

INFLATION, ECONOMIC PERFORMANCE AND EMPLOYMENT RIGHTS

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Abstract

After approaching two decades of 'deregulation' in the labour market, collective bargaining in Britain appears to be in rapid decline. Multi-employer bargaining has been particularly hard hit. However, most other member states of the European Union retain an important role for collective bargaining at sector or industry level. The goal of transnational collective bargaining is also nearer to fulfillment, as a result of the process of EU-level social dialogue. In general, multi-employer bargaining plays an important part in reducing inflationary pressures, encouraging cooperation between labour and management, and promoting social cohesion. In Britain, the restoration of dialogue and negotiation at sector level would be an essential step in the reconstruction of the collective bargaining system.

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1. Introduction

This paper examines the system of labour law which would be required to underpin an economic strategy aimed at containing inflation and enhancing competitiveness, without having resort to mass, long-term unemployment as an instrument of labour discipline. In addition to there being a good case from the point of view of social justice for the enactment of more effective legal protection for workers, a strong economic case exists for regulation aimed at promoting cooperation between management and labour and enhancing competitiveness by placing incentives on both firms and individuals to invest in labour quality. The basic elements of such a labour law system in Britain would include legal guarantees of workforce representation at the level of the firm, the existence of representative institutions at sector level to regulate working conditions, and the enactment of a comprehensive labour code designed to ensure respect for the basic rights at work of the worker. Particularly important here is the issue of collective bargaining at multi-employer level, which can operate as a mechanism for reducing inflationary pressures.

Multi-employer bargaining has been in rapid decline in Britain since the mid-1980s as it has in other systems which have experimented with labour market deregulation, most notably the USA (where it has never been very strong), New Zealand and, to a lesser extent, Australia. Yet this experience has not been universally shared. Most member states of the European Union retain effective forms of collective bargaining at sector or industry level, thereby ensuring that basic labour standards in such areas as pay, working time, job security and occupational health and safety are widely observed. At the level of the EU itself, the development of transnational collective bargaining, once thought impossible, is now closer to becoming a reality as a result of the process of *social dialogue* which was encouraged by the Maastricht Treaty. These developments suggest that with an appropriate regulatory framework, we may see the re-emergence in Britain of institutions which can serve as mechanisms for setting, implementing and monitoring labour standards.

2. Labour Law, Collective Bargaining and Deregulation

During the period of neoliberal ascendancy which has lasted in Britain since 1979, labour law has seemed to become, at times, an arm of economic policy. The removal of 'rigidities' in the labour market through 'deregulation' was meant to contribute to the reduction of inflationary pressures and to the promotion of a competitive economy. Although other, rights-based justifications for changes in labour law were made at this time - such as the protection of consumers, non-union members and others against 'abuses' of power by trade unions (Fredman, 1989) - economic considerations have always been prominent. Successive administrations have broadly followed a strategy most clearly laid out in the 1985 White Paper, *Employment: the Challenge for the Nation*. This formally rejected the idea that unemployment was caused by deficient demand, and identified instead the labour market as the 'weak link in the economy'. A three-pronged approach to economic policy was laid out, consisting of control of the money supply; the creation of jobs through deregulation of the labour market; and, in exceptional circumstances only, government intervention to assist the long-term and youth unemployed through active labour market policy (Department of Employment, 1985).

Of these three, labour market deregulation has been the policy most consistently pursued during the period since 1979 as a whole. Monetary policy has seen significant shifts of emphasis and has failed, in general, to conform to the theoretical postulates laid out by its advocates in the 1970s and early 1980s, while active labour market policy has waxed and waned according to the state of the economy and pressures to reduce public expenditure. By contrast, the process of labour market deregulation has intensified with the adoption of a succession of Acts of Parliament cutting back on both collective and individual employment rights. Employment relations have also been affected by government policies aimed at promoting competition in the markets for products and services. Redundancies, restructuring and changes to terms and conditions have followed on the introduction of price regulation in the privatised utilities, the imposition of competitive tendering of services on local government and the NHS and introduction of internal 'quasi markets' in the public health and education sectors. While these measures stop a certain way short of removing public regulation altogether from the labour market, their

effect has been to isolate the United Kingdom within the European Union and to place it on a par with such systems as New Zealand and the USA (Deakin, 1992), although not, significantly, the industrialising countries of east Asia, which by comparison are highly regulated (Deery & Mitchell, 1993).

Although frequently used, the term 'deregulation' is potentially misleading here, at least if it is taken to imply a reduced role for the state: 'contrary to all appearances, the "activist" state is by no means dismissed', since 'far from simply rejecting all interference, the state is assigned the task of setting the elementary conditions for a functioning market' (Simitis, 1987:128). The continuing presence of the state is clearest, perhaps, in those areas where competition policy has given rise to vast new fields of substantive regulation and administrative discretion which are only incompletely controlled by principles of public law and democratic accountability, as is the case with the regulatory bodies charged with overseeing competition in the utilities and in the NHS internal market.

