Legal regulation, institutions and industrial relations

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Editors Foreword

The Warwick Papers in Industrial Relations series publishes the work of members of the Industrial Relations Research Unit (IRRU) and people associated with it. Papers may be of topical interest or require presentation outside of the normal conventions of a journal article. A formal editorial process ensures that standards of quality and objectivity are maintained.

This paper publishes the text of the seventh Warwick-ACAS Lowry Lecture, given to an invited audience in April 2008 by Linda Dickens, Professor of Industrial Relations at Warwick Business School.

The annual lecture is organised in honour of Sir Pat Lowry. A former chair of ACAS, Sir Pat was for many years an Honorary Professor at the University of Warwick, a long-standing member of the Business School's Advisory Board, and a source of valued counsel to IRRU in its work. His outstanding contribution to the practice of industrial relations commenced when he joined the EEF in 1938. He went on to become the Federation's Director of Industrial Relations. He left in 1970 to join British Leyland as Director of Industrial Relations. In 1981, Sir Pat was appointed as Chair of ACAS. He stepped down six years later with ACAS' reputation for impartial and constructive advice enhanced, in the face of an often turbulent industrial relations landscape.

This lecture addressed critical issues arising from fundamental shifts in the regulation of employment in Britain. Alongside other economies, recent years have witnessed the decline here in social regulation (involving rule-setting by employers, workers and their representatives) and a rise in statutory rights enforced principally through formal legal process. Linda Dickens points to tensions in policy making that undermine the efficacy of new rights; the legal framework, she argues, is over-complicated and enforcement mechanisms are fragmented and under-resourced. The lecture prompted comment and debate amongst the audience which this publication seeks to extend more broadly.

Trevor Colling

I was pleased to be invited to give this year's Lowry lecture. Having been at Warwick Business School a long time, I personally benefited from Sir Pat Lowry's contributions as an honorary professor and a member of the WBS Advisory Board.

The audience for this annual lecture, held in honour of Sir Pat, brings together considerable depth and breadth of practitioner and academic expertise and experience. I hope to benefit from this by providing a discursive treatment of my theme; one which aims to provoke contributions - including disagreement – in the question and answer session afterwards.

The theme chosen for the lecture is very wide and in looking for a focus or peg on which to hang my presentation I have chosen to take the Employment Bill currently going through parliament.

The Employment Bill 2007/8

The Bill is proposing to do three main things:

1. To repeal measures introduced two years ago intended to reduce the number of cases coming to Employment Tribunals. These included a proscribed three stage statutory dispute resolution procedures, and penalties. The plan is to replace them with something more sensible.

2. To strengthen the enforcement framework for National Minimum Wage (for example around underpayment). Give additional inspection powers to the Employment Agencies Standards Inspectorate, and also increase penalties.

3. To amend British legislation to ensure compliance with the European Court of Human Rights judgment in *Aslef v UK* - following our domestic courts' finding that trade unions could not lawfully expel British National Party activists.

I am not wishing to talk about the detailed substance of these changes – rather I want to try to locate these issues more broadly by identifying and discussing what I am calling legacy issues. In this lecture I seek to show how legacy issues - baggage from the past - helps shape and constrain current legislative approaches and institutions and affects the their effectiveness.

The 'past' here is the fairly recent past: the period of 1979-1997, a period of Conservative government under Mrs Thatcher and then Mr Major. A period which saw a radical break with the voluntarist tradition of British industrial relations. The post-1997 Labour government has taken a different approach to that of its predecessors regarding the role of legislation in regulating the employment relation. But my argument is that this is affected – constrained, undermined - by continuities with the previous period of Conservative government.

Background sketch[1]

The voluntarist system characterized British industrial relations for most of the 20th century. At its heart was a policy of relative legal abstention, with primacy to – and support for - regulation through collective bargaining. Regulation of the employment relationship by means of collective bargaining between employers and unions (including at multi-employer level) was far more important than legal regulation through Acts of Parliament. Where statutory law intervened it did so to support and extend collective bargaining and to plug gaps it its coverage and protections. So there was not an absence of regulation but rather a system of 'collective laissez-faire', resting on autonomous self-regulation (termed hereafter, *social regulation*).

