁵¹² In 1972 the Heath Government had renewed for two years, and in 1974 it renewed for a further two years. In 1976 the Wilson Government had renewed for five years.

¹⁵¹³ TNA CAB 128/68/17, Cabinet meeting 13 November 1980. They were discussing a memorandum notionally written by the Home Secretary (Whitelaw) and the Foreign Secretary (Carrington) (TNA, CAB 129/210/16).

In 1982 the Department of Employment had stated the Tory government's 'General Policy on Denunciation of International Treaties':

'Governments are always reluctant to denounce International Treaties in part or whole, because they are solemn and binding commitments which are entered into in circumstances which at the time are thought unlikely to change, and the consequences in terms of both domestic and international publicity are almost inevitably adverse.'¹⁵¹⁴

This summed up the plight of the Tories, albeit in the careful terms of the professional civil servant: The UK government had unequivocally bound itself to promote and protect at least the right of workers to the freedom to bargain collectively and arguably to confer on workers *the right* to bargain collectively. But this first Thatcher government wanted to stop workers from bargaining collectively, and denunciation carried with it a political penalty.

The question was, therefore, should they simply just break these commitments and hope to 'get away with it'?

We have seen that sometimes denunciation was considered appropriate, while on other occasions the government might simply elect to ignore a particular obligation, and, when upbraided, argue that it believed itself to be compliant. The approach taken depended, and continues to depend, on the nature of the obligation, the strength of the enforcement regime of the instrument imposing the obligation and the extent of the breach.

When the Thatcher government had been preparing to restrict the powers of the Wages Councils it had contrasted the weakness of the European Social Charter supervisory system with the more robust and politically significant ILO regime and adjusted its approach accordingly.

As shown in chapter 3, officials at the Department of Employment in 1982 had 'assumed' that the European Social Charter requirements for either collective bargaining or wage fixing machinery to cover overtime, equal pay, deductions

¹⁵¹⁴ TNA LAB 10/2969, February 1982.

from wages, and notice periods 'would not have the same force as the [ILO] Convention' No.26 on minimum wage machinery.¹⁵¹⁵

Of course, the level of obligation was equal; it was merely that the political consequences of a breach of the Charter were thought likely to be less significant than a breach of the Convention. The civil servants were ultimately proved to have been correct.

In 1984 it was argued that the government could breach the ILO Convention and get away with it:

'there are grounds for thinking that we should be unlikely to incur serious criticism....The TUC might well lodge a complaint with the ILO but we would have good counter arguments.'¹⁵¹⁶

However, 1984 was the year in which the Government overstepped the mark to brazenly require that staff at GCHQ Cheltenham either renounce union membership or be dismissed. The bruising and humiliating encounters with the Committee on Freedom of Association and the International Labour Conference that followed made it apparent that where the ILO was concerned the Tories had pushed non compliance to the limit. While the government did not back down, and the civil servants were not permitted to join a union again until New Labour came to power in 1997, the Tories knew now that they could neither denounce the fundamental Conventions, nor could they ignore the obligations they imposed.

Ideologically pleasing as it might have been for the Thatcher Government to have stopped those civil servants from bargaining collectively, and as happy as the US government were with the new arrangements, it had made a seriously politically damaging misjudgment.

The confidence of the Department of Employment that the government could clip the wings of the Wages Councils and argue its way out of a breach ILO Convention No.26 appeared to evaporate. The Convention was denounced in July 1985. By contrast, Article 4(1) of the European Social Charter was simply ignored.

¹⁵¹⁵ TNA LAB 10/2969, 1982, *op cit.*

¹⁵¹⁶ *ibid.*

We saw that in 1988 that officials in the Department of Employment government was preparing to abolish the Works Councils had stated that

‘I think we might have to concede (privately at any rate) that a finding by the Committee of Experts [now the European Social Rights Committee] that by abolishing Wages Councils we were in breach of our obligations under Article 4:2 would be well founded.’

The key question was ‘How seriously should it be regarded?’

Their conclusion was that the Charter supervisory procedures, unlike those of the ILO, did not involve the participation of Eastern Bloc member states or worker representatives keen to make the most of any opportunity to condemn the British government. As a consequence, sanction for breaches amounted to no more than embarrassment. Denunciation on the other hand

‘would certainly not be well received in the Council of Europe, and it might be preferable for us to bear with the criticism of infringement rather than incur the odium of further denunciation.’¹⁵¹⁷

So the government simply went ahead and broke international law.

