DOI:
10.1093/indlaw/dwx001

Document Version
Peer reviewed version

NEW PERSPECTIVES ON COLLECTIVE LABOUR LAW - TRADE UNION RECOGNITION AND COLLECTIVE BARGAINING

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ABSTRACT

Drawing on the *Manifesto for Labour Law* published earlier this year, we consider Kahn-Freund's assessment of British labour law (for the first three quarters of the twentieth century) as voluntarist, abstentionist collective laissez faire as espoused by Simpson. In contrast (and utilising Simpson's tool of 'law in context'), we point up the rôle of the state during this period in implementing labour law policy in support of extensive collective bargaining by the use of public administrative law powers (in the contemporaneous sense in which such law was understood). Drawing on this legacy, we set out the measures by which collective bargaining, in particular at sectoral level, might be restored. We deal with the establishment of Sectoral Employment Commissions consisting of equal numbers of employers and union representatives (similar to the old Joint Industrial Councils). In default, tripartite bodies based on the extinct Wages Councils would be established. We propose the (re)use of 'fair wages clauses' (i.e. public procurement arrangements) to require participation in collective bargaining and the observance of collective agreements. We consider the reciprocal issues of representation at the workplace, union access thereto and reform of the recognition machinery, taking in Simpson's analysis of the current and earlier recognition legislation.

1. INTRODUCTION

The biggest problem in collective labour law in the UK is the rapidly declining number of workers covered by a collective agreement. Immediately after the Second

World War collective bargaining density was reported to be 85%.[1] Although there were fluctuations thereafter, by the time of Thatcher's accession in 1979, coverage stood at an estimated 82%. Inexorable decline has followed during the last 37 years,[2] coverage today being around 20% and falling. This means that in the course of a working life, collective bargaining density has fallen from more than four out of five workers to little more than one in five, lower than before the First World War.

This is a not a problem unique to the UK, though the longevity and consistency of the decline is probably greater here than elsewhere. As it is, the UK has the lowest level of collective bargaining of any country in the EU, except for Lithuania.[3] The UK is one of only a few EU states where collective bargaining density currently is less than 50% (though density is falling elsewhere as well).[4] But although we are in the relegation zone, we are not yet bottom of the league of developed nations, since we have a coverage higher than the United States, whose ineffective and controversial trade union recognition laws we have largely adopted.[5]

We and others have argued in *A Manifesto for Labour Law* that it is vital that the trend is reversed and collective bargaining coverage restored.[6] The *Manifesto* set out the reasons for rebuilding collective bargaining, which it referred to as the Four Pillars of collective bargaining. Although space does not permit a full reiteration here, the Four Pillars highlight collective bargaining as amongst the principal means of achieving (i) workplace democracy, (ii) social justice, (iii) economic efficiency,

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[1] Ministry of Labour and National Service, *Report 1939 - 1946*, Cmd 7225 (1947).
[2] See K.D. Ewing, J. Hendy and C. Jones (eds), *A Manifesto for Labour Law: Towards A Revision of Workers' Rights* (Liverpool: IER, 2006), 4 and fns 27 and 30.
[3] L. Fulton, *Worker Representation in Europe* (Brussels: Labour Research Department and ETUI, 2013).
[4] Discussed in K.D. Ewing and J. Hendy, *Reconstruction after the Crisis: A Manifesto for Collective Bargaining* (Liverpool: IER, 2013), at 2, and 34-39.
[5] For a sympathetic (although dated, still relevant,) critique of the US system (and an argument that the problems can be cured), see W.B. Gould, *Agenda for Reform - The Future of Employment Relationships and the Law* (Boston: MIT, 1996).
[6] Ewing, Hendy and Jones n.2, fn 2. We acknowledge the force of the arguments by E. McGaughey, 'A Twelve Point Plan for Labour, and a Manifesto for Labour Law' (forthcoming).

and (iv) the fulfilment of the UK's relevant international legal obligations,[7] consistent with the rule of law.

As Bob Simpson reminds us, however, we need to be clear about why we are addressing the problem of collective bargaining through law.[8] In the pages that follow we take the need to halt the decline as a given and focus instead on the role of law in building the structures necessary to restore extensive collective bargaining coverage. In doing so, we warmly acknowledge the learning and scholarship of Bob Simpson, particularly in relation to the trade union recognition procedures first introduced in 1971.[9] While our endeavours have been enriched by Simpson's insight and wisdom, it goes without saying that we are not always in full agreement.

2. THE LEGACY OF COLLECTIVE LABOUR LAW

It is commonplace that Simpson's work is strongly influenced by Kahn-Freund, and as such he is perhaps one of the most uncritical exponents of Kahn-Freund's interpretation of the development of British labour law.[10] It would be difficult to find a scholar more committed to Kahn-Freund's ideas of voluntarism, abstention and collective laissez faire, or a scholar more sensitive to and aware of the distinction between auxiliary, regulatory and restrictive roles of the State.[11] This is most visible in Lewis and Simpson who wrote:

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[7] See Ewing, Hendy and Jones n.2, ch 2.
[8] B. Simpson, *Trade Union Recognition and the Law* (Liverpool: IER, 1991), 31.
[9] Apart from works cited below, Simpson's important work on or dealing with recognition includes R.C. Simpson and J.C. Wood, *Industrial Relations and the 1971 Act* (London: Pitman, 1973), ch 9.
[10] As to Kahn-Freund, see especially, the two classic pieces: O. Kahn-Freund, 'Legal Framework', in A. Flanders and H. Clegg (eds), *The System of Industrial Relations in Great Britain* (Oxford: Basil Blackwell, 1954), 42, and O. Kahn-Freund, 'Labour Law' in M. Ginsberg (ed), *Law and Opinion in England in the Twentieth Century* (London: Stevens & Sons, 1959).
[11] Other sympathetic accounts include A. Bogg, *The Democratic Aspects of Trade Union Recognition* (Oxford: Hart, 2009), ch 1; D. Brodie, *A History of British Labour Law 1867 – 1945* (Oxford: Hart, 2003), and P L Davies and M Freedland, *Labour Legislation and Public Policy* (Oxford: OUP, 1993). For an important re-assessment of Kahn-Freund, see R. Dukes, 'Otto Kahn-Freund and Collective Laissez-Faire: An Edifice Without A Keystone?' (2009) 72 MLR 220.

> In the period after the war industrial self government was elevated to an ideological belief common to both sides of industry. Abstention of the law was a central plank of the prevailing voluntarist ethos in industry. The nineteenth century doctrine of individual laissez faire gave way to what Kahn-Freund brilliantly described as collective laissez faire.[12]

In the same pages, Lewis and Simpson wrote that 'the ethos of voluntarism grew out of the relatively harmonious social and prosperous economic climate of the mid twentieth century',[13] which is an understanding that may need to be revised as we become more aware of government anxieties during the Cold War, and the role played by the official trade union leadership in managing these anxieties. It is true that 'there was a notable degree of consensus over the legitimacy of the labour movement and a whole range of fundamental socio-economic issues'.[14] But this was a temporal consensus that was gradually to evaporate as the external threat dissipated and neo-liberal ideology gained traction.

In any event the collective bargaining structures operating from the mid-20th century had been developing for some time before then, and had been revived and created in a much more troubled time.[15] So, while it is claimed that 'before the 1970s, collective bargaining was an extra legal process',[16] that description gives no clue as to the role of the State in creating the structures in which the process of collective bargaining took place and in which disputes could be resolved when it failed. It may be more accurate to say that collective bargaining was not a statutory process of the kind found in the NLRA. But it was nevertheless a process established by the exercise of State power, which in turn clearly had legal authority. In that sense, it was a legal process.

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[12] R. Lewis and B. Simpson, *Striking a Balance? Employment Law after the 1980 Act* (Oxford: Wiley-Blackwell, 1981), 9-10.
[13] Ibid., 10.
[14] Ibid.
[15] See K. D. Ewing, 'The State and Industrial Relations: *Collective Laissez Faire* Revisited (1998) 5 HSIR 1. Also, C. Howell, *Trade Unions and the State – The Construction of Industrial Relations Institutions in Britain 1890-2000* (Princeton: Princeton University Press, 2005).
[16] B. Simpson, 'The Changing Face of Collective Labour Law' (2001) 21 OJLS 705, at 713.