Now the voluntary system has gone. Public policy no longer gives primacy to collective bargaining. As is well known to this audience the coverage of collective bargaining has

[1] More detailed treatment of some of these points, and follow up references, can be found in Dickens, L. and Hall, M. (1995): 'The State, Labour Law and Industrial Relations' In P. Edwards (ed.), *Industrial Relations: Theory and Practice in Britain*. Oxford: Blackwell, and Dickens, L. and Hall, M. (2003): 'Labour Law and Industrial Relations: A new Settlement?' In P. Edwards (ed.), *Industrial Relations: Theory and Practice*. Oxford: Blackwell.

shrunk, as has union membership and density – particularly in the private sector. Protection at work now rests less on collective organisation than on individual legal rights, the number of which has expanded considerably. However it is not simply a question of there being 'more law' – although there is a lot more; since 1997 the nature and scope of legal regulation has also shifted decisively, entering the heart of the employment relationship.

The voluntarist system came under challenge in the 1960s and 1970s but the major break with the voluntarist tradition came in 1979. The nature of the employment law reforms introduced by Conservative governments between 1979 and 1997 constituted a decisive shift away from the long-standing public policy view that joint regulation of the employment relationship through collective bargaining was the best method of conducting industrial relations.

The major elements of the Conservatives' employment law programme between 1979 – 1997 were:

- dismantling of statutory supports for collective bargaining (including abolishing the recognition procedure introduced in the mid 1970s and mechanisms for generalising the outcomes of collective bargaining);
- promotion of non-unionism;
- eradication of compulsory union membership;
- restriction of industrial action and increased penalties for unlawful action
- regulation of internal union government;
- weakening/removing labour law and social security measures which provided a floor to wages,
- narrowing/ removing of protections afforded by individual employment rights (most of them very recent) – seen as placing unacceptable burdens on business.

During this period there was a major piece of industrial relations legislation every couple of years – not to regulate the employment relation through statute law but to reduce the social regulation of it. The aim was to enhance and extend managerial prerogative.

But although the major plank of voluntarism (the primacy to, and support for social regulation) was dismantled during this period - the notion of voluntarism was still invoked. While dismantling it, the government made appeals to the traditional voluntarist nature of British industrial relations. It did this, for example, in order to oppose regulation at European level (although some additional legal rights and protections from this source did have to be enacted)

The concept of voluntarism was narrowed to mean an absence of legal regulation. The other prong of voluntarism - support for collective bargaining as the primary source of regulation was forgotten. So part of the legacy of this period is a reworking of voluntarism into 'No law please we're British'.

New Labour – change but continuities

At the time of the 1997 election central elements of British employment relations still remained largely outside the scope of statutory regulation but key elements in the Labour government's employment law programme extended legal regulatory norms and statutory structures into these areas.

Major elements of the post 1997 legislative agenda included:

- introduction of a National Minimum Wage (NMW) (April 1999),
- legislation regulating working time and leave (from 1998),
- legislation on trade union recognition (a statutory recognition procedure, effective from 2000) and
- more recently on the information and consultation of employees.

The UK 'opt out' from European Union (EU) social policy was ended as soon as Labour came to power. Some measures – like the NMW and statutory recognition procedure - were home grown; others were EU driven - such as working time regulation, information and consultation, and the extended grounds of anti-discrimination legislation. 'Family friendly', work-life balance measures are a mix of both.

The legislative programme is presented as reflecting a distinctive 'New Labour' approach of fairness at work; a move away from de-regulation to re-regulation, and 'better regulation'. It provides 'for the first time a comprehensive framework of minimum employment standards'[2]. However, as I've suggested, as well as new values there are continuities - legacies - from the Conservative era of the 1980s and 1990s.