Unfortunately the record starts to become rather sparse at around the 30 year mark, but it would be uncontroversial to argue that the Tories stuck to this cynical policy in subsequent years.

All the Wage Councils except for the Agricultural Wages Board were abolished in 1993. The ILO Agricultural Wage Fixing Machinery Convention was denounced in 1994,¹⁵¹⁸ and the Agricultural Wages Board was abolished in 2012.

The Failure of Rights Instruments

¹⁵¹⁷ *Ibid*, WRB Robinson, Department of Employment, 29 February 1988. Articles 8.4(a) of the European Social Charter on night work for women, and 8.4(b) on underground work for women had been denounced in 1985, ostensibly to align UK obligations under the Charter with EU anti discrimination obligations, and it was considered that a “further tranche of denunciations” would be a step too far.

¹⁵¹⁸ ILO Convention No.99, Minimum Wage Machinery (Agriculture) 1951, which had been ratified by the Churchill Government in 1953.

International and regional rights instruments are the tools of political persuasion and entrenchment to be employed when the Conservative Party has lost power. They are not a panacea. As the eminent jurist DN Pritt put it:

‘In capitalist states, where any concession of Human Rights is made with reluctance by minority ruling classes to working class pressure, the ruling class seeks always to treat the formal proclamation of the rights as sufficient realisation of them, so that in practice the right often fails to become a reality.’¹⁵¹⁹

The first Thatcher administration had been prepared, if need be, to ignore ECtHR rulings deemed to be unacceptably damaging to its domestic policies. That defensive attitude was to change in the wake of *Young James and Webster* and subsequent individualistic decisions on compulsory trade union membership. These were of very considerable value to the neo liberals, who were able to claim that *the European Court of Human Rights was on their side*. The 1988 endorsement at Strasbourg of the Government’s argument that the denial of freedom of association in the *GCHQ Case* had been a necessary and proportionate step taken in the interests of national security was an extraordinary vindication of the Thatcherite war on trade unions.¹⁵²⁰

Subsequently all legislation was required to be ‘Strasbourg Proofed’ to ensure that conflicts with the Court were kept to a minimum, and although there have been occasional displays of Tory defiance (notably absent since the June 2016 Referendum), the court’s decisions have invariably, if sometimes reluctantly and inadequately, been implemented by the British Government. While one might plausibly argue that the political damage which would be inflicted on any government defying the court ensures UK compliance, it is also the case that the respect accorded the rulings of the court by the government has served to undermine the adverse rulings of the supervisory bodies of other supranational instruments.

¹⁵¹⁹ DN Pritt, *Employers, Workers and Trade Unions*, Book One of *Law, Class and Society*, 1970, p148.

¹⁵²⁰ *Council for Civil Service Unions v UK* 10 EHRR 269. It was an extraordinary decision. The civil servants had been encouraged to join the appropriate union since the late 1940s. Trade union rights were restored in 1997 and no subsequent administration has felt the need to re-impose them.

Although the days of the court's unwavering adherence to the individualistic human rights paradigm, when the Tories and New Labour could rely on it to refuse to acknowledge the collective aspect of freedom of association, have passed, and it has adopted a wide, comparatively trade union friendly, interpretation of Article 11 ECHR since the 2008 *Demir and Baykara* case, there is no reason to suppose that, were the GCHQ case heard in 2018 by the ECtHR, it would take a different view.

The court is still apparently an ally of the British neo liberals.

In 2009 Keith Ewing and John Hendy were contemplating what appeared to be *The Dramatic Implications of Demir and Baykara* - the potential influence of that watershed Article 11 ECtHR case both on the European *acquis*, and on domestic law.¹⁵²¹

The EU Charter of Fundamental Rights explicitly incorporates Article 11 and the ILO Conventions as a 'floor of rights,'¹⁵²² and the Convention has, of course, been incorporated into UK law since 2000. In effect, the Luxembourg and domestic judiciaries had been presented with the opportunity to impose an industrial relations sea change just as the EU hit the rocks of the economic crisis.

The court had apparently broken with the human rights paradigm to hold that 'the right to bargain collectively with the employer has, in principle, become one of the essential elements of 'the right to form and join trade unions for the protection of [one's] interests' set forth in art.11 of the Convention,'¹⁵²³ to accord with the long forgotten incorporation of the terms of ILO Convention No.87 as a floor to the Article 11 protections.

