THE CHANGING FACE OF EMPLOYMENT PROTECTION

Regulation, cost and competition

Pressure from countries with long established industrial bases upon developing countries to adopt minimum standards in areas of employment such as health and safety and employment protection has often been seen in those developing countries as an attempt to reduce their competitiveness by the imposition of regulation which, it is assumed, will increase production costs. Whether or not this is a correct interpretation of motives the pressure of competition is two way and is causing developed countries to adapt those same regulations to meet it. Both reactions stem from acceptance of the economic theory which, at its most simplistic, can be stated as that regulation increases cost and so decreases competitiveness. Supposed proof of this is readily found in the effectiveness of competition from the 'tiger' economies of South-East Asia, and if it is objected that the success of this competition is, even more simply, low wages the answer will be that low wages and low regulation are inextricably mixed since regulation will, directly or indirectly, drive up wages.

This theory is at least as old as the European industrial revolution and was, indeed, more influential in the early nineteeenth century than it has been since until it was adopted as part of the dogma of right wing governments. In the United Kingdom the first consolidating Truck Act of 1831[1] was passed by the unreformed British parliament of rotten boroughs and landed interests apparently to protect workers from low wage exploitation but with the support of the growing and

[1] 1 & 2 Will 4 c.37.

influential class of large employers anxious to drive out unregulated competition which was undercutting their prices by abuse of the truck system. The earliest Factories Act was supported by the textile finishers as a means of restricting production of raw textiles in such quantities as could not be absorbed by British finishers so that the excess was exported for finishing in Holland at lower cost. Employers were at least as much inclined to resist regulation. Joseph Chamberlain, one of the largest of them, supporting the amendment of Gladstone's Employers Liability Bill of 1893 to permit contracting out, said in the House of Commons,

> If you think you are going to make the workman more careful by punishing his employer you are very much mistaken.[2]

This is to speak of regulation as the setting of legal norms. The outcome of collective bargaining is an equally effective regulator of the labour market, and in much of Western Europe and the United States of America it has, in the past, been more significant. In the United Kingdom it had, for a hundred years until 1980, been accepted by all governments as the principal regulator of the labour market. It was the alleged effect of the restrictiveness of collective agreements on the competitiveness of British industry which convinced the Conservative governments of the 1980's of the urgent need to curb the power of trade unions.

To the non-economist the basis of the conclusion that regulation means cost is beguilingly obvious. Safety regulation requires expenditure on safety devices and inspection; employment protection sets minimum standards, by definition involving increased unit costs; restrictive practices both slow down production processes and involve employment of more people. The economist is more aware that, by constructing models, he eliminates certain factors from consideration. The model on which the theory is based is never as complex as reality. The economist

[2]Parliamentary Debates 4th Series 20, 2-14. Quoted by Hanes, *The First British Workmens Compensation Act 1897* (Yale UP 1968) 79.

hopes the eliminated considerations are unimportant. His opponent argues that, at the very least, their exclusion distorts the conclusions.

This is the basis of the argument of Deakin and Wilkinson[3] that factors existing in the real labour market but missing in economic models tend to destroy the validity of the theory that regulation increases cost. They look at the classification of regulation not from the point of view of its source but of what it will bear upon. So, regulation may; (a) affect the terms of employment, or (b) produce normative principles such as rights of association and of a national minimum wage. Such normative regulation may, in turn, consist in substantive or procedural rules. The authors of this article conclude that it may, thirdly, produce 'promotional' rules such as are embodied in state training schemes. In all forms of regulation there must, additionally, be a mechanism for ensuring observance, unless what has come in European Union parlance to be termed 'derogation' permits a safety valve of opting out.

The simple economic model, it is contended, regards both legislative and collective regulation as barriers to entry to the free market erected by pressure groups anxious to shelter insiders from competition. Once inside those barriers, of course, different arguments apply but the insider may run into further internal barriers erected by other groups to protect subdivisions of that market. The European Community is a classic example of external and internal regulatory barriers. But even if the market is free employers will not necessarily take advantage of market changes. One of the most typical needs of the employer is to retain the loyalty and commitment of the workforce and that, by encouraging a productive workforce, may have much greater economic benefit than market exploitation. It can also be shown that regulation may reduce cost by eliminating external cost by restricting freedom to contract on defined matters.[4] One suspects that politicians know all of this and that deregulation is a slogan they use when desirous of attacking some consequence of regulation and discard when regulation suits them, as it normally appears to do. Regulation may, indeed, be necessary to

[3]Deakin & Wilkinson, "Rights vs. Efficiency? The Economic Case for Transnational Labour Standards" (1994) 23 *Industrial Law Journal 289* - United Kingdom.

[4]See, Aghion & Hormalin, "Legal restrictions on private contract can enhance efficiency" (1990) 6 *Journal of Law Economics and Organisation* 381.

police deregulation since it does not follow that employers will use economic cost saving in a politically acceptable fashion. When the United Kingdom CBI made the statement that

> freezing the minimum rate (of wages) or just maintaining its real value appears to have freed up part of companies' pay budgets to enable them to fund important changes to their salary structure

it could have meant, without distortion of the truth, that maintaining low wages allowed payment of large salaries to senior management.

