A Twelve Point Plan for Labour, and A Manifesto for Labour Law

Keith D. Ewing, John Hendy QC and Carolyn Jones (eds), *A Manifesto for Labour Law: towards a comprehensive revision of workers' rights* (Institute of Employment Rights, 2016) iv + 84 pp.

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1. Introduction

A successful manifesto often involves three main features. First, it must captivate public policy. It imagines a future to believe in, setting goals worth winning. The US Declaration of Independence of 1776,[1] the International Labour Organisation's Constitution of 1919, and the New Deal's Campaign Address on Progressive Government of 1932,[2] all used rhetoric for a purpose: to shift social power and privilege for human freedom. Second, there must be unifying principles. Principles, not rigid rules, are fundamental for collective action to achieve unity in a direction, minimum aims, rather than details in outcomes. Third, principles must have an order that can be remembered and rallied for. Take the first ten Amendments ratified after the Bill of Rights,[3] the ILO's first ten principles,[4] or the eight social and economic rights of the New Deal's Second Bill of Rights.[5] Modern history's great political maxims came from these: life, liberty and the pursuit of happiness; winning peace with social justice; freedom of speech, of worship, from want, from fear. Imagination, principles and clarity are basic to a manifesto's success.

Success is needed now because social democracy is under stress worldwide, not least in the UK. Inequality accelerates, climate damage mounts, representative government is decaying. Failure to move past the Thatcher, Reagan and Washington 'Consensus' has left this generation confronted with an increasingly psychotic politics of 'fascism-lite':[6] a Trumped-up 'Republican'

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1 United States Declaration of Independence (4 July 1776)

2 *Campaign Address on Progressive Government at the Commonwealth Club in San Francisco, California* (1932). Discussed in R Eden, 'On the Origins of the Regime of Pragmatic Liberalism' (1993) 7 Studies in American Political Development 74, 109 ff.

3 US Bill of Rights (1791)

4 Constitution of the International Labour Organisation, Treaty of Versailles 1919, Part XIII (1) regulation of the hours of work, including the establishment of a maximum working day and week, (2) the regulation of the labour supply, (3) the prevention of unemployment, (4) the provision of an adequate living wage, (5) the protection of the worker against sickness, disease and injury arising out of his employment, (6) the protection of children, young persons and women, (7) provision for old age and injury, (8) protection of the interests of workers when employed in countries other than their own, (9) recognition of the principle of freedom of association, (10) the organisation of vocational and technical education and other measures.

5 FD Roosevelt, *Eleventh State of the Union Address* (11 January 1944) outlining eight basic rights: 'The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation; The right to earn enough to provide adequate food and clothing and recreation; The right of every farmer to raise and sell his products at a return which will give him and his family a decent living; The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad; The right of every family to a decent home; The right to adequate medical care and the opportunity to achieve and enjoy good health; The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; The right to a good education.'

6 E McGaughey, 'Fascism-lite in America (or the Social Ideal of Donald Trump)' (2016) TLI Think! Paper 26/2016, explaining the US Supreme Court's policy is responsible, letting big money corrupt elections since *Buckley v Valeo* 424 US 1 (1976).

Party, a United Kingdom 'Independence' Party, an 'Alternative' für Deutschland, Le Pen's 'National' Front, the Swedish 'Democrats' or Putin's 'United' Russia.[7] They expose the need to rebuild social institutions, and dismantle illegitimate corporate power, for an open and just world. But most politicians fiddle while, literally, the planet burns and drowns.[8] Seeing the scale of these problems the *Manifesto for Labour Law*, authored by a host of the most distinguished labour lawyers from Britain, Europe and the Commonwealth,[9] seeks 'a comprehensive revision of workers' rights'. The *Manifesto*'s eight chapters lend a compelling narrative, with 25 'principal recommendations' for reform. The essence is a call for sectoral collective bargaining, a matching right to collective action, a meaningful floor of rights fully enforced, a renewed Ministry of Labour and an autonomous appellate Labour Court.[10] As Lord Wedderburn turned the phrase, here are proposals supported by 'hard legal analysis allied to an alternative social vision'.[11] It became official policy at the Labour Party Conference of 2016. This review will outline the *Manifesto*, and in light of its analysis, set out 'A Twelve Point Plan for Labour'.

2. A Manifesto for Labour Law

Chapter one summarises the fierce urgency of now in an impressive body of empirical data.[12] UK workers work 42.5 hours a week, only have a right to retirement at age 68, and 28.9% of people have mismatched education for jobs. We have 31% lower productivity than in France, 13 million live in poverty, and executives earn 183 times average workers. These are the worst results in the EU. The UK is the EU's most unequal country, and perpetuates a global model where a busload of 62 billionaires own as much as half of the planet. The loss of voice at work accelerated inequality, damaged prosperity and weakened democracy. Britain stopped being an example to its neighbours, except for what not to do, because power ceased to be in the hands of the many, and was now with the few.[13] Thatcher spelled disaster, and the trousers who followed were wrong.

Chapter two advances 'four pillars of collective bargaining'. First, there needs to be

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[7] See also D Boffey (5 March 2016) Guardian, on the financial and social media support of Putin for organised racism.

[8] United Nations, *Framework Convention on Climate Change* (12 December 2015) art 2(1)(a) 'Holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels.' It contains no mechanism to make responsible corporate polluters pay, or be punished for damage. This 'target' is projected to mean that 280m people worldwide, including in London, will be under water. See R Knutti, Joeri Rogelj, J Sedlá ek, and EM Fischer, 'A scientific critique of the two-degree climate change target' (7 December 2015) Nature Geoscience 1. See pictures in AFP (30 November 2015) The Telegraph.

