THE LIMITS OF STATUTORY TRADE UNION RECOGNITION

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Abstract
The paper assesses the prospects for Britain's new statutory trade union recognition procedure in the light of empirical evidence concerning union derecognition practice in the 1990s. It draws on 15 cases of union derecognition across a broad spread of employment, matched with comparable cases where recognition was retained. It is shown that in practice, the line between recognition and non-recognition was extremely blurred. A move towards more cooperative workplace arrangements, associated with a 'partnership' model of industrial relations, was common to employers in both categories. As part of this process, the traditional distinction between negotiation and consultation was breaking down. Against this background, we argue that it is far from clear that the current legislative strategy, in focusing on statutory recognition, is the best way of promoting partnership at work.

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Introduction

The statutory recognition rights provided by the Employment Relations Act 1999 appear to offer substantial new legal support for trade unions in Britain. It is, however, far from clear how substantial this support will prove to be in practice, or how far it will alter the extent and conduct of collective bargaining. There have already been some broad-ranging analyses in anticipation of the legislation (McCarthy, 1999; Wood and Godard, 1999; Towers, 1999). This paper uses an analysis of recent empirical evidence to examine and evaluate the legal conceptions that underpin the new procedures.

Although the law increasingly acknowledges alternative forms of employee representation, the promotion of collective bargaining through a recognised trade union is 'still the favoured means of advancing the interests of both unions and workers' (McCarthy, 2000: 530). There are inherent difficulties in using legal sanctions to bring parties to the bargaining table; the 1999 Act, accordingly, holds the threat of *statutory recognition* in reserve for situations where the parties have failed to make provision for *voluntary recognition*. This 'procedural' emphasis means that, on close inspection, what appears to be a statutory right to recognition is in fact nothing of the sort. The Act is therefore likely to disappoint those who see it as the harbinger of a new right to collective bargaining.

The new recognition procedure arguably makes more sense as part of a wider package of measures aimed at advancing 'partnership' at work. However, this is not necessarily consistent with the priority given to the recognised trade union as the preferred model of employee representation. The problem is not simply that the new law will have little or no impact on workplaces where union influence, while significant, is nevertheless far below the membership thresholds set for statutory recognition. Even where the union can show majority

support within the relevant bargaining unit, the new law does little to promote an active, continuing dialogue between the parties. This is in contrast to the alternative 'information and consultation' model of employee representation which is found in various forms in mainland Europe and which has enjoyed, from time to time, the support of the TUC. This approach arguably has the potential to promote partnership based on dialogue in many more workplaces than those which will be affected by the new recognition law, and, indirectly, to widen the range of matters over which bargaining takes place.

The elusiveness of recognition

A natural assumption might be that the act of trade union recognition is clear-cut. A reasonable starting point would be that it is comparable with other acts of legitimation or authorisation of status such as the granting of citizenship, or the granting of diplomatic recognition to a foreign government. By such actions governments provide access to a range of rights which are in principle both defined and enforceable and, furthermore, relate to third parties. Employers, however, are very different from governments. The rights that they can grant to trade unions are solely with regard to transactions with themselves, and do not normally bind third parties. As a result, in the context of British labour law, the definition and enforcement of these rights is both more private and more problematic.

This elusive character of recognition rights has increased with the decline of industrial agreements in Britain. Forty years ago, the granting of recognition to a union would, for the great majority of workplaces, imply at very least conformity with the appropriate industrial agreement. With this conformity would come not only substantive rights to such things as pay and hours minima, but also procedural rights to union representation, both in individual disciplinary procedures and in collective procedures to vary the agreements. Today, with a few exceptions (such as in the electrical contracting, construction, and knitwear industries) such agreements have largely disappeared. They now cover only a small proportion of

the minority of British employees who are still covered by any sort of collective bargaining (Cully and Woodland, 1998). For nearly 70 per cent of all those covered by collective bargaining, and for over 80 per cent of all those covered within the private sector, bargaining is conducted not by sector or industry, but at the level of the individual enterprise, or of some subordinate part of it (Brown *et al*., 2000).

Bargaining at the level of the enterprise does not necessarily proceed on the basis of formally defined recognition rights. The law does not require a recognition agreement to be in writing. Formal acknowledgement of a union's rights often amounts to little more than the specification of its role in a grievance or discipline procedure, or giving it a named role in consultation procedures. There may be no written document indicating that a union has negotiation rights on specified issues. Even where a union plays a substantial role of representation and bargaining within an enterprise, there may be few clues to such an entitlement from anything that has been written down.

Whether or not anything is written down, the status granted to a union by an employer is not a black-and-white issue. It is, as we see further below, a matter of degree. The *depth* of trade union recognition granted by an employer depends, in part, upon the *scope of bargaining*, which is another way of describing the range of issues on which bargaining is permitted (Clegg, 1976: 9). Other aspects of the depth of recognition include the employer's predisposition to make concessions during collective bargaining, the facilities that are offered to trade unions, the extent to which the bargaining relationship is formalised, and the extent to which the employer communicates with employees other than through union channels. The mere fact that an employer has granted union recognition tells one little about the practical value of that to the trade union in terms of effective collective bargaining.