Economic efficiency is, in any event, not the only measure of the labour market. As we shall see later, the European Union places social policy at the centre of its regulatory function, if for no other reason than that it would scarcely suit its economic policy to permit one member to vie with another in a downward spiral of social benefit provision. It may also be argued that there is no better incentive to innovation than pressure. An employer who can make a substantial profit from low value goods cheaply produced has no inspiration to improve either the methods of production or the product.

If, in the real world, issues can never be completely resolved by economic evaluation how is the correct resolution to be achieved? The economist may assign an economic value to non-economic factors thereby quantifying, aggregating and comparing advantages and disadvantages and determining a theoretical outcome. Alternatively, it can be concluded that where there is no economic measure it is impossible to evaluate usefulness. In that event non-economic decisions must be taken politically, giving due weight to individual choice. If it is necessary to resort to third party arbitration that is best done by those capable of interpreting both the economic and the non-economic rules.[5] Not surprisingly, in the light of the well established practice of civilised societies throughout history, the decision of a well informed and expert court may be more reliable than that of an economic theorist.[6]

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[5]See *e.g.*, Maughan, "Canary Wharf and Proprietary Interests in Land" (1997) 147 *New Law Journal* 914 at 915 - United Kingdom

[6]Courts often make profound judgments of the relative economic and social arguments apparently without noticing it. See *e.g.*, *Cresswell* v *Board of Inland Revenue* [1984] Industrial Case Reports (ICR) 508 - UK.

At the very least there would seem to be good reason to ask for a more thorough survey of the factors supporting the theory that market regulation means cost. In the absence of such a review it would seem unjustified to ask that the theory be applied blindly as if it were correct. The best that can be said for it is that it is a significant consideration in the process of deciding whether to regulate. This means that the economist cannot be the judge. This conclusion is scarcely surprising. As has already been remarked, governments making protective regulations in the labour market make their decisions after considerations of factors both economic and social (to say nothing of pure politics). The economic theory so widely paraded in the recent past was little more than an apparently rational front for other, less rational, policies.

The decline in regulation of the labour market

Many developing countries have, so far, avoided over-regulation of the labour market. Depending what one is looking for it can be said that they fail to protect the interests of the worker in order to facilitate the development of industry and, more particularly, the attraction of foreign investment. Some developed industrial economies long had little need to care too much about competitiveness; none more so than the United Kingdom in its imperial phase with ready supplies of cheap raw materials and receptive markets around the world. One would expect the regulation/cost theory to have been received most noticeably in the latter as colonies have turned into competitors. In the United Kingdom, the most significant application has been in the elimination of normative procedural rules rather than in direct regulation of terms and conditions for the very simple reason that, historically, regulation of the labour market was left to collective procedures. Absence of legislative interference was elevated into a dogma. Consequently an attack on regulation had to be primarily an attack on the regulatory effect of collective bargaining. Virtually all the support mechanisms for industrial relations, for example, were dismantled in the 1980s, including, at a very early stage those for protection of collective standards by extension to avoid undercutting. It is unnecessary, for the purposes of this article, to examine what was done in any detail and the broad outline is generally known. What is not always so clear is the measure of success

of this deregulatory policy, the inevitable corollary of which has been enhancement of the power of management to manage and the exposure of the relatively unprotected worker. It is, for the purpose of indicating the motives of this policy, immaterial that this deregulatory effect was achieved partly by positive steps to dismantle regulatory machinery and partly by the debilitating effect of adverse economic circumstances, particularly by high unemployment; common, incidentally to most of Western Europe but, significantly, not to the USA. Whether or not governments deliberately encouraged some of these circumstances or merely harnessed them to the overall purpose, the end result in the United Kingdom was a massive freeing of the labour market to the benefit of managerial initiatives.

In 1979 trade unions in the United Kingdom had a total membership in excess of 12 million. By 1996 that had fallen to 7,215,000; or a density for all employees of 31.3%, and for all workers of 28.8%. The rate of decline, once the deregulatory measures had begun to take effect, was reasonably consistent and membership fell by 1,749,000 between 1989 and 1996.[7] Whereas, in 1975 between 84% and 86% of the workforce (including some 3 million people subject to Wages Council regulation, abolished in August 1993) was covered by collective agreement, by 1996 only 36.5% of all employees (8,091,000) were so covered. Even among large employers, which trade unions find easiest to organise and which, in many ways, benefit from such organisation, less than 50% of employees were covered in every single section of the economy except gas, electricity and water supply (77%) and transport and communications (53%). By 1996 only 45.8% of employees worked in workplaces at which trade unions were recognised. It should be born in mind, when considering this figure, that only 7% of UK employees are employed in undertakings with less than 20 employees and it will be appreciated that derecognition has spread a long way upward from units which it is difficult effectively to organise.

[7](1997) *Labour Market Trends* (UK Office of National Statistics) 231-239.

Positive legislative standards were not widely repealed partly because, as already stated, they were not extensive but partly because, left to themselves without updating, they will become ineffective. By 1997, for example, statutory redundancy payments depended on a formula based on a maximum weekly wage of £210 whilst the average weekly wage in the UK was then around £380. The maximum payment that could be awarded was £6300 at which level many large employers were not unwilling to assign the cause of dismissal to redundancy rather than face the risk of a claim in an industrial tribunal for compensation for unfair dismissal. Not that even such a claim was particularly economically significant at a maximum in 1997 of £11,300 and with little chance of reinstatement. It is impossible to calculate the effect of this low ceiling but it is suggested that it is a significant factor in the otherwise inexplicable tendency of industrial tribunals to restrict compensation to inadequate levels.[8] It could also be said that a system which produces a success rate of 11.2% for all applicants for unfair dismissal[9] might leave the impression that regulatory protection is inadequate. In a situation where few full-time male employees are likely to earn less than £12,000 per year, whilst one dismissed over the age of 45 will have difficulty securing regular employment again, this degree of regulation is unlikely to affect competitiveness and its comparatively low level is likely to attract foreign investment.[10]

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[8]The median award in 1996 was £2499.