[9] Alan Bogg, Nicola Countouris, Ruth Dukes, Keith Ewing, Michael Ford QC, Mark Freedland QC, John Hendy QC, Phil James, Carolyn Jones, Aileen McColgan, Sonia McKay, Tonia Novitz, David Walters, David Whyte, and Frank Wilkinson.

[10] Manifesto (2016) 1-2 and 63-65

[11] Quoted in the Manifesto's Preface, iv, from KW Wedderburn, *Labour Law and Freedom* (1992) Preface.

[12] Manifesto (2016) 67-70, endnotes 2 to 34

[13] Thucydides, *History of the Peloponnesian War* (ca 411BC) Book 2, para 37, where Pericles said, 'Our government does not copy our neighbors, but is an example to them. It is true that we are called a democracy, for the administration is in the hands of the many and not of the few.'

workplace democracy. The 'right to manage' was used 'to exclude input from the workers subject to it'. Restoring productivity and sharing prosperity requires 'the re-establishment of collective bargaining at sectoral' level, and company law reform to end workers' exclusion from a vote for directors on boards: either by requiring a minimum number of employee directors, or a percentage of votes in the general meeting, or both.[14] Second, social justice must be advanced by ending humanity's condition of 'subservience': the consequence of grossly unequal wealth and bargaining power.[15] The losses in human potential 'echo down the generations' with 'burdens on the State as well as misery for its citizens'.[16] Third, government must have credible economic policy. 'A progressive economic strategy will require a strong State presence in regulating wage determination'.[17] A more equal economy will mean greater aggregate demand, and a virtuous cycle of growth; not the pits of austerity where the bad business leads the good, and the worst leads the bad. An end to traffickers who exploit migrants requires fair wages for all, utilising government procurement to spread good practice. Fourth, says the *Manifesto*, restoring collective voice means restoring the rule of law. The UK will then adhere to international law, under core International Labour Organisation Conventions and our trade agreements.[18]

Chapter three sets out institutional changes to revitalise collective bargaining. First the *Manifesto* advocates a renewed Ministry of Labour, with a seat in Cabinet. The Ministry would 'reduce unemployment', plan 'skills' needed 'for the contemporary and future world', supervise national and international labour standards, promote collective bargaining, and coordinate with the Treasury and a National Economic Forum composed of 'government, employers, unions and independent academics'.[19] Second, sectoral bargaining must replace enterprise bargaining, introduced after the Donovan Report,[20] entrenched by the suppression of solidarity action, and the Central Arbitration Committee's narrow perspective on appropriate bargaining units.[21] The 'often manipulated' 'outcomes produced by market forces' will be replaced by results 'desired by the democratic will'.[22] Enterprise bargaining generally fails to achieve coverage over 35 per cent of the workforce, while the European average is 61 per cent.[23] Collective agreement coverage was

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[14] Manifesto (2016) 8 and 23

[15] Manifesto (2016) 8-9, quoting National Labor Relations Act of 1935, 29 USC §151 and *Saskatchewan Federation of Labour v Saskatchewan* [2015] 1 SCR 245, [3] and [55]-[56] per Abella J.

[16] Manifesto (2016) 10

[17] Manifesto (2016) 12

[18] Manifesto (2016) 13-15, notably the Freedom of Association Convention 1948 (c 87), Collective Bargaining Convention 1949 (c 98), Workers' Representatives Convention 1971 (c 135) and Labour Relations (Public Service) Convention 1978 (c 151)

[19] Manifesto (2016) 17

[20] Lord Donovan, *Royal Commission on Trade Unions and Employers' Associations* (1968) Cmnd 3623, 262, 'if the basis of British industrial relations is to become the factory agreement, the change must be accomplished by boards of directors of companies.'

[21] Trade Union and Labour Relations (Consolidation) Act 1992 Sch A1, paras 11-19, from the Employment Relations Act 1999

[22] Manifesto (2016) 18, taking into account ILO Employment Policy Convention 1964 (c 122) on promoting social dialogue.

[23] Manifesto (2016) 19

82% in 1980 but sank to around 20% today. The *Manifesto* urges that government activism is needed to change. Third, new Sectoral Employment Commissions will procure Sectoral Collective Agreements. The favourability principle means all workers enjoy a national minimum of rights, better sectoral collective agreements, and better enterprise collective agreements still. There would not be derogation or 'opening clauses'. Terms would include pay and time, dispute settlement, job security, part time and gender equality, training, pensions and law enforcement.[24] Fourth, 10 per cent union membership and evidence of majority support should be enough for union recognition in a workplace. Signatures or a card check would suffice without a ballot, where employers hire lawyers and consultants to misrepresent facts and unduly influence workers to vote against their interests. The failure of this model is clear in the US,[25] and its extension in the UK was unjustified. Fifth, and crucially, the unionless must not be voiceless. We must end the exclusion of worker voice in corporate governance. Workers must be represented as of right on boards of directors, with a percentage of votes in general meetings, or both.[26]

Chapter four outlines how to restore a floor of rights for a decent living. First, the Low Pay Commission should be reformed as a Living Wage Commission and should never leave gaps in coverage or enforcement. Second, fair working time requires stopping the 'spreading virus of zero hours contracts' by guaranteeing everyone a defined hours contract and limiting deviation to 10 to 20 percent of time.[27] Collective bargaining will reduce excessive working time. Third, equality legislation should cover caste, socio-economic status, all family status and gender identity. Religion or belief should be clarified to not justify unequal treatment for others, the Disability Rights Commission should be restored and follow the social, not a clinical model,[28] and intersectional or multiple discrimination banned explicitly.[29] Maternity leave should be fully paid for six months and paternity leave fully paid for one month. The *Manifesto* recognises the

[24] Manifesto (2016) 20-21

[25] See BI Sachs, 'Despite Preemption: Making Labor Law in Cities and States' (2011) 1224 Harvard Law Review 1153, 1162-3, 'Scholars have repeatedly noted the central problems. When it comes to the rules of organizing, the regime provides employers with too much latitude to interfere with employees' efforts at self-organization, while offering unions too few rights to communicate with employees about the merits of unionization. The NLRB's election machinery is dramatically too slow, enabling employers to defeat organizing drives through delay and attrition. The NLRB's remedial regime is also too weak to protect employees against employer retaliation. And, with respect to the statute's goal of facilitating collective bargaining, the regime's "good faith" bargaining obligation is rendered meaningless by the Board's inability to impose contract terms as a remedy for a party's failure to negotiate in good faith.'