It is also the case with the labour market, where the state now assumes the role not just of dismantling those legally-binding labour standards which are the product of an earlier era, but of intervening to prevent the adoption, implementation and monitoring of standards by collective organisations outside the state. A good example of this is to be found in the conditions regulating compulsory competitive tendering: legislation denies local authorities the contractual power which they would otherwise have to insist that external contractors observe basic employment conditions, such commonly-accepted rates of pay, or even to monitor contractors' adherence to remaining legislative standards in such fields as health and safety and equality of treatment.¹ More generally, legislation now plays an important role in restricting the activities of organisations of workers, in particular where collective economic pressure is brought to bear in support of standards operating at an inter-firm or market level. Restrictions over the collective right or freedom to take industrial action free of liability at common law, and controls over the internal governance of trade unions, reached unprecedented levels in the 1980s (Davies & Freedland, 1994). Thus, whatever the case might be in other systems for talking about a system of labour law 'without the state' (Arthurs, 1996),

in the United Kingdom the state remains an active player, using the law and associated regulatory mechanisms to reshape the labour market.

3. Collective Bargaining Decline and Decentralisation²

(a) General Trends

The government's position on labour relations has played an important role in helping to undermine collective institutions (for an assessment of the various influences see Deakin, 1992). The period since 1979 has been characterised by a declining coverage and decentralisation of collective bargaining, with only a minority of British workers now covered by agreements. The *decline in collective bargaining coverage* has in fact been one of the most significant developments in the last 17 years, and appears to be without parallel in any of the other OECD countries, a recent survey concluding that 'the decline in collective bargaining has been most pronounced in Great Britain'. (OECD, 1994: 185). Collective bargaining coverage in Britain has fallen from an estimated 70% in 1980 to an estimated 47% in 1990 and the position is in fact worse when we take into account that at least another 11% or 12% of workers were formerly covered by wages council orders, pushing joint regulation up to in excess of 80%, perhaps as high as 85% (Milner, 1995). On this basis, coverage has in fact fallen to an estimated 47% from an estimated 80-85% since 1980. But not only is our decline the sharpest, we are as a result among the OECD countries with the lowest levels of collective bargaining coverage. To put the matter in perspective, in 1994 coverage in Australia stood at 80%, Finland 95%, France 92%, and Germany 90%.

Related to this is the *decentralisation of collective bargaining*, now extending from the private sector into the public sector as well. This has seen the break up of national or sectoral bargaining arrangements (with only 1 in 10 workers in the private sector now thought to be covered by multi-employer bargaining arrangements) and a greater emphasis on enterprise based bargaining. One reason why this is important is that collective bargaining decentralisation is sometimes associated with low levels of coverage, with a recent OECD study pointing out that '[c]ountries characterised by single-employer bargaining tend to have lower coverage rates compared with countries where bargaining is conducted at higher levels and where employer

organisations and union federations are strong' (OECD, 1994: 168). Although decentralisation is also a feature of bargaining developments in other countries, 'there has been great variation between countries in the nature and extent of employers' flexibility initiatives' (Ferner and Hyman, 1995: xxi). But few countries it seems have gone as far as we have, and even as late as 1994 the OECD survey could record that 'in a majority of OECD countries the sectoral level has remained the principal arena for wage determination' (OECD, 1994: 186).

(b) The Reasons for Decentralisation

The decline in sector level bargaining, which has been developing since 1945, has taken two forms. First, as already indicated, there has been the complete abandonment in many sectors of multi-employer agreements, a trend which has gathered pace since 1979. In parts of the private sector this trend away from multi-employer bargaining has since 1979 coincided, to some extent, with another. This is the tendency for employers to create more devolved and decentralised arrangements organised on the individual workplace, division or business unit. Where this has occurred, however, the employers concerned nevertheless retain considerable central control over pay settlements. But even where multi employer bargaining has remained, a second symptom of decentralisation has been the reduction in the regulatory effect of agreements, most notably through a movement towards the specification of 'minimum' rather than 'actual' pay rates.

This two-fold process of decentralisation has been influenced by a variety of factors. Notable among them have been a desire on the part of employers to bring their bargaining and human resource strategies into line with more devolved management structures; a wish to link pay more closely to rewards; a desire to develop locally more flexible working patterns; and in the public sector, political initiatives and pressures designed to create less centralised institutional structures, introduce greater competition and allow pay to better reflect local labour market and operational conditions. Such developments have influenced both the level at which bargaining takes place and the content of the agreements concluded. Where multi-employer bargaining has been dismantled or where larger employers have withdrawn from it, initiatives have often been taken substantially to revise grading systems and working patterns, and introduce a variety of

incentive pay arrangements, both within and between different parts of the business. The same is true, although probably to a lesser degree, where single-employer arrangements have been decentralised.

(c) The Equivocal Benefits of Decentralisation

These changes may be of financial benefit to the employers concerned in terms of contributing to increased labour flexibility and productivity, greater employee commitment, and reduced unit labour costs. However the changes may not always have beneficial consequences in the longer run. In particular, the decentralisation of bargaining may:

- reduce the power of unions and hence enable employers to worsen terms and conditions of employment and to compete more through low labour costs rather than more efficient capital investment;
- by leading to a multiplication in the number of 'pay decision points', create the potential for a inflationary pay spiral in tight labour market conditions; and
- in the case of the decentralisation of single-employer bargaining arrangements, act, as part of a more general devolution of human resource management, to reinforce the already ad-hoc and short-term nature of human resource management within many UK-based organisations.