Protection for the right to strike can be seen to implicit in any guarantee of a right to bargain collectively, not least one reliant upon Convention No.87, and this appeared to be confirmed in *Enerji Yappi Yol* the following year.¹⁵²⁴

In the UK trade unionists sought unsuccessfully to rely on the *Demir* jurisprudence in a series of cases.¹⁵²⁵ These cumulated in the *RM Tv UK* Strasbourg challenge to

¹⁵²¹ 'The Dramatic Implications of Demir and Baykara' (2010), 39 *ILJ* 2.

¹⁵²² See chapter 1.

¹⁵²³ *ibid*, para 154.

¹⁵²⁴ [2009] ECHR 2251. Unfortunately the report is available only in French.

the statutory trips and hurdles and the ban on secondary strike action,¹⁵²⁶ and in *Unite the Union v UK*, an attempt to call the UK to account for dispensing with the Agricultural Wages Board, the last of the Wages Councils in breach of the ILO and European Social Charter obligations to promote and encourage collective bargaining and to provide appropriate mechanisms to facilitate such bargaining.

As if to emphasise that fine words do not necessarily effective rights make, the court confirmed that Article 11 protected the right to strike,¹⁵²⁷ but found the ban on secondary action to be within the margin of appreciation,¹⁵²⁸ and the challenge to the ‘trips and hurdles’ that unions had to surmount before strike action could be deemed to be lawful to be inadmissible on procedural grounds.¹⁵²⁹

The case was a missed opportunity for the court to align itself explicitly with the international and regional norms on which its interpretation of Article 11 has relied since *Demir*. The decision was arguably a retreat, rather than a failure to advance, a ruling arguably explicable by the pressure placed on the court by Tory threats to denounce the Convention, the retirement of a highly respected British judge, and by the more formal attempts to rein in the rapidly evolving Article 11 jurisprudence initiated by the Tory dominated Coalition government, which led to the Brighton Declaration of 2012.

Had the court ruled the UK ban to be a breach of Article 11 it would have been a huge embarrassment for the Tories, who were already finding the ‘votes for prisoners’ ruling hard enough to swallow, and by effectively finding for the government in the RMT case a confrontation was avoided.¹⁵³⁰ Alan Bogg and Keith Ewing blamed ‘the crude politics of power’ for the Strasbourg judgment, with ‘the Court stepping back in the light of the political onslaught to which it had been subjected by the British government...’¹⁵³¹

¹⁵²⁵ Notably in *Metrobus v Unite the Union* [2010] ICR 173. In *Serco v RMT* [2011] EWCA Civ 226, however, the Court of Appeal did rule that as a consequence ‘the time honoured view that the immunities...had to be narrowly construed, as they were an affront to the common law’ be dispensed with and cases ‘construed in the normal way, without presumptions one way or the other’ and so lifted the labour injunction (Bogg and Ewing, *The Implications of the RMT Case* (2014) 43(1)ILJ 221, (pp222-3)

¹⁵²⁶ *RMT v UK* [2014] ECHR 366.

¹⁵²⁷ Without considering whether it was an ‘essential element’ of freedom of association.

¹⁵²⁸ Permitted by A11(2).

¹⁵²⁹ The parties had settled the dispute, and the matter was supposedly therefore inadmissible.

¹⁵³⁰ That case also concerned a ‘blanket ban,’ and all that was required of the government was a subtle adjustment to permit some prisoners the right to vote, which is what ultimately happened.

¹⁵³¹ p 223 *The Implications of the RMT Case, 2014, op cit*

Arguably, just as *Young, James and Webster* in 1981 was taken as the ‘green light’ for the Employment Act 1982, the case was taken by the Tories as permission from Strasbourg to forge ahead with what became the Trade Union Act 2016.¹⁵³²

The disappointment of the British labour movement was compounded by the ECtHR in *Unite V UK* [2014], which revealed the right to collective bargaining, that ‘essential element’ of Article 11, to be no more than a right to the freedom to bargain collectively, little more than a negative right not to be actively prevented by the state from engaging in voluntary bargaining.

Remarkably the court cited with apparent approval the claim in the government’s ‘impact statement’ on the abolition of the last Wages Council, the Agricultural Wages Board, that the fact that the majority of farm workers in the UK received more than the minimum wage, was ‘an indication that a number of agricultural workers were already negotiating their own agreements.’¹⁵³³ The application was held to be inadmissible.

