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Future Prospects for Labour Law — Lessons from the United Kingdom

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Introduction

Globalisation presents major challenges for governments, and some are now looking to the United Kingdom as an example of how to create global competitiveness, economic efficiency and labour market flexibility in a way that also responds to demands for fairness at work. But what the British approach conceals behind its alluring synthesis of regulation and deregulation is the changing nature of labour law, which is now principally a tool of economic policy, and as such less concerned with its historic mission of promoting social justice. Labour law is thus increasingly concerned principally with the re-commodification of labour, rather than the protection of workers; with promoting the flexibility of labour, rather than the security of citizens; and with controlling rather than encouraging labour organisation as an instrument of industrial democracy (a term about which little is now heard). The transformative new synthesis between regulation and deregulation is thus no more than a form of labour standard dilution, and the creation of a labour law for employers, by reinforcing the primacy of the common law in the void left by legislatures and collective bargaining.

This should not surprise us. Economic power eventually captures all legal disciplines, and there is no reason why labour law should be an exception, in an era in which free markets and global capital have triumphed, at least for the time being. The nature of that temporal triumph is reflected in a number of headline statistics about the achievements of New Labour and the New Labour Law. For example, since New Labour came to power in 1997, there has been an increase in income inequality, with the 'the proportion of wealth held by Britain's richest 10 per cent [rising] from 47 per cent [in the 1990s] to 54 per cent' in the current decade.[1] This clearly cannot all be blamed on the model of labour law now being pursued, with a number of other regulatory failures also being responsible. These and other equally depressing headline statistics are, however, a symptom of low labour standards, low levels of regulation, and contained labour power. Welcome to the New Labour Law, and prepare to be disappointed.

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The Re-Commodification of Labour

The brilliance of New Labour in the United Kingdom has been to create an illusion: a regulatory environment of regulatory restraint. So although we have more — many, many more — 'rights' since 1997, it remains the case nevertheless that (a) the direct regulatory impact of even the most significant of these 'rights' is quite limited, while (b) many of the 'rights' are porous and leak badly. Thus although gradually (and significantly) improving beyond its original adult rate of £3.50 an hour, the minimum wage — which does not purport to be a living wage — affects only a few predictable sectors of economy (most of which, paradoxically, are sheltered from global competition). The most recent increase in the minimum wage affected only about 3 per cent of the labour force. The regulatory impact of other measures is undermined by their exceptions and qualifications. So there is a right to a maximum 48-hour week; but there is also a right to waive that right (one of several infamous British opt-outs from EU minimum standards). There is a right not to be unfairly dismissed; but only if the employee has worked for a year or more. And there is a right to work flexible working hours; but only if the employer agrees. In the case of many of the 'rights', the weak and the vulnerable are cut out because of tight access conditions, and even where workers are 'protected', the rights are generally inadequately enforced, while in some cases the compliance costs for employers may not be very high. Unfair dismissal remains the classic example with the median compensation award somewhere in the region of £3,800 (with only 10 per cent of cases leading to a successful outcome for applicants after a hearing) (Employment Tribunal Service, 2007). It is thus no surprise that in an important but overlooked report, the House of Commons Trade and Industry Committee should conclude in 2005 that 'the United Kingdom still has a more lightly regulated labour market than most comparable economies' (HC 2005, para 20).

Alongside this light touch worker protection, however, has emerged a more urgent concern with labour supply, labour quality and labour flexibility, with the government using a combination of stick and carrot. It is here perhaps that the growing re-commodification of labour is most evident, with coercion being an increasingly notable device in a culture where citizens' 'rights' have quickly been balanced by citizens' 'responsibilities'. In the context of the workplace, this translates into a 'duty' to work and a 'duty' to be equipped through training and otherwise for the changing demands of a flexible labour market. So we have initiatives designed (sometimes coercively) (a) to 'liberate' people (the government's term), by getting them back into the labour market,[2] and (b) to retain those who are already there, whether (c) they be people on incapacity benefit, single mothers on income support, women who are pregnant or have caring responsibilities, or workers in retirement. The government has thus most recently announced that access to social housing may be conditional on a willingness to work,[3] while doctors are to be encouraged to provide 'well notes' rather than 'sick notes',[4] emphasising what people can rather than cannot do. So we also have initiatives designed to make people more productive by 'up-skilling' the labour force, with a constant stream of learning and training initiatives. The government has thus most recently announced that global companies (such as

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McDonalds) will be accredited to award educational qualifications up to degree level (in subjects such as running a fast food restaurant),[5] while universities will offer 'degree courses that will be co-funded and partly designed by employers'.[6] And so, too, we have initiatives on labour flexibility, with the government 'fully' accepting 'its responsibility to workers facing redundancies'. But this responsibility does not lie in protecting jobs from unfair competition, but principally in enhancing the capacity of the Employment Service to provide support, emphasising the importance of acquiring new skills as being critical to employability, and providing access to the New Deal for Skills.