Is remains uncertain why the depiction of the principles of abstentionism, voluntarism and collective laissez faire became accepted so widely as the characteristic features of the British system, when at least in relation to collective bargaining, the evidence of a strong government input in the construction of the procedures is very clear. Although not expressed in Simpson's writing, there is a lingering sense that for some, these principles were a matter of pride, a badge of labour's self-reliance on its own power, while for others they were a demonstration of the political maturity of the UK, in the sense that procedures could be established by the power of reason and pragmatism on the part of workers, employers and unions, without the input of the State.

From the trade union side, of course, there is also the sense that the foregoing ideology can be a shield that could protect workers and trade unions from the exercise of the restrictive powers of the State. The elevation of these principles to a status equivalent to a constitutional convention would be to impose a strong source of restraint on government and a defence for trade unions when under attack. But while some might celebrate the mantra that what the State does not give the State cannot take away,[17] we found out soon enough in the Thatcher years not only just what the State did in fact provide, but that the State could take away even those things that it did not provide.

The other curious feature of the voluntarist, abstentionist, and collective laissez faire school of labour law was the compatibility of these principles with the methodology employed by its teachers and pupils. The great methodological contribution of the foregoing (at a very early stage in the development of modern British scholarship) was an emphasis on the need to see 'law in context', in making the case for which Simpson has been a pre-eminent exponent in work that has been highly critical of legal formalism. This is expressed clearly in his OJLS piece where he argues most forcefully for 'law in context', to help explain how the law developed and its impact on actual behaviour.[18]

[17] Kahn-Freund n.10, above, at 244.
[18] See also Simpson n.8.

But just as there are questions about the historical accuracy of voluntarism, abstentionism, and collective laissez faire, and the reasons why these principles were so widely accepted in the face of a different body of evidence, so too there is a sense of contradiction between principle and method. One of the (respectfully gentle) criticisms that can be levelled against these principles is that of a certain demure lowering of the eyes in the face of State power and law in all its manifestations. The classic principles are sustainable only if we consider law to take a particular form, which seems at odds with the need to contextualise, suggesting a need to take a broad view of what we consider to be law in the first place.

As argued elsewhere, the British industrial relations system that has now largely gone was founded in public law: it owed more to Laski than to Kahn-Freund.[19] But as such it was a different kind of public law than the public law we know today: it was about creating rather than containing institutions; about the power of the administration to build structures, rather than the power of the judges to pull them down. There is virtually no acknowledgement of the public law powers of the State in the voluntarism, abstentionism, and collective laissez faire literature, which is rightly concerned with labour's 'Magna Carta',[20] but perhaps not enough with labour's institutional forms or how these forms were created.

3. THE LEGACY OF STATE ENGAGEMENT

Having suggested that the development of British labour law has sometimes been rather too narrowly viewed, we have some responsibility to make the case that there has been strong State engagement and to identify the forms that this engagement took. As already suggested the construction of collective bargaining machinery in this

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[19] H. Laski, 'The Growth of Administrative Discretion' (1923) 1 *Public Administration* 92. See also W.I. Jennings, 'The Report on Ministers' Powers (1932) 10 *Public Administration* 333, and W.I. Jennings, *The Law and the Constitution*, 5th ed (London: University of London Press, 1959), pp 5-6. Some of Jennings' work in later life was a pale shadow of his apparently progressive youth, as is so often the case. See W.I. Jennings, *The Queen's Government*, revised ed. (London: Penguin Books, 1965), and W.I. Jennings, *The British Constitution* (Cambridge: CUP, 1971). The former, in particular, includes some ripe passages.

[20] As the Trade Disputes Act 1906 is 'often called': H.W. Laidler, *History of Socialism* (London: Routledge and Kegan Paul, 1968), 318.

country was an exercise in administrative law rather more than labour law, and to this end took three forms. Before considering the latter, it is necessary to reinforce what we mean by administrative law, which in the first half of the twentieth century was not used as a synonym for judicial review of administrative action as it is today.

The real starting point for the exercise of administrative power was a government department, in this case the Ministry of Labour, which was established by the New Ministries and Secretaries Act 1916, along with the Ministry of Food and the Ministry of Shipping. In modern times, such formality is generally not required, and new ministries are now created without the need for fresh primary legislation, under wide powers of secondary legislation conferred upon the Crown by the Ministers of the Crown Act 1975. The latter makes extensive provision for the re-organisation of central government, and perhaps also for the creation of new departments in the event of statutory authority being necessary for this purpose.[21]

The new department inherited responsibilities previously performed by the Board of Trade, as well as all other departments with responsibility for labour. This would include obligations arising under such formative measures as the Conciliation Act 1896 and the Trade Boards Act 1909, which were to be radically revised, revamped and expanded. For the purposes of what follows, however, it is important to emphasise that the Ministry of Labour was a creation of statute, assuming wide-ranging responsibilities for ensuring compliance with various labour standards, establishing Joint Industrial Councils, resolving industrial disputes, administering unemployment insurance, and managing labour exchanges (now job centres).[22]

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[21] For an account, see A.W. Bradley, K.D. Ewing and C.J.S. Knight, *Constitutional and Administrative Law*, 16th ed (Harlow: Pearson, 2015), ch 11C. Also, R. Brazier, *Ministers of the Crown* (Oxford: Clarendon Press, 1997).

[22] The 1916 Act transferred to the Ministry the 'powers and duties' of the Board of Trade, as well as other departments and authorities 'relating to labour or industry'. See generally R. Lowe, *Adjusting to Democracy, The Role of the Ministry of Labour in British Politics, 1916-1939* (Oxford: Clarendon Press, 1986). Intervention to resolve disputes took place by virtue of statutory powers of conciliation and arbitration contained in the Conciliation Act 1896 and the Industrial Courts Act 1919. And note also Munitions of War Act 1915 and the legacy of war-time regulation: G.R. Rubin, *War, Law, and Labour. The Munitions Acts, State Regulation, and the Unions 1915-1921* (Oxford: Clarendon Press, 1987).

The responsibility for Joint Industrial Councils was part of the implementation of the Whitley Committee's recommendations made in 1917,[23] shortly after the Ministry was established. This provided a blueprint in terms of a model for industrial relations in the post-war era, no doubt with an eye on what was happening in other European capitals at time. Part of the blueprint was for the establishment of multi-employer bargaining procedures in those industries that could sustain them, with the radically revised, revamped and expanded trade boards dealing with those industries where for whatever reason such procedures would not be possible, but conveying the message that mandatory arrangements would follow if a JIC was not established.

But although the existence of a government department was an essential step in the promotion of collective bargaining, that department needed not only a plan, but also the legal authority to implement the plan. Yet this was a plan that was to be implemented without any specific legal authority or legal regulation as to the means employed, Ministry officials relying on the wide discretionary powers vested in or assumed by the department.[24] In other words, this was a government department established by statute with unconstrained discretionary powers to promote the interests of the department. So far as collective bargaining is concerned, these interests were not determined by Parliament but by successive ministers.

The latter made it clear to Parliament that it was their duty to promote collective bargaining.[25] Specifically, the Ministry's duty was to implement the Whitley blueprint, which it loyally did until 1921 when government policy changed in the face of changing economic conditions. But the commitment was restored in the early

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[23] Cd 8606 (1917).

[24] Of course, in the background were important contextual factors both stimulating government policy and promoting acceptance of it: the power of labour exhibited in the Great Labour Unrest of 1910-1913, the development in wartime of national dispute settlement by national arbitration established under the Munitions of War Act, the spectre of revolution after October 1917, events on Clydeside in January 1919 and revolution in Germany leading to the founding of the Weimar Republic the same year.

[25] Most explicitly by Ernest Brown who told the House of Commons that 'it is becoming increasingly recognised that our voluntary collective bargaining system is one of the most potent instruments for the stability of our national life. That being so, it is our duty to foster and encourage the establishment of such machinery over an ever-widening field': HC Debs, 11 May 1938, col 1621.