The court chose to refer back to the individualistic narrow interpretation that had, in the first freedom of association cases heard at Strasbourg, *the Belgian Police Trilogy* of 1975 and 1976, led the court to hold for years that Article 11 protected little more than a right to organise. That departure from *Demir*, and from the line of cases which had followed, seemingly to avoid giving Cameron’s Tories a bloody nose, was a display of judicial partiality which would have been laughable were the court less influential.

It was held that the union was free to attempt to negotiate, and for the court, the mere existence of New Labour’s inadequate statutory procedures, which it acknowledged were of use to ‘almost none’ of the 600,000 workers previously covered by the AWB, ‘represents a measure intended to encourage and promote collective bargaining across industry in general.’¹⁵³⁴ Consequently the court professed to believe that the UK could not be said to have failed to comply with its ILO C98 and European Social charter obligations to actively promote bargaining.

¹⁵³² See Michael Ford and Tonia Novitz, ‘Legislating for Control: The Trade Union Act 2016’, (2016) 45 *ILJ* 282. Ford and Novitz referred only to the RMT case and the 2016 Act.

¹⁵³³ *Unite the Union v the United Kingdom* [2016], op cit, para 64.

¹⁵³⁴ *Ibid*, para 65.

Meanwhile, at the European Court of Justice, the influence of *Demir and Baykara*, after the *Viking* and *Laval* cases had seen the court obliged to acknowledge that the rights to bargain collectively and to strike (as enshrined in Article 28 of the Charter of Fundamental Rights of the EU which incorporates Article 11 ECHR as well as ILO Conventions 87 and 98 to flesh out the protection ‘guaranteed’) were fundamental rights of the European Union, while ruling that for practical purposes they were subservient to the economic freedoms, has been undetectable. The four business freedoms, the central pillars of the 1957 Treaty of Rome and the cornerstone of jurisprudence of the ECJ, arguably rival the common law in the UK as effective ‘built in’ protections for the perceived interests of capital.

The Luxembourg court stood by in the wake of the ‘Eurozone crisis’ as *The Troika* presided over an unprecedented attack on freedom of association in southern and eastern EU States, and in Ireland, the protection of the EU Charter of Fundamental Rights seemingly now only accorded to employers. It appears now that judges are again deriving *laws against combinations* from a rights instrument, much as Article 11 ECHR and the European Social Charter were employed at Strasbourg to deny workers the right to bargain collectively in the *Belgian Police Trilogy*.

Marx understood that the protection of rights and freedoms depended on political consensus, and that the ruling classes accorded individual rights primacy in order to protect their own interests. By the time he had written *On the Jewish Question* he had realised that the post feudal evolution of law and society was not ultimately destined to be shaped by rights, whether divine or human, but by rational responses to economic and social circumstances, and in it he had expressed surprise that in the immediate aftermath of the 1789 revolution in France the collective political rights of the citizen came to be regarded as subservient to individual rights.¹⁵³⁵ What for him were merely steps taken towards social progress had become the end, while the vital vehicles of further social progress were seen merely as the means by which those individual rights were maintained. However, he noted that when those supposedly sacrosanct

¹⁵³⁵Marx, 1844, *op cit*, p13. Those rights were no more than freedom of assembly and association in the Diceyan sense and the right to vote: “The aim of all political association is the preservation of the natural and imprescriptible rights of man.” Declaration of the Rights of Man and the Citizen 1791, Article 2.

individual rights conflicted with real political power those rights were either ignored or laws were passed which went beyond mere infringement to wholly contradict those rights: 'The right of man to liberty ceases to be a right as soon as it comes into conflict with *political* life.'¹⁵³⁶ These rights were no match for economic and political power and black letter law.

In *Capital* Marx, by this time more attuned to the demands of organised labour, had observed that collective labour rights initially secured by the workers had been perceived to conflict with the individual rights of the bourgeoisie, and withdrawn:

'During the very first storms of the revolution, the French bourgeoisie dared to take away from the workers the right of association but just acquired. By a decree of June 14, 1791, they declared all coalition of the workers as "an attempt against liberty and the declaration of the rights of man."'