First, there is continuing restrictive regulation of industrial action and legislative requirements relating to internal union affairs. There have been some important changes but much of the web of complex legal restriction of the earlier period remains. Under the voluntarist system the internal affairs of trade unions, such as the arrangements for selecting leaders and disciplining members, were regulated by their own rule books rather than external legal regulation. In the 1980s and 1990s internal union government became highly regulated. It is this regulation which is being amended by the current Employment Bill in order to comply with a ruling of the European Court of Human Rights.

This is one example of how the UK has got out of step with international standards – particularly in respect of union autonomy and the restrictions on industrial action.

A second continuity is that there is no return to the public policy of encouraging and supporting collective bargaining as the best method of conducting industrial relations. The current legal framework is one which sits well with the individualisation (or de-collectivisation) of employment relations which took place during the 1990s.

The third continuity with the 1979-1997 period is a desire not to hamper employers' flexibility - to be, and to be seen to be, 'business friendly'.

[2] This is set out in various documents, including *Fairness at Work, CM 2968*, 1998 London: HMSO; *Full and Fulfilling Employment: Creating the Labour Market of the Future*, (2002) London: HMSO; *High Performance Workplaces: The role of employee involvement in a modern economy*, (2006) London: DTI; *Employment Relations Monitoring and Evaluation Plan 2004*, Employment Relations Research Series, No. 34. London: DTI.

I shall return to these last two areas in more detail later but first I want to return to my Employment Bill peg to say something about enforcement mechanisms and the issue of 'too many' cases at Employment Tribunals.

Employment Tribunals and enforcement mechanisms.

I want to place some importance on the context within which statutory employment rights emerged and developed. Individual statutory employment rights enforceable via Industrial Tribunals (as they were then) **emerged** in the 1960s and 1970s - at a time when individual statutory rights were very much minor players in the voluntarist system resting on social regulation through collective bargaining. By the time they had **developed** to the stage where the tribunals were having difficulties in coping with the growing number of jurisdictions and caseload – in the mid 1990s - the context was one of de-regulation which shaped the range of solutions considered.

If the current importance of statutory protection had been foreseen in the 1960s and 1970s we might have had more attention paid to the nature and appropriateness of the enforcement system. As it was, there was little parliamentary debate and limited strategic consideration of the kind of institution required.

Employment Tribunals (ETs) were set up in 1964 to hear appeals from employers against training levies. They were seen as a convenient institution to which to assign the first jurisdiction involving employer/employee disputes – under the Redundancy Payments Act 1965. The important unfair dismissal jurisdiction came in 1972. ETs now deal with some 70 plus different jurisdictions and handle over 100,000 cases a year (140,000 in 2006-7). The President of Tribunals in England and Wales has referred to the 'dustbin' approach of accumulating jurisdictions at the ETs. They have become the expedient option (but not necessarily the most appropriate option) for handling the ever increasing numbers of rights[3].

[3] G. Meeran 'The Employment Tribunals' in Dickens, L. and Neal, A. (2006) *The Changing Institutional Face of British Employment Relations,* The Hague: Kluwer

The voluntarism context of the emergence of rights meant there was an attempt to introduce individual protections while not upsetting collective arrangements. In the 1960s the view was that settling of collective disputes was the task of procedures of - or agreed through - collective bargaining. The tribunals were for disputes arising from statutory claims between employees and their employers. Thus an attempt was made to distinguish between individual and collective issues – one which in practice is difficult to draw and one which depended on the continuing health of collective bargaining.

We have ended up with essentially collective concerns coming to tribunals in the guise of individual cases - lots and lots of individual cases. One indication of this is the extent to which claims to ETs are multi-claimant cases (claims being brought by numerous individuals against the same employers): over 50% are multi-claimant claims

There is no provision for class action at the ETs. Trade unions have no standing to bring cases on behalf of a group of members. Representative action would provide one route to reduce number of cases clogging up the tribunals but there is no provision for this. The Equality and Human Rights Commission calculated that some 150,000 cases could be reduced to 11,000 with representative actions in the equality area.

An opportunity for strategic overview – not taken.