[9](1997) *Labour Market Trends* (UK Office of National Statistics) 151-156.

[10]It is interesting to note that the attraction of potentially cheap reorganisation can have adverse effects. It has been said that deregulation produces a "Dutch auction" where worker competes with worker across the globe for the chance of a job at lower labour costs and in worse conditions. The auction may go further than that. Early in 1997 the Ford Motor Co. announced the intention of dismissing 3,000 employees at its productive and profitable plant at Halewood near Liverpool and transferring production to the Continental mainland. The "Independent" newspaper reported on 5 February 1997 that confidential management documents revealed that a major consideration had been the saving of £45 million in making UK employeees redundant rather than their German counterparts so that, even allowing for much higher labour costs in Germany which excess would cost $27.3 million between 1998 and 2001, there would remain an overall saving.

The United Kingdom employee protected by a system of voluntary collective regulation was always vulnerable to employer withdrawal from that system. Few supposed in the 1960's that the system itself might be significantly undermined. Governments from 1979 to 1996, however, had not only the political will but a marked determination to do so. In part they created a climate of popular opinion making it politically possible to implement this purpose; but, in part, that opinion had been created in the late 1970's by the appearance of what was then a very strong trade union movement dictating policy to government. The attack on collective regulation was also greatly facilitated by inept leadership, particularly of the National Union of Mineworkers whose industry had been carefully selected by government as the principal battleground. It is unlikely that this degree of deregulatory freeing of the labour market could have occurred in any other country (with the possible exception of the USA) because legislative regulation, especially in the form of a Labour Code, is politically more difficult to demolish. But if those legislative standards were allowed to deteriorate, as has occurred in the United Kingdom merely by failure to maintain their values, a similar freeing of the labour market at the expense of employee protection would occur. As we shall see, it is to this potential threat that the European Commission has addressed itself.

The growth of the flexible market

Just as the parallel worsening of the economic climate facilitated positive policies of deregulation, so parallel broadening of the labour base of the market facilitated the desired freeing of that market. In another climate the development of atypical forms of work might have called forth regulation designed to bring those forms within the regulatory structure applicable to typical working relationships. The growth of atypical employment was rapid in many member countries of the European Union, was generally welcomed by employers as creating flexibility which facilitated competition, and so tended not to be subjected to the regulation applicable in the more rigid typical forms. The development of atypical forms of work was essentially nothing more than a mining of untapped sources of cheaper labour; cheaper not only in wage terms but in relation to added cost. In principle, though

undoubtedly not in degree, these sources were the equivalent of the sources of relatively cheap labour in developing countries.

There is no doubt that employers in general welcome the exploitation of sources of atypical labour. A European Foundation survey in 1989[11] of managers and employers in Belgium, Germany, Italy, Spain and the United Kingdom found that 48% of managers thought that part-time employment increased competitiveness whilst only 7% thought it harmful in this respect. Specifically, 36% identified as an advantage its value in coping with work peaks, while 27% saw direct cost advantages in part-time, as opposed to full-time, employment. There is, similarly, no doubt that governments welcomed the development. Significantly, in the United Kingdom, part-time employees are from 4% to 5% cheaper in terms of contracted out national insurance contributions. In 1996, for an employee paid less than £205 per week the employer paid 4% of wages. The contribution rate on earnings between £205 and £440 was 7.2% whilst above £440 it was 10.2%. No contributions at all would be payable if the work could be split between a number of employees all earning less than £105 per week.[12] Governments generally see part-time working, in particular, as a means of statistical reduction of unemployment. In 1990 the German labour minister said that if Germany had the same part-time working levels as Holland it would have two million more people in employment. Not surprisingly, 42% of employee representatives considered part-time working to have 'concrete disadvantages' and pointed to absence of chances of promotion, less job security, lack of welfare benefits and lower hourly rates.

Because detailed statistics are available the development in the UK of atypical working will be used to illustrate the effect it has had across a number of national European labour markets. Although it is more subject to restriction in other countries than in the UK temporary

[11] *New forms of work and activity: representative survey of enterprises* (European Foundation for the Improvement of Living and Working Conditions, 1990).

[12] John Hughes, "Looking for a perspective on the national minimum wage" (1996) 46 *Federation News* 58 at 72 (General Federation of Trade Unions, London).

working is a long established form in many countries. Probably for this reason it was the first to develop rapidly. It is often organised by third party agencies which impose a not inconsiderable added cost and it is scarcely surprising, therefore, that in a survey of reasons for resort to it conducted in the UK in 1996[13] only 2.2% of management cited immediate cost advantages. Again, the most frequently encountered reason was the ability to meet peaks of demand (22.7%), followed closely by holiday and sick leave cover (21.2%), with cover for maternity leave in third place (13.7%). Despite these generally applicable advantages 50% of all temporary employment in the UK is in clerical and secretarial grades, suggesting extensive influence of externalities rather than direct economic advantage.