1930s[26] in the aftermath of the Great Crash - with similar developments near contemporaneously in Europe as the developed capitalist world grappled to find the economic instruments to end the great Depression.[27] At the same time and for the same reason a commitment to sector wide regulation of working conditions was made in the United States by the National Industrial Recovery Act of 1933.[28]

The latter was struck down as unconstitutional,[29] leading to the now much maligned NLRA with its exclusive focus on enterprise based collective bargaining.[30] History took a different turn in the UK, with collective bargaining policy continuing under Bevin's leadership during the Second World War, fortified by compulsory arbitration where disputes could not be settled by voluntary mechanisms.[31] Though the legislative imposition of compulsory arbitration was largely lifted after 1951[32], support for collective bargaining continued under different governments thereafter, so that, for example, the post-war legislation establishing the nationalised industries contained what was in effect a statutory requirement to bargain collectively.[33]

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[26] And Fair Wages clauses were applied in the 1930s in many industries by legislation as a condition for the grant of government assistance: Ministry of Labour, *Industrial Relations Handbook* (1961 ed), chs 9 and 10.

[27] In 1936 France's Popular Front government established the right to bargain collectively in the accords de Matignon which settled the general strike of that year. In Ireland the Conditions of Employment Act 1936, provided by s.50, (in relation to wages payable for particular forms of 'industrial work') for the registration of collective agreements on wages made between employers and unions, for the universal application of such registered agreements and for their enforcement in the particular industry once the terms of the agreement had been registered and published in the Official Journal, *Iris Oifigiúil*. In Sweden the Saltsjöben Agreement, signed in 1938, cemented the consensual approach to collective bargaining and industrial dispute resolution which remains the bedrock of the Nordic model.

[28] Part of the New Deal: A.J. Badger, *FDR: The First 100 Days* (US: Hill & Wanhg Inc., 2008), 98 – 105.

[29] *Schechter Poultry Corp v United States*, 295 US 495 (1935).

[30] The aims of the NLRA as set out in its preamble should not be under-estimated, which makes the disappointment all the greater, even if it was probably addressed to the Supreme Court with a constitutional challenge in mind, on which see *NLRB v Jones & Laughlin Steel Corp*, 301 US 1 (1937).

[31] Conditions of Employment and National Arbitration Order SR&O 1940, No 1305.

[32] See the discussion in Wedderburn, 'Change, Struggle and Ideology in British Labour Law' in Lord Wedderburn (ed), *Labour Law and Freedom* (London: Lawrence and Wishart, 1995), at 8-15.

[33] Such as Coal Industry Nationalisation Act 1946, s 46, discussed in *NCB v NUM* [1986] ICR 736.

Largely unconstrained by law, bureaucratic power was said to bully those who could not be persuaded,[34] in some cases by the threat of the imposition of a Wages Council for the industry in question: an early example of what Bercusson was to refer famously as 'bargaining in the shadow of the law'. Although there were of course procedures for the extension of collective agreements together with a number of 'fair wages' clauses based on collective agreements,[35] these now seem relatively incidental and insignificant, falling far short of the full legalisation of national agreements as the TUC had demanded in 1931.[36] The key point missed in traditional accounts of labour law is the role of the State in building the collective bargaining structures, without which such initiatives were sterile.[37]

4. REDISCOVERING THE LEGACY

The key features of the foregoing account are that (i) by a largely administrative process, (ii) the State created a *regulatory* system of widespread application, (iii) with an unsettled question of 'legalisation' dangling like a hanging chad at the time the system began to disintegrate. The important point here is that it was a regulatory process by which terms and conditions of employment were concluded by trade unions and employers' associations applicable to all the workers employed by businesses who were members of the associations in question. By various extension

[34] See Lowe n.22.
[35] Notably the Terms and Conditions of Employment Act 1959, s 8, and the Employment Protection Act 1975, s.98, on which see B. Bercusson, *Fair Wages Resolutions* (London: Mansell, 1978).
[36] See Ewing n.15. It should be noted that employers too have long been concerned about the dangers of undercutting the agreed wage rates, see for example, *Hilton v Eckersley* (1855) 6 E&B 47.
[37] By 1960 there were an estimated 200 JICs – structures which did not just appear from nowhere: Ministry of Labour, *Industrial Relations Handbook*, n.26 above, 25. One last legal measure underpinning extensive collective agreements was the capacity of unions lawfully to organise secondary industrial action, certainly from the Trades Disputes Act 1906 onwards (*Conway v Wade* [1909] AC 606). This right was removed in 1990 as the culmination of 'enterprise confinement' (Lord Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18 ILJ 1, at 27-30. in breach of the European Social Charter, Art 6(4) and ILO Convention 87. But not in breach of the ECHR: *RMT v UK* [2014] IRLR 467; (2015) 60 EHRR 10, which sets out the relevant international jurisprudence and gives an example of how the absence of the right to call secondary action constrains collective bargaining.

mechanisms operating between 1940 and 1980, they could be extended to non-federated firms.[38]

Though the mechanisms to achieve it differed from one country to another, the effect in the UK was similar to (if often not so precise or near universal as) the European model of sector-wide collective bargaining arrangements. This contrasted with the weaker form of collective bargaining developed in the United States, which was required by default to adopt an exclusively *representative* system of bargaining via a bargaining agent chosen in an election of the workers in a bargaining unit. Although these agreements might cover vast numbers of workers, they were typically single employer agreements confined to the enterprise and applicable only to workers in the enterprise in question.

This is the only model of collective bargaining permitted in the United States for constitutional reasons, the Supreme Court objecting to the fact that in order to have general effect the US codes under the NIRA had to be approved by presidential order. This gave them a legally binding effect in the sector in question, which was treated by the US Supreme Court as meaning that the industry codes produced by this process had the status of law. In the United States' ultra-liberal constitution, however, only Congress can make law, with the result that the codes were treated as being unconstitutional, in a system where legislative authority is vested only in a legislative assembly whose members are elected and popularly accountable every four years.[39]

This contrasts with the social democratic model of law making which was to be found in the now eclipsed Social Europe.[40] This is a model which allows for parallel law-making by social institutions, including collective bargaining and social dialogue as the highest expression of what is in effect a process of collective bargaining between the social partners. The legitimacy of the former (collective bargaining) is to be seen

[38] See n. 37 above.
[39] For the application of this constitutional doctrine in Ireland, see J. Hendy, *The McGowan judgment and Collective Bargaining in Ireland* http://www.ictu.ie/download/pdf/collective_bargaining_ireland_jan_30.pdf discussing *McGowan v Labour Court* [2013] IESC 21, and *John Grace Fried Chicken Ltd v Labour Court* [2011] IEHC 277.
[40] K.D. Ewing, 'The Death of Social Europe' (2015) 26 *King's Law Journal* 76.

in instruments such as the Posted Workers Directive where 'universally applicable' collective agreements rank equally with legislation as a form of regulation to which effect is to given;[41] while the legitimacy of the latter (social dialogue) is to be seen in the *UEAPME* decision of the ECJ where it was said memorably that:

> …the principle of democracy on which the Union is founded requires – in the absence of the participation of the European Parliament in the legislative process – that the participation of the people be otherwise secured, in this instance through the parties representative of management and labour ….[42]

Yet notwithstanding this endorsement (not to mention its treaty base),[43] Social Dialogue at EU level is dying, if not already dead.[44] The pressure to decentralise collective bargaining is driven largely if not exclusively by the European Commission using powers under Title VIII of the TFEU to require member states to decentralise and deregulate collective bargaining. The Commission Report, *Labour Market Developments in Europe*,[45] stated that the new economic and political instruments of control should result in a 'reduction in the wage-setting power of trade unions'. The result is that:

> …the reforms have resulted in a dramatic decline in collective bargaining coverage, a breakdown of collective bargaining, a strong downward pressure

[41] Directive 96/71/EC (posting of workers in the framework of the provision of services), Art 3(1).
[42] *Case T-135/96, UEAPME v European Council* [1998] ECR II-2335, at para 89. See B. Bercusson, 'Democratic Legitimacy and European Labour Law' (1998) 28 ILJ 153.
[43] TFEU, Arts 154, 155.
[44] According to First Preliminary Outline on a European Social Pillar, 'Well-functioning social dialogue requires autonomous and representative social partners with the capacities to reach collective agreements. Given the decreases in terms of organisational density and representativeness, social partners need to further build their capacities to engage in a better functioning and effective social dialogue'. But there is no sense of Commission responsibility for contributing to the problem of 'representativeness' or any commitment on their part to deal with it (SWD2016 51 (final), [10].
[45] European Commission Directorate General for Economic and Financial Affairs , *European Economy 5/2012*, 104.

