



# UK Report on social dialogue in wage setting

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## **About ETHOS**

*ETHOS – Towards a European Theory Of Justice and fairness* is a European Commission Horizon 2020 research project that seeks to provide building blocks for the development of an empirically informed European theory of justice and fairness. The project seeks to do so by:

- a) refining and deepening knowledge of the European foundations of justice – both historically based and contemporarily envisaged;
- b) enhancing awareness of mechanisms that impede the realisation of justice ideals as they are lived in contemporary Europe;
- c) advancing the understanding of the process of drawing and re-drawing of the boundaries of justice (fault lines); and
- d) providing guidance to politicians, policy makers, activists and other stakeholders on how to design and implement policies to reserve inequalities and prevent injustice.

ETHOS does not merely understand justice as an abstract moral ideal that is universal and worth striving for. Rather, it is understood as a re-enacted and re-constructed ‘lived’ experience. The experience is embedded in firm legal, political, moral, social, economic and cultural institutions that are geared towards giving members of society what is their due.

In the ETHOS project justice is studied as an interdependent relationship between the ideal of justice and its real manifestation – as set in the highly complex institutions of modern European societies. The relationship between the normative and practical, the formal and informal, is acknowledged and critically assessed through a multi-disciplinary approach.

To enhance the formulation of an empirically-based theory of justice and fairness, ETHOS will explore the normative (ideal) underpinnings of justice and its practical realisation in four heuristically defined domains of justice – social justice, economic justice, political justice, and civil and symbolic justice. These domains are revealed in several spheres:

- a) philosophical and political tradition,
- b) legal framework,
- c) daily (bureaucratic) practice,
- d) current public debates, and
- e) the accounts of the vulnerable populations in six European countries (Austria, Hungary, the Netherlands, Portugal, Turkey and the UK).

The question of drawing boundaries and redrawing the fault-lines of justice permeates the entire investigation.

Alongside Utrecht University in the Netherlands, which coordinates the project, five further research institutions cooperate. These are based in Austria (European Training and Research Centre for Human Rights and Democracy), Hungary (Central European University), Portugal (Centre for Social Studies), Turkey (Boğaziçi University), and the UK (University of Bristol). The research project lasts from January 2017 to December 2019.

## EXECUTIVE SUMMARY

This national report examines the use of social dialogue in wage setting in the UK. It forms part of a broader comparative investigation on social dialogue as a form of institutional resistance to injustice in six European countries. The report offers an overview of the trajectory before and after the 2008 economic crisis and a justice-based evaluation of two social dialogue mechanisms: collective bargaining and the tripartite Low Pay Commission (LPC) advising the Government on minimum wage rates.

The 2008 social dialogue landscape is found to be the result of two contrasting trends. On the one hand, since the 1980s, a process of rapid de-collectivisation and de-centralisation of employment relations has significantly weakened and fragmented collective regulation. This process was driven, or at least facilitated, by the dismantling of the supporting institutional apparatus. The analysis discusses the overall decline of collective bargaining coverage and unionisation (especially in the private sector) and the abolition in 1992 of the tripartite Wages Councils (with the exception of the Agricultural Wage Board) which previously set legally binding sectoral minima. On the other hand, since 1998, the UK has a Government-led statutory minimum wage regime where social partners are assigned a consultative role through membership of the tripartite LPC.

This report adds two sets of findings to existing literature. Firstly, it demonstrates that while not as dramatic as in other countries, post-crisis developments *reinforced and deepened* pre-crisis trends (Part 3). This effect is manifest in the continuation of the decline in collective bargaining coverage and unionisation as well as the abolition of the last national-level Wages Council in 2013 (Agricultural Wages Board). These developments are complemented by new legal reforms placing additional constraints on unions' already heavily circumscribed ability to act as effective collective bargaining and political actors. However, the minimum wage has gained strength in terms of value and legitimacy in recent years.

The second set of findings is evaluative. Part 4 makes an assessment of two social dialogue mechanisms (LPC and collective bargaining) against a suggested evaluative framework comprising five dimensions: autonomy, inclusiveness (encompassing, equal and representative inclusion), effectiveness (meaningfulness, sustainability, distributive impact), transparency (justification and accessibility of reasoning) and justice-sensitivity (whether justice considerations enter explicitly or implicitly in the process). This part draws on desk research and interviews with high-level social dialogue participants (three sitting Low Pay Commissioners, four trade union officers and a policy officer of a sectoral employer organisation).

Concerning autonomy, the LPC combines independence with some forms of indirect state influence, most notably through the determination of its remit (and by extension the substantive factors to be taken into account in minimum wage rate determination). In relation to inclusiveness, the *encompassing* nature of the process is facilitated by the LPC's tripartite composition and its inclusive evidence base, drawn from research, oral and written submissions from different stakeholders and 'on-site visits' where Commissioners meet low-paid workers and employers. However, the process evinces deficits in terms of *representativity*, at least in the classic sense of the

term. This is because the LPC differs from ‘mandate-based’ collective bargaining where negotiators act on behalf of their organisations and their actions and mandate are subject to internal democratic mechanisms of scrutiny, debate and accountability. The analysis highlights the formally equal status of all parties within the Commission and its evidence-based process as a unique mix of ‘deliberation’ (in the sense of collaboration, preference flexibility and openness) and ‘negotiation’ relying on persuasion rather than threats of sanctions. While the report reviews two criticisms of evidence-based approaches (de-politicisation and the biased nature of evidence sources), it suggests that the LPC offers ways to address them. The LPC process is *effective* in that it is meaningful, sustained by the positive feedback on its outcomes and has a positive record on reducing extremely low-paid work. The evidence-based nature of the process means that it is not explicitly justice-sensitive as it is more dominated by economic considerations. However, the whole exercise can itself be seen as the practical realisation of a justice imperative. Finally, the transparency of the process is secured by the accessibility and well-reasoned nature of the Commission’s annual reports.

By contrast, collective bargaining is a more autonomous form of social dialogue, though its precise effect is highly conditioned by state rules, economic conditions and the legal framework. It offers an encompassing ‘mandate-based’ form of inclusion of employers and employees through negotiators acting on behalf of their respective organisations. However, the analysis highlights two forms of *potential* exclusions associated with collective bargaining: (i) exclusion of some workers from the scope of regulation and (ii) exclusion in the actual representation of non-union members. In collective bargaining, the *equality* of inclusion between parties is more power-sensitive than in the LPC, as it is contingent on labour market circumstances but also underpinned by the possibility of industrial action. As a result, collective bargaining may give the appearance of a ‘struggle’ that is ‘owned’ by the workers to a greater extent than the LPC. The report draws attention to the different effects of centralised, mainly sectoral, and firm-level negotiations. Sectoral negotiations tend to strengthen the position of workers by aggregating power among all employers and workers. If they constitute the only level of social dialogue, however, they may come at the cost of workers’ direct participation. While the collective bargaining process leads to a more equal distribution by potentially affecting more workers than the statutory minimum wage, its sustainability is more precarious because of the higher possibility of deadlock with detrimental consequences for workers eventually exposed to individual negotiations. Justice-sensitivity and transparency are not required for collective agreements but the process itself, like the LPC, may be considered as a practical realisation of justice. Transparency may be achieved by internal democracy mechanisms or, in the case of sectoral agreements, because of the wide-ranging effects of the regulation for the national economy.

The final section of this part considers the interplay between these two social regulatory mechanisms by identifying positive and negative complementarities between minimum wages and collective bargaining and between various levels of collective bargaining.

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## **ABBREVIATIONS**

ACAS	Advisory, Conciliation and Arbitration Service
AWB	Agricultural Wages Board
DEFRA	Department for Environment, Food and Rural Affairs
EU	European Union
ILO	International Labour Organization
LPC	Low Pay Commission
NLW	National Living Wage
NMW	National Minimum Wage
OECD	Organisation for Economic Operation and Development
TUC	Trade Union Congress
UK	United Kingdom
UNITE	Unite the Union

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## 1. INTRODUCTION

Wage setting is a major economic and social process of distribution of wealth and power in advanced capitalist societies. The choice over the appropriate method(s) for wage setting (individual bargaining, collective bargaining, direct state regulation) has historically been the subject of intense political and social contestation, mobilisation and debate. Due to its centrality for institutional struggles against injustice, this report focuses on the role of social dialogue in wage setting in the UK.

The function of wages can be seen from different perspectives. Wages can be viewed as ‘living’ due to their status as the principal source of income for the majority of the population; as a ‘price’ to be determined by the supply-demand rules of the competitive market; as a social practice associated with the reproduction or transformation of social relations and institutionalised norms;<sup>1</sup> as the outcome of distributive conflicts between capital and labour; as a basis for, or expression of, respect and dignity; or as a key factor influencing the egalitarian nature of society.

Three institutional actors can play a major role in wage setting. The first is the ‘market’, in the form of ‘individual bargaining’ between employers and employees as (supposedly) free and equal contractual agents operating at arm’s length. The contract of employment is the legal expression of this process. But while economic liberals found freedom and equality in this contractual exchange, others pointed to the distorting image of freedom of contract as ignoring the inequality of bargaining power disadvantaging the employee, the bureaucratic nature of the enterprise<sup>2</sup> and the character of the employment relationship as one of ‘subordination’ and ‘authority’ generating dependencies and ‘democratic deficits’.<sup>3</sup> Otto Kahn-Freund summarises this critique:

The relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the “the contract of employment.”<sup>4</sup>

Collective bargaining emerged as a mechanism to redress (at least partially) these power asymmetries. By replacing individual with *collective* negotiations between employers and employees, backed by workers’ ability to collectively withdraw their labour, the expectation is that power inequalities between the parties will be alleviated.

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<sup>1</sup> For wages as a ‘living’, ‘price’ and ‘social practice’ see Deborah Figart, Ellen Mutari and Marilyn Power, *Living Wages, Equal Wages: Gender and Labor Market Policies in the United States* (Routledge 2002).

<sup>2</sup> Hugh Collins, ‘Market Power, Bureaucratic Power, and the Contract of Employment’ (1986) 15(1) *Industrial Law Journal* 1.

<sup>3</sup> See Guy Davidov, ‘Collective Bargaining Laws: Purpose and Scope’ (2004) 20(1) *International Journal of Comparative Labour Law and Industrial Relations* 81.

<sup>4</sup> Paul Davies and Mark Freedland, *Kahn-Freund’s Labour and the Law* (3rd edn, Stevens 1983) 18.

