by K D Ewing and John Hendy QC

Rights
4th Floor, Jack Jones House, 1 Islington, Liverpool, L3 8EG
e-mail
office@ier.org.uk
www.ier.org.uk
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reconstruction after the crisis: a manifesto for collective bargaining

by K D Ewing and John Hendy QC

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CHAPTER ONE

introduction

1.1 This report is the product of a series of discussions which have taken place with trade union colleagues,[1] the Institute of Employment Rights and the Centre for Labour and Social Studies (CLASS). It was considered that the solution to the current crisis must involve a change to the structure of industrial relations in the UK. Indeed, it was considered that current features of UK industrial relations have been a cause of the depth of the current crisis.

1.2 The object of the discussions was to devise a new industrial relations settlement to lift the UK out of its deep and prolonged economic crisis (so much deeper and longer here than in comparable countries) and its catastrophic consequences.[2] The current crisis is in reality a full scale disaster which has lasted three years already and has affected the whole of Europe, North America and many other parts of the world. A long-term solution is proposed which would have immediate impact.

1.3 In short, we propose the restoration of collective bargaining as a way of reducing inequality, enhancing employee voice in the workplace, and raising wages and generally improving terms and conditions of employment. This is neither new nor radical, with similar initiatives having been adopted by governments of all political stripes across the world over the last hundred years, in response to economic crises such as the one we are now encountering.

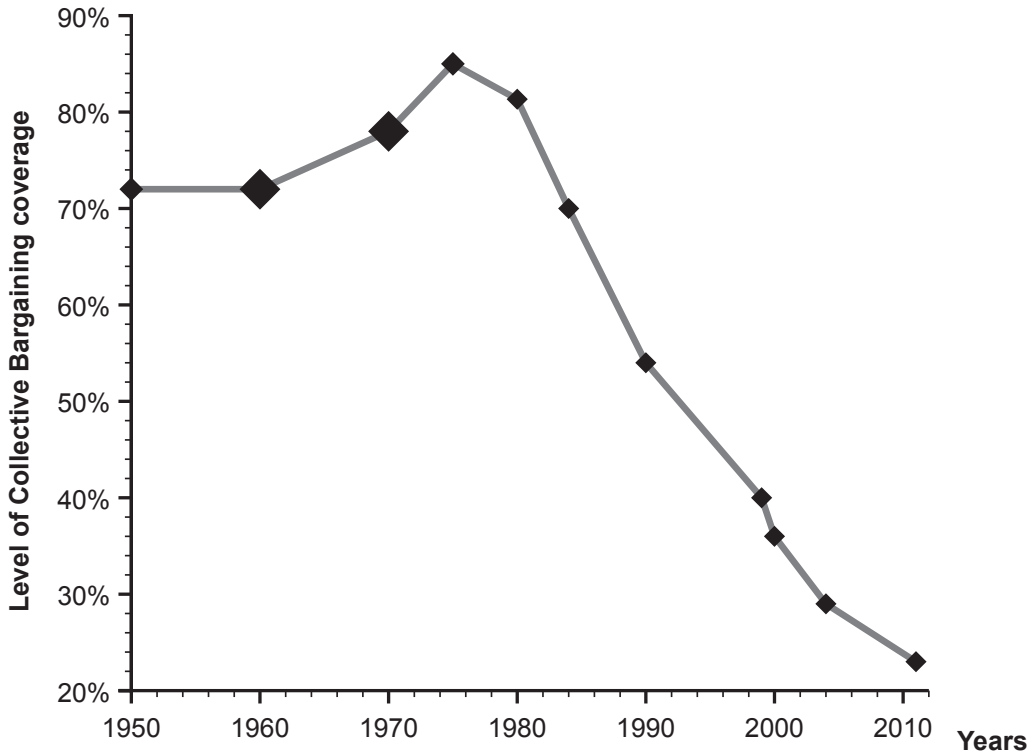
1.4 There can be little doubt that one of the most profound industrial weaknesses in the UK, that has substantially contributed to the current situation, is the massive contraction of the coverage of collective bargaining in the UK. In 1979 roughly 82% of the British workforce had some part of their terms and conditions set by collective bargaining.[3] This was around the Western European average (then and now). Collective bargaining coverage is now well below 25% and falling, the reasons for this decline being considered in the pages that follow.