> on wages leading to deflationary tendencies, downward wage competition and an overall reduction in the wage-setting power of trade unions.[46]

The fight to defend the Code du Travail in France against the socialist government's El Khomri reforms (along Commission lines) was taken to the streets of Paris and other cities in the summer of 2016.[47] It is ironic that the EU seeks to replicate a system of labour relations more like that of the UK, where industry wide collective bargaining has largely disappeared (and just at the time the UK itself is about to disappear from the EU).[48] Yet if collective bargaining is to survive as a regulatory institution benefitting the vast majority of workers and hence the economy, rather than a representative activity for an ever smaller minority, this will have to change in the UK as in Europe.

Indeed, unless it changes there is a real danger that collective bargaining will become virtually extinct within a generation, with profound effects for the role of trade unions. The challenge for collective labour lawyers is thus (i) to make the case for regulatory collective bargaining, and (ii) to propose the means by which it can be done. It is our good fortune that in this country we have a template, the UK having been a pioneer of this model of collective bargaining. Other European countries did it differently and lessons can be learned from all. The UK has had about a century of experience, though it would not be possible today to rebuild these structures by the

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[46] I. Schömann, 'Reforms of collective labour law in time of crisis: towards a new landscape for industrial relations in the European Union?', in D. Brodie, N. Busby and R. Zahn (eds), *The Future Regulation of Work, New Concepts, New Paradigms* (Basingstoke: Palgrave Macmillan, 2016), 152. The techniques employed consist, in summary: abolition of national minimum wage fixing agreements; limiting the duration of the effect of collective agreements; increasing scope for derogating from sector wide agreements; restricting the extension of collective agreements; and extending collective bargaining to non-union groupings.

[47] On 4 November 2015, France's labour minister, Myriam El Khomri, launched a reform programme the two main objectives of which are to revise the entire Code and to give company-level agreements a central rôle over sector-wide agreements. On the context of this, see T. Piketty, 'Labour Law Reform in France: An Appalling Mess', 2 Juillet 2016: http://piketty.blog.lemonde.fr/2016/07/02/labour-law-reform-in-france-an-appaling-mess/ (dealing with 'The illusion of balanced company-wide agreements').

[48] A. Bogg and K.D. Ewing, 'The Continuing Evolution of European Labour Law and the Changing Context for Trade Union Organising' (2017) 38 *Comparative Labour Law and Policy Journal* (in press).

means used in early years of the twentieth century and in particular from 1934 onwards.

This is largely because the legal context has changed, most significantly in the development of administrative law and its changing emphasis as a source of government restraint rather than a source of government power. Thirty five years of neo-liberalism and the drive to a low-wage, low-investment, service-based economy has also deeply affected the attitude of the principal players, employers and unions. Indeed many workers have never experienced the benefits of collective bargaining. The consequence is that in order to recreate the regulatory bargaining model, there will need to be a much more structured legal framework, not least to reduce the risk of any such framework being a playground for obstructive administrative lawyers.[49]

[49] On which see R.C. Simpson, 'Judicial Control of ACAS' (1979) 8 ILJ 69.

5. REBUILDING A REGULATORY COLLECTIVE BARGAINING SYSTEM

The 'system' in place in the post-war era was one of sectoral bargaining underpinning establishment level negotiation. It was built mainly by bureaucratic power, underwritten by statutory bodies in the form of wages councils and reinforced by ad hoc extension mechanisms and other indirect props. The sceptics of course will say that this cannot be recreated in present circumstances. They will say that what was done in the past in this country and throughout Western Europe, and even in the United States (until the Supreme Court stepped in)[50] gives no guidance now: the economy has changed, with growing casualisation, flexibility and decentralisation.

Quite so: these are the very conditions that drove policy makers to establish the system in the first place, and which are now a consequence of its destruction. It is true that a modern scheme in a different legal culture could not operate as it did in the past; the core framework would now need to be a statutory framework, which would have to reduce discretionary power to a minimum. Clarity of intention of such a scheme (to address the Four Pillars) is not enough. To achieve the objective, as Bob Simpson forcefully reminds us, it is vital to have regard to the context of the proposal. Previous attempts to legislate on collective bargaining (in the admittedly different context of enterprise bargaining) have foundered on such neglect.[51]

The first of two major contextual issues is *political*: as Simpson highlights in relation to the statutory recognition scheme in 2000, it had been burdened from the start by mixed and highly equivocal political messages about the government's commitment to collective bargaining.[52] Not only was such a commitment lacking in terms of wider public policy, it was also the case that the potentially liberating collective bargaining

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[50] See Badger, n.28, 104: 546 codes had been negotiated, though Badger paints a picture of a huge bureaucratic headache, which was not reported as a feature of the British implementation of this model.
[51] See esp. Simpson, n.16.
[52] See B. Simpson, 'Trade Union Recognition and the Law, A New Approach - Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992' (2000) 29 ILJ 193.

arrangements were compromised by the contradictory retention of the much of the Thatcherite legacy. Blair's muscular commitment on the eve of the 1997 election that the UK would retain the most restrictive union laws in the Western world was not auspicious.[53]

But apart from commitment, there is an even bigger question of political context which emerges from the foregoing. An essential feature in the past was the presence of a government department with responsibility to protect the interest of workers and to represent the voice of workers in government. That has gone with the abolition of the Ministry of Labour and its successor departments. This is not to say of course that a government department should be established solely to promote collective bargaining; but it is to say that there is a need within the structure of government for a department dedicated to the interest of workers with a status equal to that of other interests represented at the Cabinet table.[54]

One of the responsibilities of a new government department would relate to the second contextual matter to be taken into account. This is the apparent lack of *representative capacity* on the employer and trade union sides respectively to entertain a system of multi-employer, sector wide, regulatory collective bargaining. That too was a problem at the end of the 19th century, especially in the sweated trades where trade boards were imposed. It was overcome then and can be again. It is true that the number of employers' associations has declined from the mid-20th century (though there are still 53 on the Certification Officer's list),[55] and those which do exist

[53] *The Times*, 31 March 1997. And as reported to the *Guardian*, 27 April 1997: 'People on the Left have got to understand the realities of the economic world. You will do more to prevent people being treated as commodities by giving them the best educational skills and opportunities, and by having an employment service that is dynamic, than you will by trying to protect the workforce with over-restrictive union legislation' (ibid).

[54] It should also undertake the function of planning the workforce needed for the future, much to the benefit of employers: see Ewing, Hendy and Jones n.2, 16-18.

[55] Certification Officer, *Annual Report 2015-16* (2016), 11. There are another 39 which are described as 'scheduled', which means that they fall within the statutory definition of an employers' associations but have chosen not to be listed. They must nevertheless comply with a number of statutory duties. As the CO points out, there may be other bodies falling within the definition of which he is unaware (ibid., at 8). These employers' associations report an income of just over half a billion pounds, and

(such as the EEF) appear largely to have adapted their role to become lobbyists rather than parties to collective agreements.[56]

Employers' associations are currently defined by section 122 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) as bodies whose principal purposes include the regulation of relations between employers and workers or trade unions. Where organisations within that definition currently do not exist, it is implausible to believe that there are not representative organisations in all sectors to act on behalf of employer interests.[57] In the modern era, all industries lobby government and as Prem Sikka pointed out powerfully:

> big business has been using collective bargaining for decades to advance its interests. Banks, supermarkets, phone, gas, water, electricity and other companies collectively negotiate with governments to secure their economic interests. Finance directors of the 100 largest UK-listed companies, known as The 100 Group, pool their resources to secure advantages by shaping consumer protection, tax, regulation, competition, trade and other government policies. If big business is able to engage in collective bargaining, it is only fair that workers should also be enabled by law to collectively advance their interests.[58]

However, employer capacity is one thing, but employer resistance another. How can unwilling employers be persuaded to take part in these arrangements? And how can large multinationals with generations of hostility to trade unions throughout their global operations be compelled to do so? This brings us back to the question of

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a total annual expenditure of *£445,841,000*, both increases on the previous year (ibid., Appendix 6).