The re-commodification of labour, and the failure of labour law under New Labour as an instrument of social justice, are to be seen most clearly in the controversy about agency labour, where both of these issues of low labour standards and a preoccupation with labour supply converge. Business responds to claims that the approximately 1.5 million agency workers (often recruited from abroad) are exploited and used to undercut full time workers, by asserting that agency work should not be discouraged because it enhances labour market flexibility. The trade unions, however, see the returning spectre of 'casualisation':

> Working men and women are now being viewed as dispensable labour, hired and fired at will, never knowing from one day to the next if they have a job or will earn enough to make ends meet. This is not flexibility, it is exploitation. In the last century we fought against this inhumane treatment and we are not going to accept its return today.[7]

Because they do not always enjoy the status of employees, agency workers are denied access to many (though not all) of the limited statutory benefits; and because they are vulnerable (often recruited from abroad), they are not in a position to enforce what limited rights are available to them. Moreover, they may be paid significantly below the market rate for direct labour; they may be denied access to contractual benefits such as sick pay, holiday pay, overtime rates, or pension provision; and they may have money deducted from their wages to cover accommodation, transport costs, and domestic services not provided.[8] Yet despite growing concerns about the exploitation of these workers, and despite calls from the courts to address the position,[9] the government has sided with the business lobby to block a European Union Directive that would give such workers equal rights with direct labour, and has opposed a widely-supported private member's bill — the Temporary and Agency Workers (Equal Treatment) Bill 2008 — which would do the same, undertaking to seek a compromise that will not unduly displease the big companies.[10]

The Marginalisation of Regulatory Institutions

In addition to the growing re-commodification of labour by low labour standards, a second feature of the New Labour Law has been the retreat of alternative forms of regulation. This means principally collective bargaining, and the rejection of two central assumptions on which collective bargaining is based. The first of these assumptions is that trade unionism is to be encouraged as a source of countervailing power to the power of business, and as such, a source

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of individual protection and empowerment. Now, the first assumption is that trade unionism is to be seen as only one of the ways by which successful businesses 'harness the talents of their employees in a relationship based on fairness and through recognition that everybody involved in the business has an interest in its success' (DTI 1998). According to the government, 'each business should choose the form of relationship that suits it best' (ibid). The second assumption rejected was that trade unions should operate in a regulatory capacity through collective bargaining — as continues to be the practice of their European counterparts — to establish terms and conditions of employment for workers throughout a sector or industry, regardless of whether the workers in question were union members or not. Now, the second assumption is that trade unions are to be seen principally as representative rather than regulatory bodies, with an authority drawn from the mandate of a group of workers based in the enterprise, and with the scope of collective agreements confined to the enterprises in which they were based (Ewing 2005). This represents a crucial dilution of the trade union role, with significant implications for the level of collective bargaining density. In fact, comparative international data suggests that collective bargaining coverage is likely to be higher where collective bargaining takes place at a sectoral or industry level, rather than at the enterprise or company level. Indeed, low levels of collective bargaining coverage are associated with countries — such as the United States, Canada, and Japan — where there is variation of some kind or another of the British recognition legislation (OECD 1994).

This reorientation of the trade union role — with trade unions as representative rather than regulatory bodies — permeates the statutory machinery that was established by New Labour to facilitate trade union recognition. This legislation is admittedly based on a third assumption, which is that 'the freedom to choose must apply to employees as well as employers', meaning in turn that 'employers should not deny trade union recognition where it has the clear and demonstrated support of employees' (DTI 1998). However, this is a much weaker assumption than the other two new assumptions referred to above, in the sense that it is subordinate to the other two assumptions, and as a result is only imperfectly reflected in the legislation. Reflecting the first of these new assumptions, it is open to an employer to create its own in-house staff association or works council, which is then 'recognised' for the purposes of 'collective bargaining'. Where this is done, it is not possible for an independent trade union to seek recognition under the statutory procedure, even though the imposed representation structure is not a result of employee choice. The best known — but not the only — example of this kind of 'representation' is provided by News International (Ewing 2000), where the company's creation was denied a certificate of independence by the government's Certification Officer. Reflecting the second of these new assumptions, recognition may only be secured under the statutory procedure if the union can establish that it has the support of a majority of workers in an appropriate bargaining unit in a particular enterprise, whether on the basis of membership or in a ballot contested by the employer. So although workers thus have a freedom to choose, their choice will not be

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respected unless it has the support of a majority (there being no possibility of members-only bargaining where the union does not have a majority — as the ILO requires), and there is no opportunity in the legislation for workers across enterprises to choose a form of multi-employer collective bargaining.