Legal concepts of recognition

There are various legal concepts of recognition, the meanings of which depend on the purpose they are meant to serve. Recognition may be a passport not just to collective bargaining but to certain statutory rights. If an employer voluntarily recognises a union, it comes under a statutory obligation to consult representatives of that union before making certain redundancies; where there is a transfer of the undertaking; before contracting-out of the state earnings-related pension scheme; and in relation to health and safety matters (Deakin and Morris, 2001: ch. 9).[1] Recognition also entitles the union to claim disclosure of information for collective bargaining purposes, and entitles union members to time off for certain activities. In these contexts, 'recognition' refers to 'the recognition of the union by an employer, or two or more associated employers, to any extent, for the purposes of collective bargaining'. Collective bargaining is defined as 'negotiations relating to or connected with' a range of matters grouped under seven categories and including, *inter alia*, terms and conditions of employment; the physical conditions of work; engagement; termination; allocation of work; discipline; trade union membership; trade union facilities; and machinery for negotiation or consultation (see Trade Union and Labour Relations (Consolidation) Act 1992, s. 178). It is sufficient that the employer negotiated with a union on *any one* of these matters for the union to be recognised in this sense.

With the passage of the 1999 Act, an additional definition of recognition was needed, one which would identify those matters over which the employer would have a duty to bargain. Under the new procedure for recognition which has been put in place by the Employment Relations Act 1999, 'collective bargaining', unless the parties agree otherwise, refers to 'negotiations relating to pay, hours and holidays' (see Trade Union and Labour Relations (Consolidation) Act 1992, Sched. A1, paras. 3(2)-(4), as inserted by the Employment Relations Act 1999, s. 1 and Sched. 1) and not to the other matters listed in the 'traditional' definition of recognition referred to above.

Essentially, this means that the scope of matters over which *statutory* recognition arises are narrower than the range of matters which the law associates with the practice of *voluntary* recognition. Thus, the nature of the power relationship between the employer and the trade union will continue to be highly relevant in determining the scope and extent of bargaining, just as it was prior to the coming into force of the new procedure.

There are several other respects in which the new statutory right to recognition is tightly circumscribed. In particular, an application for statutory recognition can only be lodged in respect of bargaining units over which there is not, already, a voluntary recognition agreement. More specifically, a union which is, itself, already recognised over any one of 'pay, hours *or* holidays' (emphasis added) (Trade Union and Labour Relations (Consolidation) Act 1992, Sched. A1, para. 35(2)(b))[2] is apparently barred from bringing a claim for statutory recognition in respect of the relevant bargaining unit. Nor can a union use the statutory procedures to challenge a rival, incumbent union, unless that union is non-independent, and even then, the procedure for statutory derecognition is highly complex (Trade Union and Labour Relations (Consolidation) Act 1992, Sched. A1, Part VI).

At first sight, the new procedure enshrines a *right to recognition* over pay, hours and holidays for unions which can show that they have majority support in the relevant bargaining unit. On closer inspection, this right is far from universal since it only arises in respect of bargaining units where either no union is recognised or where the matters over which recognition has been conceded do not cover any part of the statutory core of 'pay, hours and holidays'. Moreover, it is in essence a right to invoke a procedure rather than a right to achieve a particular outcome. An employer can avoid the imposition of a statutory order by making a voluntary agreement at one of a number of stages within the recognition procedure. If this occurs, the union can hold out for bargaining over the statutory core, knowing that, if it can show majority support in a ballot or otherwise, the CAC must grant it a declaration of statutory recognition. However, the content of statutory

recognition is then dependent on the remedies which are made available against a recalcitrant employer.

If the employer resists entering into collective bargaining once the CAC has made an order of statutory recognition against it, the CAC must specify to the parties what the *Fairness at Work* White Paper refers to as a 'default procedure agreement' (Department of Trade and Industry, 1998: Annex 1), and which the Act defines as 'a method by which they are to conduct collective bargaining' (Trade Union and Labour Relations (Consolidation) Act 1992, Sched. A1, para. 31(3)).[3] The procedure agreement is 'to have effect as if it were contained in a legally-enforceable contract made by the parties' (para. 31(4)). The only remedy to be allowed for breach of this contract by either side is a court order of specific performance (para. 31(6)). It is true that this remedy could be a draconian one, since it might lead to a finding of contempt of court in the event of non-observance. However, specific performance is a discretionary remedy which a court might refuse in what it considers to be appropriate circumstances; where this occurs, there is no possibility of the court making an order of damages against the employer instead. The court also has a discretion in deciding whether or to what extent to punish an employer who is found to be in contempt. Arguably, then, specific performance here is a much less effective sanction than legally binding arbitration which would result in an improvement to terms and conditions of employment of the workers in the bargaining unit (McCarthy, 1999).[4]

If a rights-based conception of the new recognition procedure is difficult to sustain, what of its links to the increasingly important agenda of 'partnership'? The Prime Minister has declared partnership to be 'an essential part of developing a modern workplace that can produce goods and services of quality. It is part of the answer to the quest for economic success' (Blair, 1999). Certainly it is a central theme of the *Fairness at Work* White Paper which paved the way for the Employment Relations Act (DTI, 1999). How comfortably do the statutory recognition procedures sit alongside that theme? To answer this question, it is necessary to look beyond the law and to consider

the nature of contemporary practices relating to recognition and derecognition.