[26] Manifesto (2016) 23. The manifesto adds that a duty should be owed to employees of equal intensity as to shareholders. Technically, shareholders are owed no duty in law: see Companies Act 2006 s 172 (and the absence of the word, 'shareholder' rather than 'member'). Employees can and should become members of companies. Previously in Companies Act 1985 s 309, employee interests were explicitly acknowledged, but these paper duties have little positive value without participation rights. See further, E McGaughey, *Participation in Corporate Governance* (2014) ch 2(3)(b) 29-32.

[27] Manifesto (2016) 26-27, drawing on the Zero Hours Contract Bill 2014, sponsored by Ian Mearns MP. The same result has already been achieved (albeit with weaker enforcement) using common law norms: see E McGaughey, 'Are Zero Hours Contracts Lawful?' (2014) Submission to DBIS Consultation.

[28] See further, UN Convention on the Rights of Persons With Disabilities 2007

[29] Equality Act 2010 s 14, not yet in force, but any such behaviour is already completely illegal as indirect discrimination.

importance of this issue because 'despite over 40 years of equal pay legislation' a 19.2 per cent gender pay gap persists.[30] There should be a right to leave for five years to care for all children up to age 18, all employers should do pay audits, and tribunals should be empowered to make recommendations.[31] Fourth, in health and safety law duties should extend to all persons conducting an undertaking, to sub-contractors and heads of supply chains. Unions should be able to access and appoint health and safety representatives in non-unionised workplaces, and initiate private prosecutions, to bolster a strengthened inspectorate with more enforcement powers.[32]

Chapter five seeks to reverse poor rights coverage, from weak judicial interpretation, poor state policy, high fees, few collective rights and representation, and the vulnerability of precarious workers. Following international law,[33] the burden of proof should fall on the employer denying employment duties, and multiple employing entities should bear duties jointly. Vulnerable workers should be protected in Sectoral Collective Agreements, or deemed protected by law. To access justice there must be 'a fully-fledged Labour Inspectorate' that can bring representative actions, with analogous powers to the insolvency or competition authorities. Tribunal fees must be abolished, free advice provided, judges must be (explicitly) empowered to grant injunctions to prevent unilateral contract changes.[34] Caps on unfair dismissal should be removed. There should be proportionate liability for aggravated breach of employment rights. Most importantly, 'an autonomous Labour Court system with exclusive jurisdiction to deal with all employment and labour related matters should be introduced.'[35] This will ensure a judiciary with expertise in labour law and human rights is not merely convention, but codified in an institutional framework.

Chapters six and seven expand on how freedom of association and collective action can be secured. Trade unions should be freed from red tape in the conduct of elections and ballots, subject to minimum standards of democracy. Only members, not any third party should be able to sue for damages for infringements of ballot rules.[36] Worker representatives must enjoy effective protection against any detriment, and access to workplaces guaranteed.[37] The Trade Union Act 2016 should be scrapped. It was a breach of international standards to suppress check off systems in the civil service, and the Certification Officer should be able to provide model

[30] Manifesto (2016) 25. House of Commons Women and Equalities Committee, *Gender Pay Gap* (2016) HC 584, 5
[31] Manifesto (2016) 28-29
[32] Manifesto (2016) 29-31, including restoring civil liability for health and safety regulation breach in the Health and Safety at Work etc Act 1974 s 47.
[33] ILO Employment Relationship Recommendation 2006 (r 198)
[34] This appears to be implicit in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58, as a unilateral variation would amount to a breach of contract because it defeats the parties' reasonable expectations. See further *Equitable Life Assurance Society v Hyman* [2000] UKHL 39 on the control of discretionary power, and preempting its abuse.
[35] Manifesto (2016) 39
[36] Manifesto (2016) 44-46
[37] ILO Workers' Representative Recommendation 1971 (r 143)

rules on workplace access. The right to strike should be positively recognised in statute, and there is 'no justification for denying to workers in a democracy the right to withdraw their labour as an instrument of political protest'.[38] Solidarity action must be explicitly recognised as lawful.[39] Notice periods for ballots should be reduced to 3 days warning.[40] No model rules for ballots should be needed if the Certification Officer agrees rules are fair, subject to Labour Court appeal.

The *Manifesto* concludes by emphasising that collective 'bargaining cannot thrive without active State support' but also rejects 'an ostensible belief that every problem must have a legal solution'.[41] Between the likely consequences of the law today, and the *Manifesto*'s proposals, the evidence supports the *Manifesto* as a strategy for social prosperity. But there is more: should we have to rely on government to build union membership and spread sectoral bargaining? If government support was dismantled before, could it not be again? The next shift of politics must prevent democratic institutions being taken apart, and take apart oligarchs that would. For these reasons, we need 'A Twelve Point Plan for Labour' to build and consolidate the *Manifesto*:

1. **Automatic enrolment and all-out recruitment to trade unions**.
2. **Board representation by votes at work**.
3. **Councils at work elected with binding rights**.
4. **Dismissals must be deferrable by work councils**.
5. **Extension of collective agreements**.
6. **Full employment through fiscal, monetary and trade policy**.
7. **Gender and general equality**.
8. **Holidays progressively raised to half the year**.
9. **Investment funds for income insurance**.
10. **Jobholders must have all rights**.
11. **Knowledge economics: a right to education at work**.
12. **Labour Courts, Labour Ministry and Legislature reform**.