1.5 Until very recently, the United Kingdom was isolated in the EU as the only country with collective bargaining coverage below 50%. It appears, however, that the governing elite in Brussels are taking advantage of

the economic crisis generally and the weaknesses in the Eurozone in particular to attack collective bargaining institutions in a number of EU jurisdictions. This is particularly true in relation to Romania and to Greece, where financial support from the international community has been made conditional on changes being introduced to collective bargaining systems.

Figure 1 Collective Bargaining in Britain

The level of collective bargaining coverage (including wages councils) has dramatically declined as can be seen from the following table:



Note 1: The data in this graph are drawn respectively from S Milner, 'The Coverage of Collective Pay-setting Institutions in Britain, 1895- 1990' (1995) 33 BJIR 69 (1950-1980); N Millward, A Bryson and J Forth, *All Change at Work? British Employment Relations, as Portrayed by the Workplace Industrial Relations Surveys Series* (2000), p 197 (1984, 1990, 1998), K Brook 'Trade Union Membership: An Analysis of Data from the Autumn 2001 Labour Force Survey', (2002) 110 (7) Labour Market Trends, p 343. See also P Davies and M Freedland, *The Evolving Structure of Collective Bargaining in Europe 1990-2004; National Report on the UK*, (European Commission and University of Florence, 2004 (2000); H Grainger *Trade Union Membership 2005* (DTI, 2006), pp 12, 39 (table 28), B Kersley, C Alpin, J Forth, A Bryson, H Bewley, G Dix and S Oxenbridge, *Inside the Workplace: Findings from the 2004 Workplace Employment Relations Survey* (2006), B van Wanrooy *et al*, The 2011 Workplace Employment Relations Study, First Findings (2013), p 22 (table 1) (2004, 2011).

Note 2: Some of these figures, particularly the early ones, may significantly under-estimate collective bargaining density, with the Ministry of Labour and National Service reporting much higher levels (86%) just after the second world war.

1.6 The Troika (the European Commission, the European Central Bank and the International Monetary Fund) has demanded decentralisation and fragmentation of collective bargaining activity, away from national level (covering all workers and employers in the country) and sectoral level (covering all in a particular industry) to enterprise level (the level of the company). Part of the effect of decentralising collective bargaining in this way is, of course, that many employers take the opportunity to opt out. In consequence, collective agreement coverage haemorrhages.[4]

1.7 The United Kingdom was the pioneer, first in the development of collective bargaining (from 1917 to 1921, and from 1934 to 1979), and then in the attack on collective bargaining (from 1980 until today), see Figure 1 above. But we are not alone, with industrial relations structures in countries in what was once social democratic Europe now also falling like ninepins. In leading liberal market economies such as the United States and Canada, the erosion is even greater than in the United Kingdom. The recent developments in Wisconsin highlight a national malaise in the USA.[5]

1.8 Some of these trends are discussed more fully in chapter 7 below, indicating the full extent of the challenge for European trade unions generally. The starting point for us, however, is the position in the United Kingdom, in relation to which we argue in the pages that follow that the revitalisation of collective bargaining must be the priority for trade unions, so that we can begin to reverse the long slide, and move towards a system in which every worker enjoys the protection of a collective agreement and the protection of their trade union in their workplace.

Box 1.1

We are not Alone – The Attack on Collective Bargaining in Greece

The Constitution of Greece provides that 'General working conditions shall be determined by law, supplemented by collective labour agreements contracted through free negotiations and, in case of the failure of such, by rules determined by arbitration' (Art 22(2)). The system operating in Greece was one where the national agreement set minimum terms and conditions for all workers. Industry-wide 'sectoral' agreements then established specific provisions sector by sector, improving on the national agreement, while enterprise level agreements in turn built upon the relevant sectoral agreement.