The third institution is the state, which in modern democratic societies reflects the political process. The state possesses the ability to influence wage setting by establishing ‘protective standards’ in the form of direct substantive norms (such as a minimum wage prohibiting unacceptably low wage valuations) and indirectly in the form of participatory standards (such as the right to collective bargaining).<sup>5</sup> Beside these functions, the state influences wage setting in a variety of other ways, including the provision of a basic regime of contractual rights enforced by the judiciary, macro-economic policies, administrative practices, tax and social security provisions.

Social dialogue, a constitutive dimension of the European Social Model,<sup>6</sup> enters this picture as an umbrella term referring to participatory collective wage-setting mechanisms operating, at least in theory, beyond the market and direct state intervention. Social dialogue mechanisms can be bipartite (involving employers and employees) or tripartite (with the inclusion of government representatives or independents as a third party). They can operate at different levels (national, sectoral, regional, firm) and enable different degrees of worker influence ranging from co-determination and collective agreements to mere information and consultation. The International Labour Organization (ILO) defines social dialogue as including ‘all types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers, on issues of common interest relating to economic and social policy’.<sup>7</sup>

The usage of the term in this report raises two sets of challenges. The first derives from the multiplicity of definitions. Hyman identifies two descriptive and two normative meanings of ‘social dialogue’.<sup>8</sup> Descriptively, the term can refer to industrial relations covering collective agreements and other types of agreements between employer and employee representatives. By contrast, the term can be used to cover industrial relations *excluding* collective bargaining. A third, more normative use assumes an institutional configuration ‘encouraging consensual or positive-sum interaction between the parties’<sup>9</sup> while a fourth denotes a ‘normative orientation towards social partnership and the avoidance of conflict’.<sup>10</sup> This report treats social dialogue as a descriptive term denoting the *practice of participatory collective wage setting* but rejects any normative positivising in favour of the consensual or the unitary conflict-free construction of the employment relationship.

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<sup>5</sup> Werner Sengenberger, ‘Protection – participation – promotion: The systemic nature and effects of labour standards’ in Werner Sengenberger and Duncan Campbell (eds), *Creating economic opportunities: The role of labour standards in industrial restructuring* (ILO 1994).

<sup>6</sup> See Commission of the European Communities, ‘European Social Policy: A Way Forward for the Union’ Com (94) 333 Final (1994) as reaffirmed in the European Pillar of Social Rights reference on social dialogue and involvement of workers (Clause 8 of the European Pillar of Social Rights (EU Publication Office 2017).

<sup>7</sup> See ILO website section on social dialogue <<https://www.ilo.org/ifpdial/areas-of-work/social-dialogue/lang-en/index.htm>> (last accessed on 30.10.2018).

<sup>8</sup> Richard Hyman, ‘Social dialogue and industrial relations during the economic crisis: innovative practices or business as usual?’ (2010) ILO Working Paper No.11 11 <[https://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---dialogue/documents/publication/wcms\\_158355.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_158355.pdf)> (last accessed on 30.10.2018).

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

A different type of challenge arises from the absence of the term from the standard lexicon of British industrial relations, not least because of the general absence of peak-level bargaining as in most continental European countries. Even the New Labour discourse of ‘partnership at work’ did not really extend to ‘social partnership’, in the sense of the law being used to re-build strong collective institutions.<sup>11</sup> Even if the term is maintained for comparative purposes, the fact that it is alien to UK employment relations can hardly be overlooked.

Following these clarifications, let us now turn to the findings of this report. Part 2 offers an account of two contrasting trends. On the one hand, the long-standing de-collectivisation and de-centralisation of collective bargaining has weakened and fragmented collective regulation. This is manifest in the decline of collective bargaining and the disappearance of the tripartite Wages Councils (with the temporary exception of the Agricultural Wages Board, AWB) which previously set legally binding sectoral minima. On the other hand, since 1998, a Government-led statutory minimum wage scheme was established, with social partners playing a consultative role through membership of the tripartite Low Pay Commission (LPC). Focusing on post-crisis social dialogue developments, Part 3 finds a continuation of pre-existing trends. Along with declining collective bargaining coverage and union density rates, the abolition of the last Wages Council, namely the AWB which previously set minimum rates for agricultural workers, marked the formal disappearance of the institution at national level. At the same time, the minimum wage has continuously risen and the LPC has been entrusted with new tasks.

Part 4 offers an evaluation of two social dialogue mechanisms (LPC and collective agreements) through a framework comprising five dimensions: *autonomy* (independence and state control), *inclusiveness* (encompassing, equal and effective inclusion), *effectiveness* (meaningfulness, sustainability, distributive impact), *transparency* (justification and accessibility of reasons) and *justice-sensitivity* (whether justice considerations enter directly or indirectly into the process). The analysis is based on desk research as well as key insights from high-level social dialogue participants, including three sitting Low Pay Commissioners. The last section of this part explores positive and negative interactions between different social dialogue processes. Part 5 concludes.

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<sup>11</sup> Paul Davies et al ‘The Evolving Structure of Collective Bargaining in Europe 1990-2003: UK National Report’ (2004) London School of Economics and University of Oxford 11 <<http://www.nielswergin.net/2/Papers/eu2004report.pdf>> (last accessed on 30.10.2018).

## 2. SOCIAL DIALOGUE IN WAGE SETTING: FROM COLLECTIVE REGULATION TO DE-COLLECTIVISATION AND CONSULTATION

For most of the 20<sup>th</sup> century (up to the 1980s–90s), UK wage setting relied on industry-wide collective regulation rather than legislation. The last three decades have seen this model upended as a result of two developments. Firstly, a long-standing process of de-collectivisation<sup>12</sup> and de-centralisation of employment relations has significantly weakened and fragmented collective regulation.<sup>13</sup> This process is driven, or at least facilitated, by the dismantling of the supporting institutional apparatus. Secondly, the Minimum Wage Act 1998 established for the first time a (nearly)<sup>14</sup> universal statutory minimum wage, in force from 1<sup>st</sup> April 1999. Social partners obtained an advisory role through their membership of the tripartite LPC which makes minimum wage recommendations to the Government. This transformation takes place within an overall regulatory shift from collective to individual rights.<sup>15</sup>

### 2.1. THE TRADITIONAL WAGE SETTING SYSTEM: BIPARTITE COLLECTIVE BARGAINING AND TRIPARTITE WAGES COUNCILS

The traditional wage system<sup>16</sup> could be seen as comprising two levels: (i) ‘core’ bipartite (industry-wide) collective bargaining for the majority of workers, though a process of gradual de-centralisation to the firm took place after 1945;<sup>17</sup> (ii) ‘subsidiary’ regulation by tripartite Wages Councils, known before 1945 as trade boards, in certain sectors characterised by low pay and/or inadequate collective

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<sup>12</sup> See Andy Charlwood, ‘The de-collectivisation of pay setting in Britain 1990-98: incidence, determinants and impact’ (2007) 38(1) *Industrial Relations Journal* 33; William Brown and Janet Walsh ‘Pay determination in Britain in the 1980s: The anatomy of decentralisation’ (1991) 7(1) *Oxford Review of Economic Policy* 44.

<sup>13</sup> See John Purcell, ‘The End of Institutional Industrial Relations’ (1993) 64(1) *The Political Quarterly* 6; Chris Howell, *Trade Unions and the State: The Construction of Industrial Relations Institutions in Britain, 1890-2000* (Princeton University Press 2007) Ch 5; *Davies et al* (n 11).

<sup>14</sup> UK law has a dual scheme of employment status. ‘Employees’ are those with an employment contract (whose existence is determined by multiple, technical and complex legal tests). This status gives access to *all* employment rights. The category of ‘workers’, which gives access to a more limited set of rights, covers those providing personal services but with no contract of employment. While the minimum wage applies to both categories there are a few exceptions, including those during a placement year, share fishermen, resident workers, prisoners and au-pair workers. Individuals who are denied the ‘worker’ status (for instance because of ‘substitution clauses’ in their contract) are also excluded from its application.

<sup>15</sup> William Brown et al, ‘The Employment Contract: From Collective Procedures to Individual Rights’ (2002) 38(4) *British Journal of Industrial Relations* 611.

<sup>16</sup> As the UK did not set a universal minimum wage until 1998, any discussion about a traditional (minimum) wage system needs to be qualified by the observation that this was never the result of a single plan. The system emerged through various regulatory interventions interacting with autonomous collective bargaining.

<sup>17</sup> *Howell* (n 13) Ch 4; *Davies et al* (n 11).

bargaining machinery. This system achieved relatively high levels of bargaining coverage, which rose from 62% in 1940 to over 80% in 1980.<sup>18</sup>

In the comparative eye, the limited role of the law in securing this outcome stands out as a striking feature of British industrial relations. Kahn-Freund famously described this model as ‘collective laissez-faire’.<sup>19</sup> This term was intended to capture and rationalise a strong preference for ‘voluntarist’ and ‘autonomous’ bargaining with minimal legal intervention. Rather than being absent, the law played a dual supportive role. As *negative law*, it neutralised the common law’s general hostility to trade union organisation, collective bargaining and industrial action.<sup>20</sup> As *auxiliary legislation* (in contrast to ‘regulatory legislation’),<sup>21</sup> it intervened in those marginal areas where power disparities between organized labour and organized management was ‘so great as to prevent the successful operation of [...] negotiating machinery’,<sup>22</sup> including by supporting collective bargaining through various institutional arrangements.<sup>23</sup> There was also *regulatory legislation* affecting individual employment relationships without having any direct connection to collective bargaining, such as health and safety and social security laws.<sup>24</sup>

The collective laissez-faire account has attracted strong criticism,<sup>25</sup> including for its neglect of the state’s intervention in promoting collective bargaining through a web of non-legal administrative measures and other practices<sup>26</sup> and various forms of institution building.<sup>27</sup> Understood only in relative and comparative terms, however, it concisely captures the absence of a duty to bargain in good faith, a statutory union recognition scheme<sup>28</sup> and an automatic legal effect of collective agreements. Binding ‘in honour only’ (unless parties agree to the contrary, a rare occurrence in practice), collective

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<sup>18</sup> Data from the table included Keith D. Ewing, John Hendy and Carolyn Jones (eds), *A Manifesto for Labour Law: towards a comprehensive revision of workers’ rights* (Institute of Employment Rights 2016) 4, which is based on a meta-statistical analysis of data from various academic sources.

