## Employment Law Michael MacNeil

## Introduction

In striving for a fairer and more equal society it is essential that the economic system and world of work is examined including the institutional arrangements and regulatory framework governing the employment relationship and industrial relations (IR) more generally.

Discussions around IR are always underpinned by a range of political philosophies. Many follow the dominant political paradigm, that the state should have very little role in determining the relationship between employer and employee – believing the market should decide the terms of employment (except, of course, when workers organisations apparently distort the market). Others adopt a pluralist position, taking what they consider to be more enlightened positions, trying to give voice to workers within the economic system, while others take a fundamentally more critical view of the employment relationship, seeing the exploitation of labour power as the crux of the capitalist system and that a progressive government should help rebalance the power between labour and capital. The existence of these perspectives (whether stated or not) is often the key to understanding why particular approaches to IR are adopted. This article will give a precis of the role of the state in IR over the last 40 years before highlighting a project that recommended a series of legislative outcomes that could be delivered by a progressive government. The applicability of this approach to Scotland is considered, taking account of both existing and potential future constitutional arrangements. The conclusion is that in all scenarios there is much more that could be done by the Scottish Government, the fact that the reform agenda in Scotland is so modest is a matter of political will and ideological perspective.

### Economic restructuring and the role of the state in Industrial Relations

There has been a tumultuous restructuring of the UK economy since the late 1970s. During this time, the state has acceded to the push by big business and finance capital to break the post-war consensus by implementing competitive de-regulation of labour markets, pursuing policies aimed at weakening the legal frameworks within which workers are employed and eroding the ability of unions to organise and take collective action, thereby hampering their ability to regulate the labour market through collective bargaining.

The election of the New Labour government in 1997 did little to reverse the radical right-wing approaches of the previous Tory Governments. This wasn’t particularly surprising given the ambivalent attitude of the party’s hierarchy to the unions. On paper, individual rights were improved (including the introduction of minimum wage provisions) but nothing was done to repeal a canon of anti-union laws intended to restrict organised labour’s freedom to act, leaving workers with limited means to enforce these individual rights. Admittedly, New Labour made an attempt to appease the unions with a new statutory route to compel employers to recognise trade unions but the provisions proved to be largely ineffective in helping to rebalance the power between workers and their employers (which was, of course, never the intention).

The Tory/Lib Dem coalition that followed also reduced collective rights and, unsurprisingly, the Tories have continued this approach since their election in 2015.

The net result of these deliberative actions over the last 40 years has been a significant tilt to the employers in the balance of power between labour and capital, resulting in declining living standards, the growth of super-exploitative employment practices and insecure work, and increasing levels of inequality across a range of measures.

It is against this backdrop that any proposals for state intervention in IR should be judged. Before looking specifically at Scotland, it is worth considering the kind of reforms that could help address the make a real difference to workers.

### What is to be done?

In 2016 the Institute for Employment Relations (IER) published *A Manifesto for Labour Law[[1]](#endnote-1)* to outline of how the state could intervene to address the super-exploitative practices that had developed within the UK labour market. The outcome of long discussions between lawyers, academics, and trade unionists, key proposals were for:

* A Ministry of Labour, a Labour Court, and a National Economic Forum
* The roll-out of sectoral collective bargaining
* Stronger trade union rights to recognition, access and inspection of workplaces
* A minimum of two workers on boards
* A real living wage
* A single ‘worker’ status with equal rights from day one for all workers
* Replacing zero-hours contracts with an expectation of a minimum number of guaranteed hours for all workers and a premium rate for overtime
* Stronger equality rights
* An emphasis on in-house dispute resolution to avoid costly litigation
* An independent Labour Inspectorate to monitor labour law compliance
* Compensation commensurate with the losses incurred by the victim and criminal sanctions for the worst offenders.

At core, the recommended actions envisaged an expanded role for the state; one which not only provided a legislative floor of statutory rights but also tackled issues of enforcement both through state institutions and workers themselves. Be clear, this wasn’t a silver bullet to the problem of declining union organisation across the economy but the IER’s initial proposals provided a sketch of how a new institutional framework could enable workers to act collectively to improve wages and working conditions. Evidence of the benefit of such an approach for employers and the economy at large was provided but there is little doubt that, if implemented, the proposals would start to address the gross imbalance in the power that the past 40 years of state policy had produced.

Although the IER’s approach was drafted with an eye on legislation at Westminster, for the purposes of this article, it is crucial to note that the project not only received support from the Labour Party under Corby’s leadership but also from the SNP and the Greens.

Further work on the practical steps required to implementing the IER’s initial proposals at a UK-level was undertaken[[2]](#endnote-2), where many of the proposals were incorporated into the Labour Party’s 2017 general election manifesto. Clearly, the Tory election victory has scuppered those plans for the time being but, for the purposes of this article, there is a blueprint showing the kind of legislative changes that could make a real difference.