By far the greatest expansion of flexibility of working practices in Western Europe has lain in the employment of women. Between 1986 and 1996 the number of women working part-time in the United Kingdom increased by 11% (586,000) at a time when unemployment rates remained well above two million. Employers commonly justify the apparent disadvantages of part-time working by saying that women prefer it. Indeed, a survey in 1996[14] disclosed 90% of women with dependent children supporting this view. This is like finding that poor people prefer cheap food. If society expects women to take the principal part in child care of course they will prefer part-time working, and it is significant that two thirds of women working part-time have dependent children. The employment of significant numbers of working women is a post second world war phenomenon in the UK, but by the Spring of 1996 71% of women of working age (11,756,000) were 'economically active' compared with 85% of men (18,083,000). Forty per cent of all those of working age in employment were women and 67% of working age women were in employment. (77.8% of men). Part-time work is overwhelmingly concentrated among women

[13]Heather, Rick, Anderson & Morris, "Employers' use of Temporary Workers" (1996) 104 *Labour Market Trends* 403.

[14]Sly, Price & Risden, "Women in the Labour Market" (1997) 105 *Labour Market Trends* 99.

throughout the European Union where, overall, 85% of part-timers are women. In the United Kingdom only 8% of men (just over one million) work part-time only and a high proportion of them are students. Women are concentrated in certain sectors of industry and outnumber men among health associate professionals, teaching professionals, secretarial and clerical occupations, sale and general service operatives.

If employment of women and part-time working develop together we would expect to find evidence of economic advantage in the market freedom thereby created. In this most important of all developing markets flexibility it is not hard to find. In the Spring of 1996 in the United Kingdom average hourly earnings of full-time women, at £7, were 80% of those of men. But average hourly earnings of part-time women were only £5.27.[15] Significantly, the proportion of part-time women employees over the age of 21 who earned less than £2.90 per hour actually rose from 6.4% in 1993 to 6.99% in 1995.[16]

Without regulation, and also by reason of exclusion from existing regulation applicable to typical employment, atypical workers are more exposed to disadvantage. Commonly, temporary workers in the United Kingdom have no protection from unreasonable termination. Until very recently in the United Kingdom part-time workers with less than 16 hours employment a week had less right of access to industrial tribunals upon termination. This has recently been rectified as a result of reliance on European Community law,[17] but considerable associated disadvantages remain. To give just one example; if a woman returning

[15]The average hourly earning of part-time men was actually lower at £5.14, but that was because, as already remarked, most of them were students. Another set of statistics taken in June 1996 gave full-time women an average gross weekly earning of £285.80 as compared to £395.10 for men (72.3%).

[16]John Hughes, *op.cit.*, at 65.

[17]*R.* v *Secretary of State for Employment ex parte Equal Opportunities Commission* [1994] Industrial Case Reports (ICR) 317 - a decision of the UK House of Lords.

from maternity leave is permitted[18] to transfer from full to part-time employment she will forthwith forfeit a considerable amount of benefit under a final salary pension scheme (which she might consider she had already earned), and upon any subsequent redundancy where compensation will also be based on her final salary as a part-timer. John Hughes[19] also shows that lower wages increase less in proportion with higher wages. He demonstrates that, whereas in 1995 lowest decile earnings for non-manual men were £204 a week, had they maintained their 1979 differential with highest decile earnings the rate should have been £543 in 1995. In fact it was £713.

The European Union compromise

Whether or not the theoretical economic arguments for deregulation are sound it is clear from what has been said that deregulation means less legal or practical protection, whether it be in terms and conditions of employment, health and safety or job security. Most systems of labour law throughout the world rely on a contract of employment to govern the relationship. It is usually left to the worker to agree with the employer upon entry to employment. The principal difference between one country and another lies in the degree of external regulation imposed upon the outcome of this agreement. In many a more or less extensive legislative code of labour rights will override key provisions of the contract. Alternatively, collective agreements will regulate large sections of the market, and even if there is no machinery for extending them so as to prevent non-participants from opting out of their regulatory effect, they will, in practice, control the market. But if we imagine a total absence of either form of regulation we are left only with the contract and that is dictated by the employer. As Professor Sir Otto Kahn-Freund wrote in 1972,[20]

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[18]And in the UK, as distinct, for instance from Slovakia, she has no right, having been employed full-time, to return part-time.

[19]*op.cit.*, 60 & 62.

[20]Kahn-Freund, *Labour and the Law* (1st Ed. Stevens 1972) 41.

> the rules of employment are thus, in the main either an emanation of the managerial power of the employer or they are a complex amalgam of legislation and of collective bargaining.

Freeing the labour market, therefore, whether or not it enhances competitiveness, detracts from the protection and security of the worker. In a discussion paper issued in 1997 the British Trade Union Congress summed up its view of deregulation thus;

> the course of the last 18 years where Government abdicates responsibility for good relations at work, whereby some employers uncritically exploit the weakening of rules and standards governing work, and whereby trade unions fall into an easy habit of taking an oppositional stance and conveniently blame all ills on the government

as, incidentally, does this extract.