Nor can the desirability of decentralisation be assessed purely on the ground of the financial benefits to particular companies. The issue also raises important questions about the quality and standards of living of workers and families. Two related points arise here. The devolution of bargaining structures, by creating more isolated and smaller bargaining units, creates a greater potential for derecognition and may make membership loss more likely to arise as a result of member disillusionment and direct employer pressure. Secondly, as already pointed out, the abolition of multi-employer arrangements acts to reduce the degree of union regulation in the labour market, because such agreements have always tended to also affect pay and conditions in both non-union and non-affiliated organisations. Indeed as the

OECD study points out the density of collective bargaining coverage is likely to be significantly lower in countries with decentralised bargaining systems.

4. Labour Standards and Economic Performance: Comparative Evidence

The undermining of collective institutions has been accompanied by an increase in labour market inequality in Britain, as it has in the USA and New Zealand. It is often argued that such inequality is the price to be paid for a more efficient labour market. As evidence for this, in the 1980s and 1990s the US has enjoyed a much faster rate of job creation than the more highly regulated EU systems. On the face of it, the higher employment rate of the US lends some plausibility to the hypothesis of a trade-off between wage equality and the rate of employment growth: 'maybe the United States "paid" for employment creation through low or declining wages, while Europe "paid" for high or rising wages with sluggish growth of employment' (Freeman, 1994: 14). A similar point is sometimes made with regard to the UK, although evidence for a significant job creation effect arising from deregulation is confined to the brief period of the Lawson boom from 1986 to 1989 (Deakin and Wilkinson, 1996). Evidence for a positive employment effect in New Zealand in the wake of the Employment Contracts Act 1991 is even more elusive (Anderson, Brosnan and Walsh, 1995).

Closer study has shown that the major cause of job growth in the USA since the early 1980s has been population growth (Houseman, 1995). In the US, there was a large increase in the working-age population, which the US economy was able to absorb, leading to dramatic headline increases in jobs and a less dramatic, if still significant growth in employment participation rates. The converse of the United States' superior jobs record, however, is its relatively poor record on wage growth and on productivity. In the US, working hours have been extended and average wages have fallen in real terms since the early 1970s, and labour productivity has grown more slowly than in France, Germany or the UK. US GDP per head has also declined relative to the larger EC economies in the same period (Deakin and Wilkinson, 1994). The OECD, among others, has noted the 'poor quality' of jobs created in the US in the 1980s (OECD, 1993: 30; see also Loveman and Tilly, 1988; Freeman, 1993). The downside for the US economy, then, is not

simply its reduced capacity to generate good jobs: it is also felt in terms of reduced efficiency in the use of labour and, ultimately, in a reduction in its capacity to generate wealth.

When economic performance is measured in terms of labour productivity and real wage growth, not only do the European economies fare better than the US, but within western Europe it is those systems with the most intensive forms of labour regulation - above all, Germany and France - which do best of all. Buchele and Christiansen's recent econometric study of the G7 countries found that 'productivity and real wage growth from the early 1970s to the late 1980s are, indeed, positively related to workers' rights... we invariably find that in countries where worker rights are strongest, labour productivity and real wage growth are highest' (Buchele and Christiansen, 1995: 419). These findings require the use of indices of the strength of labour standards across countries which involve, inevitably, some degree of subjective judgment. However, the results 'at the very least ought to caution European policy makers about the potential negative consequences for productivity and real wage growth of attempts to reduce unemployment by wholesale deregulation and dismantling of worker rights' (Buchele and Christiansen, 1995: 419).

The European Commission's *White Paper on Social Policy*, published in 1994, reflects the dilemma facing policy-makers in the EU. On the one hand, the Commission insisted that it was not seeking a 'dilution of the European model of social protection' (European Commission, 1994: 10). At the same time, the *White Paper* identified the issue of the employment rate as the 'key' to improved social and economic cohesion, and advocated an employment policy in which 'as well as supporting high productivity jobs, the Union maximises its ability to generate and sustain jobs at other levels, particularly in the unskilled, semi-skilled and personal and local services fields' (European Commission, 1994: 10). This statement may be read as implying a greater stress on labour market flexibility, particularly when coupled with the admittedly rather ambiguous suggestion that 'the need to alter fundamentally, and update, the structure of incentives which influence the labour market is still not adequately recognised' (European Commission, 1994: 11). One option which the Commission has been considering is the partial removal of employment protection for certain forms of employment, designed to

make it more attractive for employers to hire workers on lower pay or in certain forms of employment, such as part-time or fixed-term contract employment; another is the use of targeted reductions in social security contributions and other forms of social charges, similarly designed to subsidise employment creation.