<sup>19</sup> Otto Kahn-Freund, ‘Labour Law’ in Morris Ginsberg (ed), *Law and Opinion in England in the 20<sup>th</sup> century* (Stevens & Sons 1959) 224.

<sup>20</sup> Davies and Freedland, *Kahn-Freund’s Labour and the Law* (n 4) 12.

<sup>21</sup> *Ibid* Chapter 3.

<sup>22</sup> Kahn-Freund, ‘Labour Law’ (n 19) 224.

<sup>23</sup> Most notably by the creation of bipartite Joint Industrial Councils and tripartite Wages Councils. See Paul Davies and Mark Freedland, *Labour Legislation and Public Policy* (Oxford University Press 1993) 27-34.

<sup>24</sup> Davies and Freedland, *Kahn-Freund’s Labour and the Law* (n 4) 37-51.

<sup>25</sup> For an excellent review of critiques to collective laissez-faire see Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart 2010) Chapter 1.

<sup>26</sup> Keith D. Ewing, ‘The State and Industrial Relations: “Collective-Laissez Faire” Revisited’ (1998) 5 *Historical Studies in Industrial Relations* 1.

<sup>27</sup> *Howell* (n 13) 79-82.

<sup>28</sup> There have been only two other forms of recognition, the Industrial Relations Act 1971 (repealed by Trade Union and Labour Relations Act 1974) and the scheme introduced by the Employment Protection Act 1975 (repealed by the Employment Act 1980). The current statutory union regime was introduced by New Labour (Employment Relations Act 1999).

agreements affect individual contracts entirely through their incorporation as express<sup>29</sup> or implied (by custom and practice) terms.

Wages Councils, known before 1945 as Trade Boards, provided a second *subsidiary* mechanism partly addressing the gaps produced by the absence of collective bargaining machinery in certain sectors. They were tripartite institutions composed of employer and union representatives with a maximum of three independent persons (thus allowing an agreement when employer and employee sides agreed). They had the power to issue legally binding *minima* for all workers in the sector. Their orders were backed by public enforcement mechanisms and the threat of civil and criminal sanctions.

Wages Councils were originally envisaged by the Trade Boards Act 1909 as targeted institutions to tackle the social problem of ‘sweating’<sup>30</sup> in a few sectors with ‘exceptionally low pay’ linked to the absence of effective bargaining.<sup>31</sup> However, their status gradually rose to that of statutory props for voluntary collective bargaining. In the words of John Roberts, the Minister of Labour upon the passing of the Trade Boards Act 1918, they were intended as ‘a temporary expedient facilitating organization within the industry, so that, in course of time, the workers or the employers [would] not have need of the statutory regulations’.<sup>32</sup> Integrated into a system that prioritised joint regulation, they functioned as ‘collective bargaining institutions in embryo’<sup>33</sup> and ‘second best’ alternatives to voluntary bargaining.<sup>34</sup> Clegg describes their intended function as instilling ‘the habit of collective regulation, so that ultimately voluntary collective bargaining would be universal’.<sup>35</sup> To quote Bayliss, ‘this conception of the function of Wages Councils amounted to the use of state power to keep collective bargaining going when economic circumstances tended to destroy it, and was quite different from the simpler, ameliorative purpose of abolishing sweating’.<sup>36</sup>

The Wages Councils Act 1945 expanded the permissible scope of their orders to a wide range of terms and conditions, such as different minimum rates of pay for different ages and types of workers as well as holiday entitlements. Deakin and Morris consider this Act as a major step in establishing ‘a

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<sup>29</sup> This is through ‘bridging clauses’ in the contract referring to the applicability of a certain collective agreements.

<sup>30</sup> Sweating was defined by three main characteristics: ‘1. a rate of wages inadequate to the necessities of the workers or disproportionate to the work done; 2. excessive hours of labour; 3. an insanitary state of the houses in which work is carried on’ (House of Lords, Fifth report from the select committee of the House of Lords on the sweating system. Henry Hansard and Son 1890). See further Sheila Blackburn, ‘Curse or Cure? Why was the Enactment of Britain’s 1909 Trade Boards Act so Controversial?’ (2009) 47(2) *British Journal of Industrial Relations* 214.

<sup>31</sup> Winston Churchill ‘But where you have what we call sweated trades, you have no organisation, no parity of bargaining, the good employer is undercut by the bad, and the bad employer is undercut by the worst’ [HC Deb 28 April 1909, c 388].

<sup>32</sup> HC Deb 17 June 1918 c 70.

<sup>33</sup> *Howell* (n 13) 69.

<sup>34</sup> Davies and Freedland, *Labour Legislation and Public Policy* (n 23) 29.

<sup>35</sup> Hugh Clegg, *The Changing System of Industrial Relations in Great Britain* (Blackwell 1979) 296.

<sup>36</sup> Frederick Bayliss, *British Wages Councils* (Blackwell 1962) 56.

generalized floor of rights to terms and conditions of employment',<sup>37</sup> while Bayliss describes its intention as 'to become the statutory foundation of a comprehensive system of industrial relations'.<sup>38</sup> In addition, the Act allowed the creation of Wages Councils not only in sectors lacking effective regulation or bargaining machinery but also when 'the existing machinery for the settlement of remuneration and conditions of employment (...) is likely to cease to exist or to be adequate for that purpose'.<sup>39</sup> The 'adequacy criterion' explicitly included the extent to which voluntary agreements were observed.<sup>40</sup>

In 1945, 25% of the British workforce (4.25 million workers) was covered by Wages Councils including the AWB.<sup>41</sup> Wages Councils reached their peak in 1953, when 66 of them were in place. However, no new Councils were created after 1950. Stronger trade unions, bolstered by full employment and rapid economic growth, started to view them as 'a positive hindrance to the development of collective bargaining',<sup>42</sup> responsible for institutionalising low pay<sup>43</sup> and in any case less relevant in post-war favourable economic conditions.<sup>44</sup> Echoing these critiques, the 1968 Donovan Commission found that they did not encourage collective bargaining and did not sufficiently raise the remuneration of low paid workers compared to other sectors or to those better off in the industry.<sup>45</sup> However it fell just short of recommending their general abolition. In 1980 there were only 33 Wages Councils left, covering 3 million workers (excluding the AWB).<sup>46</sup> Despite these critiques, the Councils played an important role in establishing a universal sectoral floor for workers falling outside the 'core' net of voluntary collective bargaining in the absence of a National Minimum Wage (NMW).

Wage Councils offered a challenge to the explanatory currency of collective laissez-faire. The legal effect of their orders as non-derogable minimum rates contrasts with the non-enforceability of collective agreements whose legal effect was produced entirely through incorporation in individual contracts. While their orders were formally advisory, there was an expectation that the Minister would not challenge them.<sup>47</sup> The appointment of their members was made by *nomination* from employer

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<sup>37</sup> Simon Deakin and Frank Wilkinson, *The Law of the Labour Market* (Oxford University Press 2005) 242.

<sup>38</sup> Bayliss (n 36) 53.

<sup>39</sup> Wages Council Act 1945 s.1(2)b), 2(1), 3.

<sup>40</sup> Ibid 4(6).

<sup>41</sup> Bayliss (n 36) 72-73.

<sup>42</sup> Paul Davies and Mark Freedland, *Labour Law: Texts and Materials* (2<sup>nd</sup> edn, Weidenfeld and Nicolson 1984) 149.

<sup>43</sup> Sheila Blackburn, 'The problem of riches: from trade boards to a national minimum wage' (1988) 19(2) *Industrial Relations Journal* 124, 131. See in general for the different phases in the attitude of unions toward the minimum wage.

<sup>44</sup> Ibid.

<sup>45</sup> Royal Commission on Trade Unions and Employers' Associations (1968) Cmnd 3623.

<sup>46</sup> Davies and Freedland, *Labour Law* (n 42) 144.

<sup>47</sup> See William Brown, 'The toxic politicising of the National Minimum Wage' (2017) 39(6) *Employee Relations* 785-786.

associations and trade unions, thus providing a form of direct representation.<sup>48</sup> In procedural terms, their tripartite nature seemingly deviated from the classic pattern of bilateral collective negotiations, but when the sides agreed they were not that dissimilar from collective bargaining. Otto Kahn-Freund found that in such cases they constituted to some extent 'a statutory replica of a voluntary negotiation board'.<sup>49</sup> As he put it, the order was 'in substance not all that different from a collective agreement, though in law it is of course something miles apart from it'.<sup>50</sup> In instances of disagreement between employer and union representatives, independent members acted as conciliators.<sup>51</sup> Only if the disagreement persisted did they have to side with one party. Independent members thus effectively offered a built-in mechanism of conciliation and arbitration.

Both levels were strengthened and consolidated by two extension mechanisms. Firstly, Fair Wages clauses obliged Government contractors to pay certain minimum rates to their employees.<sup>52</sup> Secondly, the law imposed a general duty on employers to observe 'recognised terms and conditions' set by machinery or negotiation in an industry.<sup>53</sup>

## **2.2. THE TRADITIONAL SYSTEM UNDER ATTACK: THE COLLAPSE OF COLLECTIVE BARGAINING AND THE ABOLITION OF WAGES COUNCILS**

The traditional model came under a multi-front attack between 1979 and 1997, when Conservative Governments were in power. Strongly influenced by neo-classical economic approaches that viewed with suspicion all collectivist forms of wage regulation,<sup>54</sup> public policy ceased to treat collective bargaining as a public good.<sup>55</sup> The negative view of collective regulation as an impediment to the efficient functioning of the labour market was based on a supply-demand argument that posited a strict negative trade-off between employment rates and non-market forms of regulation that pushed

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<sup>48</sup> While the Minister could in theory reject nominees put forward by the employer and unions, he 'almost without exception' accepted them. Bayliss (n 36) 103.

<sup>49</sup> Davies and Freedland, *Kahn-Freund's Labour and the Law* (n 4) 185.

<sup>50</sup> *Ibid* 185.

<sup>51</sup> See *Bayliss* (n 36). See Chapter 7 for the role of independents as conciliators and mediators between the two parties.

<sup>52</sup> Since 1891, there have been three Fair Wage Resolutions instructing the Government to set in the contract minimum rates to contractors (Fair Wage Resolution 1891, Fair Wage Resolution 1909 and Fair Wage Resolution 1946).

<sup>53</sup> Article 5 of the Conditions of Employment and National Arbitration Order (1940), Industrial Disputes Order 1376 (1951) and s 8 of the Terms and Conditions of Employment Act. See further Davies and Freedland, *Labour Law* (n 42) 159-163.