Not only was there little strategic deliberation at the outset, but even when the tribunal jurisdictions grew to a point where the system was seen to be under strain, opportunities for such strategic consideration were not taken. In 1994 there was an opportunity for reconsideration. The government produced a Green Paper, *Resolving Employment Rights Disputes – Options for Reform.* But - despite the title - this did not herald a radical re-think of how employment rights disputes might be resolved. Rather its proposals were about options for cost savings through increased efficiency.

As I indicated, this reflects the context of the time – one where the government viewed statutory protections as burdens on business to be minimized. This de-regulation stance – together with a desire to cut the costs to the public purse posed by an ever increasing

tribunal caseload – informed the approach taken to reducing the tribunals' caseload. Changes were designed to make it more difficult for people to bring claims and more difficult to succeed if they did. This type of solution – erecting barriers to access - has been echoed in reviews since.

The Labour government since 1997 has instituted various reviews of the tribunal system but, even in the changed context, there has been no thorough going exploration of how employment disputes might best be dealt with. The concern predominantly has been with the efficiency and cost effectiveness of the ET system[4]. As with the1994 review, broad titles conceal a rather narrower focus. The latest review called *A Review of Employment Dispute Resolution in Great Britain,* basically looked only at Employment Tribunals and, in particular, the operation of the 2004 Dispute Resolution Regulations (the repeal of which is in the Employment Bill)[5].

Alternatives to Employment Tribunals

It is worth considering what a more radical review might have considered had one been undertaken in the mid 1990s. I'll discuss four possibilities: placing some tribunal jurisdictions elsewhere; greater use agency and administrative enforcement and of inspectorates; employing processes alternative to judicial determination and, fourthly, using other levers, including procurement.

During the mid 1990s, however, rather than alternative institutions and approaches being considered they were being abolished, abandoned, cowed, and weakened.

Sending jurisdictions elsewhere

The Central Arbitration Committee (CAC) was one potential different body to which it was suggested at the time some jurisdictions might be sent (notably polycentric disputes), but it was stripped of most of its functions during this period. The CAC was set up in

[4] J.Gaymer (2006). 'The Employment Tribunals System Taskforce' in L. Dickens and A. Neal *op cit*.
[5] M.Gibbons (2007) *Better Dispute Resolution. A review of employment dispute resolution in Great Britain* London: DTI

1975 and inherited a hybrid role – standing arbitration body and adjudicator of rights[6]. For a few years at the end of the 1970s, was emerging as a kind of collective labour court – operating what could be called regulated arbitration. But it was stripped of most of its jurisdictions under Mrs Thatcher and effectively mothballed.

Some of those lost jurisdictions were concerned with supporting and extending collective bargaining – so fell victim of the shift in policy away from this. But there was also a role given to the CAC under the Equal Pay legislation which is worth reflecting on. This was an attempt to provide a mechanism for tackling the collective, systemic nature of pay inequality by providing for either of the social partners or the Secretary of State to refer pay structures, collective agreements or employers' rules to the CAC to explore alleged discrimination and ensure positive amendment to level up conditions for the disadvantaged group.

The CAC's purposive interpretation to its role was not supported by the courts on judicial review. Rather than overcome the effects of this to ensure an effective mechanism, the government repealed the provision.

Since I am a Deputy Chairman (sic) of the current CAC I should make it clear I am not necessarily trying to drum up more business. My point is that part of the legacy of the approach taken in the earlier period is that we do not have a mechanism for tackling the collective, systemic nature of pay inequality, although instances of unequal pay rarely exist in isolation from the pay system as a whole. Currently one in every four individual ET case concerns equal pay.

There has been little re-allocation of tribunals jurisdictions since that period, although disputes between unions and their members have been more appropriately located with the Certification Officer[7].

[6] S.Gouldstone and G.Morris (2006) 'The Central Arbitration Committee' in Dickens and Neal *op cit*
[7] D.Cockburn (2006) 'The Certification Officer' in Dickens and Neal *op cit*

Inspectorates and administrative enforcement

The Wages Councils provided an example of minimum standard setting and enforcement via an inspectorate – but these were being abolished in the 1980s and 1990s.