The question facing not only the old established industrial nations, but indeed every nation that aspires to develop its own industry is simple. Competition from all other nations similarly inclined will have to be met. Is the economic model of regulation increasing cost and decreasing competitiveness to be accepted and, if so, does this mean abandoning the worker, as an unprotected individual offering his labour in a profit dominated market? Even if the model is not accepted the question only changes to ask how much protective regulation can be risked.

The European Commission has declared that the worker should be able to share in the anticipated increase in wealth. Presumably this implies some resort to regulation since it is unlikely that multi-national companies can be relied on voluntarily to achieve a fair sharing. As already stated, the European Union has a vested interest in maintaining minimum standards because, to the extent that it does not do so, it leaves members free to compete. It accepts that such competition is not necessarily contrary to the spirit of a common market but, at the same time, acknowledges the need for a floor of protection. That is all very well if such a policy is accepted. How then does the Union propose to secure acceptance of worker protection by its all important employers?

There are many examples in European Union law of direct regulation of the labour market and it is well known that the arch

deregulator—the previous government of the United Kingdom—has opposed many of them almost entirely on the basis of their alleged adverse effect on competitiveness. A good example is to be found in the most effective of all labour Directives, the Transfer of Undertakings Directive of 1977.[21] When the British government eventually incorporated this in United Kingdom law it expressly stated in Parliament that it did so 'with remarkable lack of enthusiasm'. As is generally known, the Directive primarily provides for automatic transfer of an employee's contractual and other rights from the transferor to the transferee employer wherever there is a transfer of undertaking and provided that the employee was employed by the transferor at the time of the transfer.[22] Employees are protected from dismissal by reason of the transfer unless the dismissal is for an economic, social or organisational reason involving a change in the workforce. For some years the United Kingdom regulations implementing this Directive remained almost a dead letter because transferring employers resorted to the practice of dismissing the workforce immediately before the transfer so that it would not be employed at the time of the transfer.[23]

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[21]Directive 77/187 OJ L61 5.3.77 at p23.

[22]The normal method of business transfer in the case of companies in some countries including the United Kingdom and the Republic of Ireland is by acquisition of a controlling share interest. Such transfers are not within the terms of the Directive but in such cases the actual employer remains the same company so the employees' rights remain unaltered.

[23]Such dismissal, unless for economic social or organisational reasons would normally be regarded as automatically unfair so as to entitle the dismissed employees to compensation. Usually, however, the transferor would go into liquidation with as few assets as possible so that only the basic compensation would be paid, and that by the government rather than the dismissing employer. The government was not averse to this device believing that it facilitated continuation of the business and, therefore, continuing employment, at least for some, albeit on different terms. For the same reason the United Kingdom government has negotiated with the European Commission what amounted to a derogation from the Directive to permit liquidators to continue a practice of transferring only assets to an operating company the business of which was subsequently sold without the liability represented by employees who remained with the original insolvent company.

Eventually the House of Lords declared such a dismissal to be unlawful and ineffective for the purposes of the regulations.[24] Nevertheless, transfers in the public sector continued to be regarded in many cases as outside the terms of the Directive because the activity was not profit making and so was thought not to constitute an 'economic entity'. When the European Court of Justice taught the British that this phrase, like many others in the English language, was given a different meaning on the continent of Europe[25] the resultant extension to public sector transfers dealt a severe blow to one of the most useful devices for deregulatory enhancement of competition introduced by the British government in the 1980s.

What is known as Compulsory Competitive Tendering (CCT) was imposed as an obligation particularly on local government authorities and the National Health Service, introducing what is often called the internal market. Such service providers are required to put out to tender, at specified intervals, distinct parts of their operation as, for instance, catering in the NHS and local authority schools, and to accept the lowest tender. There is little doubt that many such services had become economically inefficient in the absence of any system of accounting for costs. To take one example, it was not unknown for local authority to direct works departments (which undertook property maintenance as well as new building on behalf of the authority) to price materials as if the whole cost unit, such as a sheet of plywood, would be used on a single job such as boarding up a window. What happened to the surplus is a matter for speculation. But CCT almost immediately developed another, less universally desirable, form of economy in that outside contractors not subject, as was the authority, to the regulatory effect of collective bargaining, would cost their tenders on the assumption that they would take over the existing workforce (or engage new employees) at substantially reduced rates of pay and/or reduced hours in which to perform the same amount of work. It was also

[24] *Litster* v *Forth Dry Dock and Engineering Co Ltd* [1989] Industrial Case Reports (ICR) 341 - UK.

[25] *Dr Sophie Redmond Stichting* v *Bartol* [1992] Industrial Relations Law Reports (IRLR) 366 - UK.

common for the successful contractor to deregulate procedurally by ceasing to recognise a trade union for bargaining purposes.[26] Whether these extra competitive advantages were originally intended or not (and one suspects at least procedural deregulation was envisaged) they are of obvious, and considerable, economic advantage. They form a fascinating study of economic models. The newly elected Labour government in the United Kingdom has announced that it proposes to discontinue the internal market in the National Health Service because the external costs of administering it render it uneconomic. That is not to say that they were always so. It could be that employment standards have been forced down to somewhere near their lowest economically viable level leaving for consideration only the cost of implementing a process no longer productive of cost saving.