This is not to suggest that the recognition model is inappropriate or that it has no role to play. But it is to suggest that it carries too heavy a load if it is to carry the burden of workplace representation on its own. It needs to be complementary to a regime designed to promote collective bargaining as a regulatory device through sectoral or industry-wide bargaining, which the government and employers (with a few exceptions) have set their face against. And it needs to be underpinned by procedures which allow for the collective representation of the trade union interest (rather than simply the trade union representation of individuals) where the union does not yet have a majority of the bargaining unit. To put the matter into perspective, the number of workers covered by a collective agreement had fallen sharply from 71 per cent (82 per cent if equivalent activity is included) in 1979 at the end of the last Labour government (Milner 1995), to below 40 per cent in 1997, when the present Labour government came to office. By the time Tony Blair stopped being Prime Minister in 2007, it is estimated that collective bargaining coverage had fallen to 33 per cent, which means that in 10 years Labour failed to arrest the decline, despite the legislation. To put it more starkly, this means that out of a labour force of an estimated 31 million workers, some 20 million are not directly protected by a collective agreement. Although it is unlikely that this failure can be blamed wholly on the statutory procedure, it has been said nevertheless to be 'remarkable' that so few recognition deals — voluntary or statutory — have been concluded under the legislation. Particularly striking is that 'only some 78,000 more workers gained recognition in 2003' (Hendy 2004). Although this 'may sound a lot', it has been said that 'given that some 9 million workers have lost that benefit over the last 30 years, at this rate it will take over 100 years to get back to where we were and getting on for 150 years to get back to the European average' (ibid).

The Disempowerment of Labour Organisation

Thus, the New Labour Law so far has two notable features. The first is the low level of regulation by statute; and the second is the marginalisation of other forms of regulation. A third feature has been the continued disempowerment of organised labour, with Tony Blair signalling during the election campaign in 1997 that much of the Conservative government's legislation restricting the freedom to take industrial action would remain in place and that the United Kingdom would continue to have the most restrictive labour laws in Europe.[11] He kept his promise, with the result that British trade unions are ill-equipped to deal with many controversial employment practices, as revealed by a *cause celebre* involving a small United States-owned company in North Wales. Friction Dynamics — which made parts for motor vehicles — introduced new arrangements whereby the workforce was 'faced with unilateral management action to remove the workers' contractual rights to have their terms and conditions determined by a collective bargain. The employer also took steps to remove union

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involvement at the workplace' (Thompsons 2003). The common law providing no remedy for workers who found that their contracts might as well have been written on water (if written anywhere), they took industrial action to protect their terms and conditions. Although the employees were replaced, a number of them succeeded in using New Labour's new 'right' to bring a complaint for unfair dismissal for being dismissed for taking part in a lawful strike, and had compensation awarded in their favour.[12] To the dismay of the individuals concerned, however, the company announced that it was going into voluntary liquidation, to re-form as Dynamex Friction, 'allegedly' buying the assets of the old company (Chamberlain 2003). Yet despite being wronged at various stages (unilateral change of contractual terms, displaced by replacement labour, and denied unfair dismissal compensation), at no point could these employees lawfully call on members of their own union to support them in their struggle with the company by putting pressure on the company by refusing to deliver its supplies or handle its products until it respected the contractual and statutory rights of its (former) employees.

The continued disempowerment of organised labour through restrictions on the right to strike of this kind means that, after 10 years of a Labour government, the United Kingdom continues to be in breach of ILO Convention 87 and the Council of Europe's Social Charter of 1961 (JCHR 2004). But it is not only in relation to the ILO and the Council of Europe that the United Kingdom is failing. A revealing insight into the government's labour market strategy is provided by the reaction to the proposal for a European Union Charter of Fundamental Rights. The government's first response was to try to block this and then to dilute its scope, so that it would be simply a legally unenforceable 'showcase' of existing rights, rather than a source of legally enforceable new rights, a strategy achieved when the Charter was agreed in the Treaty of Nice in 2000 (Ewing 2002). However, the movement in favour of European integration — as well as the tendency of rights documents to become inflated beyond the original intention of their authors — led, in the Treaty of Lisbon 2007, to the EU Charter being given a formal legal status. Undaunted, the British government negotiated another of its opt outs, this time from the 'Solidarity' chapter of the Charter, which deals with matters such as the right to information and consultation, and the right to strike. It did so on the ground that it was not prepared to put the United Kingdom's flexible labour market at risk (HC 2007). As a result, the rights in European law to be derived from the Treaty are to be no greater in the United Kingdom than the rights already existing in domestic law.[13] So, while workers in Germany or France will have an autonomous right to strike under European law which may go beyond that provided by their own national legal system, the relevant rights of British workers in European law will be pegged to the rights of these workers in domestic law, despite the fact that these latter rights fall well below minimum international standards.