Importantly, as well allowing individuals to take cases to ETs, the anti-discrimination legislation of the 1970s had given administrative enforcement roles to the CRE and EOC. However the use of these inquiry powers was increasingly constrained by legal challenges. The government refused to regulate to overcome problems which unsympathetic judicial review in the mid 1980s had caused. These problems have been addressed to a large extent in the powers given to the new EHRC. The new single body has stronger powers and more freedom to act than its predecessor bodies - it remains to be seen whether in the discrimination area there will be a shift towards strategic enforcement by a strong commission[8].

In the 1980s and 1990s a lot of public bodies were being abolished as Quango hunters looked for prey. Others had their budgets cut – including the Advisory Conciliation and Arbitration Service (ACAS). ACAS performs a very important conciliation role, keeping cases from going to a tribunal hearing: it is a very cost effective filter. My view is that budget constraints (and changed performance indicators) prevented it playing a wider dispute prevention role. Budget cuts also hit the Health and Safety Commission. Numbers of health and safety inspectors dwindled as resources shrank – affecting the possibility and credibility of enforcement in this area.

The parts of the latest Employment Bill dealing with the enforcement of the NMW, however, remind us that there have been some post 1997 developments in terms of this alternative to enforcement of individual rights via ETs.

Enforcement of the NMW via the Revenue and Customs is seen by the major stakeholders largely to have been a success. It has reduced the number of cases which

[8] L.Dickens (2007) 'The Road is Long. Thirty years of equality legislation in Britain'. *British Journal of Industrial Relations* 45(3)

otherwise would come to ETs and has secured a good level of compliance. Of course the Revenue is regarded as a particularly credible enforcement body and it has had something fairly clear cut to enforce.

Willy Brown – one of the founding Commissioners on the Low Pay Commission - has argued that it provides a model to be followed more broadly[9]. The Citizens Advice Bureau has also been a strong advocate of this approach - calling for a 'Fair Employment Commission'. Their perception of the problem in relation to the Employment Tribunals is not that too many cases are being brought, but rather that too few are.

Surveys of many different kinds indicate that only a very small proportion of those workers experiencing problems at work, including those involving a potential breach of legal rights, actually go to tribunals[10]. The issues here centre on the growing number of vulnerable, unorganized workers, without effective knowledge of their rights and how to enforce them. Where knowledge of rights may exist, people may work in contexts where they are reluctant to exercise them. Where people do seek to bring claims to tribunals they face problems of lack of affordable advice and representation within a system where this is increasing necessary.

At present there seems little appetite for wider agency enforcement although there has been ad hoc agency development. For example the Gangmasters' Licensing Authority (GLA) set up following the shocking events at Morecambe Bay. This is indicative of an approach which addresses an immediate problem with a one off solution rather than taking a broader strategic look.

The GLA is restricted to workers in agriculture, horticulture, shellfish gathering and processing and packing. It sits alongside the NMW enforcement division of the Her Majesty's Revenue and Customs (HMRC), and DEFRA's (Department for Environment, Food and Rural Affairs) Agricultural Minimum Wages Inspectorate. Then there is the

[9] W.Brown (2006) 'The Low Pay Commission' in Dickens and Neal *op cit*
[10] A.Pollert (2005)'The Unorganised Worker' *Industrial Law Journal* 34(3)

Employment Agency Standards Inspectorate, and the Health and Safety Executive. Even in combination the remit of these bodies is far from comprehensive in terms of rights and the areas of activity. The result is incompleteness, fragmentation and complexity

It has been suggested that these different bodies might be joined up. There is certainly acknowledgment of need to facilitate cooperation and knowledge sharing between them, something touched upon by the Chair of the Health and Safety Commission (HSC) in last year's Lowry lecture[11]. Employers falling foul of one area are likely to be breaching other standards. Amalgamation would not be without problems. If there were to be any move along this path then lessons could be learnt from the equality commissions, as well as HSC and NMW about the factors which influence the effectiveness of agencies and this kind of enforcement.