The data

Our evidence of contemporary practices comes primarily from a study of over thirty British firms carried out for the DTI in 1996-98 (Brown *et al*., 1998), in which the research methods are detailed. The initial research strategy was to identify 15 firms which had gone out of their way within their sector to, in their own terms, 'individualise' employment. The firms were selected with the help of employer organisations and trade unions from a broad range of industries and services where 'individualisation' was reported to be an issue. These included utilities, engineering, port transport, printing, telecommunications, newspapers, television, retail, finance, health, education, and chemicals. For these studies we interviewed managers and, where possible, we interviewed employee representatives, who might be members of consultative bodies or ex-union activists.

It became apparent that the term 'individualisation' was used very loosely. Some employers implied that their objective was to achieve *substantive individualisation*, with greater differentiation between individual employees' contracts. In practice, however, this was not the major outcome. Our study confirmed previous findings that, certainly so far as *non-pay* terms and conditions are concerned, firms pursuing 'individualising' strategies generally show no tendency to increase differentiation between their employees (Evans and Hudson, 1994). The standardisation of substantive non-pay terms increased rather than diminished. So far as *pay* terms and conditions were concerned, there was an increase in differentiation but, as we shall see, it was not substantially out of line with that occurring among firms which made no claims to 'individualisation'. Where these firms were distinctive in explicit policy was their pursuit of *procedural individualisation*, meaning the removal of collective mechanisms for determining terms and conditions of employment (Brown *et al*., 1998).

We then decided to assess the consequences of procedural individualisation by selecting 'matching' firms, where trade unions were still recognised, for as many as possible of these 'individualising' firms. With guidance from various sources, firms were selected which were each comparable with one of the 'individualisers' in terms of size and product market niche, but which appeared to be committed to retaining collective bargaining. In addition, some further cases were selected in order to illuminate extreme circumstances: firms that had never recognised unions and, at the other extreme, public services in which collective bargaining was deeply embedded.

This sample was not intended to be statistically representative. An analysis of the broadly contemporary WERS98 for another purpose has made it possible to place the sample firms in statistical perspective, and this does, as it happens, suggest that over a range of comparable dimensions they are broadly characteristic of their sectors (Brown *et al.*, 2000). From the point of view of this paper what is important is that the cases are firms over a wide range of employment where the issue of trade union recognition has been, is already, or may become, controversial.

The nature of derecognition

There has been a substantial decline in union recognition in Britain - from 66 per cent of workplaces of 25 or more employees in 1984, to 53 per cent in 1990, and to 45 per cent in 1998 - chronicled by WERS98 and its predecessors (Cully *et al.*, 1998). Earlier studies had suggested that most of this did not arise from the active withdrawal of recognition by employers, so much as from employee apathy and from a tendency for recognition not to be granted at newly established workplaces (Millward, 1994; Geroski, Gregg and Desjonqueres, 1995; Beaumont and Harris, 1995; Disney, Gosling and Machin, 1996; Marginson *et al.*, 1996). Later studies provide evidence of an increase in active derecognition strategies in the late 1980s and early 1990s (Claydon, 1996; Gall and McKay, 1994, 1999). Our own initial

case studies were aimed at employers who, by virtue of being self-conscious 'individualisers', were adopting an active derecognition strategy, and they were mostly doing so during the first half of the1990s.

The nature of derecognition varied greatly between the firms we studied. It varied in coverage, in scope, and in formality. We start with *coverage*, by which we mean the bargaining units within a workforce for which unions are recognised. Most of the employers derecognised selectively. The most common practice was just to withdraw recognition from unions covering managerial staff. Although there are exceptions, this has been widespread in those industries and services which have recently been privatised, such as the utilities, which have thereby moved into line with comparable private sector enterprises. Within the established private sector we had cases in finance, publishing and retail. Some firms have gradually extended their definition of affected managerial grades downwards. Other firms selected bargaining units for derecognition by their function. For example, a retail firm withdrew recognition from its store staff but not from distribution staff, except where it established a new distribution depot. A chemicals company withdrew recognition at a major site, first from its supervisory staff, and later from its maintenance staff, but not from its process staff.

There were notable variations in the *scope* of derecognition, meaning the range of issues affected. For a substantial minority of our cases, derecognition was confined to collective issues. These employers considered it important (or were prepared to concede) that employees could continue to be represented by their trade union in *individual* disciplinary and grievance procedures - a practice that has since received statutory support from the Employment Relations Act.[5] We had cases of this in printing, health, engineering and utilities. Some encouraged individual membership, and some (perhaps with ulterior monitoring motives) continued to deduct their employees' trade union dues. A minority of our firms which allowed unions no collective bargaining rights did allow them a formal position on *consultative*

committees, most commonly health and safety committees. Newspapers, chemicals, retail and utilities provided examples.