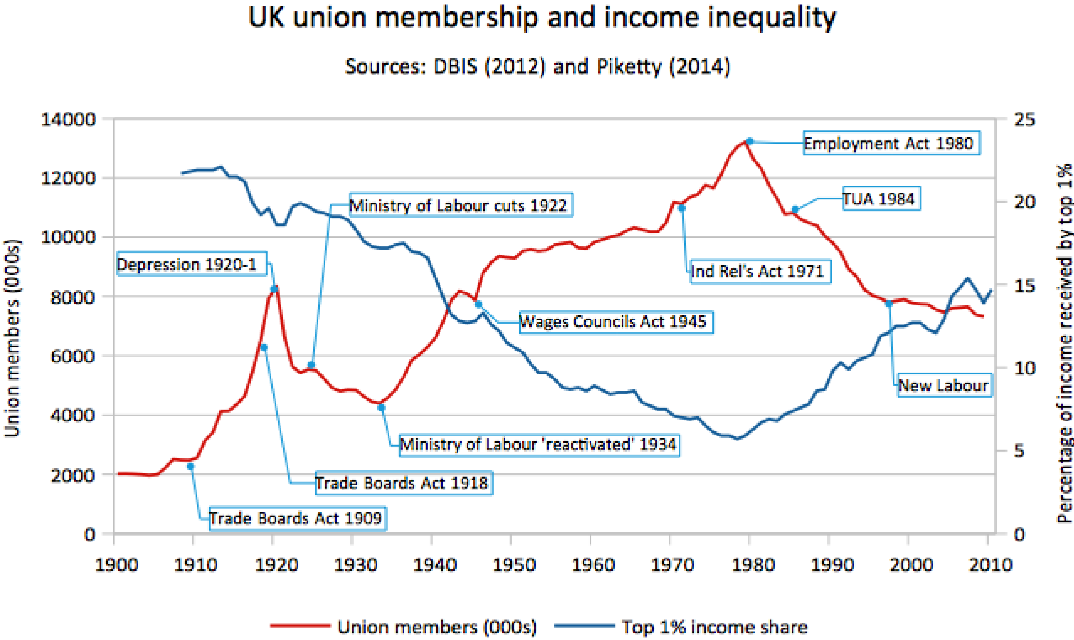
These twelve points reflect priorities that the international labour movement will increasingly demand. These aims are global. For people who have lived the global financial crisis, Eurozone failure, the rise of right-wing fanatics – the sheer incompetence of yesterday's political consensus – they will be seen as fundamental to equality, fairness and justice for the future. Parliament may

[38] Manifesto (2016) 53
[39] Manifesto (2016) 54
[40] Manifesto (2016) 55
[41] Manifesto (2016) 59-60

be slow to act. Unions can and must win ten of them (save F and L) in collective bargains now.

3. A Twelve Point Plan for Labour

1. **Automatic enrolment and all-out recruitment to trade unions**, with a right to opt out, like pensions. The worldwide decline in union membership must be reversed. Few want the closed shop back, but the Employment Act 1980 and *Young, James and Webster v UK* were the single most reckless acts in modern labour law.[42] The chart below, as the *Manifesto* reproduces, shows the UK results.[43] In our 'single channel' system, when union membership fell, inequality soared. Evidence from just one study on pensions shows auto-enrolment, with an opt out right, raised participation to 86 per cent, up from 49 per cent when people had to opt in. That is, 37 per cent of people passed up free pension money simply because of our '*status quo* bias'.[44] Collective agreements can require auto-enrolment in union membership with a right to opt out, right now.[45] Serious gains in union membership, like in pension participation, would result. Unions must go for all-out recruitment, like before 1920, to *quadruple* membership by the end of 2020.[46]



[42] *Young, James and Webster v United Kingdom* [1981] ECHR 4, holding the closed shop unlawful. Contrast the compelling dissent.

[43] From E McGaughey, 'All In 'It' Together: Worker Wages Without Worker Votes' (2016) 27(1) King's Law Journal 1, 8

[44] BC Madrian and DF Shea, 'The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior' (2001) 116(4) Quarterly Journal of Economics 1149, 1151, discussed in E McGaughey, 'Behavioural economics and labour law' (2014) LSE Legal Studies Working Paper No. 20/2014, 24-27

[45] See the Trade Union and Labour Relations (Consolidation) Act 1992 s 146(1)(c) and (3). There is plainly no 'compelling' or 'enforcing', when the new member of staff has a right to opt out.

[46] Methods include (1) standardising an introductory zero fee for membership (2) effective marketing of union service guarantees, including insurance services such as dismissal protection (3) further development of services, such as mutual banking (4) the TUC modelling best practice templates for local union governance, with a nationwide monthly union day (5) effective coordination of online workplace union groups. All these strategies are used by UK unions now, or were in the past, and are used across successful European and Commonwealth countries: best practice must simply become ubiquitous.