Use of processes other than judicial determination

Here I am thinking of conciliation, mediation, arbitration, adjudication. I do not think we have had real policy engagement with what these different processes and mechanisms (as well as judicial determination) might offer, and in what contexts and conditions they might be appropriate.

There was interest in arbitration at the time of the 1994 review but mainly because it seemed to provide a cheaper option, involving a single arbitrator rather than a three-person panel. This eventually resulted in a little used arbitration alternative to an employment tribunal hearing in some jurisdictions.

As just noted, last year we had the Gibbons review looking at ETs, as part of a broader 'employment law simplification' review[12]. The Report did mention processes of conciliation, mediation, arbitration, and advocated more alternative dispute resolution (ADR) in the form of workplace mediation to take place before tribunal applications

[11] B.Callaghan (2007) 'Employment Relations: The heart of health and safety' Warwick Papers in Industrial Relations no.84 IRRU
[12] M.Gibbons (2007) *Op.Cit.*

arise. In advocating this, Gibbons commented favourably on mediation in the context of the family courts.

I wonder if I am the only one here who found Gibbons' brief discussion of ADR rather detached from the long experience of alternative dispute settlement processes in British industrial relations? There may well be a role for mediation but it needs to be recognized that disputes in the employment context may differ from the kind of interpersonal disputes found in family cases – differences which relate to the particular nature of the employment relationship.

More use of other levers e.g. procurement.

The use of national and local state power in the form of contract compliance might have been considered in the mid 1990s but public policy was pushing in an opposite direction. The Fair Wages Resolution had been abolished and legislation had been passed to curtail attempts by some local authorities to impose broadly defined equal opportunity requirements on their contractors. The policy shift towards compulsory competitive tendering (CCT) for contracting out of public services could have provided a route for disseminating good practice out from the public sector – it was not used in that way.

There has been some revival of seeing procurement as a route to instilling and generalising good practice - this was recommended for example by the Women and Work Commission in 2006. Public procurement is worth around £100 billion a year - but it remains an underused tool.

It need not be just public procurement. In some areas, such as ethical trading, the private sector uses the power of the organisation at the head of a supply chain to seek ensure certain standards. Why not leverage the supply chain in terms of fairer workplaces?

Elements of an alternative approach

The important point about a number of the approaches I have just outlined in talking about alternatives to cases going to ETs is that they represent an alternative to the

individualised private law model characteristic of our system which leaves individuals to enforce their rights. I suggest that this is what is needed

Key elements of this alternative approach are, firstly requiring those with power – the employing organisations – to take action, and, secondly, providing assistance to help secure necessary change and gain compliance – rather than simply penalising. But penalties must be ultimately available.

The focus advocated here is less on providing *individual* redress for breaches of rights once they occur and more about producing the kind of workplaces where breaches are less likely to occur. This approach facilitates a move towards more tailored approaches, a move away from 'one size fits all' towards different ways of arriving at desired outcomes. An example – albeit not a completely ideal one – comes from the equality area where in the last few years equality duties have been placed on employers, requiring them to be pro-active in taking action to eliminate discrimination and promote equality. So far the duty only applies to public sector employers. Monitoring of compliance with the duties and enforcement action will now rest with the new Equality and Human Rights Commission.

This kind of alternative approach provides scope to engage other stakeholders in assisting organisations fulfill their duties, and in achieving the outcomes which the duties are intended to serve. These stakeholders include trade unions.

However, although using the regulatory tools of non-state actors can enhance the regulatory capacity of the state, the involvement of social partners and other stakeholders in monitoring and enforcement has not been a feature of the British approach. Generally, there is a failure to harness the potential of social regulation through collective bargaining as an adjunct to state regulation.