<sup>54</sup> For the influence of Hayekian ideology on Thatcherite labour law reforms see Lord Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18(1) *Industrial Law Journal* 1.

<sup>55</sup> Ewing, 'The State and Industrial Relations' (n 26).

'above market-clearing wages'.<sup>56</sup> Trade unions were also singled out as drivers of inflation and unemployment through their pursuit of sectional interests.<sup>57</sup> Their exclusion from the labour market, employment representation and the representation of the 'labour interest' in society became an avowed aim.<sup>58</sup> In a classic example of economisation of normative arguments, the 'matching power argument' that previously viewed collective regulation as a necessary corrective of power imbalances vanished from policy pronouncements.<sup>59</sup> Individual and localised negotiations were explicitly put forward as desirable alternatives.<sup>60</sup>

The state withdrew its support for collective bargaining,<sup>61</sup> marginalised unions from policy-making and used law for restricting trade union powers.<sup>62</sup> A policy of 'enterprise confinement', exemplified by the prohibition of solidarity action, was also pursued.<sup>63</sup> Multi-employer collective bargaining gradually collapsed from the 1980s onwards.<sup>64</sup>

With respect to Wages Councils, the direction of criticism shifted. While previous scepticism focused on their perceived failure to promote collective bargaining and raise low pay, they were now dismissed as a 'rigidity' that lifted the price of labour 'beyond its marginal product and [was] therefore a cause of unemployment'.<sup>65</sup> The Wages Act 1986 initially confined the scope of their orders to the setting of a single hourly and overtime rate. This was because the proliferation of other standards was judged 'difficult for both employers and employees to understand, unnecessarily burdensome, and

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<sup>56</sup> Davies and Freedland *Labour Legislation and Public Policy* (n 23) Chapters 9 and 10; see also *Deakin and Wilkinson* (n 37) 264-272.

<sup>57</sup> On this see Friedrich Hayek, *1980s Unemployment and the Unions: essays on the impotent price structure of Britain and monopoly in the labour market* (Institute of Economic Affairs 1980).

<sup>58</sup> Paul Smith and Gary Morton, 'Union Exclusion and the Decollectivization of Industrial Relations in Contemporary Britain' (1993) 31(1) *British Journal of Industrial Relations* 97.

<sup>59</sup> William McCarthy, 'The Rise and Fall of Collective Laissez Faire' in William McCarthy (ed), *Legal Intervention in Industrial Relations: Gains and Losses* (Blackwell 1992) 48-49.

<sup>60</sup> See White Paper *People, Jobs and Opportunity* Cm 1810 (1992): 'Traditional patterns of industrial relations, based on collective bargaining and collective agreements, seem increasingly inappropriate and are in decline... [Individual workers] want the opportunity to influence, in some cases to negotiate, their own terms and conditions of employment, rather than leaving them to the outcome of some distant negotiations between employers and trade unions [para 1.15 and 1.18].

<sup>61</sup> This included rescinding the Fair Wages Resolution in 1982, forbidding local authorities from setting Fair Wages clauses in 1988 (clauses obliging government contractors to observe terms and conditions at least equal to those provided in collective agreements) by legally disabling them from considering 'non-commercial matters'. The following mechanisms were also abolished: compulsory extension mechanisms for terms and conditions of multi-employer collective agreements, compulsory arbitration previously provided in certain cases and the previous weak statutory union recognition procedure (Employment Act 1980, s 19).

<sup>62</sup> Most notably, the tripartite National Economic Development Council (a peak-level tripartite forum for economic planning) was terminated in 1992.

<sup>63</sup> *Wedderburn* (n 54) 27-30.

<sup>64</sup> *Davies et al* (n 11) 36-38. The authors note that there was a 'centralisation trend from workplace to division or company level' alongside the de-centralisation trend (38-39).

<sup>65</sup> David Coats, *The National Minimum Wage: Retrospect and Prospect* (The Work Foundation 2007) 17.

detrimental to flexibility and efficiency'.<sup>66</sup> The Act also excluded workers under 21 from the personal scope of the orders.

In 1993, all Councils were abolished except the AWB. The Government argued that they were ineffective anti-poverty instruments (as most workers covered did not live in poor households), reduced employment and were outdated (as the problems driving their establishment in 1909 had lost their relevance).<sup>67</sup> At the time of abolition, 26 Wages Councils covered around 2.5 million workers (10% of the workforce).<sup>68</sup> The largest Councils were in retail, hotel and catering, clothing manufacture and hairdressing.<sup>69</sup>

Conservative reforms also brought about a fundamental 'restructuring of the public sector of the labour economy'.<sup>70</sup> From setting a collectivist example for the private sector (through centralised determination of wages, promotion of collectivism, collective bargaining, public sector trade unionism and 'fair wage clauses' in public contracts), the state shifted to a model aiming to emulate private market rules and 'apply private-sector, free-market ideas to its own employment practices'<sup>71</sup> (through privatisation, contracting-out, decentralisation of bargaining units and withdrawal of support for unions and national collective bargaining). The devolution of pay to localised units was among the most significant trends in this period. This included the substitution of an emphasis on cash limits (meaning how each unit could afford to pay) for the comparability of wage rates between units<sup>72</sup> and the creation of expert-only Pay Review Bodies advising the Government on minimum wage rates, replacing some national sectoral collective bargaining arrangements.<sup>73</sup>

New Labour Governments between 1997 and 2010 failed to reverse the fundamental trends of de-collectivisation and de-centralisation. Coverage of collective agreements declined from around 50% in 1993 to around 30% when New Labour left office in 2010.<sup>74</sup> As part of its overall aim of replacing

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<sup>66</sup> Department of Employment, *Consultative Paper on Wages Councils* (21 March 1985) para 7.

<sup>67</sup> See Richard Dickens et al, 'Wages Councils: Was There a Case for Abolition' (1993) 31(4) *British Journal of Industrial Relations* 515.

<sup>68</sup> *Deakin and Wilkinson* (n 37) 271.

<sup>69</sup> Stephen Machin, 'The decline of labour market institutions and the rise in wage inequality in Britain' (1997) 41 *European Economic Review*, 647, 650.

<sup>70</sup> Davies and Freedland, *Labour Legislation and Public Policy* (n 23) 615-635; also *Howell* (n 13) 153-156.

<sup>71</sup> See Sandra Fredman and Gillian Morris, *The State as employer: labour law in the public services* (Mansell 1989) 1; in general, from the move to the 'market-based' model see also Sandra Fredman and Gillian Morris, 'The State as Employer: Is it Unique?' (1990) 19(3) *Industrial Law Journal* 142.

<sup>72</sup> Paul Edwards et al, 'Great Britain': From Partial Collectivism to Neo-liberalism to Where' in Anthony Ferner and Richard Hyman (eds), *Changing Industrial Relations in Europe* (2<sup>nd</sup> edn, Blackwell 1998) 35; see also Davies and Freedland, *Labour Legislation and Public Policy* (n 23) 545-550.

<sup>73</sup> *Edwards et al* (n 72) 36-37. *Edwards et al* views these bodies as a 'quasi-bargaining' process because of the possibility for trade unions, employers and employees to submit evidence and the fact that the Government is less likely to reject their recommendations because of the political costs involved.

<sup>74</sup> Data from *Ewing et al* (n 18) 4.

conflict with partnership,<sup>75</sup> New Labour focused on providing individual rights, with minimum wages as a flagship policy, rather than securing collective rights.<sup>76</sup> The notable exception was a weak system of trade union recognition based on majority support.<sup>77</sup>

The combined effect of de-collectivisation (with coverage plummeting from around 80% in 1980 to 40% in 1993 and 30% in 2008)<sup>78</sup> and the disappearance of Wages Councils was a major gap in minimum-wage regulation, increasing the incidence of low pay.<sup>79</sup>

### **2.3. THE STATUTORY NATIONAL MINIMUM WAGE AND THE LPC**

New Labour Governments chose to address this gap not by reconstructing sectoral-level collective bargaining institutions but by means of a statutory NMW. The Minimum Wage Act 1998 established for the first time in British history a statutory NMW regime. The aim of the law was presented both in terms of economics and fairness, namely as incentivising individuals to find and make the most out of jobs, ensuring greater fairness at work, removing the worst types of exploitation and forcing businesses to adopt 'quality-driven' rather than 'labour cost-driven' strategies.<sup>80</sup> As Thornley and Coffee put it:

T[he] recent sharp growth in material inequality, the increasingly plausible observation that low pay had failed to produce economic 'success' and sustained pressure from trade unions and low pay campaigners provided the crucial context for the Labour Party's commitment to a national minimum wage.<sup>81</sup>

In procedural terms, the model adopted was that of Government decision-making based on the recommendations of a tripartite consultative body (the LPC). LPC membership consists of nine

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<sup>75</sup> Foreword by the Prime Minister Tony Blair, *Fairness at Work White Paper*, Cm 3968 <<http://webarchive.nationalarchives.gov.uk/+www.berr.gov.uk/files/file24436.pdf>> (last accessed on 30.10.2018).

<sup>76</sup> Labour Party, *Manifesto for 1997 General Elections* (emphasis added) <<http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml>> (last accessed on 30.10.2018).

<sup>77</sup> For critiques see Alan Bogg, 'The Mouse that Never Roared: Unfair Practices and Union Recognition' (2009) 38(4) *Industrial Law Journal* 390; Paul Smith and Gary Morton, 'New Labour's reform of Britain's Employment law: The Devil is not only in the Detail but in the Values and Policy Too' (2001) 39(1) *British Journal of Industrial Relations* 119 and Ruth Dukes, 'The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?' (2008) 37(3) *Industrial Law Journal* 236.

<sup>78</sup> Data from *Ewing et al* (n 18) 4.

<sup>79</sup> Simon Deakin and Frank Wilkinson, 'The Law and Economics of the Minimum Wage' (1992) 19(3) *Journal of Law and Society* 379.

<sup>80</sup> *Fairness at Work* (n 75) 12.

<sup>81</sup> Carole Thornley and Dan Coffey, 'The Low Pay Commission in Context' (1999) 13(3) *Work, Employment & Society* 525, 528.

Commissioners: three independent Commissioners (two academics and the Chair), three Commissioners with a trade union background and three with an employer background.

The Commission has the mandate of 'recommending levels for the minimum wage rates that will help as many low-paid workers as possible without any significant adverse impact on employment or the economy'.<sup>82</sup> Minimum rates vary by age. Until 2016 there were four rates: an adult rate (over 21 years old); a youth developmental rate (18-20); a rate for 16-17; and an apprentice rate. Since 2016 there is an additional 'living wage rate'<sup>83</sup> applicable to those over 25.