The interest of this example does not end at this point. Clearly other governments than that of the United Kingdom were interested in exploiting the economic advantages of unregulated service contracting. The EU Commission had already announced its intention of amending the Directive to exclude transfers of service contracts but the European Court of Justice has, probably, saved it the trouble. In *Suzen* v *Zehnacker*[27] it emphasised the need to establish that something tangible had been transferred and that it was not sufficient merely to show that the actual function had passed from A to B. The message was clear and was immediately picked up by the UK Court of Appeal.[28] It remains to be seen to what extent this will induce transferees not to take over existing workforces where no other assets exist to create a transfer of undertaking.

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[26]Because recognition for bargaining purposes remains voluntary in the United Kingdom derecognition is permissible even if the transfer regulations apply. The transferee is entitled to do what the transferor could have done. The difference, of course, is that the transferor would be likely to employ a large proportion of trade union members, who would pressurise it to continue recognition, whilst the transferee might not.

[27][1997] IRLR 255.

[28]*Betts* v *Brintel Helicopters Ltd* [1997] 2 All England Reports (All ER) 840.

One of the most hard-fought examples of European Union regulation, which the United Kingdom contends will have distinct anti-competitive effect, is the Working Time Directive 1993.[29]

The usual working week for the average employed male in the United Kingdom is by far the longest in the European Union. In 1992 it was 45.1 hours whilst the nearest comparator was Portugal, with 42.8, with Ireland at 41.9. Seven of what were then twelve members had, for all workers, an average of less than 40 hours. The Directive proposes to introduce a maximium of 48 hours over a seven day period to be averaged over a four month period, capable of extension by collective agreement to a twelve month period. Despite the relative flexibility permitted by these derogations the Directive still permits an individual worker by contract to agree to work longer than the normal maximum. This extraordinary further derogation is purportedly safeguarded by a provision that there shall be no victimisation of a worker who fails to agree to such extension, but one suspects that such a worker is likely to miss out on benefits such as promotion. In the interests of flexibility also, management has simply been excluded from the safeguards. One can see clearly the conflict of economic and social principle which led to this watery compromise. The Directive is on firmer ground in providing a minimum of three weeks annual paid holiday, rising to four weeks in November 1999. It is common to compare this with a supposed absence in the United Kingdom of any regulated right to paid holidays but this is an erroneous failure to note that since regulation in the United Kingdom was, in the past, usually achieved by collective bargaining it is to the product thereof that one must look for the regulated standard which, it turns out, is not

[29]Council Directive 93/104 EC OJ L 307/18 13.12.93 p18. The Directive was approved under Article 118a of the Treaty as a health and safety measure by a majority of votes rather than by the normal process requiring unanimity. The United Kingdom government pursued a hopeless challenge to the legality of this process. Quite properly, it is submitted, the ECJ, and probably the rest of the members of the EU, consider regulation of hours and the provision of rest time and holidays to protect the health of employees. See, *United Kingdom* v *Council of the European Union* [1997] Industrial Relations Law Reports (IRLR) 30 - a decision of the European Court of Justice.

out of line with the rest of Europe. Workers in some developing countries will recognise yet another illustration of the fallacy of the argument that regulation reduces competitiveness. When the present author was working in The Gambia in 1980 and 1981 it was normal for employed workers (of whom, incidentally, there were only 30,000 in a population of 800,000) not to take paid holidays simply because there was nothing to do and sitting at home provided no great source of pleasure. One might suppose an economic advantage in the order of 5.75% but reality is unlikely to support such a conclusion.

Such examples could be multiplied. The protection of atypical workers, whom this article has suggested are most in need of protection, is a declared purpose of the Community Charter of the Fundamental Social Rights of Workers and a Directive aimed at improving their standards of health and safety protection was passed in 1991. The United Kingdom blocked the progress of two others which could not be brought within the health and safety loophole. The United Kingdom government is well aware that it treads on thin ice whenever, as with the Working Time Directive, it postpones implementation. It may justify the postponement in political terms by saying that it needs thoroughly to review all consequences. But the fact remains that the Directive is almost certainly enforceable in the public sector and that it would be difficult, once tribunals and courts had begun to apply it there, to produce a substantially less beneficial set of regulations in national law.[29a]

It is of equal interest to note that the European Union has, almost from its outset as the European Community of six nations, experimented to achieve the most effective form of labour regulation. By 'effective' is meant one producing acceptable regulation and that, in turn, requires one that can compromise between demands for deregulation in the interests of competition (or profit, if one prefers to regard that as the motive) and the social demands of protection of the worker. Lord

[29a]Since this article was finally revised the United Kingdom government has implemented the Directive by statutory instrument in the Working Time Regulations 1998 (S.I. 1998/1833) coming into force on 1st October 1998. The 43 clauses and 2 schedules covering 23 pages appear to support the argument that such regulation imposes considerable administrative cost.