The first of these options, the creation of unskilled and semi-skilled jobs alongside higher productivity jobs through partial deregulation, appears to be based on a contradiction. How will economic competitiveness be maintained in those sectors which become heavily reliant on low-wage, low-productivity employment? While it might once have been possible for parts of the public sector or for sectors such as retailing and distribution, which have been insulated from international competition, to perform this function, it seems doubtful that they can continue to do so in the future, given the shrinkage of the public sector and the opening up of a wider range of services to international competitive pressures as economic integration increases. These sectors, in just the same way as manufacturing, are under constant and increasing pressure to improve their labour productivity rates. More generally, there is a danger that measures aimed at subsidising low-paid and low-skilled employment will create a 'disincentive to upgrade the productive system if this would involve the labour losing its subsidy... the economy may be diverted towards those low-skill, low-investment sectors that are subsidised by the policy' (Michie and Wilkinson, 1995: 148).

Nor is it necessarily clear that much progress would be made by cutting charges on employment in the form of taxes and social security contributions. At first sight, it would seem that social security contributions, in particular, represent a substantial charge on employment in virtually all EU countries. Employers' contributions are on average over 30% of wages in Italy, over 25% in Belgium, between 20% and 24% in Spain and between 15% and 20% in the Netherlands, Germany, Greece, Portugal and France; the average for the EU is 19%. To this must be added employees' contributions (which are in effect met by employers as a proportion of payroll costs) and employees' income tax, at an EU average of 10% and 13% of wages respectively. Not only is the overall level of charges high by contrast to the USA and Japan, but there are considerable differences between Member States. However, as the European Commission has pointed out, 'there is no

simple, causal relationship between the level of social contributions and the total cost of labour' in any given member state (European Commission, 1993b: 87). In systems with relatively low mandatory contributions - such as the United Kingdom and, above all, Denmark, where employers' contributions are on average only 3% of wages - contractual payments by the employer tend to be higher, by way of compensation, or wages themselves have to rise in order to enable employees to make their own contributions. It is sometimes suggested that the element of statutory compulsion in some systems introduces unnecessary rigidity and inhibits flexibility in hiring during periods of low demand in the business cycle (Emerson, 1988). However, the employment record of systems with very low mandatory charges, such as Denmark, is no better than those of systems in which uniform contribution rates are set by law.

One option might be to reduce the impact of regulation and taxation on a selective basis, for example by excluding certain forms of low-paid employment from the scope of statutory social security contributions. Together with partial exemptions from employment protection legislation for part-time and temporary work, this technique has been quite widely adopted within member states since the early 1980s. The German Employment Promotion Act of 1986 (renewed in 1992) removed restrictions on fixed-term hirings in the case of new recruits and apprentices completing their training. In each case, the employer was permitted to offer a fixed-term contract of up to 18 months, after which the worker had to be offered a permanent employment if he or she was to be retained. The measure also allowed newly-established firms, and firms employing fewer than 20 employees, to make use of fixed-term contracts of up to two years (Mückenberger, 1992). In France there has been a series of measures aimed at promoting labour flexibility, in particular by encouraging self-employment and part-time work through rebates on social security contributions (Supiot, Lorvellec and Kerbouc'h, 1992; Lyon-Caen, Pélissier and Supiot, 1993: 117), and similar legislation promoting fixed-term employment has been in operation in Spain since 1984 (Ojeda Aviles, 1992; Auvergnon and Gil y Gil, 1994).

Yet the outcome of these initiatives has been at best unclear, and possibly even counter-productive. Studies suggest that one effect of the German Employment Promotion Act has been to encourage employers

to dismiss workers during downturns in the business cycle, and that overall the impact of the Act on job creation has been minimal and possibly slightly negative (Büchtemann, 1993). There is doubt as to whether part-time jobs of the kind subsidised by the Act constitute 'bridges' into regular employment or, more likely, 'traps' from which it is difficult to find a good job (Büchtemann and Quack, 1989). In Spain, over 90% of new hirings now take the form of fixed-term employment in one of its subsidised forms (Recio, 1993). Overall, these forms of intervention suffer from the familiar 'deadweight' and 'displacement' effects which have dogged many more direct forms of labour market subsidy: either employers would have created the jobs in any event, or the new jobs displace other workers from more regular employment.

Whereas in the mainland European systems the focus of deregulation policies has been on part-time and temporary work, in the USA and Britain it is often full-time employment which is associated with very low pay and poor working conditions, as a result of the general decline in institutional wage determination in those systems. Yet even in the USA, with its generally superior record on employment, there are limits to what deregulation can achieve: 'the fact that less skilled and low-paid American men had relatively poor employment prospects despite falling real wages shows that the American problem goes beyond a simple trade-off analysis' (Card and Freeman, 1994: 233). In Britain, most of the recent employment growth is accounted for by forms of self-employment at very low rates of pay and by part-time work below the minimum threshold at which social security contributions become payable (Joseph Rowntree Foundation, 1993: 53).