Legacy constraints

No support for collective approaches

Arguably this failure to harness social regulation is part of a legacy whereby unions are seen as part of the 'problem' (as indeed at times they were) rather than potentially part of any 'solution'. Trade unions potentially are effective positive mediators of legal rights, helping translate formal rights into substantive change at the workplace and helping ensure and establish good practice through self regulation. As such they can play a role in reducing recourse to legal action.

This gives a different angle on how one might address the 'problem' of the ET caseload and also helps us see how baggage from the past constrains this.

As noted at the start, the current Employment Bill is seeking yet again to get issues resolved at the workplace rather than coming to tribunals. However attempts to do this are seriously impeded by the decline in union representation (only 14% of workplaces now have a lay union rep). The Government has acknowledged that unionised workplaces are 'better at managing individual employment disputes'[13]. Research shows that workplace employee representation arrangements encourage internal solutions to individual employment disputes. But the implications of this connection between the collective and individual areas of labour law have not been followed through - for example into support for collective, representative structures in the workplace.

Although there is no longer the hostility to collective bargaining which characterised its predecessor, and of course the statutory recognition procedure symbolizes this, the Labour government is reluctant to privilege collective bargaining, or even collective voice, over more individualised methods of conducting employment relations.

Collective representative structures need not be based solely on trade unions but the government has been reluctant to encourage any structures for collective voice and

[13] Department of Trade and Industry (DTI) (2001) *Routes to Resolution*, London: HMSO

representation. It actively opposed EU social policy proposals designed to promote this. Where it has had to address the 'representation gap' in non-union workplaces in order to implement European legal requirements for employer consultation with worker representatives over a growing range of issues, such as redundancy and health and safety, the British government has shown a preference for ad hoc, one-off solutions rather than institution building. The reluctance to privilege collective voice also carried through to the implementation of the Information and Consultation Directive.

The ad hoc - rather than institution building - approach means we have an array of different kinds of representative who may be required for different purposes and they have a complex variety of legal rights. A recent ACAS publication[14] notes there are now at lest 15 different sets of legislation laying down different rights for employee representatives: health and safety reps, information and consultation reps, transfer of undertakings reps, reps for redundancy consultation, union learning reps, and shop stewards. Again – complexity and fragmentation. Not in my view business-friendly….

The business friendly legacy

I do not wish to be misunderstood. The problem is not that the government seeks to be business friendly in developing its legislative agenda. The government should be sensitive to employer concerns and views; should be sensitive to how legislation impacts on employers. It should be doing what it is doing to assist and inform, for example with businesslink.gov.uk.

The problem I think comes in the way 'business friendliness' has operated to undermine the coherence and potential achievements of the Fairness at Work approach, while at the same time often producing outcomes which are business-unfriendly.

The post-1997 government has struck a different balance to its predecessor between worker protection and management freedom. Various documents emphasise the

[14] S.Podro et al (2008) *Employee Representatives: Challenges and changes in the Workplace* Acas Policy Discussion Paper

government's 'cardinal principle' that competitiveness can go hand in hand with fairness at work. Social justice, fairness and security are presented as contributing to economic success, efficiency and competitiveness rather than running counter to them. For example, the provision of minimum standards, such as the NWM, can prevent a 'race to the bottom' and direct employers away from the 'low road' to competitiveness. Some legislative change has been presented as part of achieving a high skill, high productivity economy achieved through high performance workplaces.

The articulated justifications for legislative intervention and social rights stress 'business case' economic arguments, both in general or in relation to particular areas. For example, discrimination is described as a 'economic drag' and the 'economic imperative for more diverse workplaces' and the waste of talent caused by discrimination are stressed. The Employment Act 2002 grouped 'family friendly rights' under 'participation, retention and development of skills'. Legal rights also can serve state objectives – for example getting people off benefits and into work, aiding social inclusion.

So effective enforcement of statutory rights and securing compliance, while clearly in the interests of workers, is also seen as being in the interests of employers and the state. This should push the government towards ensuring effective rights and their effective enforcement but we have seen this is not necessarily the case. There is no time to go into detail, but what seems to happen is that the big picture of how effective legal regulation can serve business interests, and can assist in high road competitiveness of the economy, loses out to a rather narrower set of immediate business interests articulated by business itself where, often, better regulation is equated with no regulation. This leads to refusal to regulate, minimal implementation, soft law, and 'light touch' approaches.