2. Board representation by votes at work. The crowning achievement of collective bargaining, now codified by law in most EU countries,[47] also operates among some of the most successful and democratic UK workplaces: universities.[48] While boards are monopolised by shareholding institutions, corporate interests take everything from workers, give as little back as possible, and call the difference 'profit'. Investment of capital justifies votes in business enterprise a lot of the time – indeed this is usually employees' retirement savings. The ultimate investors should have a voice. But 'investment of labour' in enterprise *always* justifies the vote.[49] People must have votes at work regardless of whether collective bargaining is opposed or successful, and collective bargaining is easier if you participate in electing the people you bargain with. The *Manifesto*'s company law proposals are right, and must apply to all enterprises regardless of legal form, size, across corporate groups, and bind foreign entities with their real seat in the UK.[50] Simple changes to the Companies Act 2006, the Partnership Act 1890 and other statutes can make workers 'members'. Crucially, revised Model Articles should recognise workers as company members, with a percentage of votes in the general meeting, by default, in every new company startup.[51]

3. Councils at work elected with binding rights on workplace matters. Health and safety, working time and break patterns (within collectively agreed limits), job security and adjusting to economic change: all these should be regarded as issues on which elected work council representatives have a binding voice. A template for collectively agreed work councils was written by the British government and allies for Germany in 1946,[52] and Britain is no less deserving of the same rights today. Better than the current *ad hoc* system, information and consultation rights on health and safety or redundancies can be efficiently consolidated and expanded. The evidence shows that work councils deliver a rapid avenue, and a standing institution, for voice and union organising: a real voice for organised labour. Economic risk will decrease. Productivity will rise.

4. Dismissals must be deferrable by work councils pending arbitration and court. We must tear down 'the "Donald Trump" model of workplace relations'.[53] That is where irrational authority figures bark 'you're fired' whatever the cost to enterprise or society. Supervisors and

[47] E McGaughey, 'The codetermination bargains: the history of German corporate and labour law' (2016) 23(1) Columbia Journal of European Law (forthcoming)
[48] e.g. Oxford University Act 1854 ss 16 and 21 and Cambridge University Act 1856 ss 5-51
[49] See further E McGaughey, 'Ideals of the Corporation and the Nexus of Contracts' (2015) 78(6) Modern LR 1057, 1061-1070
[50] Under EU law, public policy justifies derogating from the general position that the seat of incorporation determines the applicable law for a corporation. See *Überseering BV v Nordic Construction Company Baumanagement GmbH* (2002) C-208/00, [92]
[51] e.g. in the Model Articles for Public Companies, Sch 3, a new para 34(2) could read 'The company's workers shall be registered as members and entitled to 30 per cent of the total votes in the general meeting. Each person shall have one vote.'
[52] Control Council Law No 22 (10 April 1946) in *Official Gazette of the Control Council for Germany* (1946) LSE Archives, 43 (R498)
[53] See E McGaughey, 'Unfair dismissal reform: political ping-pong with equality?' (2012) 226 Equal Opportunities LR, page 16

managers have a potential conflict of interest in dismissals over personal behaviour, while shareholding representatives have a social conflict of interest: they may retrench valuable staff for short term dividends, at the enterprise's expense. A basic value of British decency is the right to a hearing by one's 'peers, or by the Law of the Land.'[54] If an elected work council defers a dismissal, the employee's contract stays in full force, pending arbitration or court. For redundancies, employing entities (worker representatives now on board) should have the final say in the interests of the enterprise, but subject to severance pay that fully internalises social costs.

5. Extension of collective agreements to sectoral level, and further by regulation. The human 'right to just and favourable remuneration' is universal.[55] As the *Manifesto* acknowledges, sectoral collective agreements, helped by a revitalised Ministry of Labour, should leave no one out. Local, regional and national government should be able to extend collective agreements to an economic sector in their geographic area, on application of workers or employing entities. This is critical to protect responsible, productive businesses, by ending unfair competition. The right to collective action must correspond, in every way: the right to strike is the vanguard of democracy, from the deposition of the Kaiser, to Indian Independence, to the collapse of the Iron Curtain, and finishing apartheid South Africa.

6. Full employment through fiscal, monetary and trade policy. Collective labour law is important, but pales in the face of global economic force.[56] To go further than a 'high level of employment',[57] or 'objectives for growth and employment',[58] and end the daily, tragic loss of people's potential, everyone must be guaranteed the right to work. Fiscally, that means everyone should have the right to a job on a living wage from government.[59] To pay for it, corporations and asset owners must be taxed. Productive property owners must not be able to monopolise the supply of capital to the job market, suppress competition, growth and prosperity for private

[54] Magna Carta 1297 XXIX

[55] Universal Declaration of Human Rights 1948 art 23(3)

[56] O Kahn-Freund, *Autobiographical Memories of the Weimar Republic. A conversation with Wolfgang Luthardt* (February 1978) Translated by Ewan McGaughey (2016) 11, 'Whatever one wants to think about collective labour law, after the creation of millions of unemployed and the deflationary economic and financial policies of Brüning collective labour law in Germany failed. Because collective labour assumes, among other things, a certain balance of forces. A balance between the representatives of the labour movement and the representatives of employers. This balance was completely destroyed by mass unemployment, and with that the trade unions were robbed of the necessary strength for the maintenance of collective labour law.' Original in German, (1981) 14(2) Kritische Justiz 183, 196.

[57] TFEU art 9, and see also 127 and 119-150. By contrast TEU art 3(3) says it is 'aiming at full employment'. Does this bind the central bank? See M Roth, 'Employment as a Goal of Monetary Policy of the European Central Bank' (2015) ssrn.com.