The policy choice facing the European systems is, then, a complex one. It is not a simple question of a trade-off between job creation and social protection; nor a matter of sacrificing the rights of 'insiders' in an effort to re-integrate excluded groups into employment. All the signs are that the wholesale removal of labour standards would have a harmful effect on economic performance, as well as further undermining the financing of the welfare state. But equally, there is no guarantee that high labour standards which promote high productivity will provide, of themselves, a solution to the problem of unemployment. With inflation kept in check by restrictive macroeconomic policies and by the impact of the EMU convergence criteria on taxation and public expenditure decisions, the mainland European systems can produce only 'jobless growth'.

5. Developments in European Community Social Policy

To break this log-jam in labour market policy, a potentially important idea which is emerging within the European debate is that of 'social policy as a productive factor',³ that is to say, a social model which explicitly combines economic competitiveness with social cohesion. This implies that social policy should form part of an integrated strategy for sustainable employment growth. Two aspects of this process may be emphasised here: the modernisation of labour standards and the role played by social dialogue between representatives of management and labour at European level.

(a) *The Modernisation of Labour Standards*

This approach sees labour-market regulation as a necessary aspect of the efficient use of labour and places greater stress in the elaboration of policy on the collective benefits which flow from social regulation, as opposed to the near-exclusive focus on the costs of regulations to individual firms and enterprises which tends to prevail at present. Examples of such benefits include the reduction of absenteeism and of the costs of illness and injury which are brought about by health and safety legislation; the reduction of turnover and search costs which are brought about by the regulation of dismissals; and the raising of skills levels through public provision of training.

It follows that the aim of regulatory policy with regard to the labour market should be to achieve an appropriate balance between cooperation and competition, rather than always seeking to maximise the intensity of competition as such. The former approach is based on the understanding that the competitiveness of firms and industries depends to a large extent on the effectiveness of the linkages between the different elements involved in the process of production - between labour and management, and between firms at different point in the chain of supply. Cooperative relations, based on a long-term orientation and on the fostering of mutual trust between the parties, require a certain degree of control over 'destructive' competition, in the sense of competition based on price alone as opposed to competition based on the quality of products and services (Deakin and Wilkinson, 1996). In seeking to regulate against destructive competition, labour standards should be put in place in order to provide incentives for *competition*

based on quality, on the basis that this is the best long-term basis for the competitiveness of the EU economies.

There is also a growing recognition that labour standards generate collective economic benefits in so far as they strengthen social cohesion and reduce inequality. The direct costs of inequality include the additional burden on public expenditure which arises from extra health care costs, and from social security programmes which support the unemployed and top up the wages of the low paid. Less directly, inequality threatens the social fabric in a variety of ways, such as increased crime levels, use of drugs and family break-up. There should be a recognition, then, that the promotion of social cohesion entails broader economic benefits and or reduced costs in terms of public spending. The issue, from this point of view, is no longer whether regulation is necessary, but what form it should take. Individual measures would be carefully assessed for their wider economic and social effects, but deregulation *as such* would not be the goal. Notwithstanding the criticisms which employers and others have levelled against particular regulations both at EU level and within member states, it is significant that the *UNICE Regulatory Report* of 1995 suggested that rather than always seeking less regulation, companies more frequently would like to see 'targeted changes to improve the quality and harmonisation of regulations... and their enforcement' (UNICE, 1995: 39).

(b) Social Dialogue

Provision is made for social dialogue in the Agreement on Social Policy of the Maastricht Treaty, which imposes a duty on the Commission to promote the consultation of management and labour at Community level and to take measures to facilitate their dialogue. To this end the Commission is required to consult the social partners 'on the possible direction of Community action' as well as on the content of any proposed Community action. It is also provided, however, that where management and labour so desire, 'the dialogue between them at Community level may lead to contractual relations, including agreements'. Agreements concluded in this way may be implemented in one of two ways, 'either in accordance with the procedures and practices specific to management and labour and the Member States' or in some cases 'at the joint request of the signatory parties, by a Council

decision on a proposal from the Commission'. The latter method of enforcement can be used only in respect of matters which are covered by article 2 of the Agreement, which include health and safety, working conditions, equality between men and women, and protection from dismissal. A Declaration appended to the Agreement expressly provides, however, that there is no obligation on member states to apply the agreements directly or to work out rules for their transpositions.

At the time writing one agreement has been made under this procedure though it has not yet been implemented. This is the Framework Agreement on Parental Leave which provides for three months parental leave (for each parent) following the birth or adoption of a child, the right of workers to return to their job after parental leave, and time off work for urgent family reason. The Agreement leaves much of the detail to be implemented by legislation and/or collective bargaining, but in the case of Britain, however, it is clear that these decisions would have to be taken by Parliament which in the absence of an adequate collective bargaining infrastructure will be the principal vehicle for the implementation of this and other instruments made under this procedure, which at the time of writing does not of course apply to the United Kingdom. Many will regard it as paradoxical that we should be bound to rely mainly on legislation (primary or secondary) to implement the fruits of the collective bargaining process.