The Committee decides its recommended rates during so-called annual retreats lasting two and a half days. This follows a lengthy process of evidence gathering through research, oral and written submissions from stakeholders and 'on-site' meetings with low paid employees and businesses. Thus far all LPC recommendations have been reached by consensus. The role of the Commission as a form of 'social partnership' in minimum wage setting<sup>84</sup> will be examined in detail in Part 4.3.

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<sup>82</sup> Low Pay Commission website- terms of reference <<https://www.gov.uk/government/organisations/low-pay-commission/about/terms-of-reference>> (last accessed on 30.10.2018).

<sup>83</sup> See Part 3(3) below.

<sup>84</sup> William Brown, 'The Process of Fixing the British National Minimum Wage, 1997-2007' (2009) 47(2) British Journal of Industrial Relations 429.

### 3. RECENT DEVELOPMENTS: SOCIAL DIALOGUE AND WAGE SETTING AFTER THE CRISIS

The UK entered the 2008 economic and financial crisis as a highly deregulated market economy with limited, weak and fragmented social dialogue structures for wage setting. British banks, largely unregulated and highly interdependent and exposed to US-based financial derivatives, were among the first European casualties of the crisis.<sup>85</sup> The Labour Government reacted by adopting Keynesian policies, nationalising banks and financially supporting the ailing financial and banking sector.<sup>86</sup>

Following the 2010 elections, the Conservative-led Coalition Government (with Liberal Democrats as junior partner) embraced the austerity<sup>87</sup> and financial squeeze as major policy paradigms.<sup>88</sup> In contrast to Eurozone countries' adoption of austerity in the context of external factors linked to the lack of currency adjustment flexibility and as a condition for financial assistance from the International Monetary Fund and the EU,<sup>89</sup> British austerity was largely self-imposed as a (supposedly) pre-emptive measure with moral associations. This was evident in a statement by David Cameron, then leader of the Opposition, according to which 'the age of irresponsibility is giving way to the age of austerity'.<sup>90</sup> The 2010 Coalition Agreement enshrined this position by 'recognis[ing] that deficit reduction, and continuing to ensure economic recovery, is the most urgent issue facing Britain'.<sup>91</sup>

This part shows that recent developments have *reinforced and deepened* pre-crisis trends of social dialogue in wage setting. On the one hand, the decline of collective bargaining and the abolition of the last Wages Council (AWB) have furthered the collapse of collective regulation. This has been

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<sup>85</sup> For a general background of the crisis see Joseph Stiglitz, 'The Financial Crisis of 2007–8 and its Macroeconomic Consequences' in Stephany Griffith-Jones, José Antonio Ocampo and Joseph Stiglitz (eds), *Time for a visible hand: Lessons from the 2008 world financial crisis* (Oxford University Press 2010) and Marc Blyth, *Austerity: The History of a Dangerous Idea* (Oxford University Press 2013) Chapters 2 & 3. See also Colin Hay, *The Failure of Anglo-liberal Capitalism* (Palgrave Macmillan 2013).

<sup>86</sup> For an insider autobiographical account of the decision for intervention in the banking sector, see Gordon Brown, *Beyond the crash: overcoming the first crisis of globalisation* (Free Press 2010) Part II.

<sup>87</sup> Blyth defines austerity as a 'form of voluntary deflation in which the economy adjusts through the reduction of wages, prices, and public spending to restore competitiveness, which is (supposedly) best achieved by cutting the state's budget, debts, and deficits' Blyth (n 85) 12.

<sup>88</sup> Michael Burton, *The Politics of Austerity: A Recent History* (Palgrave MacMillan 2016) and Christopher Hood and David Heald, 'The Politics of Fiscal Squeeze' in Christopher Hood, David Heald and Rozana Himaz (eds), *When the Party's Over: The Politics of Fiscal Squeeze in Perspective* (Oxford University Press 2014).

<sup>89</sup> See Aristeia Koukiadaki and Lefteris Kretsos, 'Opening Pandora's Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece' (2012) 41(3) *Industrial Law Journal* 276; Ioannis Katsaroumpas, 'De-Constitutionalising Collective Labour Rights: The Case of Greece' (2018) 47(4) *Industrial Law Journal* 465 and more generally, Klaus Armingeon and Lucio Baccaro, 'Political Economy of the Sovereign Debt Crisis: The Limits of Internal Devaluation' (2012) 41(3) *Industrial Law Journal* 254.

<sup>90</sup> David Cameron, 'The Age of Austerity' speech, 26 April 2019 <<https://conservative-speeches.sayit.mysociety.org/speech/601367>> (last accessed on 30.10.2018).

<sup>91</sup> Cabinet Office, *Coalition: our programme for government* (May 2010) 15 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/78977/coalition\\_programme\\_for\\_government.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf)> (last accessed on 30.10.2018).

complemented by legal reforms placing additional constraints on unions' ability to act effectively as collective bargaining and political actors. On the other hand, the value and legitimacy of the minimum wage regime has increased and new tasks have been assigned to the LPC.

This part will consider developments in three areas: (i) 'collective regulation' (ii) legal reforms affecting union powers, and finally (iii) statutory minimum wage.

### **3.1. COLLECTIVE REGULATION: THE CONTINUOUS DECLINE OF COLLECTIVE BARGAINING AND THE ABOLITION OF THE AWB**

#### *3.1.1. COLLECTIVE BARGAINING*

All major collective bargaining indicators reveal a significant decline in the public and the private sector alike (Table 1). Overall bargaining coverage dropped from 33.6% in 2008 to 26.3% in 2016.<sup>92</sup> During the same period, trade union density fell from 27.0% to 23.7%.<sup>93</sup>

These numbers mask an important variation between the public and the private sector. In the private sector, which is largely de-collectivised, coverage was as low as 16.1% in 2015 (down from 18.7% in 2008). Collective bargaining in this sector is largely confined to the level of the firm. Sectoral bargaining is minimal, notably surviving in construction and manufacture.<sup>94</sup> By contrast, the public sector currently constituted the 'heartland' of trade unionism with relatively high levels of membership, collective bargaining and collective regulation, with strong social norms of membership.<sup>95</sup>

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<sup>92</sup> OECD Dataset data <<https://stats.oecd.org/Index.aspx?DataSetCode=TUD>> (last accessed on 31.10.2018).

<sup>93</sup> Ibid. This is a rate based on administrative data. The OECD also provides a survey data rate for the UK, based on which the overall decrease is 4% (from 27.5% in 2008 to 23.5% in 2016) <<https://stats.oecd.org/Index.aspx?DataSetCode=TUD>> (last accessed on 31.10.2018).

<sup>94</sup> Lewis Emery, 'Multi-employer bargaining in the UK: Does it have a future?' in Guy Van Gyes and Thorsten Schulten, *Wage Bargaining under the new European Economic Governance* (European Trade Union Institute 2015).

<sup>95</sup> Benjamin Hopkins and Melanie Simms, *Bargaining and Social Dialogue in the Public Sector: United Kingdom Report* (University of Amsterdam 2018) 17 <<https://www2.le.ac.uk/departments/business/people/academic/dr-benjamin-hopkins/barsop-uk-final-report>> (last accessed on 30.10.2018).

**TABLE 1. COVERAGE AND UNION DENSITY RATES (2008-2016)<sup>96</sup>**

	Coverage			Union density		
	Overall	Public	Private	Overall	Public	Private
2008	33.6	70.6	18.7	27.5	57.2	15.6
2009	32.7	68.1	17.8	27.4	56.7	15.1
2010	30.9	64.5	16.9	26.6	56.4	14.2
2011	31.2	67.8	17	26.0	56.6	14.2
2012	29.3	63.7	16.1	26.1	56.4	14.4
2013	29.5	63.7	16.6	25.6	55.5	14.4
2014	27.5	60.7	15.4	25.0	54.3	14.2
2015	27.9	60.7	16.1	24.7	54.8	13.9
2016	26.3	n.d.	n.d.	23.5	n.d.	n.d.

However, the overall trajectory in the public sector is on a downward trend. Between 2008 and 2017, coverage and trade union density fell from 70.6% to 60.7% and 57.2% to 54.8% respectively.

Collective bargaining arrangements tend to go beyond the minimum rates agreed by the Government following the recommendations of the Pay Review Bodies. These bodies consist entirely of independent experts, reflecting an intention to de-politicise but also de-collectivise wage setting. While they receive evidence from employer organisations and unions, they cannot be equated to collective bargaining or even social partnership bodies by virtue of their composition and operation. In 2017, it is estimated that their awards applied to 45% of public sector employees (around 2.4 million workers).<sup>97</sup>

It is notable that the Coalition Government in 2010 deployed the deregulation discourse to abolish the negotiating body for school support staff. This bipartite body set a national scheme of pay and conditions for teachers' supporting staff (teaching assistants, cleaners, porters, IT specialists). This

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<sup>96</sup> Data for overall coverage from OECD. The rest are taken from the tables contained in *ibid* 17-19.

<sup>97</sup> Office of Manpower Economics, *Business Plan 2017-2018* (Office of Manpower Economics 2016) 2 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/652623/OME\\_Business\\_Plan\\_2017-18.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652623/OME_Business_Plan_2017-18.pdf)> (last accessed on 30.10.2018).

was justified on the basis that it did not fit the ‘government’s priorities for greater deregulation of the pay and conditions arrangements for the school workforce.’<sup>98</sup>

### 3.1.2. THE ABOLITION OF THE AGRICULTURAL WAGES BOARD

In 2013, the Coalition Government abolished the only remaining Wages Board, the AWB.<sup>99</sup> This was linked to the general aim of cutting ‘red tape’ and removing burdens on business.<sup>100</sup>

In existence since 1917<sup>101</sup> and in its consolidated form since 1948,<sup>102</sup> the AWB consisted of union (UNITE) and employer (National Farmer Union) representatives sitting alongside independent members. The Board issued an annual, legally binding order setting minimum rates for all agricultural workers<sup>103</sup> at a higher level than the NMW. The Board enjoyed discretionary power to determine other terms and conditions. In practice it set a comprehensive array of terms and conditions, including a graded pay structure, on-call payment, night allowance, annual leave entitlements over and above the statutory ones, bereavement leaves and sick pay.<sup>104</sup> Since its abolition the NMW applies to those workers and protection for other entitlements has been lost. In its own impact assessment, the Government acknowledged the employer-biased redistributive impact of the reforms by predicting a transfer of £258 million from agricultural workers to employers within 10 years.<sup>105</sup>

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<sup>98</sup>See the written ministerial statement by Michael Gove on the abolition of the School Support Staff Negotiating Body (SSNB) <<https://www.gov.uk/government/speeches/written-ministerial-statement-by-michael-gove-on-the-abolition-of-the-school-support-staff-negotiating-body-ssnb>> (last accessed on 30.10.2018).