Freedom of association, as freedom to organise and bargain collectively, had been steamrollered in the name of individual liberty – or the right to property - in what Marx called a *bourgeois coup d'états*.¹⁵³⁷

Dicey had scoffed at the conceit of rights instruments which purported to 'guarantee' the rights they purported to protect,¹⁵³⁸ and even his beloved common law, that unwritten and infinitely flexible individualistic rights instrument, so long successful in defending the economic privileges accorded his class, had to yield when citizenship was ceded to the working classes. As we have seen, Dicey was unable to reconcile the legal recognition of economic and social rights, and the carving of fundamental labour rights out of the common law, with his belief in the primacy of the individual, condemning the statutory immunities

¹⁵³⁶ Individual liberty was being sacrificed by the state ostensibly in the public interest. Marx noted that although there was a constitutional right to press freedom the press was censored in the interests of protecting 'public liberty', and that despite the right to security private correspondence was opened as a matter of routine. 'Revolutionary practice is in flagrant contradiction with its theory...The right of man to liberty ceases to be a right as soon as it comes into conflict with *political* life, whereas in theory political life is only the guarantee of human rights, the rights of an individual, and therefore must be abandoned as soon as it comes into contradiction with its aim, with these rights of man. But practice is merely the exception, theory is the rule.' (Marx, 1844, *op cit*, p13).

¹⁵³⁷ *Capital*, vol I, Part 8, chapter 28 (p519 Wordsworth Classic Literature edition 1987). The French Revolution was a people's revolution usurped by the Bourgeoisie.

¹⁵³⁸ 'We can hardly say that one right is more guaranteed than the other'. AV Dicey, *Introduction to the Law of the Constitution*, 1915, p. 119

for permitting ‘legalised wrong doing,’¹⁵³⁹ and peaceful picketing as ‘peaceful war.’

Dicey’s reputation would perhaps have been better served had he acknowledged that, whether collective or individual, written or unwritten, rights are of little consequence when they are at odds with political power.

Entrenchment & A Fresh Compromise

Effective entrenchment and approximate political consensus are therefore crucial to protect labour and employment rights from the tyranny of the majority – or, more accurately, from the Westminster dictatorships that result when an administration hostile to those rights has a working majority in the House of Commons.

During the first 35 years following WWII it was understood by all governments that supra national labour rights instruments must either be adhered to or denounced through formal procedures, and that collective bargaining was essential to the orderly functioning both of the economy and society. Respect for the rule of law, the acknowledgement of the value of collective negotiation to liberal and social democracies, and, arguably the knowledge that any withdrawal of freedom of association would have unacceptable domestic and international repercussions, ensured the protection of workers’ rights.

De facto respect for freedom of association was of immense value. In 1958 a group of Tory lawyers wrote a famous pamphlet called *A Giant’s Strength*.¹⁵⁴⁰ They presented a radical view the right to strike, arguing that “the law’s original declaration that strikes were illegal is of the same kind as its subsequent declaration that they were permissible: neither involve any fundamental principle of right or liberty like the individual’s right to withdraw his own labour: in each case it is a question of the law responding to the political climate or to economic expediency. The issue is not whether the strike is on balance moral or immoral, but whether it is a useful or necessary expedient.”

¹⁵³⁹ Ibid, p. lviii.

¹⁵⁴⁰ By the ‘Committee of Members of the Inns of Court Conservative and Unionist Society,’ 1958, *op cit* .

As is so often the case in right wing circles, labour rights were not considered as human rights, yet the proposals in *A Giant's Strength* led to the Industrial Relations Act 1971,¹⁵⁴¹ which for all its considerable faults, was a bold attempt, as voluntarism faltered, to stabilize industrial relations by the provision of a raft of collective labour rights – a step not taken by any UK government before or since. The Tories acknowledged the importance of collective bargaining, and theirs was a genuine, if outstandingly clumsy and insensitive, attempt to accommodate the individualism that is part of the libertarian baggage of the Conservative Party with the need of the trade unions for solidarity.

Had an accommodation been reached then the UK would arguably have seen the adoption of something close to the Scandinavian and German industrial relations models, a fresh reconciliation of the individual and collective interest, offering the prospect, to judge by the post war and 21st Century experience in northern Europe, long term prosperity and stability. However, instead of the fresh compromise proposed by Heath's Tories a wholly uncompromising abandonment of the post war reconciliation was introduced using the 'stepping stones' approach agreed upon by the Tory leadership during 1975-1978.