It is thus possible under Community law not only for standards to be established by collective bargaining, but also for standards to be implemented by collective bargaining. This is true of several instruments including for example the Working Time Directive⁴ which lays down minimum standards in terms of minimum daily rest periods, rest breaks, weekly rest periods, maximum weekly working time, and annual leave. The Directive provides that it may be implemented either by laws or by agreement between the two sides of industry. It also provides for the possible derogation from standards 'by means of 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'. That is to say '[d]erogations at enterprise level are to be shaped by framework agreements at national or regional level' (Bercusson, 1994: 47). In member states where there is no statutory system for collective

bargaining at national or regional level, derogations may also be allowed by collective agreements concluded between the two sides of industry 'at the appropriate collective level'.

We are not suggesting that the absence of sector bargaining arrangements in Britain would make it impracticable to implement this or other EC Directives. It is clearly possible for legislation to be primary vehicle for the carriage of Directives into domestic law in the usual way and for derogations to be made at enterprise level by collective agreements, this being the appropriate collective level in this country for concluding such agreements. But although this would be feasible, and indeed inevitable unless there are reforms to the bargaining machinery, the effect would be to impose a heavy load on legislation. It would also be to encourage the adoption and application of the barest of minimum standards, and it would be a wasted opportunity for the social partners in each sector to take responsibility for the transposition of these obligations in their own industry in a manner which more accurately reflects the needs and experience of employers and workers in the sector in question. Transposition in this way is not necessarily secured at the expense of flexibility within enterprises for it is clearly contemplated that the possibility for further derogations can be devolved by the terms of a sectoral agreement to individual enterprises.

6. Reform of Collective Bargaining in Britain: Rebuilding from Below

There are two broad approaches which can be adopted to the rebuilding of an institutional framework for the joint regulation of working conditions in Britain. The first involves using legislation to encourage the growth of trade union recognition at the level of the enterprise or firm. The TUC proposes that a union with 50% membership in the defined bargaining unit should be entitled automatically to negotiating rights (TUC, 1995a). Below that, a union which can demonstrate majority support in a bargaining unit by those participating in a survey or ballot, to be conducted by a proposed new Representation Agency, will also be entitled to negotiating rights. Below that a union with lower levels of support, but with at least 10% membership, will be entitled to general consultation rights which would apply to matters other than the mandatory issues prescribed by EC law (notably

collective redundancies and transfers of undertakings); and in work places where there is no union support of this level the employer would be required to establish what is in effect a standing works council (unlike the ad hoc measures which the government is proposing to permit), referred to as 'elections as a fall-back' in which unions would have a right to nominate candidates, and with which consultations would take place on the European issues.

These are interesting and important proposals, although there are a number of problems which have to be addressed, some more important than others. The first is the fact that the extensive discretion vested in this Representation Agency may mean that we are in danger of returning to the battlegrounds of the 1970s when ACAS was severely undermined by judicial review proceedings, at a time when judicial review as we know it today was in its infancy (Ewing, 1995). There is the possibility of problems arising in terms of how surveys are conducted; of determining the scope and extent of the bargaining unit; and of deciding who is entitled to vote at the election. Secondly it is not clear what is to happen to these elections as a fall back procedure if the union should subsequently acquire consultation rights about the same issues in its own right by securing 10% support from the workforce. If the union candidates win a majority of the places in the election, it is proposed that the union should be granted general consultation right and the EFB will not then be established. But if the EFB is established and the union then acquires general consultation rights, is the EFB to be wound up (and 90% non union members disenfranchised), or is the employer to consult with both about the same issues?

The other part of the strategy involves promoting minimum standards agreements across industry, 'which will provide a floor of minimum standards at work for all employees' (TUC, 1995b). A recent example is provided by the reported initiative of the TUC to seek meetings with the leading employers' organisation (the CBI, the Institute of Directors, the Institute of Management, and the British Chambers of Commerce) with a view to setting minimum standards at work in order to prevent good employers being undercut by the bad, and to explore ways by which employers and trade unions can implement standards agreed at European level. In the case of the latter this was said to include the making of agreements on matters such as parental leave and working time, with the law operating as a safety net. It is proposed that the

agreements should deal with training and education, job security, and the 'adoption of a minimum floor under wages that would be a powerful incentive to develop the careers of the low paid and also the performance of the firms for which they work'.⁵ This is self evidently an important initiative which provides clear evidence of the importance of multi employer measures as a means of promoting social justice in the workplace on the one hand and transposing European standards on the other.

It remains to be seen how far voluntary initiatives of this kind can be taken and it may not be insignificant that at least one of the employers' organisations mentioned is reported as having responded in a sceptical vein. The problem is that agreements of this kind are likely to be concluded by those employers who least need to have them in the sense that it is they who are already unionised and are already paying decent wages and observing more than adequate standards. There is thus the question of how any minimum standards agreement of this kind could be introduced into sectors where they are most likely to be needed but most likely to be resisted, and where they are introduced how they could be extended to employers who have no wish to be bound by their terms. At least in the latter case it would be impossible to contemplate the extension of agreements without some form of legal intervention in the form of the procedures once contained in Schedule 11 of the Employment Protection Act 1975. This provided a procedure whereby a trade union could make a claim to require employers paying less than the going rate to observe terms and conditions settled by collective bargaining, or failing which 'the general level' of terms and conditions.