Wedderburn[30] has opined that 'failure' in terms of these experiments means that employers' organisations have refused to accept any particular proposal. Employer objection would seem to be most likely since the experiments are seeking to establish a procedural regulator, but Professor Wedderburn further concludes that the search for employer approval involves measuring the desirability of the system by reference to its effect on the harmonious functioning of the market; thus dragging standards down to the lowest nationally compatible level. His classification of the experiments is instructive:

> **Stage 1 - Participation** (otherwise 'social dialogue' or 'co-determination'). The object was seen to be to achieve full participation of workers and management at the decision making stage. The experiment is seen in the Draft Statute of the European Council and the Draft Fifth Directive. Apart from problems of acceptance the proposals ran into problems of definition because different models existed in different countries.
>
> **Stage 2 - Collective Bargaining** which could be an alternative to Stage 1. (Otherwise 'conflictual partnership'). This ran into even more problems. Again there were different models, such as those in the United Kingdom and France, which reflected such vital differences as the binding effect of agreements, which is virtually non-existent in the UK. In the European context there was also the problem of whether workers or trade unions would predominate. Nevertheless, this method might seem to have offered the ideal system if combined with, rather than discarded in favour of, stage 3.
>
> **Stage 3 - Consultation** (whether or not 'with a view to agreement'). This is the system ultimately adopted and applied to the Social

[30]Wedderburn, "Consultation and Collective Bargaining in Europe: Success or Ideology" (1997) 26 *Industrial Law Journal* (UK) 1.

Action Programme because it is acceptable to employers and, accordingly, 'not a failure'. It was already in use in relation to some Directives such as those dealing with redundancy and with transfer and it is the basis of the concept of the European Works Councils Directive (94/45). It raises many, as yet unanswered, questions such as the determination of effective remedies and the range of objectives of such consultation. Its primary significance lies in the fact that it is applied not only to regulation within a higher regulatory structure but to the formation of that higher structure. The Working Time proposals, for example, would have been resolved by this system had not the British employers withdrawn from the discussions. It ought to tie in with -

Stage 4 - Information supply

The European Union, therefore, has moved from bargaining at source to consultation. Consultation will normally take place on proposals already formulated and is designed as a mutual resolver of problems. If it works it disposes of industrial action, which is, by definition, the final stage of collective bargaining but no more than an acknowledgement that consultation has broken down. Such a development will suit governments which rightly wish to avoid the damaging effects of the inefficiency deliberately produced by all forms of industrial action. As we have seen, the system is designed to operate at any stage in the standard setting process from plant bargaining to establishment of rules for the whole European Union. We have also seen that it is designed to contain within itself the necessary compromise between excessive regulation, in favour of workers but damaging to competition, and excessive market freedom. The remaining question is whether such a system of mutual regulation is likely to be accepted or to prove effective if accepted.

What of the Consultative Partnership?

The European Works Council is the chosen implement of the consultative partnership at plant level. Higher levels, although less formal, will embody the same principles and, presumably, practice in

the one will produce expertise in the other. The Works Council is an accepted, and effective, feature of industrial relations in many European countries, of which Germany provides the best known example. Those not acquainted at first hand with its operation are quite likely to view it with scepticism as a device to enable the employer to secure endorsement of its proposals, adding, perhaps, a little final polish. Significantly, the Directive establishing the European Works Council only requires the supply of information whereas the earlier Collective Redundancies Directive requires consultation with a view to agreement.[31] Bargaining in good faith is a concept derived from United States law and requires some sort of enforcement mechanism if it is to be more than a slogan of some potential educative effect. Its omission from the later Directive may well be an acknowledgment that no such mechanism is envisaged, or indeed feasible. When the United Kingdom, not possessing a system of works councils, was forced by the Commission to compel employers, declaring redundancies but not recognising trade unions, to consult with someone it chose to permit the election of ad hoc worker representatives. The danger then is that not only will consultation replace bargaining but isolation will replace collective organisation. However much information is provided to worker representatives there is little advantage if they cannot interpret it and have no access to centralised advisory services. The local representative may acquire experience over time but will be ineffective by comparison with those having resort to such backup.

The European Union, however, is not alone in developing this new form of regulation, which has the same attraction for employers and governments everywhere. Consequently, it has become the standard of future regulatory machinery which the third party — the worker collectively represented — is apparently forced to accept. So the British Trades Union Congress, in 1997, has issued a policy declaration entitled 'Partners for Progress. Next Steps for the New Unionism' which states,

[31] Directive 75/129 EC Article 1. OJ L 48 22.2.75 p.29.

> At the workplace social partnership means employers and trade unions working together to achieve common goals such as competitiveness and fairness ... At the national level partnership means Government discussing issues with employers and unions on a fair and open basis ...

This statement must be understood in the light of the function of such a body within the labour market. In many countries the 'Trade Union Centre' is an umbrella under which all legal trade unions crowd. Sometimes that Centre only consults with government; sometimes it is virtually controlled by government; and sometimes the Centre itself bargains. The British TUC is none of these things and it must seek to establish its influence upon government by inducing government to listen to it. For eighteen years it has failed to do that and so it is understandable that, if consultative partnership is the current catchphrase, it should extol the merits of consultation. That it has effectively mimicked its master is apparent from the words of the British Prime Minister in a Foreword of a White Paper on employment policy in May 1998.[31a] He wrote,

> This White Paper is part of the Government's programme to replace the notion of conflict between employers and employees with the promotion of partnership.