Rather than specify what the scope of recognised activity was, some firms preferred to specify what it was not. Most importantly, some made a point of withdrawing bargaining recognition for the single issue of pay. We had cases in television, engineering, software, and telecommunications where, with the introduction of individual performance related pay, the unions were informed that there would be no more negotiations over an annual pay increase, but that there was no intention to terminate all relationships with the union. In some cases this proved to be a prelude to a gradual (sometimes terminal) further erosion of the scope of bargaining.

If we move from the formal to the *informal* status of trade unions, the picture becomes still more complex. The most extreme case, where management appeared to have severed every link with the old union, was a firm in port transport. But otherwise managers in firms which had derecognised their unions, sometimes with considerable acrimony and conflict, made efforts to maintain lines of communication with the unions which they had rejected. A newspaper company, for example, which had withdrawn all formal recognition rights in a dramatic show of force, frequently invited full-time officials in for meetings ‘as long as the union understands that it has no rights in these things because we have no agreement with them’. The manager saying this felt that the officials could provide employees with a sense of perspective. A television company and a publishing company, which had both had stormy derecognition episodes, later settled down to a routine of informal meetings with full-time officials. Indeed, interviews for a subsequent research project suggest that this sort of informal working relationship may be the practice of a high proportion of employers who have withdrawn all formal recognition rights (Oxenbridge *et al*., 2001).

Attitudes were more mixed so far as lay union officials were concerned. Some firms where the old relationship had been difficult

(in some docks and newspapers, for example) denied any consultative status to ex-stewards. But for others, some sort of *de facto* consultation with ex- or current stewards continued. We met examples in engineering, television, chemicals, an ambulance trust, and a utility. Indeed, in the last of these the management asked the lay branch secretary of the derecognised union to chair an internal task force on cultural change, and his role and facilities were further developed in partial response to Labour's victory in the 1997 Election. However, for many of these firms the denial of formal recognition made ex shop stewards a wasting asset, gradually losing touch with events and the workforce unless, as sometimes happened, they reappeared as elected representatives on newly created non-union consultative committees.

Derecognition encompassed employer attitudes towards unions which ranged from outright hostility to tacit warmth. Within some companies this range of attitude was still evident among the managers themselves. Employer attitudes were often reflected in the degree of confrontation in the way in which the derecognition occurred. In several cases, for example, the employer had launched a frontal attack on the union: temporary work cover was arranged in case of strike action; existing collective agreements were declared void; notice was served on all employees; and they were invited to re-apply for jobs (sometimes substantially fewer jobs) on the basis of employer-designed contracts. In other cases a more cautiously incremental or partial approach was used, such as when management announced it was not going to bargain any more over pay. Even where very aggressive tactics were employed initially, there was often a softening in the employer's stance as a new set of collective relationships developed and bedded down. The status of derecognition, in short, depended upon employer attitudes which were not only varied, but fluid.

One final observation is relevant to understanding the nature of derecognition. The attitude adopted by the derecognising employer appeared to have a marked influence upon their employees'

propensity to retain union membership. There was considerable variation in the extent to which membership density fell in bargaining units which had been denied recognition during the subsequent three or so years. In some it held up as high as 80 per cent and in some it tumbled to 20 per cent. Craftsmen and journalists were examples of groups who tended to retain membership for professional reasons. Otherwise membership generally held up higher where managers provided the unions with residual rights and informal roles.

The nature of recognition

If the notion of union derecognition covers such a diversity of status, is that of recognition more clear-cut? A superficial indication of the variability of recognition is provided by a CBI survey of 830 private sector employers carried out in early 1999 (CBI, 1999). Although the survey's representativeness is unclear, of those reporting that they recognised trade unions at all, 15 per cent said it was only for consultation, and six per cent said it was only for disciplinary and grievance purposes. The WERS98 survey also suggests there to be marked variations in bargaining scope (Brown *et al*., 2000).

The nature of recognition requires closer scrutiny. We do this with reference to the firms that we selected to 'match' those that had derecognised unions in terms of their size and product market, but which had ostensibly maintained collective bargaining. What, in terms of the characteristics by which we have described derecognition, was the nature of union recognition at these firms?

As a preliminary point, it should be said that the varied challenges of deregulation, sharpening competition, privatisation and more demanding shareholders which lay behind our initial firms' strategies involving derecognition, were no less acute, and very similar sector by sector, for the firms we chose to match them. Their objectives in terms of productivity improvements were also similar. These were being pursued in a similar environment of legal and political change

for trade unions. Even where collective bargaining continued during the 1990s, its conduct changed, and these firms were no exception.

This is evident with the *coverage* of union recognition. Despite their apparent commitment to collective bargaining for the bulk of their workforce, most of our cases withdrew recognition from unions covering management grades during the 1990s, and in certain cases earlier. For some firms the switching of managers to individual contracts was an accompaniment to privatisation, but it was also to be found in long-established private sector companies in, for example, paper, finance, publishing, and the docks.