These important proposals are not free from difficulty (Ewing, 1996), and although important may not be enough to ensure the coverage of collective bargaining across large sectors of the economy. The mechanism suggested may not be enough on its own because it requires trade unions to devote a great deal of resources to organisational activity, at a time when resources are stretched. It may be insufficient secondly because it requires the investment of considerable resources for what may be little influence, namely the right once 10% of the workforce is signed up into membership to no more than general consultation rights, which may be little more than an annual meeting in some cases. And it may be insufficient thirdly because it will almost certainly lead to employer resistance and to wasteful and damaging

litigation in the courts which will inevitably have some impact in drawing the teeth of the legislation. All of this is not to deny the merits of the TUC's approach, which seeks 'to combine the best features of voluntarism with the establishment of a wider range of legal rights' (TUC, 1996b: 12). But we do suggest that if the economic goal is to raise standards effectively and comprehensively, the proposed strategy may need to be complemented by other initiatives.

7. The Restoration of Sectoral Regulation of Working Conditions⁶

It remains to be seen how far the TUC strategy will extend the frontiers of collective bargaining and help the unions to march into new territory, though we should not underestimate the flexibility and subtlety of these proposals as a strategy for the extension of collective bargaining. As a package it ought to be able to meet the problems presented by the majority rule requirement of the US legislation and overcome the problems in the United States where a union has to demonstrate 50% support for certification in a 'death or glory' election. It is of the greatest importance that under the TUC proposals a union with 10% membership will be entitled to general consultation rights, not just on what might refer to as the European issues of redundancy and business transfers, but more generally to include 'management proposals involving significant changes in employment numbers or working conditions'. Admittedly it is not clear how far this will go, but it is nevertheless a crucial measure which will reward unions for support and give them encouragement to build up membership to secure full recognition rights thereby giving workers the right to have their terms and conditions covered by a collective agreement.

But although these arrangements will undoubtedly help trade unions, we should also be realistic about these proposals can be expected to deliver. If we return to the OECD survey we are reminded of the fact that countries characterised by single employer bargaining tend to have lower rates of coverage of collective agreements. More specifically the survey points out that collective bargaining coverage in the United States is 18%, Japan 23%, and Canada 38%, all countries not only dominated by establishment-based bargaining, but also countries with a legal framework for trade union recognition which is geared towards single-employer bargaining. It is true that the TUC proposals are

predictably more union-friendly than the legal regimes operating in the USA or Canada. But it remains the case that under these proposals a union will need majority support in the bargaining unit to negotiate on pay, unless the employer agrees to collective bargaining on a voluntary basis. It may well be that we will simply have to become accustomed to lower levels of bargaining coverage and a diluted form of trade union representation, unless this particular strategy is combined with others which seek actively to take the initiative at the sectoral level to encourage multi-employer regulation of working conditions.

(a) The Low Pay Strategy

One possible area which has potential for development is the low pay strategy proposed by the Labour Party. Although the precise details are uncertain, this involved at one stage the creation of a tripartite Low Pay Commission with responsibility for fixing a statutory minimum wage. Proposals published at the time of writing suggest that the Commission will be tripartite in composition, its members presumably appointed by the Secretary of State, and suggest also that its recommendations as for example on the level of the minimum wage, will not necessarily be binding on the government. It is unclear whether the Commission will be asked to set a single flat rate of universal application, or whether it will be empowered or indeed required to set sectoral, occupational or geographical variations. It is also unclear whether it will be empowered to deal with matters other than pay. Is it possible, for example, to regulate pay without regulating in some way the question of working time? Questions will also arise as to the legal status and enforcement of the Commission's recommended minimum, though if adopted by the government any recommendation could presumably be implemented by way of regulation and constitute an enforceable minimum below which no one would be permitted to fall.

Although not conceived to do so, the low pay strategy is capable of metamorphosing into something much more ambitious and much more comprehensive in order to deal with the problem of declining collective bargaining coverage and in order to relieve the State of its responsibility of direct regulation of working conditions through legislation. There are thus two opportunities provided by this strategy. The first relates to the issues which the Low Pay Commission is asked to deal with. As already suggested these need not necessarily be

confined to pay, for even if the Commission is to concentrate its efforts on the low paid, there is no evidence to suggest that pay is the only matter for which the vulnerable need standards to be regulated by a body such as the Low Pay Commission. Obvious candidates for inclusion would be working time and parental leave. The second opportunity relates to the possibility that this Commission could perform these tasks through what might be called sectoral chambers or councils so that rather than having a flat rate or common term for every worker in the country, there are sectoral variations which are sensitive to the needs of the each particular industry or sector. If this approach were adopted it would be possible to build up the sectoral chambers or councils slowly with the emphasis initially on those sectors where there is no effective collective bargaining.