Of the danger of the whole system becoming a 'talking shop', simply preceding the establishment of predetermined objectives, the TUC says, 'Social partnership is not a comforting set of words . . . and needs to be underpinned by minimum standards.' Either this is a comforting set of words or it is a thinly veiled call for regulation by legal norms in place of the former regulation by collective agreement. Social partnership, as we have just seen, does not necessarily involve trade unions; competitiveness and fairness are not parallel concepts but, as this article has shown, opposed objectives. They may be common

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[31a] *Fairness at work* m 3968/1998.

goals if employers accept the argument that regulation — the source, surely, of 'fairness' — is not necessarily uneconomic. Resolution of the conflict by discussion is, therefore, possible and sensible. But there is not necessarily any source of underpinning 'minimum standards' in this partnership which, according to the TUC, requires such regulatory underpinning of standards if it is to be acceptable. It follows that there must be a source of regulatory standard setting apart from the partnership. In short, legal norms must replace what was once the subject of collective bargaining. The argument is, therefore, circular. We return to the basic proposition that the labour market must, to some extent, be regulated and the only question is as to what extent. It is scarcely surprising, therefore, that the TUC policy document casts doubt on trade union acceptance of the flexible market. It insists that its primary concern is the attainment, presumably for everyone rather than the favoured few, of 'secure jobs'. It seems that it also requires standards to be fixed by some mechanism because it speaks of 'good quality jobs'. There must be a suspicion that, if it is not impliedly criticising the type of atypical employment outlined in this article, it is certainly seeking to regulate the extent to which the flexibility it gives to the market can be used to cut costs.

Like the TUC, the thesis of this article returns to the simple truth that there is no such thing as a labour market free of regulation. No national economy could operate such a system and total freedom, meaning freedom for the employer to do what he wished subject only to the availability of labour, would be politically unacceptable. History indicates that such freedom would be no less unacceptable to employers who abhor a free for all in which bad standards drag down good. Consultative partnership, as a means of providing regulation, depends on acceptance by management and is, therefore, a sort of enlightened paternalism. Like all paternalism it breaks down under pressure of adverse circumstances. It is a misconception to believe that the sole function of trade unions is progressively to raise standards. It is, and historically was even more obviously, to protect standards which were under attack either from a desire for greater profits or from adverse economic circumstances. At a time when the first casualty of procedural deregulation is secondary action it is worth remembering that one of the *raisons d'etre* of unionisation was the support it provided from

those not under attack for those who were. The TUC is, therefore, quite right to say that consultative partnership will have to be supported by regulatory standards from some other source. Unfortunately, the TUC policy statement is content not to ask what source and what degree of standards. No doubt it wishes to be invited by government to consultation on these questions and so, tactfully, avoids indicating that the stark choice is standards laid down either by legislation or by collective bargaining. If there are to be standards there must be a method of enforcement and consultative partnership, admirable as it may be as a formula for productivity, is attractive largely because it provides no such method.

Nowhere is the problem facing the standard setter more acute than in consideration of a national minimum wage; assuming that to be intended as a protective standard rather than, as in so many countries, an instrument of fiscal policy. Not surprisingly, the United Kingdom government resorted to the time-honoured device of those who do not know the answer and wish, in any event, to delay it, of appointing a commission of enquiry. This article can only mention one or two of the problems it must have considered. If, in 1996, 7% of women in part-time employment earned less than £2.90 per hour, whilst the average, non-overtime, hourly rate for full-time men was £9.39, what is likely to be the effect, if any, of fixing a national minimum even as high as £3.60 per hour. If, as many commentators insist,[32] raising minimum wages must result either in the invention of perpetual motion or job loss the poor become poorer. If, on the other hand, as John Hughes argues,[33] the proportionate increase in higher wages tends to exceed that in lower wages the rich become richer. As Hughes acknowledges,[34] if the low paid are to be adequately protected regulation

> involves conscious effort to secure an improvement in the real as well as the notional pay of . . . low paid employees. It should seek too a comparative redistribution of pay in their favour — for both

[32] *E.g.*, Professor Walter Oi in the Journal of the Institute of Economic Affairs (1996).

[33] *Supra* n 12.

[34] *Op cit.* at p. 59.

> social fairness reasons and to limit the cost of inflationary implications of the policy.

A mere twenty-five years ago regulation of the labour market was the catchword in the United Kingdom. The government of Edward Heath was about to produce the most beautiful, and the least effective, machinery for controlling industrial relations ever thought of in that country[35] and it was in the middle of phase one, and contemplating phase two, of a comprehensive wage policy, which also failed, having disrupted the course of most practical industrial relations. But even then no one officially took up the suggestion that what was needed was a national wages policy. It seems unlikely that any government will embark on such a policy in an age of alleged deregulation.[36]

Is it not true to say that there must, of course, be regulation of the labour market. The European Union may speak of consultative partnership but when consultation failed to produce acceptable standards of working hours it enacted the required regulations. This may be the latest invention whereby the consultative parties are informed that they may establish the standards but that, should they fail to do so, acceptable standards will be imposed. Such a compromise may well be the means of squaring the circle by allowing those interested in maintaining competition as much freedom as is compatible with minimum protective standards. What it must not do is to create the impression that everything can be simplified by deregulation. The truth is that regulation is likely to become more extensive and, certainly, more complex. All that may really change is the procedure by which regulation is achieved. As the Prime Minister of the United Kingdom wrote[31a]

> it cannot be just to deny British citizens basic canons of fairness — rights to claim unfair dismissal, rights against discrimination for

[35]It appeared, of course, as the Industrial Relations Act 1971.

[36]The UK policy is enacted in the National Minimum Wage Act 1998 (Chap. 39) - a mere 56 sections and 3 schedules.

[31a]*Fairness at work* m 3968/1998.

making a free choice of being a union member, rights to unpaid parental leave — that are a matter of course elsewhere.

It is suggested that the longer his government survives the more surprised it will be by the length of this list of examples.

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