The Government is committed to ensuring 'the fair treatment of employees within a flexible and efficient labour market'. The attempt is a synthesis and mutual reinforcement of social (fairness) and economic (market) goals. In practice, however, there is a

hierarchy – fairness is pursued not as an end in itself but to the extent that it is seen to promote competitiveness. There is fairness – up to a point. It can be trumped.[15]

Once we get on the terrain of business arguments *for* legislation, it opens the way for business arguments *against* legislation. There may be gains to be made for business as a whole, gains at the level of the economy, gains in the longer term – but these may not be so immediately apparent to individual businesses.

While the Labour government seeks to distinguish itself from the de-regulatory philosophy of previous Conservative governments, there are nonetheless echoes of this in concerns about not hampering employer's flexibility – often with a similarly narrow concept of what flexibility entails.

In this connection it is interesting to note that work on developing an index of *Labour Market Adaptability* is underway at the Department of Business, Enterprise and Regulatory Reform (a revealing choice of departmental title). If flexibility is seen primarily in terms of ease of disposability then it easily gets equated with weak employment protection. This is not the case where it is seen in terms of adaptability linked to such things as skills development, or 'flexicurity'.

Counterproductive business friendliness

I suggested that sometimes the desire to be business friendly may lead to outcomes which are not. I see this happening through increasing the frequency of legislation, adding to the piecemeal nature of change, producing complexity in regulation, adding to its administrative consequences and minimizing the likelihood of positive benefits accruing in the longer term.

There are numerous examples of this. For instance, making extensive use of derogations and exemptions in implementing European law to meet employer objections can lead to greater complexity and also give rise to further legislation in order to get into compliance

[15] Dickens, L., and Hall, M. (2006) 'Fairness – up to a point. Assessing the impact of New Labour's employment legislation' *Human Resource Management Journal* 16

(as has occurred in a number of areas). It can also undermine the potential of such legislation to bring about organisational changes with longer term business benefits. Research undertaken by Barnard and colleagues at Cambridge for example shows how the 'business friendly' opt out within the Working Time regulations hampers positive impacts in terms of innovative and modernised working arrangements[16].

And - to return to where I started - the Employment Bill provides another example of how supposedly 'business friendly' measures can backfire.

The statutory dispute procedures were informed by employer concerns about 'compensation culture' and the view that cases were being brought by people who had not tried to resolve things with their employer first. (in part a misreading of available evidence). Morris and Hepple suggest their inclusion also was part of trade off so business would accept new rights in other parts of the 2002 Act.[17]

The regulations are only two years old but are now needing to be repealed and replaced because of 'unintended consequences' – in short they have made things worse for employers as well as for employees. 'Unintended' the consequence may be – but not unforeseen nor unpredictable since the provisions widely criticised at the time. All this adds to instability in the legal framework and increases the administrative burden of coping with legislative change.

Big bold steps

In the 2006 document *Success at Work: Protecting Vulnerable Workers, Supporting Good Employers*[18], the Secretary for State set out the government's aim as achieving a 'stable and proportionate regulatory framework in which complying with the law is easy

[16] Barnard, C., Deakin, S. and Hobbs, R. (2003) 'Opting Out Of the 48-Hour Week: Employer Necessity or Individual Choice?' *Industrial Law Journal*, vol.32 (4).

[17] Hepple, B and Morris, G (2002) 'The Employment Act 2002 and the Crisis of Individual Employment Rights' *Industrial Law Journal* 31 (3)

[18] Department of Trade and Industry (DTI) (2006) *Success and Work: Protecting Vulnerable Workers, Supporting Good Employers*. March. London, DTI.

and simple..'. I suggest it may need to take some big, bold steps to achieve this - and be prepared to shake off some of the legacies.