[56] On the other hand, the accelerations of mergers and acquisitions means that there are a number of very big players as well as the multitude of SMEs.

[57] Employers appear to have no difficulty in establishing associations for mutually desirable objectives, including price fixing cartels and blacklisting workers – as to the latter, see D. Smith and P. Chamberlain, *Blacklisted – The Secret War between Big Business and Union Activists*, 2nd ed (New Internationalist, 2016). As to the former see the examples (including the LIBOR scandal) at http://www.tutor2u.net/economics/blog/oligopoly-recent-examples-of-price-fixing-behaviour.

[58] *Guardian*, 3 August 2016.

power, and the coercive power of the State in particular, to be reclaimed as a force for good rather than as the enemy as it has been by some workers for almost two generations.[59] In the modern legal climate a system of regulatory collective bargaining needs to anticipate that power and harness it in a productive manner. Apart from obligation, persuasion, incentives and penalties,[60] other coercive options include:

- Consistently with ILO Convention No. 94, there should be no question of any *public sector contract, advertising or government licence* being awarded to, or *any public service delivered by*, an employer who refuses to participate directly or indirectly through a representative association in collective bargaining either at sectoral or enterprise level (on which see below). This would be an adapted and expanded version of fair wages resolutions and clauses operating in the past, designed to 'persuade' but not 'compel'.

- Where multi-employer collective bargaining takes place, it should not be possible for any employer in the sector in question to refuse to abide by the terms of the relevant agreement. The early TUC idea of 'legalisation' should be given statutory effect so that the terms of sector wide agreements become mandatory terms of all contracts of employment in the sector in question, including non participating firms.[61] This was an essential feature of the wages councils (which, indeed, imposed criminal sanctions on those who did not comply – a measure we do not propose).

[59] T May, 'But a change has got to come. It's time to remember the good that government can do', Speech to Conservative Party Conference, 5 October 2016: http://www.mirror.co.uk/news/uk-news/theresa-mays-speech-conservative-party-8983265.

[60] For example, should companies that seek advantage by not dealing with trade unions be required not only to pay a mandatory penalty to workers (on which see below), but also pay a higher rate of taxation for unfair competition?

[61] Employers would thus be bound automatically by a process in which they do not participate; some may thus be inclined to participate to have some influence or control over decisions that will affect their businesses.

6. ESSENTIAL FEATURES OF A NEW FRAMEWORK

All of which brings us to the hard question: what would such a scheme look like? And how could it be constructed? Clearly the finer details are beyond the scope of this short article, which is designed principally to map out a framework to reverse the current slide to a Victorian system of labour law. Clearly too, this is not a matter for the exclusive engagement of labour lawyers, standing as it does on the boundaries of public administration, administrative law (as originally conceived), industrial relations, as well as our own discipline. That said, it is obviously necessary nevertheless to identify the core challenges and to suggest how they might be met.

The first issue to address relates to identifying each sector for the purposes of sectoral bargaining. This would have to be done by legislation, and we propose that it would be the responsibility of the Ministry of Labour to create the sectoral map for this purpose, in consultation with employers and trade unions. In creating that map Ministry officials would doubtless take into account the boundaries of the more than 200 previous JICs and Wages Councils (where still relevant), the Standard Occupational Classification of jobs and the indexes of services and industries maintained by the ONS, as well as the law and practice of other countries with extensive sectoral bargaining.

Within each category there would doubtless have to be numerous sub-categories. But once the basic framework is identified, in the interests of the integrity, permanence and formality of the procedures, it should be set out in a statutory instrument (as in an SI), approved by Parliament with any changes to the structure requiring formal amendment, and subsequent parliamentary approval.[62] There are some self-contained industries where the need for sectoral collective bargaining is particularly urgent: care homes, agriculture, small deliveries (drivers and cyclists), and fast-food outlets, being immediately obvious candidates, suggesting the possibility that a scheme of this kind could be rolled out gradually.

[62] For a different approach (and less formal) see Wages Councils Act 1979, Part I (wages councils), and Part II (statutory JICs). The 1979 Act was repealed in 1993.

Within all identified sectors, the legislation would provide for the establishment of a Sectoral Employment Commission to perform tasks that in the past would have been discharged by a Joint Industrial Council. There would be equal representation of trade unions and employers, with any disputes about representation on the workers' side to be resolved by the TUC Disputes Principles and Procedures, revised again if necessary.[63] The CBI could have responsibility for representation disputes on the employers' side. Failure on the part of employers to take part would be addressed by the formation of a tripartite body similar in form to the wages councils, with empty chairs if necessary. There would be no question of an employer's veto.

It would be the central responsibility of these Commissions (whether bipartite or tripartite) to set the terms and conditions of employment for the workers in the sector in question. In terms of the subject matter of negotiations and standard setting, ILO Convention No. 154 describes collective bargaining to mean

> (a) determining working conditions and terms of employment; and/or
> (b) regulating relations between employers and workers; and/or
> (c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations.

In our view, the jurisdiction of Sectoral Employment Commissions should include as minimum mandatory terms for negotiation the foregoing requirements of ILO Convention No. 154. It ought of course to be possible for the parties to extend the scope of collective bargaining in whatever direction they agree to.

Thus Sectoral Collective Agreements might be expected to cover, for example, pay (basic and enhanced rates), allowances, benefits, pensions, hours, flexibility, working time, breaks and holidays, health and safety, the physical conditions of work,

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[63] Legal constraints on the TUC procedures in TULRCA 1992, s 174 (as introduced by the Trade Union Reform and Employment Rights Act 1993, s14), should be removed. On the 1993 Act's changes, see B. Simpson, 'Individualism versus Collectivism: An Evaluation of section 14 of the Trade Union Reform and Employment Rights Act 1993' (1993) 22 ILJ 181. For background see *Cheall v APEX* [1983] 2 AC 180.

promotion, transfer, redundancy, security of employment, permissible forms of engagement, grievance, disciplinary and dismissal procedures, recruitment levels, training, apprenticeships, restructuring, the introduction of change and new technology, non-discrimination, equal pay, closure of the gender gap, adjustments for the disabled, trade union facilities and check-off, trade union membership or fair shares arrangements, the collective bargaining machinery itself (including its possible extensions) and disputes resolution.[64]

Apart from the creation and powers of Sectoral Employment Commissions, there is also the question of the legal effect of their Agreements (in the case of commissions established on a bipartite basis) or Awards (in the case of commissions established on a 'tripartite basis'). It was an Achilles heel of the JICs in the past that they applied only to those who were party to them, which on the employer's side meant federated firms only. Wages Council orders on the other hand applied as a matter of law to all workers in the sector covered by the order in question, and were enforceable both by the wages inspectorate as a matter of criminal law and through the employment contract as a matter of civil law.