The problems which British workers (and indeed all workers in the European Union) now face have been compounded substantially by the decision of the European Court of Justice in *International Transport Workers' Federation*

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v Viking Line.[14] This concerned a dispute in the Baltic when the owners of a ferry proposed to register it in Estonia rather than Finland in order to be able to pay lower wages. The shipowners complained that the action of the Finnish union (supported by the ITF in London) violated Article 43 of the EU Treaty, which provides for the right to freedom of establishment throughout the European Union. The case was heard initially by the English courts (because the ITF is based in London), before being referred to the European Court of Justice, which although accepting that the right to strike was part of the general principles of European law, held that it was secondary to the right of business freely to establish itself across the Union. The right to strike would only be permissible if it was proportionate, about which the court gave little guidance to assist trade unions, although it would not be enough for this purpose that the strike was lawful under the national law of the member state in which it took place. It would have to be shown that jobs were genuinely at risk as a result of the conduct of the employer, and that the union had exhausted alternative means of dispute resolution. The outcome was an undisclosed but substantial settlement in favour of the company, in a case as significant today as the *Taff Vale* case was in domestic labour law over 100 years ago.[15] But unlike the *Taff Vale* case (which led to substantial damages being awarded against the railway union) (Lockwood 2007), there is no obvious political solution to enable the damaging decision in *Viking* to be reversed. *Taff Vale* led to the foundation of the Labour Party and the Trade Disputes Act 1906, the latter forming the bedrock of British labour law until 1971, and some might say beyond.

Conclusion

The *Viking* case is immensely important, and is likely to have an impact on workers well beyond the territorial limits of the European Union. It brings into sharp relief a battle that many had thought had been won — the battle between free trade and free trade unions, and re-enacts that battle on the transnational high plains of treaty law, rather than in the domestic trenches of restraint of trade (as in the nineteenth century), or conspiracy to injure (as in the twentieth century). But the issues are just the same, as is the outcome, and as such the decision is symbolic of the extent to which business has consolidated its power in the global economy. As we have seen, however, that consolidation has a political as well as a legal dimension, which is reflected also at European Union level in the concept of 'flexicurity', the European Commission's oxymoron as the driving force for the future (HL 2007), and another synthesis likely to be a synonym for further deregulation. Although globalisation may not have produced — as some had predicted — a 'race to the bottom' in terms of labour standards (and indeed has not stopped all regulatory innovation), it may nevertheless be creating a 'drift to the bottom': a pattern of low standards and weak regulation, which even the most politically powerful labour movements seem unable significantly to influence. Indeed, even the most politically powerful labour movements are being forced to accept a role designed for them by governments rather than by members, as channels of communication (in the workplace as well as in the political

process), rather than sources of power (whether in the workplace or in the political arena). While centre left political parties thus seem unwilling or unable to confront the giants of globalisation, there is renewed optimism that Australian workers and trade unions will see major improvements, in a global climate of weak, fearful, and timid governments.

Notes

1. *BBC News*, 2 August 2004.
2. See *BBC News*, 10 October,2005.
3. *BBC News*, 5 February 2008: 'new applicants for social housing might sign "commitment contracts" pledging to seek employment'.
4. *The Guardian*, 5 February 2008; *BBC News*, 20 February 2008.
5. *The Times*, 28 January 2008.
6. *Times Higher Education*, 27 March 2008.
7. *T&G News*, 19 February 2008.
8. *Consistent Group Ltd v Kalwak* [2007] IRLR 560. See *The Guardian*, 24 September 2007.
9. *James v Greenwich LBC* [2008] EWCA 35.
10. For the debate on the Bill, see HC Debates, 22 Feb 2008, col 663.
11. *The Times*, 31 March 1997.
12. *Davis v Friction Dynamics* (Employment Tribunal, Unreported Liverpool ET, Case No. 6500432/02).
13. See European Union (Amendment) Bill 2008. See esp HC Debs, 5 February 2008, esp. Jon Cruddas MP.
14. 11 December 2007. For background, see Bercusson (2007).
15. *Taff Vale Railway Co. Ltd. v Amalgamated Society of Railway Servants* [1901] AC 426.

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