(b) Rebuilding National Bargaining

One possibility is legislation requiring multi-employer bargaining arrangements to be established in all parts of the private sector. A variation of this, which could perhaps be combined with other strategies, is to require national bargaining to be conducted in selected industries, notably the privatised utilities. Yet despite the social benefits, despite the fact that it happens elsewhere, and despite the importance of collective bargaining as a method of workplace regulation, it would be very ambitious to seek to re-assert the primary role of sectoral bargaining in this way. In the first place it would require a commitment to reconstruction as great as that demonstrated in 1917, but without the spectre of Communism haunting Europe to drive the engine of reform. Secondly, it would mean setting up sectoral wages councils or statutory joint industrial councils in very industry, at a time when organisation on the employers' side appears to have weakened if not disintegrated. Thirdly, it would mean confronting rather than appeasing the resistance of employers at a time when there is no ideological stomach for such a fight and no obvious political capital to be gained in picking one.

These problems indicate that a determined effort to re-assert the primacy of sectoral bargaining in Britain would be a great deal to contemplate by voluntary means alone. Even with a strong political commitment, it is open to question whether it could be done without the support and cooperation of employers, and there is no evidence of any

enthusiasms on their part for such structures. Indeed the opposite appears to be the case, with William Brown pointing out for example that '[e]mployers' determination to remain with single-employer bargaining if they are to have any sort of bargaining is strongly implied by their rejection of existing forms of employer collaboration' (Brown, 1993: 198). Further evidence of employer resistance to the idea was indicated some time ago by the CBI (1991) which was clearly of the view that it would be unrealistic to turn back the tide given the trend towards decentralisation in the 1980s. Despite the admitted advantages of a highly centralised system of pay bargaining, they thought it more sensible and in keeping with current practices and institutions, to enhance wage flexibility by moving more rapidly towards decentralisation in pay determination, taking advantage in the process of the weakened market power of trade unions.

(c) A Radical Option: Sectoral Employment Commissions

There are thus a number of steps which could be contemplated with a view to re-establishing sectoral determination of working conditions. There are also a number of problems standing in the way of any such initiative. A more radical approach still, perhaps more accurately reflecting the urgency of the current situation, is to build on all of the initiatives and options canvassed in this paper in order to construct more directly by legislation the conditions in which sectoral regulation may take place. We have in mind here the possibility of sectoral bodies being established by statute (Sectoral Employment Commissions?) both empowered and obliged to regulate the working conditions in the sector in question. Indeed the jurisdiction of such bodies (bipartite in composition) could be extended also to include the transposition of EC Directives, training arrangements for the sector in question, and pension provision for those engaged in the sector. But in addition to the type of problems already discussed in relation to the other options canvassed (which are likely to be compounded in relation to this particular option), there are more practical difficulties likely to arise here and which would have to be faced before an initiative of this kind could be contemplated.

First and most obviously the economy would need to be divided into a number of sectors for this purpose, a huge administrative task particularly when the economy does not neatly divide into identifiable

sectors. Quite apart from the mechanics of the operation who would be its engineer? Secondly there is the question of who would sit on these commissions and what would happen if employers refused to participate: would the procedure be mandatory or consensual? Thirdly there is the question of the functions and duties of these Commissions and what would happen if they were unable to reach an agreement on any particular matter: who would resolve any disagreements between the parties? Fourthly there is the question of how any such initiative would relate to existing collective bargaining structures and procedures: would such a Commission be established where there was adequate coverage of collective agreements? Fifthly, there is the question of the status of any agreement which is made, and the related question of to whom it would apply: would it apply to everyone in the sector in question, or only to union members or only to workers of employers in some way engaged in the process? And finally there is the question of flexibility: would employers and workers be bound by a rigid framework when their own local needs called for a different set of arrangements?⁷

8. Conclusion

We have argued for the need to rebuild in the United Kingdom the institutional framework for the joint regulation of working conditions. This could be done in one of two ways, either by encouraging enterprise based initiatives and their extension outwards and upwards; or by indirect or direct forms of institution building at sectoral level. Although the public policy agenda and debate is currently dominated by the former strategy, in our view this may not be an adequate response on its own in light of the goals which are to be realised. For a number of reasons which we explain this strategy is much less efficient than the latter and is much too unpredictable in terms of whether it could create a comprehensive framework of institutions for the joint regulation of working conditions. This is not to deny that such a strategy has a role to play, but it is to suggest that it needs be complemented by one based more consciously on the building of institutions at the sectoral level. While we are conscious of the political and practical difficulties surrounding the adoption of a 'top down' strategy, we are equally conscious of the fact that the practical difficulties are not incapable of resolution if there is the political will to overcome them.

Notes

1. The principal legislation here is the Local Government Act 1988, as amended.
2. This section draws on IER, 1996, and in particular on work done jointly by the authors and Phil James of Middlesex University, to whom we are most grateful for permission to use it here.
3. Speech of President of the Commission, Jacques Santer, to the European Social Forum, Brussels, 28 March 1996: 'une nouvelle approche de l'emploi et du social comme facteur productif, au coeur de notre projet politique'. See also European Commission 1996.
4. Directive 93/104.
5. *Financial Times* 29 February 1996. For an earlier initiative by the Transport and General Workers Union, see *The Record* August 1995, p. 1.
6. This section draws on Ewing, 1996, and IER, 1996.
7. These issues are considered more fully in IER, 1996.

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