It was in the *scope* of recognition that changes were more remarkable. Traditionally, in many industries such as engineering, procedural agreements might make reference to 'managerial prerogatives', but the procedure was seen as a general purpose safety valve and the scope of issues it covered was undefined. Far greater constraints appear to have been placed on collective bargaining during the 1990s. Perhaps most remarkable in historical terms are constraints on pay bargaining. A high proportion of the firms we spoke to which appeared to offer full recognition to non-managerial grades had in fact withdrawn it with regard to pay bargaining. Examples were companies in commercial television, car assembly, international publishing, book distribution, provincial newspapers, utilities, and port transport. Despite often high union membership (100 per cent in the case of the docks) and an active shop steward organisation at these firms, pay rises for most of the 1990s had effectively been fixed by employer imposition, for some with a cost-of-living formula. Nor was it just by withdrawing the annual pay round that many firms had changed their unions' bargaining agenda. Many of the firms which still recognised unions, some of which still observed an annual pay round, had introduced individual performance related pay based upon managerial discretion. It should be added that generally they had not gone as far in this direction as those firms which had derecognised unions altogether. The WERS98 corroborates this picture of a decline in traditional pay bargaining; a substantial proportion of managers (34

per cent) and an even higher proportion of worker representatives (47 per cent), in workplaces where unions were recognised, reported that they consulted over, rather than negotiated an agreement over, pay (Brown *et al*., 2000).

There was also ample evidence of the narrowing of the scope of bargaining with regard to pay structures. Unions which were accustomed to bargaining over complex grade structures and tightly regulated, often job evaluated, internal pay structures, found much of this denied to them. To take grade structures first: among those of our cases which retained recognition, there was a general tendency to reduce the number of job grades substantially. It was to much the same extent as among those which had derecognised completely. This reduction was unavoidably associated with less precision of job description leaving more (when unions are weak) to managerial discretion. Greater simplicity of job grades itself had implications for the defence of established internal pay differentials.

More shocking to unions was the tendency for many firms in effect to reject the long-standing internal pay structures that had evolved through collective bargaining. They did this by imposing lower rates for certain occupations in order to reflect the prevailing rates being paid outside in the local labour market. This was commonly called ‘introducing market rates’. Some of our cases did this just for new recruits; others did it for existing employees, ‘red circling’ their pay so it did not fall in money terms. We actually found more examples of this among those of our cases which recognised trade unions than among those which had derecognised them. Examples were in provincial newspapers, engineering, publishing, retail, television, utilities, and the docks.

Such substantial narrowing in the scope of recognition at these firms could be considered tantamount to partial derecognition. However, it would be misleading to suggest that, where collective bargaining continues, the scope of recognition has *simply* narrowed, with the expansion of the employer’s frontier of control. The undoubted fact

that across much of employment the impact of unions on job regulation diminished does not necessarily imply that the scope of recognition also diminished. What constitutes the withdrawal of an issue from the scope of recognition is a refusal by management to discuss it with union representatives with any possibility of modifying the outcome. An employer's refusal to discuss the annual pay round would be an example of this. This was often found alongside a willingness to have genuine negotiations over more peripheral issues such as sick pay, absenteeism and pension provisions. A notable aspect of collective bargaining arrangements was also the willingness of unions to discuss, and for employers to modify, changes in working practice, many of which previously might have been considered inadmissible, because they were contrary to national agreements or to established practice.

There is also evidence that new issues were being brought into collective bargaining during this period. These include non-traditional issues such as job security, family friendly policies, and pensions (Dex and McCullough, 1997; AEEU, 1998), as well as more general issues of work organisation. In making our matched comparisons we were interested to establish to what extent the act of union derecognition had provided employers with an advantage in introducing more productive working practices (Brown et al., 2000). So far as it was possible we compared practices affecting the temporal flexibility and the functional flexibility of labour in our 'matched pairs': flexible shift patterns, manning levels, multi-skilling and so on. Our conclusion was that the firms that had derecognised trade unions had not achieved any advantage in terms of either temporal or functional flexibility over comparable firms which continued to recognise them. What was notable for the present discussion was that, in firms where unions were recognised, they had been involved in negotiating and consultation on these changes and had been able to influence the form which the flexibility took.

This change was accompanied by a significant blurring of the line between negotiation and consultation. A provincial newspaper we

studied had unilaterally terminated its long-standing house agreement with its unions but had granted them a (much diminished) 'procedural protocol' instead. A fully unionised dock firm made clear to its elected works council that it was a consultative committee not a negotiating forum, and no alternative was offered. A utility 're-recognised' its union on the understanding of a greatly narrowed scope of bargaining. A car assembly company insisted that, since the electorate for its 'advisory board' consisted of the entire workforce, the members need not be union members - a constitutional arrangement which has been common among newly created European Works Councils.