The austerity package implemented by the Troika, apart from imposing pay cuts by law and invalidating any provisions in collective agreements which made provision to the contrary, also provided that both sector and enterprise-based agreements could henceforward provide less favourable terms and conditions than the relevant national agreement.

Under the new law, moreover, ad hoc associations of employees could negotiate these latter arrangements where there were no trade unions. This last provision was a response by the Greek government to the concerns of the Troika that enterprise-level agreements were not sufficiently widespread. This was because there were very few trade unions at enterprise level, with enterprise agreements applying only to enterprises with more than 50 workers, and with Greek law requiring a minimum of 20 persons to establish an association.

Following a report on the Greek situation by an ILO High Level Mission, these changes were strongly criticized by the ILO Committee of Experts as violating the obligations of the Greek government under ILO Convention 98 (on which see paragraph 4.6 below). The Committee of Experts challenged the procedures for the decentralisation of collective bargaining, and in particular the procedures permitting derogation from sectoral agreements by non-union associations of workers at enterprise level.

These latter provisions led the Committee to express 'deep concern' that the changes – 'aimed at permitting deviations from higher level agreements through 'negotiations' with non-unionized structures' – are 'likely to have a significant – and potentially devastating – impact on the industrial relations system in the country'. This, however, was only the start, the Committee expressing the fear 'that the entire foundation of collective bargaining in the country may be vulnerable to collapse under this new framework'.[6]

4.4 The **International Covenant on Economic, Social and Cultural Rights** 1966 by Art 8(1)(a) protects 'the right of everyone … to join the trade union of his choice … for the promotion and protection of his economic and social interests.' Art 8(1)(d) specifically protects the right to strike. Whilst the right to bargain collectively is not specifically mentioned, it is inherent in the right to trade union membership – as the ECtHR have held on the basis of similar wording (see below). The Committee on Economic, Social and Cultural Rights regularly assesses the extent to which the countries which are members of the Council of Europe conform to the Articles each has ratified. For several years it has held the UK in breach of Art 8.

4.5 The **International Labour Organisation** is the starting point for specific trade union rights under international law. The tripartite ILO was created in 1919 and is an UN agency, responsible for setting labour standards. Lest there be any doubt about the commitment to collective bargaining, the seminal ILO Declaration on Fundamental Principles and Rights at Work 1998 provides that:

> Collective bargaining is a fundamental right accepted by member States from the very fact of their membership in the ILO, and which they have an obligation to respect, to promote and to realise in good faith.

More recently, the ILO Declaration on Social Justice for a Fair Globalisation 2008 noted:

> that freedom of association and the effective recognition of the right to collective bargaining are particularly important to enable the attainment of the four strategic objectives.[51]

4.6 These latter commitments to collective bargaining draw inspiration from ILO Convention 98, which by Art 4 imposes the following obligation on States:

> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Convention 98 is one of the fundamental Conventions of the ILO. Its scope is elaborated by the quasi-judicial Committee of Experts on the Application of Conventions and Recommendations (CEACR).[52]

But Convention 98 is not the only ILO Convention devoted to collective bargaining. Also important are ILO Convention 135 (the Workers' Representatives Convention, 1971), ILO Convention 151 (Labour Relations in the Public Service Convention, 1978), and ILO Convention 154 (the Collective Bargaining Convention, 1981). Conservative governments in the United Kingdom ratified both Conventions 135 and 151, though not Convention 154. The ILO also publishes Recommendations which are non-binding. These include ILO Recommendation 151 (Collective Agreements Recommendation, 1951), which provides:

> Measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement.