The motives of the Heath and the Thatcher administrations differed where the protection of the individual was concerned. The Heath government was primarily catering for the traditional libertarian concerns for the individual voiced by large sections of his core supporters, typified by stories in the right wing press on the tiny number of 'closed shop martyrs.' As DN Pritt was moved to observe in 1970;

'freedom' is a 'much overworked word,' which 'always comes in as a sort of 'blackleg' whenever anything in legislation or Court decisions seems likely to weaken trade unionism or to help those few trade unionists who want, or are persuaded, to act against the general interest of their class.'¹⁵⁴²

The Thatcherites, however, didn't merely wish to weaken trade unionism – their uncharacteristic concern for these dissident workers disguised a long term ambition to deny all workers the opportunity to bargain collectively.

¹⁵⁴¹ For an account of the events leading to the passing of the Act and the response to the Act see Michael Moran's book *The Politics of Industrial Relations*, 1977, which is almost wholly devoted to the events of 1970-74.

¹⁵⁴² Pritt was commenting on *Bonsor v Musicians Union* [1952] in Book 1 of *Law, Class and Society: Employers, Workers and Trade Unions* (1970) p. 101.

The Heath government prohibited the closed shop as, in almost all circumstances, ‘an unfair industrial practice,’ but permitted agency shops (albeit open to challenge by individual workers), which in practice maintained membership at 90-95%, and permitted dissident workers to disobey a strike call should they so choose. Montgomery Woodhouse, junior minister for employment had told the Commons when discussing the proposals for agency shops:

‘Collective bargaining inevitably at some stages impinges on the rights of the individual and it is necessary to make a careful balance between the interests of the individual and the collective interest.’¹⁵⁴³

A few months later Wedderburn, in criticizing the Act, had argued that:

‘Individuals must be protected... by the law against unfair treatment by employers or unions. But the duty of a labour law system is *first* to the individuals in the collective majority; and only *second* – not to be forgotten, but *second* – to individuals who wish to opt out of collective labour relations.’¹⁵⁴⁴

With hindsight it is little short of a tragedy that the two sides were not able to come to a workable compromise. In contrast to the polarised politics of the 1980s, the Tories and the trade unions were not far apart. When the Thatcherites came to power – directly attributable to the failure of the attempts at a fresh compromise during 1969- 1973 - they used individual employment rights attracting very large awards to make closed shops unworkable, and legislated to prohibit industrial action to enforce trade union membership. Agency shops were outlawed. There was no question of a compromise.

In 2019, however, there is every promise of a fresh compromise being reached. The 2017 Tory manifesto stated that:

‘We reject the cult of selfish individualism...We know that our responsibility to one another is greater than the rights we hold as individuals. We know

¹⁵⁴³TNA, LAB 10/3644, House of Commons, Motion for the Adjournment Wednesday, 21 April, Mr Woodhouse, ‘Operation of the Closed Shop by British Rail’ Notes for Reply, para 8.

¹⁵⁴⁴‘Labour Law and Labour Relations in Britain’, *British Journal of Industrial Relations*, 1972, p290, emphasis supplied.

that we all have obligations to one another, because that is what community and nation demands.’¹⁵⁴⁵

While it would be naive to read much into a vague pre election statement made as part of a failed strategy to persuade Labour supporters that the Tories were now the workers’ party, this modest political gesture became much more significant when in the subsequent election the healthy support for the unequivocally collectivist policies of the Labour Party revealed that the centre ground of British politics had shifted far more markedly to the left than May’s advisors had envisaged. It became more significant still as the minority government became mired in the Brexit disaster, dividing the nationalist and pragmatist Tories, raising the prospect of a socialist Labour government, or Labour dominated coalition, being returned to power in 2019.

The search has been on for years for signs of a ‘post – Fordist’ reconciliation of capital and labour, often with particular emphasis placed on the role of human rights instruments.¹⁵⁴⁶ While the recognition of the necessity for full freedom of association demanded by these of instruments is unquestionably of great importance, the lessons of the past 40 years tell us that even if we are able to restore the rough consensus on which compromise depends, multiple protections are required.