These changes suggest a shift in the function of the union, away from the traditional role of negotiating on behalf of its members, to a wider but looser role of expressing the collective voice of the workforce over a range of matters relating to work organisation. In these cases, the retention of recognition was a strategic employer decision with far-reaching implications for the constitution, allegiances and resources of the trade union organisation with which the employer chose to deal. Many firms witnessed a process of 're-recognition' during the 1990s, with the creation of new procedural forms implying diminished recognition rights but, nevertheless, a continuing role for union voice.

Partnership in practice?

Employers grant trade union recognition as a means of establishing a procedural structure within which a power relationship can be mediated. We have argued thus far that a diminution in union power has been associated with the diminution in the coverage and the shifting of the scope of recognition in many industries. Employers have exercised greater discretion to determine the terms of recognition. Most important of these terms have been the bargaining units and bargaining agents with whom they deal, and their choice has increasingly been for enterprise- or site-based bargaining with 'single-table' arrangements. A consequence has been that the agents of the

union whom they have chosen to recognise have been representatives who are also their own employees, whose independence of the firm is thereby compromised and who are becoming increasingly isolated from their union organisation outside.

The major change in the trade unions' role in many of the case study firms which continued to grant recognition arose because changed competitive circumstances reduced the employing unit's capacity to earn economic rents. In other cases, changed competitive, managerial and legal circumstances reduced the unions' ability to gain access to these rents. But despite the diminution of this 'rent-sharing' role, where trade unions retained recognition, they also retained a representative role. This generally permitted both representation for individual employees with grievances and disciplinary problems and also collective representation for wider consultation over workplace changes. The less the opportunity for 'zero-sum' or 'distributive' bargaining, the greater the attractions *for both sides* of 'positive-sum', co-operative' or 'integrative' interactions. Consequently, unions in this period increasingly built upon their traditional role as a vehicle for representative consultation. Nor was this a strategy of despair. Shareable economic rents can be generated not just through collusion and the control of competition, but also through the sort of co-operation between unions and management which may facilitate innovation and competitive success (Appelbaum and Batt, 1994).

From the employers' point of view, even where trade unions were vulnerable, collective representation continued to have a role because much contemporary competition creates continuous pressure to maintain high quality and to increase productivity. Many firms, especially over a certain size, found that the task of motivating employees to cope with these pressures cannot be left to individualised incentive structures alone. Collective voice, in some form, had a role to play.

The key question for trade union recognition is how far this collective voice is affected by *independent* employee representation. The

competitive survival and evident success of many of the derecognising firms in the present study might imply that such strategies can be successfully pursued without trade union involvement. Following derecognition, it was common for employers to set up non-union consultative bodies containing elected employee representatives, as a basis for the expression of collective employee voice. It was evident, however, that the larger non-unionised firms often had difficulty in making these consultative arrangements effective. Employee representatives were often uncertain about both their authority and their mandate (Brown *et al*., 1998).

On the other hand, it was evident in the 'matched', unionised (and comparably competitive) firms, that the retention of collective bargaining was seen by employers as important in legitimating the process of restructuring. As well as offering the 'voice' of a representative consultative process, collective bargaining with relatively independent trade union organisations was perceived to be a means of enhancing the credibility of employers' promises to respect job security and the long-term career interests of those employees who retained their jobs. The decision of our case study firms whether or not to retain and develop collective bargaining appeared to be heavily dependent upon their perception of the availability of a trade union 'partner' with whom they could deal and whose 'voice' they could trust. The form of recognition that they subsequently granted reflected their intention to reinforce a 'partnership' relationship which embodied this voice (Brown *et al*., 1998).

All this is reflected in the rising interest in 'partnership' arrangements nationally (Guest and Peccei, 1999). In early 1999 the TUC unequivocally described 'partnership' as the key to 'new unionism at the workplace' (Trade Union Congress, 1999), and in 2001 it founded a Partnership Institute to develop this notion in practice. The partnership idea balances, on the one hand, a trade union commitment to enterprise success with, on the other, a reciprocal employer recognition of the union's legitimate differences in interest and also the employer's granting a high priority to employment security, career

development and information exchange. A similar approach is evident in the approach that most major British unions are adopting in their efforts to win recognition as part of their strategy of winning and retaining members.

Statutory support for partnership?

How far is this potentially productive trade-off one which finds support in the law governing employee representation? Both the 'traditional' legal definition of recognition and the new definition used to define the employer's duty to bargain under the statutory procedure are premised on the 'pluralist' conception of collective bargaining. Recognition is viewed as a prelude to negotiation, which is to be conducted on the basis of the formal separation of the parties' interests. The result is expected to be a collective agreement which, although it will almost invariably lack legal force between the parties to it, is essentially a private contract. This notion of recognition excludes less formal arrangements of the kind which, as we have just observed, are common in practice, under which the employer may refuse to negotiate over pay and conditions but nevertheless engages in informal consultation or allows the trade union to represent individual members for the purposes of grievance and/or disciplinary hearings.