As suggested above, the principle of 'legalisation' should apply to both Agreements (when operating in a bipartite manner) and Awards (when operating in a tripartite manner).[65] The worker would obviously have the right to enforce a term of the agreement applying to him or her personally, [66] but we consider that both employers and unions which are party to a Sectoral Employment Commission should have the right to initiate legal action to enforce its Agreements or Awards against a defaulting employer (or hypothetical worker).[67] Although it ought to be possible to negotiate more favourable terms of an Agreement or an Award at enterprise level (on which see

[64] TULRCA 1992, ss 178, 218, and 244 also provide useful checklists. Compare Wages Councils Act 1979, s 14. All these go well beyond the 'pay, hours and holidays' to which the recognition procedure is restricted: Sched A1, para 3(4).
[65] For the avoidance of doubt this does not mean that collective agreements should be legally enforceable between unions and employers, which is a separate question from the legal enforceability of the parts of agreements designed to regulate terms and conditions of employment.
[66] Proposed by the *Manifesto*: Ewing, Hendy and Jones n.2, at 39.
[67] This would be in addition to a Labour Inspectorate to enforce these and other infringements: ibid., at 37-38.

below), extreme care would need to be taken about derogations below the minimum standards.[68]

7. COLLECTIVE BARGAINING AND WORKPLACE REPRESENTATION

This scheme of course would be a big change from what we now have, and it would be as big a challenge for trade unions as for anyone else. In many trade unions there will be only a vague memory of multi-employer bargaining, and in others the memory will not be a happy one. It is not to be overlooked that a number of key officials strongly supported the Donovan Commission's proposal to move from sectoral to enterprise based bargaining, partly because of what they saw to be the restraining effects of the former. Jack Jones made clear his disdain for JICs on several occasions in his autobiography, explaining that he had:

> never formed a high opinion of joint industrial councils, which all too often had seemed to me to be talking shops from which only meagre concessions were obtained.[69]

These concerns need to be accommodated, particularly if workers in productive plants are to be rewarded for their efforts. A scheme of the kind proposed so far will also be a challenge for those who have invested heavily in the union organising model, and to union officials who work well under the current exclusively enterprise based arrangements. There will otherwise be serious questions of sectionalism and institutional self-interest, which will be a sometimes hidden reason to oppose reform. So no one should suppose that this will be an easy adjustment, though we are not suggesting that there is a binary distinction between regulatory and representative bargaining or between sectoral and enterprise bargaining.

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[68] See the discussion of 'inderogability' in Lord Wedderburn, 'Collective Bargaining at European Level: the Inderogability Problem', in Wedderburn n.32.

[69] J. Jones, *Union Man – An Autobiography*, 2008 ed. (London: Harper Collins, 2008), 65. But note also his comment post Donovan that 'a system devised nearly fifty years ago, and imposed at a time when trade union organisation was weak, is irrelevant where you have strong unions' (ibid., 199).

So as suggested above, sectoral collective bargaining is not an alternative to enterprise level bargaining.[70] On the contrary, the two are complementary, sectoral bargaining a base on which enterprise level bargaining can take place, necessary to adapt the provisions of the agreement to the needs of the parties in the enterprise. Indeed, such enterprise based bargaining is crucial to the long-term success of sectoral bargaining since only unions with strength at the workplace will have leverage at the national bargaining table. Furthermore, sectoral bargaining without enterprise based bargaining and an enterprise based trade union presence is a recipe for the alienation of workers from their unions, and an encouragement for free riders.

European systems with sectoral bargaining arrangements also have procedures for workplace representation, either to make the sectoral agreement operative at workplace level, or to deal with issues that are not covered by the sectoral agreement in the first place. The Ministry of Labour *Industrial Relations Handbook* of 1961 reminds us that in the UK that role was performed mainly by shop stewards,[71] with the Donovan Commission later criticising these arrangements for being informal in the sense that there were often no written agreements setting out mutual rights and duties.[72] In other systems - notably the German - sectoral bargaining is

[70] Nor do we suggest that there is a binary distinction between regulatory and representative bargaining.
[71] Ministry of Labour, *Industrial Relations Handbook* n.26, ch 6.
[72] Royal Commission on Trade Unions and Employers' Associations (Chairman Lord Donovan), Report, Cmnd 3623 (1968).

complemented by other systems of workplace representation in the form of works councils,[73] and worker directors.[74]

In our view, the extension of collective bargaining is not simply about the expansion of horizontal measures for sectoral standard setting, but also for simultaneously deepening vertical enterprise based trade union activity, vertical in the sense that the trade union role should be embedded from the cloakroom to the boardroom.[75] The two (the horizontal and the vertical) should be highly integrated: worker representation by trade unions at all levels within a firm suggest that the firm in question is less likely to oppose sectoral bargaining, while sectoral collective bargaining is said to suggest that firms are less likely to oppose enterprise representation (at least in the form of collective bargaining if not otherwise).

So far as enterprise based collective bargaining is concerned, Bob Simpson's writings illuminated the difficulties associated with legislation designed to encourage such procedures, there now having been three attempts at legislation in the UK.[76] So far as the first of these is concerned (the Industrial Relations Act 1971), it was in Simpson's terms 'a spectacular failure', foundering 'on the rocks of union opposition

[73] Although there is some support for the latter among scholars in the UK, this is an idea that has failed to capture the imagination of the wider trade union movement. This is perhaps because in a decentralised collective bargaining system such as our own, non-union based works councils are seen to be in direct conflict with union based arrangements for enterprise collective bargaining. But note the fascinating account of consultative committees 'at the place of work' as reported in the Ministry of Labour, *Industrial Relations Handbook* n.26, where it is said in relation to British workplaces that 'it is usual for works councils to include among the subjects they discuss: (i) Changes or improvements in methods of production and related matters, including the encouragement of suggestions within the factory' (at 127). There is no quantitative assessment of these practices in 'private industry' though the clear implication is that such practices were prevalent, in which case there is not much new in the 2002 Directive or the Regulations implementing it, save the absence of a strong collective bargaining culture to nurse them along.

[74] See J Williamson, *All Aboard - Making worker representation on company boards a reality* (London: TUC, 2016).

[75] On which see the especially important R. Dukes, *The Labour Constitution – The Enduring Idea of Labour Law* (Oxford: OUP, 2014), ch 3.

[76] Industrial Relations Act 1971; Employment Protection Act 1975; and Employment Relations Act 1999 respectively. For a compelling account covering all three, see Bogg n.11.

and management indifference'.[77] So far as the second is concerned (the Employment Protection Act 1975), this too failed, though for different reasons, though it had much in common with the 1971 Act, both being short-lived initiatives trapped in the transitional space between an epoch that had gone and another yet to come.

With the benefit of hindsight, the 1971 Act was too much a break with the immediate past in attempting to switch from an administrative model to a statutory model of labour law, while the 1975 Act was too close to what it sought to replace by retaining the administrative form of labour law at a time when the nature and purpose of administrative law was changing. ACAS confronted the limits as well as the power of administrative law, the latter awakening from a long sleep in 1964,[78] with the Lords in *Padfield* only four years later giving fair notice that wide discretionary power was no longer to be indulged.[79] This was a cue that those who drafted the EPA 1975 did not hear (or to which they did not listen).

Although the powers of ACAS were restored by the House of Lords reversing two of three highly contentious Court of Appeal decisions of the late 1970s, as Wedderburn pointed out, this was after the government had announced its intention to repeal the recognition procedure altogether;[80] in these circumstances, the judges could afford the luxury of magnanimity. But with the incidence of judicial review about to explode after the Order 53 procedural reforms in 1978,[81] Simpson was right to be sceptical about the future of the recognition procedure once the government, by these reforms,

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[77] Lewis and Simpson n.12, 21.
[78] *Ridge v Baldwin* [1964] AC 40. The courts were not completely silent and administrative law was not wholly benign: H. Laski, 'Judicial Review of Social Policy in England: A Study of *Roberts v Hopwood'* (1926) 39 *Harvard Law Review* 832; W.I. Jennings, 'The Courts and Administrative Law – The Experience of English Housing Legislation' (1936) 49 *Harvard Law Review* 426. Nor were judges unconcerned about the expansion of the administrative state. See Lord Hewart of Bury, *The New Despotism* (London: Ernest Benn Ltd, 1929) (a collection of the Lord Chief Justice's 'sensational essays on the administrative practices of government': R.J. Smith, Book Review, (1930) 39 *Yale Law Journal* 763), and subsequently the Report of the Committee on Ministers' Powers, Cmd 4060 (1932).
[79] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.
[80] Lord Wedderburn, 'Industrial Relations and the Courts' (1980) 9 ILJ 65.
[81] H.W.R .Wade and C.F. Forsyth, *Administrative Law*, 11th ed (Oxford: OUP, 2014), ch 18

had effectively vindicated and legitimised the new and growing supervisory jurisdiction of the courts.