Employment rights of EU origin have proved to have an extraordinary resilience. Wide as the margin of appreciation afforded by the EU principle of subsidiarity is, and feeble and diluted as the rights implemented into domestic law are, the threat the infringement procedure being invoked by the Commission, and the cross party perception that access to the single market depends on compliance, has ensured that what is transposed into both primary and secondary legislation remains intact. Despite the ‘sabre rattling’ of the Tory dominated Coalition in 2010 – 2015, and the delusional promises of the short lived Cameron administration of 2015-2016 that it would ‘repatriate’ employment rights, not

¹⁵⁴⁵ The Tory Manifesto 2017, *Forward Together*, p9.

¹⁵⁴⁶ For an upbeat piece placing particular faith in the ILO Declaration of Fundamental rights at Work (an admittedly brilliant initiative – see chapter 4), the EU Charter of Fundamental Rights and capability theory published just before the Eurozone disaster, see Judy Fudge ‘The New Discourse of Labour Rights: From Social to Fundamental Rights’(2007) 29 *Comparative Labour Law and Policy Journal*, 29.

only do they remain intact, but to the fury of the right wing of the Tory party, it is very likely that they will continue to be seen as inviolate even when (or if) the UK leaves the European Union. Thus not only does Brexit provide us with an object lesson in the effective entrenchment of employment rights, but also of the power of broad political consensus, both regionally and domestically, and UK citizens now seem set to have at least a *backstop* to protect employment rights of EU origin.

For years the Tories threatened to denounce the ECHR, largely, it would appear, to appease Eurosceptics within and without the party. If it was bluster then, it is unthinkable now, although in the event of a second referendum and a decision to remain in the EU, or to join EFTA, and therefore remain in the European Economic Area with the EU 27, membership, confused threats to perform that particular pointless act of self harm will no doubt once more be heard at Westminster. For all the faults of the Strasbourg Court, the Convention, and the ECtHR jurisprudence, can be said to provide *longstop* protection for a heavily compromised freedom to bargain collectively and to strike.

Senior Labour Party politicians have expressed an interest in retaining the EU Charter of Fundamental Rights post Brexit - an interesting, if ultimately absurd proposition. The Charter reflects the *acquis*. While it draws on the UN, ILO and Council of Europe instruments examined in previous chapters to identify the fundamental rights conferred by European law, it is *legitimately* engaged in the domestic courts only when EU law is relied upon. It is a Charter for EU member states. Moreover, where labour law is concerned the apparent negation of Article 28 by Article 16 has fatally undermined its value to trade unionists.

As a tool of entrenchment it is important insofar as that it showcases the fundamental rights and freedoms that must be respected by EU states. Nevertheless, if the UK does leave the EU, the Charter goes too.

Of much more value, and what any future Minister of Labour must be contemplating, would be a new comprehensive British Bill of Labour Rights which included unequivocal protection for the right for all workers to bargain collectively and to take strike action to further their economic and social

interests.¹⁵⁴⁷ Such an instrument, entrenched along the lines of the US Bill of Rights would see labour and employment rights properly recognised as constitutional rights, rather than treated as appendages to a free trade agreement, or as disposable treaty obligations by rogue governments prepared to operate outside of the law. The US instrument requires the sanction of two thirds of Congress and three quarters of States before it can be amended, and it requires their Supreme Court to ‘strike out’ laws which breach the rights and freedoms guaranteed.

Beyond the reach of the ECJ, the effective primacy afforded the business freedoms over labour rights, the toxic legacy of *Viking* and *Laval* and the ‘trumping’ of Article 28 of the EU Charter by Article 16, and escaping the gravitational pull of the common law individualistic human rights paradigm, freedom of association in the context of industrial relations could be accorded its proper status as a fundamental human right.

The political and constitutional difficulties implicit in what could be argued to be Parliament limiting its own sovereignty by placing excessive power in the hands of unelected members of the judiciary might justifiably be considered too great an obstacle to taking such a step.¹⁵⁴⁸ However, the *Factortame* style ‘disapplication’ of legislation under the European Communities Act can be said to have placed similar power in the hands of the judges and, at the risk of lapsing into conjecture, Parliament could establish an elected court at Westminster to rule on such matters to provide the requisite element of democracy.

Of course, a ‘strike out’ under the provisions of a British Bill of Rights would have the political virtue of not requiring a reference to a foreign court, although the government could, by these means, comply with the demands of the UN Committee on Economic, Social and Cultural Rights to implement the provisions of the UN Covenant into domestic law.