As a result, the traditional legal definition does not capture the increasingly common position of trade unions which continue to have influence within an organisation, without having formal collective bargaining rights. In the practice of the mid to late 1990s, 'derecognition' involved a spectrum of degrees of influence. It is not only that some firms which formally derecognised their unions actually made use of them informally. It is also that other firms that provided apparently substantial recognition rights, as we have seen, significantly narrowed the scope of bargaining.

How far can the statutory procedure be used to restore the scope of collective bargaining to where it stood prior to the wave of

derecognition in the 1990s? A first point to note is that unions which currently enjoy partial recognition, in the sense just described, may not be able easily to invoke the statutory procedure, which excludes claims made by unions which are recognised over just one of 'pay, hours or holidays'. Equally, those unions which currently enjoy informal consultation and information rights will not be in a position to trigger the new law unless they can show that they enjoy majority support in the relevant bargaining unit. This is a high threshold to cross. The implication from our empirical study is that the recognition law will do little or nothing to encourage more cooperative approaches in those many workplaces in which unions currently exercise collective voice on behalf of a minority of the workforce.

What of those workplaces in which unions can demonstrate majority support? The use of specific performance as the sole remedy for breach of a default procedure agreement holds out the unwelcome prospect of a degree of formal judicial intervention in the collective bargaining relationship which is without recent parallel in Britain unless we count the experience of the Industrial Relations Act between 1971 and 1974. In the more legally constrained, and arguably more confrontational attitudes of North American labour relations, there are acute difficulties in enforcing rights to 'bargain in good faith' (Anderson *et al.*, 1989). In the more amorphous, informal, and increasingly (of necessity) cooperative climate of British industrial relations, it must be questioned whether courts can effectively enforce collective bargaining by direct intervention and, in particular, through such a blunt instrument as an order for specific performance (Hepple, 1999).

An alternative view is that the procedure for legally imposed recognition is potentially so unpleasant that employers (with the encouragement of unions) will seek to avoid it by adopting recognition on a voluntary basis. As we have seen, the Act provides numerous escape routes of just this kind, enabling employers to avoid the intervention of the Central Arbitration Committee and (at a further remove) of the courts. It is, on this view, possible that the Act will operate indirectly to foster voluntary collective bargaining, with the

compulsory recognition procedures staying in the background. In this way, a conclusion more consonant with the currently influential idea of 'reflexive law' – law which operates through the indirect encouragement of self-regulation rather than through more direct prescription (Rogowski and Wilthagen, 1994) – would have been achieved.

Even if this is the case, it does not alter the implication of the earlier part of our analysis, which is that the nature of the trade union recognition which will be achieved in these circumstances will be poorly defined, and very much still at the employer's discretion. The provision of a bargaining right to one party in a bilateral relationship can only be a weak provision if its exercise is ill-defined, difficult to enforce, and (in practice) largely dependent on the goodwill of the opposing party.

The unwelcome conclusion is that the new recognition law may well be ill suited to the government's aim of promoting partnership. Yet, if enhanced cooperation at work is the aim of the present government's labour law policy, there was a much better alternative close to hand in the form of laws which grant unions and other employee representatives rights to information and consultation. Unlike the (limited) encouragement to dialogue offered by the recognition law, these rights are not confined to workplaces where there are recognised trade unions. Following rulings of the European Court of Justice in the early 1990s (Cases C-382/92 and C-383/92 *Commission* v. *UK* [1994] IRLR 412), United Kingdom legislation was amended in 1995 to provide for information to be given and consultation to take place over redundancies and transfers with elected representatives of the workforce at establishment level. Originally, employers had a choice of consulting either with a recognised union or with separate workforce representatives. With the election of the present government, the law was changed to restore the rights of the union to be regarded as the exclusive channel for representation in workplaces with recognition, but with provision for employee representatives to fulfil this role in other cases.[6]

This extra-union form of representation has traditionally been regarded with hostility by trade unions, for reasons explained by McCarthy (2000: 532-533): employee representatives normally have no rights to enter into negotiations over terms and conditions; they must represent the view of members and non-members alike; and their role is capable of being used by management actively to undermine independent trade union representation. However, as McCarthy also points out, union attitudes have become less dogmatic over time, in response to falling union membership, European Community legal initiatives, and the example of successful 'universalist' models of representation in mainland European systems. Indeed, the idea that unions might make use of statutory channels of employee representation to further collective voice was adopted by the TUC in its proposals for changes to the law following the rulings of the ECJ (Trade Union Congress, 1995a, 1995b), proposals which were not only rejected by the then Conservative government but which have also formed no part of the present Labour government's policy.

The relationship between collective bargaining and consultation is a complex one. The clear distinction between the two which operates, for example, in US labour law, is blurred in the context of European Community labour standards which require employers to consult with employee representatives 'with a view to reaching agreement' on such matters as redundancies and transfers of undertakings (Wedderburn, 1997; Deakin and Morris, 2001: ch. 9). Failure to comply with these laws can result in financially-damaging claims being made against employers; in contrast, as we have seen, the only remedy allowed for a failure to operate the default procedure agreement under the statutory recognition procedure is an order of specific performance, which may be highly uncertain in its effect. Studies of restructuring show that the existence of an effective sanction in the background can be used to encourage employers to come to the bargaining table when they might otherwise have limited incentives to do so (Armour and Deakin, 2000). In effect, then, the European model uses information and consultation laws to ease employers into a position where bargaining seems a more attractive option than would otherwise be the case.