<sup>99</sup> Section 72 of the Enterprise and Regulatory Reform Act 2013. The law initially abolished the AWB only in England and Wales. Following a Supreme Court decision finding in favour of the Welsh Assembly’s competence in retaining the Board, there has also been an AWB in Wales ( see *Agricultural Sector (Wales Bill- Reference by the Attorney General for England and Wales* [2014] UKSC 43 <[https://www.supremecourt.uk/decided-cases/docs/UKSC\\_2013\\_0188\\_Judgment.pdf](https://www.supremecourt.uk/decided-cases/docs/UKSC_2013_0188_Judgment.pdf)> (last accessed on 01.11.2018). Scotland and Northern Ireland have their own AWBs.

<sup>100</sup> Department for Environment, Food and Rural Affairs (DEFRA), *Consultation on the Future of the Agricultural Wages Board for England and Wales, and Agricultural Wage Board for England and Wales, and Agricultural Wages Committees and Agricultural Dwelling House Advisory Committees in England* (October 2012) 9 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/82652/awb-consult-doc-20121016.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/82652/awb-consult-doc-20121016.pdf)> (last accessed on 30.10.2018).

<sup>101</sup> Corn Production Act 1917.

<sup>102</sup> Agricultural Wages Act 1948.

<sup>103</sup> Despite the use of the term ‘worker’, these orders cover only ‘employees’ (see n 14 above for the distinction).

<sup>104</sup> Agricultural Wages Board, *The Agricultural Wages (England and Wales) Order 2012* (Agricultural Wages Board 2012) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/69593/awo12.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/69593/awo12.pdf)> (last accessed on 30.10.2018).

<sup>105</sup> The Government’s own impact assessment estimated that the abolition will lead to a transfer of resources from employees to employers of up to £259 million in the ten years following abolition. DEFRA, *Final Impact*

The Government offered four main arguments in favour of abolition. The first relied on the neo-classical economic thesis suspecting any push above market-clearing wages to produce a negative effect on employment.<sup>106</sup> Secondly, the Government alleged that previous market failures had been resolved through the minimum wage and the additional protection offered by employment law.<sup>107</sup> Here one can see how individual statutory legislation, especially the minimum wage, was rhetorically deployed to de-legitimise a social dialogue arrangement. Thirdly, the Government considered abolition necessary to end the preferential treatment of the sector, noting that ‘no other sector of the economy is subject to the same intervention’.<sup>108</sup> This exemplifies a classic ‘race to the bottom’, with a previous Government decision to abolish Wages Councils being used as a justification against the remaining one. The fourth argument adopted a ‘rigidity’ framing of AWB orders, regarded as ‘prescriptive and constrain[ing] flexibility between workers and employers to reach their own agreements’.<sup>109</sup> This argument overlooks the inequality of bargaining power for agricultural workers, whose vulnerability is heightened by the isolated and short-term nature of their work, high levels of employer dependence for accommodation and increased levels of agency work.<sup>110</sup> Neither does it take into account the fact that AWB orders only established a floor which could be improved by individual agreements. Davies describes this development as a move away from an employment-focused agricultural work policy aiming to provide decent terms and conditions.<sup>111</sup>

What is more notable for our purposes is the Government’s complete neglect of the social dialogue mechanism built into the Boards. Its discourse seems revolve around a binary statutory/market divide without engaging with the *social dialogue* basis of the statutory regulation.

John Hendy’s close examination of the AWB reveals an extremely high similitude with classic collective bargaining processes,<sup>112</sup> complemented with an in-built mechanism of conciliation, mediation and ultimately arbitration by independent members when the two parties disagree.<sup>113</sup> UNITE, as the employee representative, submitted every February an offer regarding the minimum wage and other terms and conditions. The NFU, as the employer representative, then provided a written response. A two-day meeting was held in June with multiple adjournments whereby the two sides worked towards an agreement. Only in the failure thereof did independent members act as

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Assessment (19 December 2012) 13 <[http://www.legislation.gov.uk/ukia/2013/1057/pdfs/ukia\\_20131057\\_en.pdf](http://www.legislation.gov.uk/ukia/2013/1057/pdfs/ukia_20131057_en.pdf)> (last accessed on 30.10.2018).

<sup>106</sup> Ibid 1.

<sup>107</sup> Ibid 11.

<sup>108</sup> Ibid 10-11.

<sup>109</sup> Ibid 9.

<sup>110</sup> A.C.L. Davies, ‘Migrant Workers in Agriculture’ in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford University Press 2014).

<sup>111</sup> Ibid.

<sup>112</sup> John Hendy (submission by Unite on International Law Aspects before the Joint Committee on Human Rights), *In the Matter of the proposal to abolish the Agricultural Wages Board*, (2013) Bills (12-13) 141A para 29-39 <[https://www.parliament.uk/documents/joint-committees/human-rights/Submission from Thompsons Solicitors\\_150413.pdf](https://www.parliament.uk/documents/joint-committees/human-rights/Submission_from_Thompsons_Solicitors_150413.pdf)> (last accessed on 30.10.2018).

<sup>113</sup> Ibid.

mediators assisting the parties to conclude an agreement, and only if such mediation proved fruitless did the body have to decide by majority voting. In effect, independent members thus operated as quasi-arbitrators (quasi because they had to side with the proposal of one of the parties, whereas typical arbitrators can submit their own). If one substitutes a 'collective bargaining' for a 'rigidity' frame of analysis, the abolition appears as a disguised attack on a quasi-sectoral collective bargaining arrangement, thereby eliminating a form of participatory wage setting.

The abolition of the AWB marked the formal disappearance of Wages Councils, the second level of collective regulation, on the national scene. This, combined with the collapse of collective bargaining, left the minimum wage as the only non-market remuneration floor for most workers.

### **3.2. LEGAL REFORMS: CONSTRAINING UNION POWER**

Since the 1980s, as discussed above, the law has been deployed to restrict trade union power. In 1997, Tony Blair famously acknowledged that the UK had 'one of the most restrictive frameworks in the world',<sup>114</sup> a statement that retains its full validity today. In recent years, two legislative interventions have put additional constraints on unions' ability to act effectively in political and industrial arenas.

The Lobbying Act<sup>115</sup> (branded the 'gagging act' by its opponents)<sup>116</sup> was introduced in 2014 by the Coalition Government. While this Bill originated from highly mediated cases of undue influence in politics,<sup>117</sup> it paradoxically ended up enacting a more restrictive framework for political campaigns by unions and other civil society actors. This was done by the simultaneous expansion of what counts as 'controlled expenditures' and the reduction of maximum spending limits alongside stricter reporting requirements. Abbott and Williams argue that the Act exacerbated the workplace representation gap by deterring a range of other civil society organisations 'from engaging in coalition working and from operating at the level of the state, both of which are important channels they use to exert pressure and secure policy changes supportive of working people'.<sup>118</sup> Part 3 of the Act also added new obligations for unions to maintain membership registers.

The Trade Union Act 2016, in force since 1<sup>st</sup> March 2017, tightened the conditions for industrial action. The lawfulness of industrial action was already tied to complex technical requirements

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<sup>114</sup> Tony Blair, *Times* (31 March 1997).

<sup>115</sup> *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014*.

<sup>116</sup> Keith Ewing, 'The Gagging Act: What can be done' (Institute of Employment Rights, 3 March 2015) <[www.ier.org.uk/blog/gagging-act-what-can-be-done](http://www.ier.org.uk/blog/gagging-act-what-can-be-done)> (last accessed on 30.10.2018). See also Keith Ewing, 'Another Political Attack on Free Speech' (UK Constitutional Law Association Blog, 8 July 2013) <<https://ukconstitutionallaw.org/2013/07/08/keith-ewing-another-political-attack-on-free-speech/>> (last accessed on 30.10.2018).

<sup>117</sup> These misconducts involved bribing for asking questions (cash for questions), foreign donations to the Labour and Conservative parties and the exchange of donations for public office (cash for honours).

<sup>118</sup> Brian Abbott and Steve Williams, 'Widening the "representation gap"? The implications of the "lobbying act" for worker representation in the UK' (2014) 45(6) *Industrial Relations Journal* 507, 520.

(mandatory postal ballot, multiple information and notice requirements, prohibition on secondary and solidary action, strict law on picketing and frequent use of injunctions) which tend to increase 'substantially the cost and complexity both of union organization and of strike action'.<sup>119</sup> The Act introduced mandatory turnout thresholds (50% for all ballots, and an additional 40% threshold of all union members favouring a ballot in 'important public services' such as education and health), lengthened the required notice from 7 to 14 days and extended the investigative and enforcement powers of the Certification Officer to impose fines and sanctions for any violations 'should he have any concerns', opening the door to 'unwarranted administrative burdens and expenses on trade unions'.<sup>120</sup> The Act also converted the previous opt-out for worker contributions to unions' political funds into an opt-in, a move anticipated to have a negative impact on funding to political parties (mainly channelled to the Labour Party through trade union affiliation).

Bogg describes the Act as sealing a transition from neoliberalism to authoritarianism. This is because it is suffused by an illiberal attempt to mute industrial action as a form of critique, an overall de-democratisation and an anti-pluralist appeal to social order based on the democratic interests of consumers.<sup>121</sup> Indeed, the Government's reasoning is fundamentally predicated on a sharp division between the interests of strikers and those of 'ordinary' workers and service users, as well as on an axiomatic conception of strikes as a disruption of civic unity.<sup>122</sup> In its consultation, the Government stated that industrial action in important public services

can have far reaching effects on significant numbers of ordinary people who have no association with the dispute. People have the right to expect that services on which they and their families rely are not going to be disrupted at short notice by strikes that have the support of only a small proportion of union members. Parents want to know that they can drop their children off at school because the schools will be open, and that they can get to work on time because the buses and trains are operating normally.<sup>123</sup>

The 'striker versus ordinary worker' frame portrays the Government as fulfilling the duty to fairly 'balance' the interests of unions and consumers and ensure that industrial action decisions result from a clear and positive choice.<sup>124</sup> The Bill adopted most of the proposals contained in a report by a right-

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<sup>119</sup> William Brown, 'Industrial relations in Britain under New Labour, 1997–2010: A post mortem' (2011) 53(3) *Journal of Industrial Relations* 402, 404.