### What could be done in Scotland?

With employment law remaining a reserved matter, it is easy for Scottish politicians to divert outrage at the current inadequacies and unfairness of the law to Westminster. However, even within the current constitutional constraints, more robust action could be taken at a Scottish level. In the aftermath of the 2019 general election, IER Scotland developed a Charter of Workers’ Rights in Scotland[[3]](#endnote-3) (and importantly how it might be monitored and enforced) that could be adopted if a government was serious about strengthening workers’ rights.

Of course, if employment law was no longer a reserved matter, then, with some adjustment, there is no reason why a legislative programme based on the IER proposals could not be drafted for the Scottish Parliament. The question is if there really is a will to create the conditions for such a profound shake-up of industrial relations in Scotland?

### What is being done in Scotland?

It is not at all clear that this is what the SNP in government wants. Instead, a more managerial approach has been adopted. In 2014, in the aftermath of the bitter INEOS dispute, the Scottish Government commissioned an (allegedly) independent review (but appointed Jim Mather, an SNP grandee as chair) to look at workplace relations with a clear remit to‘optimise the relationships that link trade unions, employers and Government’. This *Working Together Review[[4]](#endnote-4)* led neatly (and utterly predictably) to the establishment in 2015 to the tripartite *Fair Work Convention[[5]](#endnote-5)*￼(FWC). With an emphasis on boosting productivity and competitiveness, the FWC’s intent is that:

by 2025 people in Scotland will have a world-leading working life where fair work drives success, wellbeing and prosperity for individuals, businesses, organisations and society.

With fair work defined as:

work that offers effective voice, opportunity, security, fulfilment and respect; that balances the rights and responsibilities of employers and workers and that can generate benefits for individuals, organisations and society.[[6]](#endnote-6)

It is a matter of record that while there have been improvements in some matters, for example the comparatively higher rate of adoption of the living wage by employers[[7]](#endnote-7), progress in realising the vision is proving more difficult than expected. Even the higher proportion of workers receiving at least the living wage is likely to have more to do with the deals done between unions and public sector employers than the FWC.

On the face of it, the Fair Work Convention may have laudable, if modest, intentions but the reliance on soft regulation and employer co-operation, with no meaningful mechanisms of enforcement, and no attempt to address the structural imbalance in power between workers and employers means that the outcomes are always likely to be fiddling about the edges.

Is this really the best that can be achieved in Scotland?

Even within existing powers, more use could be made of the state’s role as an employer and a procurer of services, so one has to question the political will to implement the kind of changes that would make a real difference to workers. Like so many other aspects of Scottish Government policy, there are much better levels of communication and engagement with trade unions and civic organisations but fundamental differences in policy outcomes are hard to detect.

### Difficulties, contradictions and inconsistencies

There are those who argue that employment law should remain a reserved matter. It is difficult to accept technical arguments that employment law cannot be devolved when other fiendishly complex areas have been (the right to raise taxes, social security provisions). It is also hard to accept any principled objections when Northern Ireland already had devolved rights under the current constitutional settlement.

Of course, the argument has been made that large employer operating across borders would avoid being subject to Scottish law prefering a jurisdiction with weaker employment regulation but this logic could be used against any extension of powers such as tighter environmental controls introducing a chill factor so that nothing meaningful is done.

There is a logical inconsistency with politicians representing Scotland bemoaning the state of employment law set by Westminster and backing the IER’s plans for a fundamental review at a UK-level, but then not promoting the same agenda within Scottish institutions. In this respect, the substantially weaker approach of the Fair Work Convention is difficult to compare to the proposals suggested by the IER’s *Manifesto for Labour Law*.

### Conclusion

Implementing the kind of changes that would make a serious difference to workers depends on political will but it is clear that the right government in Scotland could make a significant difference. But this would necessitate a considerable challenge to the status-quo within the UK and Scotland.

However, as the SNP and Greens were happy to support the IER Manifesto when it was directed at Westminster, perhaps it is time for them to put their money where their mouth is and take a similarly radical agenda into Holyrood? A blueprint for future reform already exists.

1. For more information, see: <https://www.ier.org.uk/manifesto/> [↑](#endnote-ref-1)
2. See https://www.ier.org.uk/product/rolling-out-manifesto-labour-law/ [↑](#endnote-ref-2)
3. https://www.ier.org.uk/projects/charter-of-workers-rights-for-scotland/ [↑](#endnote-ref-3)
4. See: https://www.webarchive.org.uk/wayback/archive/20170107140812/http://www.gov.scot/Publications/2014/08/4647 [↑](#endnote-ref-4)
5. See: https://www.fairworkconvention.scot/ [↑](#endnote-ref-5)
6. https://www.fairworkconvention.scot/wp-content/uploads/2018/12/Fair-Work-Convention-Framework-PDF-Summary-Version.pdf (p4) [↑](#endnote-ref-6)
7. See Heery; and, https://www.fairworkconvention.scot/wp-content/uploads/2020/12/Fair-Work-in-Scotland-Report.pdf [↑](#endnote-ref-7)