[58] Bank of England Act 1998 ss 1, 11-13 and 19

[59] See S Webb, *How the Government Can Prevent Unemployment* (1912), M Kalecki, 'Political aspects of full employment' (1943) 14(4) Political Quarterly 322, and V Mantouvalou (ed), *The right to work: legal and philosophical perspectives* (2015) ch 15 in particular.

gain.[60] There is no right to have society fund courts to enforce productive property rights, when those same property holders fail to utilise the assets, and hold back human development. Monetarily, full employment must be every central bank's objective. Private banks must no longer be subsidised by central banks and taxpayers on low inter-bank lending rates, let alone open market operations, while they profit by hiking interest rates against enterprise growth.[61] A public option investment bank is essential for fair competition and investment. In trade, full employment requires in every treaty that countries selling products or services to the UK progressively raise labour standards. This is enforceable through shifting trade incentives for governments,[62] and tax sanctions for multi-national corporations.[63] The best immigration policy is international development. We must have the right to free movement, but stop economically compelled, unfree movement of workers, and never give in to racists saying they will build walls.

7. Gender and general equality. We must urgently end gender discrimination, and prejudice in general. Instead of a limited protected characteristic list, there should be a positive right to equal treatment based on skills and social inclusion.[64] After four decades of equal pay law, it is clear the gender pay gap will not end until we end state sanctioned sex discrimination in child care rights. Distinction in maternity and paternity leave must be abolished. It forces sex segregation in child care roles. It stacks the odds against mothers' careers and fathers' relationships with children. All parents must have nine months paid leave, progressively increased to one year. This should not be tradable, so that social stereotypes are not perpetuated by private choice. There must be a crèche at every large workplace and universal pre-school outside. Moreover, the old gender pay provisions must be completely scrapped.[65] They are an irrational historical import,[66] and less favourable than equal pay claims for any other protected characteristic.[67] The time limits must rise to nine months for all,[68] and high court claims and representative actions allowed. Companies must achieve equal gender balance on boards, and ethnic diversity proportionate to the

[60] On the theory of property here, see H Sinzheimer, *Grundzüge des Arbeitsrechts* (1920) ch 2, 22-27 (in English, *Foundations of Labour Law*) and AA Berle, 'Property, Production and Revolution' (1965) 65 Columbia Law Review 1

[61] See EP Ellinger, E Lomnicka and CVM Hare, *Ellinger's Modern Banking Law* (5th edn 2011) ch 1, 19

[62] See World Trade Organization Dispute Settlement Understanding arts 22-23.

[63] Such 'horizontal effect' for multinational corporations will invert 'Investor State Dispute Settlement' (ISDS).

[64] Technically there are several ways to open the limited protected characteristic list. Unfair dismissal laws effectively do this: ERA 1996 s 98. Another model is the ECHR art 14, which lists protected characteristics but also an open-ended 'other status'. Arguably that result is already law, both at common law and through the EU's general principle of equality (e.g. *Kücükdeveci v Swedex GmbH & Co KG* (2010) C-555/07) although the judiciary may welcome this being made explicit.

[65] Equality Act 2010 ss 64 to 80.

[66] From the 'Bennett Amendment' to the US Equal Pay Act of 1963. This is explained by GA Rutherglen, *Employment Discrimination Law* (3rd edn 2009) 122-123. This aspect of exporting US law to UK and EU law was never thought through.

[67] S Deakin and G Morris, *Labour Law* (6th edn 2012) 695-705, discussing differences and consequences.

[68] As was done for members of the armed forces in gender pay claims, but for nobody else, by the Enterprise and Regulatory Reform Act 2013 s 103(3). Contrast the six month limit for gender pay claims in the Equality Act 2010 s 129 with the extendable three month limit for all others in s 123.

workforce.[69] Finland's comply or explain model has possibly been most successful to date.[70]

8. Holidays progressively raised to half the year. While weekly working time may require flexibility, total days off each year does not. Labour law's goals are not just rights to work, or at work, but a right to be free from work and pursue life's true values: citizenship, family, literature, music, philosophy and science, art, music, sport. The European Social Charter 1961 article 2(1) required the working week to be 'progressively reduced to the extent that the increase of productivity' permits,[71] and John Maynard Keynes calculated in 1930 that if collective bargaining continued its pace (as it created the 'weekend' and 'retirement') we should have worked 15 hours a week by 2000.[72] Productivity rose, but working time stopped falling. Today, people with 28 days holidays a year and a two day weekend are working two thirds of the year. This should be reduced to one half: either through a three day weekend, or a further 50 days paid holidays. Everyone should have the freedom of academics, judges, or Members of Parliament, because more autonomy will increase productivity and the willingness of people to do flexible hours.

9. Investment funds for income insurance. A plan for labour law needs to reclaim all votes in the economy, which workers' capital buys.[73] Private and public investment funds assure workers income in retirement, unemployment, insolvency, sickness and disability, but worker voice is taken away. Pension share ownership rose and fell with the fortunes of collective bargaining, as the chart below shows. Pension funds usually delegate control to asset managers, who buy bonds, or gilts, and especially company shares. In the UK, like almost every country, asset managers have come to monopolise shareholder voting rights, and all with 'other people's money'.[74] They often cut pensions, oppose unions and labour rights. Workers' own capital is used against them, and asset managers charge fees for this 'service'. In short, capital is already socially owned, but it must become democratic. Every pension fund must have democratically elected trustees, and those representatives must control and coordinate all voting rights their money buys. Asset managers have mass conflicts of interest, and should be banned from voting by the courts and statute, like Swiss banks and American brokers were after the global financial crisis.[75] The National