<sup>120</sup> Stephen Cavalier and Richard Arthur, 'A Discussion of the Certification Officer Reforms' (2016) 45(3) *Industrial Law Journal* 363.

<sup>121</sup> Alan Bogg, 'Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State' (2016) 45(3) *Industrial Law Journal* 299.

<sup>122</sup> *Ibid* 323-325.

<sup>123</sup> Department for Business, Innovation and Skills, *Trade Union Reform: Consultation on Ballot Thresholds in Important Public Services* (BIS/15/418, July 2015) 3  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/445433/BIS-15-418-consultation-on-ballot-thresholds-in-important-public-services.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445433/BIS-15-418-consultation-on-ballot-thresholds-in-important-public-services.pdf)> (last accessed 7 June 2016).

<sup>124</sup> For the Government's arguments and critiques see Michael Ford and Tonia Novitz, 'An Absence of Fairness... Restrictions on Industrial Action and Protest in the Trade Union Bill 2015' (2015) 44(4) *Industrial Law Journal* 522.

wing think tank<sup>125</sup> but was not preceded by meaningful negotiations with trade unions. The final version of the Act softened some restrictions, yet concerns remain around its compatibility with the international protection of the right to strike.<sup>126</sup>

Along with these interventions, there have been two other areas involving austerity-driven attempts to restrict trade union power.

In recognition of the value of facility time for unions' effectiveness, the law granted to officials of recognised unions the right to reasonable paid time off for union duties (negotiation and consultation) and reasonable, not necessarily paid time off for other union activities.<sup>127</sup> The Coalition Government recasted facility time provision in the public sector as a 'subsidy'. A consultation for the civil service recommended that its provision should be capped to a fixed proportion of the total paybill (0.1% per department) and restricted to an upper limit of 50% of time for each union report, as well as making *unpaid* time off for trade union activities the default position (contrary to previous practice).<sup>128</sup> The aim was to 'ensure the current provisions for trade union facility time represent the best value for money'.<sup>129</sup> Expressing a clear austerity rationale, the Minister praised that the changes had 'saved taxpayers £25 million in the last rolling year to date' and 'reduced the number of taxpayer-funded full-time union officials in central Government from 200 in May 2010 to fewer than 10 now'.<sup>130</sup> Parading the reduction of trade union representation as a fiscal success exemplifies an economisation of justice contrasting with the ILO's support for appropriate facilities in order to enable unions to carry out their functions promptly and efficiently.<sup>131</sup> This cost analysis also ignored two important elements. Firstly, it failed to consider the broader economic benefits of facility time provisions documented in the literature, such as meaningful consultation, partnership facilitation improving employer representation, the dispute-preventing nature of early intervention saving staff time and legal costs, better communication minimising negative impact on work and the reduction of potential costs derived from industrial action).<sup>132</sup> Secondly, it ignored the role of facility time to address the negative

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<sup>125</sup> See Ed Holmes, Andrew Lilico and Tom Flanagan, *Modernising Industrial Relations* (Policy Exchange, 2010).

<sup>126</sup> Keith D. Ewing and John Hendy, 'The Trade Union Act 2016 and the Failure of Human Rights' (2016) 45(3) *Industrial Law Journal* 391.

<sup>127</sup> Sections 168 and 170 of the *Trade Union and Labour (Consolidation) Relations Act*.

<sup>128</sup> Cabinet Office, *Consultation on reform to Trade Union facility time and facilities in the Civil Service (13 July 2012)*

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/78929/Facility\\_Time\\_Consultation\\_Document\\_Final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/78929/Facility_Time_Consultation_Document_Final.pdf)> and Cabinet Office, *Consultation on reform to Trade Union facility time and facilities in the Civil Service: Government Response* (8 October 2012). <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/78930/facility-time-consultation-govt-response\\_0.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/78930/facility-time-consultation-govt-response_0.pdf)> (both sources last accessed on 30.10.2018).

<sup>129</sup> *Consultation on reform to Trade Union facility time and facilities in the Civil Service (13 July 2012)* (n 128).

<sup>130</sup> The Minister for the Cabinet Office and Paymaster General Mr Francis Maude, House of Commons Debate (7 January 2015) Column 257.

<sup>131</sup> Article 2(1) of the ILO Workers' Representative Convention 135.

<sup>132</sup> See Martin Mitchell, Steven Coutinho and Gareth Morrell (prepared on behalf of NatCen Social Research for Unison), *The Value of Trade Union Facility Time: Insights, Challenges and Solutions* (NatCen Social Research 2012)

impact of bargaining power inequality on effective representation.<sup>133</sup> As Bogg and Ewing note, worker representatives are

pitted against what may be the extensive capacity of the human resources department of the employer [whilst] [u]nlike the workers' representative, the human resources manager is unlikely to be distracted by the fact that he or she too is expected to perform his or her role in addition to another job performed by the employer.<sup>134</sup>

The Trade Union (Facility Time Publication Requirements) Regulation 2017 required all public sector employers to publish economic information on 'facility time',<sup>135</sup> including number of union officials, total amount spent, percentage, amount per category of duties/activities and facilities provided by the employer. The Trade Union Act 2016 also granted to the Secretary of State reserved powers to restrict facility time for public sector employers.<sup>136</sup>

A similar austerity-driven philosophy has informed the challenge to so-called 'check-off arrangements'. These allow a union to collect subscriptions directly from the payroll rather than through direct debit. Even if it was not mandatory, it has been standard practice in the public sector.<sup>137</sup> The Government stressed that 'at a time of fiscal consolidation, Departments should no longer provide unnecessary services on behalf of trade unions that can cause additional costs and constraints on payroll process and services'.<sup>138</sup> The Trade Union Act 2016 eventually permitted check-off but only when other alternatives (direct debit) are available and unions cover the costs.<sup>139</sup>

All these reforms provide cumulative restraints in an already overburdened regulatory environment, forcing unions to redirect resources from campaigning to legal enforcement. Weak

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<[https://www.unison.org.uk/content/uploads/2013/06/Briefings-and-CircularsBG-Value-of-Union-Facility-Time-FULL-REPORT-FINAL\\_2.pdf](https://www.unison.org.uk/content/uploads/2013/06/Briefings-and-CircularsBG-Value-of-Union-Facility-Time-FULL-REPORT-FINAL_2.pdf)> (last accessed on 30.10.2018) and ACAS, *Code of Practice 3: Time off for trade union duties and activities* (ACAS January 2010) 6.

<sup>133</sup> See Jackie Lane, 'The Threat to Facility Time in the Trade Union Act 2016- A Necessary Austerity Measure?' (2017) 46(1) *Industrial Law Journal* 134.

<sup>134</sup> Alan Bogg and Keith D. Ewing, *The Political Attack on Workplace Representation* (Institute of Employment Rights 2013) 12.

<sup>135</sup> Section 13 (inserted after section 172 of TULRCA 1992) and section 8 of the Trade Union (Facility Time Publication Requirements) Regulation 2017.

<sup>136</sup> Section 14 (inserted after section 172A of TULRCA 1992).

<sup>137</sup> See Fredman and Morris, *The State as employer: Labour law in the public services* (n 71) 110-112.

<sup>138</sup> Minister for the Cabinet Office Francis Maude, *Deduction of Trade Union Subscriptions at Source ("Check-Off") Guidance (20 December 2013) paragraph 3 (emphasis added)* <<https://www.theguardian.com/politics/interactive/2014/oct/03/liberal-conservative-coalition-francismaude>> paragraph 3 (last accessed on 30.10.2018).

<sup>139</sup> Section 15 (inserted after section 116A of the TULRCA 1992).

unions contribute to what Scott and Williams describe as an employer-biased operation of ‘voluntarism’ in the UK.<sup>140</sup>

### 3.3. LOW PAY COMMISSION

In contrast to the decline of collective regulation, the minimum wage has been subject to annual uprates every single year. It rose from £5.73 in 2008 to £6.19 in 2012 to £7.83 in 2018.<sup>141</sup> In proportion to median earnings, there is a slight but steady increase from 46% in 2008 to 47% in 2012 and 54% in 2017.<sup>142</sup>

In recent years, the LPC has been entrusted with new tasks. In 2015, the Conservative Government introduced a National Living Wage (NLW) and asked the LPC ‘to set out how the new NLW will reach 60% of median earnings by 2020’<sup>143</sup> so as to ‘tackle low pay and ensure that lower wage workers can take a greater share of the gains from growth’.<sup>144</sup> This amounted to an innovation in two respects. Firstly, the size of the increase (10.8%) was much greater than previous ones. Secondly, the target-based nature of the mandate moved the emphasis away from preventing job losses. However, the ‘living wage’ terminology is rather confusing as NLW determination is not linked to an analysis of living costs<sup>145</sup> but to a relationship with median earnings. For other minimum wage rates, the remit of the LPC is still to ‘recommend minimum rates that will help as many low paid workers as possible without any significant adverse impact on employment or the economy’.

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<sup>140</sup> See Peter Scott and Steve Williams, ‘The Coalition Government and employment relations: Accelerated neo-liberalism and the rise of employer-dominated voluntarism’ (2014) 15 *Observatoire de la société britannique*, text quoted here from the online version para 1 <<https://journals.openedition.org/osb/1636>> (last accessed on 30.10.2018).

<sup>141</sup> In 2008, the rate is for workers over 22, in 2011 over 22 while in 2018 is for living wage (over 25).

<sup>142</sup> See OECD, *Minimum relative to average wages of full-time workers* <<https://stats.oecd.org/Index.aspx?DataSetCode=MIN2AVE>> (last accessed on 30.10.2018).

<sup>143</sup> HM Treasury, *Policy Paper Summer Budget 2015* (House of Commons 2015) 33 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/443232/50325\\_Summer\\_Budget\\_15\\_Web\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/443232/50325_Summer_Budget_15_Web_Accessible.pdf)> (last accessed on 30.10.2018).