Council of Europe

4.7 Art 11 of the **European Convention on Human Rights and Fundamental Freedoms** 1951 says:

> Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

The European Court of Human Rights (ECtHR) has made clear in recent landmark judgments that Art 11 includes the right to bargain collectively, the right to strike, the right of unions to decide their own constitutions and membership, and the right of members not to be penalised for seeking union support. In the most important European labour law judgment this century, *Demir and Baykara v Turkey*,[53] the ECtHR makes clear that workers must have (and States must protect) the right to collective bargaining. Permissible restrictions on these rights are set no lower than the level of the ILO Conventions and the European Social Charter. The ECtHR places great weight on the jurisprudence of the supervisory bodies of the Treaties in relation to labour rights.

4.8 Unlike the other international supervisory bodies, ECtHR decisions are binding on UK courts because of the Human Rights Act 1998 – though so far the UK courts have resisted acknowledging the right to strike or to bargain collectively. But one way or another, the United Kingdom will ultimately have to yield to the over-riding supremacy

of international human rights law and fully recognise the trade union rights of British workers, or become an international pariah State. The extent of that obligation is set out in the Court's judgment in *Demir and Baykara* as follows:

> the Court considers that, having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Art 11 of the Convention, it being understood that States remain free to organise their system so as, if appropriate, to grant special status to representative trade unions.[54]

4.9 The **European Social Charter** 1961 is also a Treaty of the Council of Europe (a sort of little sister). Art 6(2) requires ratifying States:

> to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements

Demonstrating the importance of this provision (also to be found in the Revise Social Charter of 1996), the ECtHR in the *Demir and Baykara* case observed that Art 6(2):

> affords to all workers, and to all unions, the right to bargain collectively, thus imposing on the public authorities the corresponding obligation to promote actively a culture of dialogue and negotiation in the economy, so as to ensure broad coverage for collective agreements.[55]

4.10 The quasi-judicial body supervising the Charter is the European Committee of Social Rights (ECSR).[56] From time to time the ECSR publishes 'Statements of Interpretation'. It has done so in relation to Art 6(2). It held:

> … in accepting the terms of this provision, the Contracting Parties undertake not only to recognise, in their legislation, that employers and workers may settle their mutual relations by means of collective agreements, but also actively to promote the conclusion of such agreements if their spontaneous development is not satisfactory and, in particular, to ensure that each side is prepared to bargain collectively with the other.

> Where adequate machinery for voluntary negotiation is set up spontaneously, however, the government in question is not, in the Committee's opinion, bound to intervene in the manner prescribed in this paragraph.[57]

Art 6(4) of the Charter provides for the right to strike for the purpose of collective bargaining. Although the Tory government of Harold Macmillan was the first to ratify this treaty, the United Kingdom is now one of the countries most seriously in breach of its obligations under the Charter, particularly in relation to its laws on strikes, the ECSR having repeatedly held that in the UK:

> the scope for workers to defend their interests through lawful collective action is excessively circumscribed; the requirement to give notice to an employer of a ballot on industrial action, in addition to the strike notice that must be issued before taking action, is excessive; the protection of workers against dismissal when taking industrial action is insufficient.[58]

Box 4.2

The Other Europe

From a legal point of view there are two Europes. There is the Council of Europe consisting of 47 member States and is the body which has given us the European Convention on Human Rights and the European Social Charter, as dicussed in the text.

The other Europe is the European Union. It has 27 member States and is primarily an economic union, a common market. Its laws are in the Treaty of the European Union and the Treaty on the Functioning of the European Union (as well as Regulations and Directives). Its court is the Court of Justice of the European Union (CJEU).

So far as the EU is concerned, the CJEU has also recognised the right to collective bargaining as a fundamental principle of EU law: see the *Laval* case.[59] The CJEU has also recognised that collective bargaining, though inherently anti-competitive in setting the price and conditions of labour on the labour market, is nevertheless compatible with the social dimension of the EU and therefore legally tolerable: see the *Albany* cases.[60]

That right is now reinforced by the Charter of Fundamental Rights of the EU 2000, which provides in Art 28 that:

> ***Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right***

Director **Carolyn Jones**

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The Institute of Employment Rights
4th Floor Jack Jones House
1 Islington
Liverpool, L3 8EG
Tel: 0151 207 5265
Email: **office@ier.org.uk**
Twitter: @ieruk

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