The game had changed, with the result that it was thus necessary to accept that 'a third party [adjudicator] cannot operate successfully on the basis of legal rights and procedures which establish broad general powers and a wide measure of discretion'.[82] For Simpson there were thus two options: one was to rely on a body such as ACAS having general powers to resolve disputes, rightly thought now to be insufficient to be effective. The other was to build on the 1975 Act with more 'tightly drawn procedures' and potentially 'coercive sanctions', the recent experience of judicial review revealing the 'impossibility of devising provisions which leave no scope for judicial amplification'.[83]

8. THE STATUTORY RECOGNITION SCHEME

The third and current statutory recognition scheme - restricted to enterprise level bargaining - is rooted very firmly in what might be referred to as a 'labour law model', and to that extent reflects a triumph of sorts for the 1971 Act's approach (and in some respects its content), in what had been a decade of transition to a different kind of law. It also reflects the changing nature of administrative law and the impossibility now of using the administrative model as the core means to promote collective bargaining. That model has become even less plausible as judicial power and the principles on which they rest were strengthened by the Human Rights Act 1998 and the Constitutional Reform Act 2005 respectively.[84]

The current statutory recognition scheme is a labour law scheme in the sense that it eschews a wide discretion in a statutory agency, in favour of legal rights and duties for the parties (trade unions and workers on the one hand and employers on the other).

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[82] Simpson n.49, 83.
[83] Ibid.
[84] For a sober assessment of the former (HRA), see Simpson n.52 (HRA as another potential danger), and Simpson n.16, (sceptical of the HRA's potential to advance workers' interests). And see B Simpson, 'Judicial Control of the CAC' (2007) 46 ILJ 287, and in particular the discussion relating to the HRA aspects of the *Racing Post* case (*R (NUJ) v CAC* [2005] EWCA Civ 1309).

In contrast to the 1975 Act whereby a union could refer a recognition issue to ACAS, the 1999 Act refers to a trade union 'seeking recognition to be entitled' to conduct collective bargaining.[85] The foregoing is an entitlement as against the employer, which if necessary will crystallise into an order by a quasi-judicial body (the CAC) that the employer recognises the union, provided a large number of eligibility, admissibility and support criteria are met.

The latter is a development and trajectory that Simpson had fully anticipated, albeit with strong reservations. But in moving from an administrative law to a labour law model, it was necessary to give trade unions not only the right *to make* a complaint but also rights *in the* complaint to deal with the reluctant and hostile employers, rights which are unnecessary in a system where the third party conciliator, mediator, or arbiter does not hear a recognition *complaint* but has responsibility to resolve a 'recognition *issue'*. Simpson's seminal article on the statutory procedure quickly drew attention to the failures in this respect, informed by the considerable body of evidence from other jurisdictions where procedures of this kind are in operation.[86]

The changing form of legislative model from administrative law to labour law was not under the provisions introduced by the Employment Relations Act 1999 calculated to lead to any greater success for the legislation (assuming that success can be judged from legislation that was unclear as to its purpose). Unlike the 1975 Act, the new recognition procedure operated in an environment in which there was no obligation on any public authority or anyone else to promote collective bargaining, this duty of ACAS having been removed in 1993 and not restored since.[87] In addition, as Simpson pointed out, collective labour law was now projecting contradictory messages, the new procedure operating in an otherwise hostile legal climate.[88]

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[85] Employment Protection Act 1975, s 11 and TULRCA 1992, Sch A1, para 1, respectively.
[86] Simpson, n.52.
[87] Ibid.
[88] Ibid. Also on the 1999 Act are Bogg n.11, Part 3; and T. Novitz 'A Revised Role for Trade Unions by New Labour: The Representation Pyramid and "Partnership"' (2002) 29 JLS 48.

But that apart, it seems to us that the statutory recognition model was bound to fail, if success is to be judged by increasing collective bargaining coverage, or even by the less demanding standard of stopping the haemorrhage of collective bargaining density. We may cavil about the context, but the more fundamental cause is the very model (almost regardless of its internal design) if used exclusively as the vehicle for collective bargaining growth. In this respect it is striking that when comparisons are made with collective bargaining density worldwide, there is no country which has adopted the enterprise based representative model of collective bargaining that has a collective bargaining density in excess of 35%.

We believe that this tells us something about the inherent limitations of the model, which have been brutally exposed in the United States in particular, but basically boil down to the huge logistical problem for trade unions in trying to organise company by company in what may be a hostile environment, and retaining members during long campaigns, which may be extended by aggressive litigation at the suit of the employer. In our view, such a scheme can succeed only if it has much more limited ambitions as a complement to other forms of intervention, such as the collective bargaining proposals referred to above, dealing as a result with the question of workplace representation in a system focused primarily elsewhere.

As the OECD pointed out as long ago as 1994,[89] employer resistance to a trade union presence at enterprise level is thought likely to diminish where collective bargaining affecting the employer in question takes place at other locations. The purpose of enterprise bargaining in a system of sector wide bargaining is to apply and build upon the sector terms which in most cases are likely only to be a minimum standard. As discussed above, this means that there will be scope for enterprise bargaining on pay and other terms and conditions, and for the flexible implementation of standards established by sector wide agreements. Sector agreements would set a floor not a ceiling.

The OECD view may be rather optimistic, and is certainly no reason for not anticipating the likelihood of resistance and legislating to deal with it. Apart from

[89] OECD, *Economic Outlook* (1994).

effective coercive measures designed to discourage and penalise employer bad practice, this can be achieved by a more careful design of the procedure to draw resistance in other ways. This is necessary to avoid the 'death or glory' nature of the US model, by ensuring a more graduated route to full recognition.[90] In this way, a representative union that does not have majority support sufficient to justify negotiating rights would nevertheless have the right to negotiate on behalf of its members, as well as enjoy consultation rights of various forms.

9. ADAPTING THE STATUTORY RECOGNITION SCHEME

The question then is how to adapt the ineffective recognition scheme inherited from the Blair government and retained (so far) by the Cameron and May governments to the proposed new circumstances.[91] Here we share the critique of Simpson that the existing procedure is too complex, and that it gives too much power to employers in the course of union organising drives and recognition campaigns,[92] to which we would add that it provides too many opportunities for destructive litigation in the CAC and the High Court by hostile employers. The classic example of the latter was the *Cable and Wireless* case, in which there were five contested questions requiring CAC determination, as well as a judicial review.[93]

There are two issues here. One is the right of a union to bargain on behalf of a group of workers, and the other is the right of a worker to be represented by a trade union. So far is the former is concerned, in our view the statutory scheme could be greatly simplified, and the power of the hostile employer greatly reduced, if the procedure ended at the admissibility stage. That is to say, what is currently the admissibility

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[90] On which see K.D. Ewing, 'Trade Union Recognition – A Framework for Discussion' (1990) 9 ILJ 209, and P.L. Davies and C. Kilpatrick, 'UK Worker Representation after Single Channel' (2004) 33 ILJ 31.

[91] On employer proposals for change, see CBI, *Making Britain the Place to Work – An Employment Agenda for the New Government* (London: CBI, 2010) – designed to tighten the statutory recognition procedures still further.

[92] Simpson n.52. As Alan Bogg has shown this power has not been addressed by subsequent amendments designed to deal with employer abuse: A. Bogg, 'The Mouse That Never Roared: Unfair Practices and Union Recognition' (2009) 38 ILJ 390.

[93] On *Cable and Wireless*, see H Collins, K D Ewing and A McColgan, *Labour Law* (Cambridge: CUP, 2012), 574-7.

stage should be the final stage, in the sense that it should be enough that a union can demonstrate to the adjudicator – whether ACAS or the CAC as at present for this purpose - that at the point of application it is likely to have majority support amongst a group of workers on behalf of whom it has a mandate to act.