There are, of course, alternative, rather less radical approaches which would augment current protections, rather than embed or entrench, suitable for coalition governments or minority administrations with ‘confidence and supply

¹⁵⁴⁷ See for example, KD Ewing and J Hendy, *A Charter of Workers’ Rights* (Liverpool, IER, 2002).

¹⁵⁴⁸ See ‘The Bill of Rights Debate: Democracy or Juristocracy in Britain?’ in KD Ewing, C A Gearty and B A Hepple (Eds), *Human Rights and Labour Law: Essays for Paul O’Higgins* (London, Mansell, 1994).

agreements.’ One, which would involve accepting the very limited jurisdiction of a supra national quasi judicial body, would be to accede to the Optional Protocol to the UN International Covenant on Economic, Social and Cultural Rights by which individual ‘communications’ can be presented for consideration by the UN Committee on Economic, Social and Cultural Rights. States which have acceded to the protocol may further assent to the Committee’s special ‘Inquiry procedure,’ whereby ‘grave and systematic violations’ of the Covenant may be investigated.¹⁵⁴⁹ Until 2008 the UNICESCR had no mechanism by which complaints against signatory states could be pursued, although the equivalent Optional Protocol to the UNICCPR – complaints are addressed to the Human Rights Committee - has existed since 1966.

As the government has been required to adhere to the provisions of the Covenant 1976 (and subject to monitoring by the UN Committee since it was established in 1985), ratifying the ‘OP’ would, like the ratification of the EU Charter in 2000, confer no fresh substantive rights. States found to be violating the Covenant are advised of the ‘recommendations’ adopted by the Committee, and are required in subsequent government reports as part of the normal reporting cycle to detail the measures taken to secure compliance. Unfortunately, not only are the determinations of the Committee under the procedure not regarded as legally binding, but any communication to the UN Committee regarding a matter which ‘has been or is being examined under another procedure of international investigation or settlement,’ will be held to be inadmissible, and denunciation requires only six months’ notice.¹⁵⁵⁰

The UN procedures could augment the Collective Complaints ‘Additional Protocol’ to the European Social Charter, adopted in 1995 by the Council of Europe, as a backstop to domestic protections. While that procedure can be restricted to handle only complaints of breaches of the 1961 Charter, it is unlikely that any government willing to accede to the protocol would not ratify the 1988 Additional Protocol and the Revised European Social Charter, which while arguably not conferring any new labour and employment rights can be said to have revitalised the 1961 text.

¹⁵⁴⁹ See Articles 1 – 10 of the OP for the handling of communications and the issue of recommendations, and Article 11-13 on the Inquiry procedure, the follow up to the inquiry procedure and ‘protection measures.’

¹⁵⁵⁰ Article 3.

Based as it is on the ILO procedure permitting unions and employers' organizations to present complaints to the Freedom of Association Committee, the Charter procedure is well suited to complement the right of British citizens to petition the ECSR's sister body the Strasbourg Court (whether individually or collectively), and for collective complaints be made to the ILO.

Crucially, the ECSR may declare a complaint admissible even when another supra national body has considered, or is considering, the same matter, and just as the provisions of Part II of the Charter are legally binding, the decisions of the European Committee of Social Rights are binding on states party to the Additional Protocol. Like the Conclusions adopted by the Committee states are required to give them effect in domestic law, and a failure to do so a breach of international law. Having declared a complaint admissible the Committee may require a state to take immediate measures to limit potential harm. If the ECSR rules that a state is in violation of the Charter the Committee of Ministers is informed, and the state is required to explain to the Ministers how it will rectify the matter. The Ministers may then adopt by a majority vote a *resolution* taking into account of the state's proposals. If the state makes no such proposals, or the position remains unsatisfactory, then, with a two thirds majority, the Committee may make a *recommendation*. Thereafter, the state is required to inform the ECSR of the measures taken, or being taken, to secure conformity with the Charter in every report submitted as part of the normal reporting cycle.

Cap that with the ratification of Protocol 12 of the ECHR, described in chapter 7, and any UK government would be placed under extreme supranational pressure when tempted to infringe workers' rights.

However, such measures are no substitutes for black letter law backed by a British Bill of Labour Rights. They are backstops which will promote consensus by changing the political climate, pressing home the message that the right to bargain collectively is a fundamental human right, 'feeding into' the positive legal rights to bargain, and to fresh British constitutional guarantees for freedom of association.

Real freedom for British workers requires *full* freedom of association, actually existing freedom, and a government which adheres to the rule of law.

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