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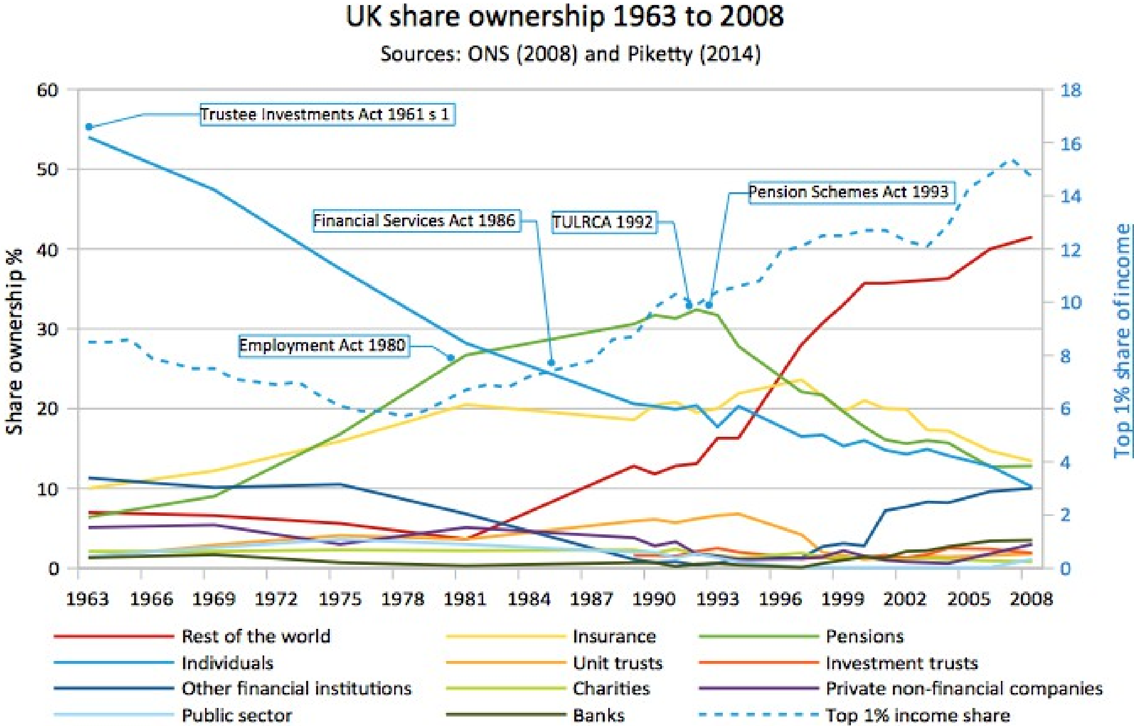
[69] This is already an aim of the Association of Member Nominated Trustees in its 'Red Line Voting Initiative'. See 'I' below.
[70] See E Davies, *Women on boards* (February 2011) 22
[71] ESC 1961 art 2(1)
[72] JM Keynes, *Economic Possibilities of our Grandchildren* (1930)
[73] For a quick primer on the system, see E McGaughey, 'Member Nominated Trustees and Corporate Governance' (Speech to the AMNT, 26 June 2013) KCL Law School Research Paper No. 2015-26.
[74] In general, LD Brandeis, *Other People's Money and How the Bankers Use It* (1914)
[75] E McGaughey, 'Does Corporate Governance Exclude the Ultimate Investor?' (2016) 16(1) Journal of Corporate Law Studies 221, 237-8

Employment Savings Trust must have member nominated trustees. The National Insurance Fund, which covers the state pension, unemployment, insolvency, sickness and more, must no longer be a Whitehall balance sheet, and become a democratic wealth fund, with board representation for contributors.



10. Jobholders must have all rights. Anyone who works in a job, unless they are proved to deal with a client or customer, should enjoy protection in every employing entity for all rights.[76] The *Manifesto* is correct in all of its proposals because it 'is a vain thing to imagine a right without a remedy'.[77] The necessary recognition by the Court of Appeal of binding precedent,[78] and reforms to government policy, must be accompanied by totally free access to tribunals and representative enforcement powers analogous in strength to competition or insolvency law.[79]

11. Knowledge economics: a right to education at work. To have the world's most productive workforce, everyone needs education at work. Elected work councils should have an education and training budget, derived from a fixed minimum percentage of profits in large enterprises.[80]

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[76] The Pensions Act 2008 s 1 introduced the 'jobholder' concept. The term's use here does not have its place or age limits. See also E McGaughey, 'Social rights and the function of employing entities' (2016) OJLS (forthcoming)

[77] *Ashby v White* (1703) 92 ER 126

[78] Chiefly *Autoclenz Ltd v Belcher* [2011] UKSC 41, which, for example, was disregarded on wholly inadequate and unreasoned grounds in *Smith v Carillion (JM) Ltd* [2015] EWCA Civ 209, [30], another intermediated employment case.

[79] e.g. Implementation Regulation 2003 (EC 1/2003) arts 20-24 (on investigations and fines); Company Directors Disqualification Act 1986 s 6 (on the Secretary State bringing claims).

[80] For example, by analogy the Indian Companies Act 2013 s 135 requires 2% of net profits to be spent on social responsibility.

Basic types of education involve participatory management (including training for union representatives and pension trustees), the sector's historical and technological development, and expanding professional skills. This right to ongoing adult education should be consistent with a general government policy that makes all public and private education tuition free: a right to be free from all wealth discrimination and wealth segregation in education.

12. Labour Courts, Labour Ministry and Legislature reform. Democratic reform needs to cover every branch and power of government. As the *Manifesto* urges, the judiciary needs an autonomous Labour Court analogous, for example, to the German Federal Labour Court, and the executive needs a Minister for Labour in Cabinet. There must be legislature reform as well. First, every regional government must be entitled to pass labour law standards that are higher than the national minimum, favouring workers. All preemption of social democracy must end, as we restore our communities to be laboratories of democracy and enterprise.[81] Second, the House of Lords must become a true House of Peers elected by every UK resident within their professional field. The Lords work best as a house of review, but democratic reform stalled because of uncertainty about whether it should mirror the Commons on other geographical lines: we have not yet developed a federal system, but even then a federal system does not require two legislative chambers. There should be peers elected for health, education, transport, finance, science, technology, culture and sport, security, civil service, and so forth.[82] Each group of our elected peers should have seats allocated proportionate to the number of people who worked or registered as voters in that profession. Peers elected by profession, not nepotism or geographic division, will revolutionise the quality of legislation and deliberative democracy.