Moreover, the EC Directives envisage the establishment of a *process* of dialogue which is intended to form the basis for the collective participation of employees in the enterprise or workplace. As such, they have much in common with a mainland European tradition of employee representation which aims at 'greater social consensus and a greater capacity to respond to changed economic circumstances in broadly beneficial ways' (Rogers and Streeck, 1994: 148). This philosophy is also reflected in the draft EC Directive on information and consultation (Commission, 1998; subsequent amendments to this proposal are discussed by Bercusson, 2001). This would greatly extend the range of matters over which information and consultation would be required at workplace level. However, the British government, now almost alone of the EC member states, has fought to oppose it (Bercusson, 2001).

While information and consultation laws clearly do not *guarantee* effective collective bargaining, the same is true of statutory recognition procedures which, at the end of the day, cannot create the goodwill on which a meaningful bargaining relationship depends. In the event of employer resistance, they can only deploy legal sanctions of doubtful utility. The issue is whether direct sanctions of this kind are going to be more effective at promoting collective bargaining than the indirect encouragement to dialogue which is provided by information and consultation laws. On the basis of the empirical evidence which we have presented here, that must be doubtful.

Conclusion

Our argument is not that the Employment Relations Act is unsupportive to trade unions. Quite apart from many provisions which reduce impediments to organisation and enhance the union role, the Act appears to have a powerful demonstration effect in marking a clear shift in official attitudes towards trade unionism (Oxenbridge *et al*., 2001). Our argument relates specifically to the procedures for statutory recognition.

We have argued that recognition and derecognition are, in practice, very diverse phenomena because they reflect the varied choices of individual employers in legitimising their bargaining relationship with their workforce's union organisation. Statutory intervention to enforce the enhancement of that relationship may have as little likelihood of success as compulsory marriage has of achieving domestic stability. In building the relationship, trade unions are increasingly having to earn - not to fight for - the degree of recognition from employers to which they aspire. Their task is made more difficult by the knowledge that they cannot do so effectively unless they continue to uphold and represent their members' unavoidable differences of interest with their employers.

Given the government's stated objectives, the issue for the law now is how to encourage self-regulation along lines which open up a space for unions which was denied them by the hostile laws and practices of the 1980s and 1990s. This is a role in which they mediate between organisational change and the defence and articulation of employment rights (Brown et al., 2000). It is far from clear that this role will be enhanced by the new recognition procedures which, in this respect, arguably compare unfavourably with the information and consultation model which enjoys wide and growing support in mainland Europe and in legal initiatives of the European Community. Is it possible that the government's policy of promoting statutory recognition while opposing the extension of information and consultation rights through EC law will prove to be a historic missed opportunity?

Notes

[1] It should also be noted that an employer which is subject to a statutory recognition order in the sense identified in the text (below) must enter into consultation on training. See Trade Union and Labour Relations (Consolidation) Act 1992, ss. 70B-70C, as inserted by the Employment Relations Act 1999, s. 5.

[2] The use of the word 'or' rather than 'and' in this provision is highly ambiguous, but the view in the text would seem, on balance, to be the most natural meaning of this provision. It also appears to have been the government view of the provision, as stated during the relevant Parliamentary debates: see Lord Macintosh of Haringey, *Hansard*, House of Lords, 6 July 1999, at cols. 1038-1039, and Ian McCartney, *Hansard*, House of Commons, 26 July 1999, col. 36.

[3] This is not the same thing as a collective agreement; the procedure does not require the employer to reach such an agreement even with a union which has been granted a declaration of statutory recognition. Under the Trade Union Recognition (Method of Collective Bargaining) Order, SI 2000/1300, a method is laid down which the CAC must take into account (but has some discretion to depart from) when determining the default procedure imposed upon the employer.

[4] It should also be noted that an award of statutory recognition does not prevent the employer making separate, individual contractual agreements with employees. For the implications of this see Wedderburn, 1998.

[5] Ss. 10-15 of the Employment Relations Act 1999 provide a worker with a right to be accompanied by a union officer or a fellow worker in grievance or disciplinary hearings with their employer.

[6] A full account of information and consultation laws lies outside the scope of this paper, but see McCarthy, 2001, and Deakin and Morris, 2001: ch. 9.

Legislation

Employment Relations Act 1999, s. 5; ss. 10-15.

Trade Union and Labour Relations (Consolidation) Act 1992: ss. 70B, 70C (as inserted by Employment Relations Act 1999, s. 5); s. 178; Sched. A1 (as inserted by Employment Relations Act 1999, s. 1 and Sched. 1).

Trade Union Recognition (Method of Collective Bargaining) Order, SI 2000/1300.

Cases

Cases C-382/92 and C-383/92 *Commission* v. *UK* [1994] IRLR 412.

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