Also for this purpose, the evidence of majority support would be confidential and would not be shared with the employer,[94] and should be treated as sensitive personal data.[95] It should be for the union to decide which groups of workers on behalf of whom to seek a mandate, not the employer, the CAC, or the State. Unions would most likely tailor so called bargaining units to their areas of strength within the enterprise, a practice which as rational actors we would expect them to adopt, and to which we see no reasonable objection. Collective bargaining would be limited to these groups of workers and it would be a matter for the employer as to whether to extend the benefits of any agreement beyond the represented group.

This means that there would be no CAC hearing about bargaining units, though the problem of bargaining units has perhaps not been a problem quite on the scale anticipated at the time the legislation was enacted.[96] Nor would there be a need to demonstrate majority membership or the need for a ballot, whether or not there was majority membership. This would minimise the damaging anti-union campaigns during organising drives, and reduce the influence of lawyers and consultants in such circumstances. It is also necessary to remove the ability of employers to avoid recognition of independent unions by establishing non-union based staff associations – such as the News International Staff Association - as alternatives.[97]

There is of course no guarantee that an employer would give effect to any recognition order by the adjudicator (whether ACAS or the CAC), which brings us to the question

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[94] See *AEEU and GE Caledonian*, CAC Case No TUR 1/120/(2001).
[95] Data Protection Act 1998, s 2.
[96] But see *R (Kwik-Fit (GB) Ltd) v Central Arbitration Committee* [2002] EWCA Civ 512.
[97] See also *R (Boots Management Services) v CAC* [2014] IRLR 278 and [2014] IRLR 887. There are also substantive defects with the recognition scheme such as its limitation to 'pay, hours and holidays' (though other matters may be agreed). Space does not permit exploration of these other aspects though these will need to be corrected.

of sanctions, which as Bob Simpson pointed out is 'a touchstone issue for labour lawyers'.[98] Here we share Simpson's concerns about the practicality of current arrangements (particularly in contrast to the 1975 scheme), which have yet to be seriously tested, for reasons unlikely to include the effectiveness of the regime in question. Although the 1975 scheme had many weaknesses, one advantage it enjoyed over the current scheme was the remedy of unilaterally triggered arbitration, even if the latter was not used to its full potential.[99]

We accept that there may be employers who will seek to avoid meaningful enterprise level collective bargaining, whatever happens. But the imposition by law of sectoral collective agreements will be a source of persuasion and encouragement to bargain at establishment level. So too would a provision in a universally applicable sectoral agreement that would allow unions to refer enterprise based disputes about the application of sectoral agreements or awards for arbitration by either the CAC or preferably the disputes procedure in the agreement itself. Furthermore, given that the right to bargain collectively is a human right,[100] any arbitral award should include an element of mandatory compensation awards for violation of the right.

A further important change is necessary to underpin these proposed enterprise arrangements. This relates to situations where for whatever reason there is no enterprise based collective bargaining affecting workers generally or particular groups of workers. In these situations, it is important to recall the ILO principle that 'workers' organizations should nevertheless be able to conclude a collective agreement on behalf of their own members'.[101] This would require a change to domestic law and in particular the Employment Relations Act 1999, sections 10-13 which is currently limited to provide a right for workers to be accompanied by a trade union official in grievance and disciplinary matters.

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[98] Simpson n.52, 211-2.
[99] On these procedures, see B. Doyle, 'A Substitute for Collective Bargaining? The CAC's Approach to s16 of the Employment Protection Act 1975' (1980) 9 ILJ 154.
[100] *Demir and Baycara v Turkey* [2008] ECHR 1345.
[101] B. Gernigon, A. Odero and H. Guido, 'ILO Principles Concerning Collective Bargaining' (2000) 139 *Int Lab Rev* 33, at 51.

As this provision currently stands, however, there are two defects. The first is that it allows for trade union representation in relation to grievances about existing terms and conditions but not grievances about a change to existing terms and conditions,[102] a distinction ('rights' v 'interests'). This cannot be justified by reference to the ECtHR jurisprudence by which the right to be accompanied is now underpinned.[103] The right to accompaniment should therefore extend to all matters which a worker wishes to raise with the employer. And secondly, the provisions do not allow for the collective representation of workers or the representation by a trade union in relation to a grievance of a collective nature (such as a pay cut imposed on a group of workers, or the failure to accede to a pay rise sought by a group of workers). The provisions should thus be extended to permit the union representative to raise with the employer collective issues at the request of members.

10. CONCLUSION

The UK has historically operated two quite different kinds of collective bargaining system and has used two quite different kinds of legal model for this purpose. These are respectively the regulatory collective bargaining model, based on multi-employer agreements, created and grown by administrative law; and the representative collective bargaining model based on the enterprise or parts thereof, created and operated by labour law techniques. What is proposed here is a rediscovery of the former and reconciliation with the latter, using legislation to empower administrative action while minimising bureaucratic discretion, in an era of greater judicial power. One of the challenges for trade unions under a framework such as that described above is to avoid such a focus on top-down arrangements as would distract from 'building from the bottom'. There is also a concern that a great deal of effort will be spent improving employment conditions for workers who are not members of the union. In the past, that problem could be addressed, albeit not wholly eliminated, by closed shop arrangements, which of course are generally not permissible as a result of

[102] Employment Relations Act 1999, s 13(5): 'For the purposes of section 10 a grievance hearing is a hearing which concerns the performance of a duty by an employer in relation to a worker.'
[103] *Wilson v UK* [2002] ECHR 552, esp. [44] – [48].

the ECtHR's jurisprudence,[104] though they may not be forbidden in all circumstances.[105]

A collective bargaining strategy of the kind described here is not inconsistent with organizing. There should be no doubt that the route to trade union revival will always be grass-roots organising and recruitment, and it should be emphasized that *trade unions must have a right of entry to the workplace*.[106] Equally, trade unions need *impact* as well as *members*, and their effectiveness will be judged by the number of lives they touch, as well as the number of members they have. It is true that in countries with regulatory collective bargaining models, there tends to be a huge gap between bargaining density on the one hand and membership density on the other. But there are steps that can be taken to mitigate problems.[107]

The task of rebuilding is enormous, requiring great multi-disciplinary skills. Above all it requires the commitment of government. But it is hard to see what the alternative is. We can continue to administer palliative care to collective bargaining as a diminishing institution, which experience shows will continue to decline and will become the pursuit of an ever smaller minority of the working population, to the detriment of all. Or a new government can mobilise its vast public powers to rebuild

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[104] *Young, James and Webster v UK* [1981] ECHR 4. There are also restrictions under the European Social Charter of 1961, despite clear intentions that the closed shop should not be restricted by its provisions.

[105] The government did not argue the point and did not seek to defend the closed shop in any circumstances ([58]). Nevertheless, Art 11(2) was considered by the majority and dismissed on the ground that 'the railway unions would in no way have been prevented from striving for the protection of their members' interests … through the operation of the agreement with British Rail even if the legislation in force had not made it permissible to compel non-union employees having objections like the applicants to join a specified union' ([64]). This leaves open the case where the unions would 'have been prevented from striving for the protection of their members' interests'.

[106] This would be in order to recruit, advise or represent workers. Such rights require amplification beyond the space available here but are a crucial limb of the pincer movement to re-establish collective bargaining in the UK, to avoid further the portrayal of sectoral collective bargaining as a solely top down measure.

[107] Such steps include mandatory contributions to union costs in conducting bargaining ('Fair Shares Fees'). In taking these steps it would be important to take into account relevant international obligations. See *Confederation of Swedish Enterprise v Sweden*, Complaint 12/2002 (European Committee of Social Rights), esp. [39] – [43].

collective bargaining structures to advance a (i) more democratic, (ii) more equal, (iii) more economically efficient, and (iv) more legally compliant society (the Four Pillars). Democracies have and make choices.

Building on earlier work,[108] in the space available we have tried to set out in the pages above and in the context of the current crisis in collective labour law, our proposals for the establishment of the new framework and the means by which we believe that alternative can be pursued through law and State power.

[108] Ewing and Hendy n.4 above.