4. Conclusion

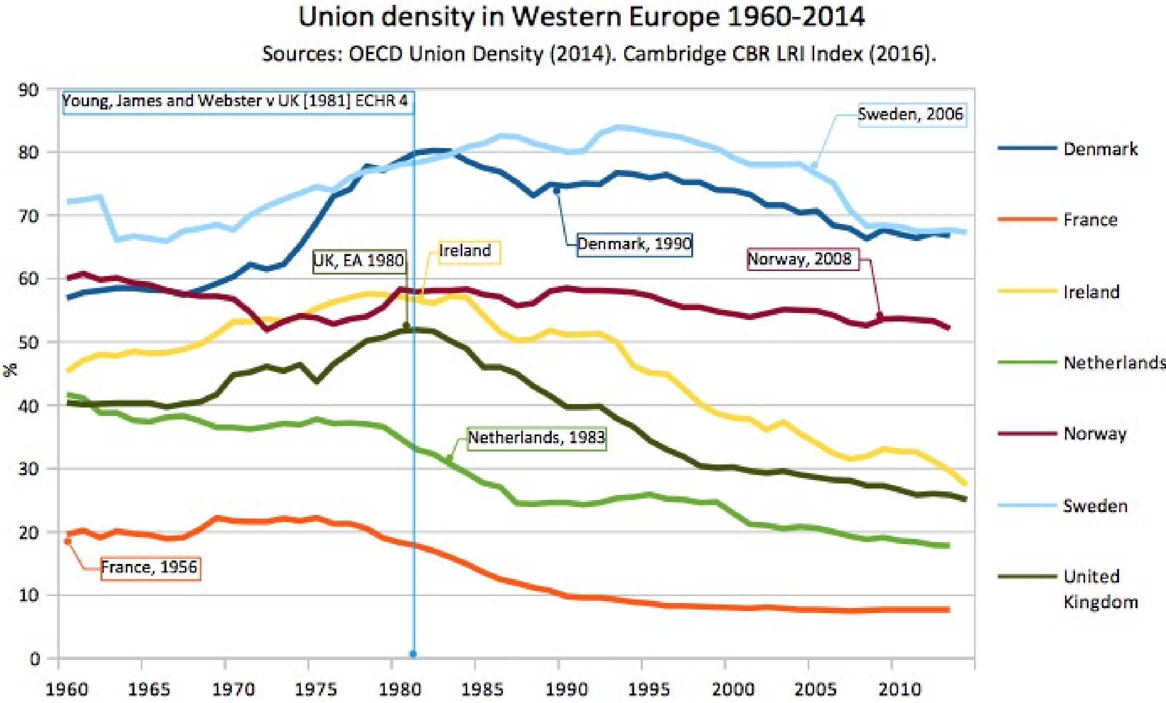
This Twelve Point Plan for Labour builds and consolidates the pathbreaking *Manifesto for Labour Law*, and builds the labour policy elements for a qualitative shift in politics. Qualitative shifts are more scarce than changes in government. In the UK, those shifts were represented by Thatcher from 1979, Attlee from 1945, and the government elected from 1905, soon led by Lloyd-George. Positive change came with mass social organisation, not 'leaders' on a frolic of their own. Each was a turning point, because each reshaped the basic model of how to organise society, and how to address its fundamental problems. Today, almost all major social and economic problems

[81] See *New State Ice Co v Liebmann*, 285 US 262 (1932)

[82] Once called a literally 'fantastic project' by S Webb, *Reform of the House of Lords* (1917) Fabian Tract No. 183, 7, at 12, Webb preferred a chamber of around 100 people elected by proportionate representation. Contrast the proposals, of a different nature (the sole concern here is deliberative democracy), in GDH Cole, *Self-Government in Industry* (5th edn 1920) ch V, 134-135.

revolve around an authoritarian model of economic governance: inequality, climate damage, and all forms of prejudice that are drummed up by politicians to divide democratic society and protect their oligarch puppet masters. People want a living planet for their children, a fair day's wage for a fair day's work, and the right to shape the laws that bind them. These desires will always be stronger than the interest groups that oppose them. To drive for change, social democracy – the single most transformative movement since the Industrial Revolution – needs to regain its purpose and impetus worldwide. Our laws must come alive again, our social innovation must revive again, for 'democracy and social justice'.[83]

Appendix: A note on closed shop abolition and union membership attrition in Western Europe



This chart shows the effects of *Young, James and Webster v UK* in Western Europe, and when national rules formally implemented the position of that ruling, based on the CBR Labour Regulation Index.[84] Scandinavian countries delayed far longer than the UK. They faced the same result of membership attrition since. France is a special case, because closed shop practices persisted but in isolated industries.[85] In countries not shown (no closed shop practices, small, or recent dictatorships) union membership attrition occurred as commitment to all-out recruitment faltered. Belgium has successfully bucked the trend, but Scandinavian membership is still higher.

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[83] LD Brandeis, 'The Living Law' (1916) 10 Illinois Law Review 461

[84] Z Adams, L Bishop and S Deakin, *CBR Labour Regulation Index: Dataset of 117 Countries* (Centre for Business Research, 2016)

[85] EM Kassalow, 'The Closed and Union Shop in Western Europe, an American Perspective' (1980) 1(2) Journal of Labor Research 323, 333