<sup>144</sup> *Ibid.*

<sup>145</sup> There is a voluntary ‘living wage’ calculated by the Resolution Foundation and overseen by the Living Wage Commission currently consisting of 10 members: five business leaders or executives of prominent firms, such as IKEA and the Nationwide Bank (including the Chair), the trade union leader of TUC, a cleric, a politician (deputy Mayor of London) and two academics. The calculation is based on a ‘basket of goods and services that represents an acceptable standard of living’ produced by academic consensus weighed against an average of earning and family types to produce an hourly rate. See Conor D’Archy and David Finch, *Calculating a Living Wage for London and the rest for the UK* (Resolution Foundation November 2017) 5 <<https://www.resolutionfoundation.org/app/uploads/2017/11/Living-Wage-calculation-paper.pdf>> last accessed on 31.10.2018. The 2018 living wage rate was £10.20 in London and £8.75 outside London, hence significantly higher than the statutory living wage of £7.93.

Another development came from the Taylor review on modern working practices,<sup>146</sup> a report commissioned in 2016 by Prime Minister Theresa May in the context of insecurity in employment status, and gig economy and zero-hour contracts.<sup>147</sup> The review proposed two additional tasks for the LPC.

Firstly, it suggested that the LPC remit should include advising on the impact of a higher NMW for workers with non-guaranteed hours.<sup>148</sup> This measure aims to rebalance the costs of flexibility towards the employer.<sup>149</sup> The Government has accepted the goal of avoiding one-sided flexibility but qualified this with references to the need to 'retai[n] the flexibility that many people find so valuable and avoid placing unnecessary burdens on business'.<sup>150</sup> It has also asked for consideration of alternative options.<sup>151</sup> From a social dialogue perspective, this proposal was interesting as it sought to use social partnership (through the LPC) in a strategy of 'mutualising risk'<sup>152</sup> for precarious workers. This was to be done through a 'cost incentive' strategy aimed at 'nudging'<sup>153</sup> workers away from those contracts. Following consultations with employers and employees, the LPC recognised the problem of one-sided flexibility but decided not to recommend minimum wage premia for non-guaranteed hours. Instead, it suggested other measures such as a right to switch to a contract reflecting normal hours, reasonable notice of shifts, compensation for cancelled shifts without reasonable notice and

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<sup>146</sup> *Good Work: The Taylor Review of Modern Working Practices* (July 2017) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf) (last accessed on 30.10.2018).

<sup>147</sup> Abi Adams and Jeremias Prassl, 'Zero-Hours Work in the United Kingdom' (International Labour Office 2018) <[https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_624965.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_624965.pdf)> (last accessed on 30.10.2018); Abi Adams, Mark Freedland and Jeremias Prassl, 'The "Zero-Hours Contract": Regulating Casual Work, or Legitimizing Precarity' (Oxford Legal Studies Research Paper No. 11/2015) and more generally Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press 2018).

<sup>148</sup> *Taylor Review* (n 146) 44.

<sup>149</sup> *Ibid.*

<sup>150</sup> HM Government, *Good Work: A response to the Taylor Review of Modern Working Practices* (February 2018) 39 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/679767/180206\\_BEIS\\_Good\\_Work\\_Report\\_Accessible\\_A4\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679767/180206_BEIS_Good_Work_Report_Accessible_A4_.pdf)> (last accessed on 30.10.2018).

<sup>151</sup> *Ibid.*

<sup>152</sup> See Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (Oxford University Press 2011) Concluding Chapter.

<sup>153</sup> Katie Bales, Alan Bogg and Tonia Novitz, "'Voice' and 'Choice' in Modern Working Practices: Problems with the Taylor Review' (2018) 47(1) *Industrial Law Journal* 46, 65.

information for workers.<sup>154</sup> Following the LPC's advice, the Government did not explicitly include minimum wage premia in its *Good Work Plan* published in December 2018.<sup>155</sup>

Secondly, the Taylor Review proposed that the LPC should undertake sectoral reviews where a significant number of the workforce was at or close to minimum wage, 'build[ing] on its current tripartite structure'.<sup>156</sup> It is uncertain what the impact or follow-up of these reviews will be but there seems to be no evidence at the moment that they may act as overtures for sectoral minimum wage rates or reconstruction of sectoral bargaining.

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<sup>154</sup> Low Pay Commission, *Low Pay Commission Report: A Response to Government on 'One-sided Flexibility'* (Crown Copyright 2018) available at <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/765193/LPC\\_Response\\_to\\_the\\_Government\\_on\\_one-sided\\_flexibility.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/765193/LPC_Response_to_the_Government_on_one-sided_flexibility.pdf)> (last accessed on 23.12.2018).

<sup>155</sup> HM Government, *Good Work Plan* Cm 9755 (December 2018) available at <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/766167/good-work-plan-command-paper.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766167/good-work-plan-command-paper.pdf)> (last accessed on 23.12.2018).

<sup>156</sup> *Taylor Review* (n 146) 107.

#### 4. REGULATING FOR JUSTICE: A COMPARATIVE EVALUATION OF THE LPC AND COLLECTIVE BARGAINING

This part provides an evaluation of two social dialogue mechanisms (LPC and collective bargaining) from the perspective of justice. Compared to the voluminous literature on the effects of minimum wages in the UK, the literature on the process of the LPC as compared to collective bargaining has been far less extensive.<sup>157</sup>

The report seeks to make two contributions to existing literature. Firstly, it develops a new evaluative framework for assessing social dialogue mechanisms consisting of the following dimensions: *autonomy, inclusivity, effectiveness, transparency* and *justice-sensitivity*. Secondly, it draws on insights from eight semi-structured interviews with high-level social dialogue participants<sup>158</sup> combined with desk research (general and UK specific academic literature). The participants were:

- Three sitting Low Pay Commissioners: Sarah Brown (independent), Neil Carberry (employer background) and Simon Sapper (employee background).
- Four trade union officers:
  - Rosa Crawford, Policy Officer for EU and International Relations at the Trade Union Congress (TUC), a federation of most British unions. TUC has more than 5.6 million members. Although it does not engage in collective bargaining, it plays an important role in terms of coordination, policy development and support for union activities;
  - Diana Holland, UNITE Assistant General Secretary for Transport and Equalities. UNITE is the largest union in the UK, with a membership of around 1.2 million;
  - Bill MacKeith, National Union of Journalists delegate and former secretary as well as president of the Oxford Trades Unions Council;
  - Simon Crew, president of Bristol Trades Unions Council.
- An officer of a sectoral employer organisation, Timothy Thomas (EEF Director of Employment and Skills Policy). EEF is the largest sectoral employer organisation in the UK, representing businesses in manufacturing and engineering.

This part is organised as follows. Section 4.1 develops the evaluative framework consisting of five dimensions. Sections 4.2 and 4.3 examine the LPC and collective bargaining along these dimensions. The final section considers the interplay between different mechanisms.

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<sup>157</sup> Brown, 'The Process of Fixing the British National Minimum Wage' (n 84); Thornley and Coffey (n 81). Maria Karamessini and Damian Grimshaw, 'Minimum wages and the remaking of the wage-setting systems in Greece and the UK' in Damian Grimshaw et al (eds), *Making work more equal: A new labour market segmentation approach* (Manchester University Press 2017).

<sup>158</sup> I would like to thank especially Pier-Luc Dupont for his excellent conduct of all interviews.

#### 4.1. JUSTICE AND SOCIAL DIALOGUE IN WAGE SETTING: AN EVALUATIVE FRAMEWORK

What is ‘just’ or ‘fair’ wage setting? This question can be examined from an ‘outcome’ or ‘process’ standpoint. The former focuses on the fairness of a particular wage outcome as assessed against an external normative criterion, e.g. purchasing power, equity, input-output correspondence or fairness of distribution. By contrast, the latter interrogates the justice of the underlying process. This distinction reflects the well-established division between ‘substantive’ (or distributive) and ‘procedural’ justice developed by Rawls,<sup>159</sup> also used in other areas such as democratic theory<sup>160</sup> and organisational justice.<sup>161</sup>

Simon Sapper favoured a *procedural* definition of fair employment relations as those that ‘are freely collectively bargained between workers and their representatives and employers’. For him, ‘high and effective levels of trade union membership’ are the best guarantee for fair and just working conditions. Instead, Timothy Thomas preferred a more substantive definition of economic justice as covering issues such as gender pay reporting, pensions, investment, skills, tackling zero-hour contracts and making sure that the supply chain is free of modern slavery.

In normative terms, the use of social dialogue in wage setting is a major tool in an *empowerment* strategy for addressing the fundamental problem of labour commodification. Commodification is a term referring to labour’s *treatment* as a commodity with a ‘price-tag’ (wage) to be exchanged and adjusted according to ordinary market rules, as exemplified in neo-classical economic theory:

By treating labour as a commodity, we circumvent the moral basis on which the employer/employee relationship stands, and incorrectly make the market rule the sole regulator of that relationship. [...] Accepting the worker’s labour as an extension of the worker’s personality requires according him broad liberty. It signifies that the transaction of such an incomplete commodification as work cannot be considered only in relation to

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<sup>159</sup> John Rawls, *A Theory of Justice* (Harvard University Press 1999 [1971]) 83-90.

<sup>160</sup> Robert Lane, ‘Procedural goods in a democracy: How one is treated versus what one gets’ (1988) 2(3) *Social Justice Research* 177; Alois Stutzer and Bruno Frey, ‘Political participation and procedural utility: An empirical study’ (2006) 45(3) *European Journal of Political Research* 391; Catherine Bochel, ‘Process matters: Petitions systems in Britain’s legislatures’ (2016) 22(3) *The Journal of Legislative Studies* 368.

<sup>161</sup> See Mary Konovsky ‘Understanding procedural justice and its impact on business organizations’ (2000) 26(3) *Journal of Management* 489; Robert Bies and Debra Shapiro, ‘Voice and Justification: Their influence on procedural fairness judgments’ (1988) 31(3) *Academy of Management Journal* 676; E. Allan Lind and Tom R. Tyler, *The social psychology of procedural justice* (Springer 1988); Kevin W. Mossholder, Nathan Bennett and Christopher L. Martin, ‘A multilevel analysis of procedural justice context’ (1999) 19(2) *Journal of Organizational Behavior* 131; Daniel P. Skarlicki and Robert Folger, ‘Retaliation in the workplace: The roles of distributive, procedural, and interactional justice’ (1997) 82(3) *Journal of Applied Psychology* 434 and John Thibaut and Laurens Walker, *Procedural Justice: A psychological analysis* (Lawrence Erlbaum Associates 1975).

its market value. It has to be considered also from a moral dimension which will reflect the freedom and dignity of the employee's personality.<sup>162</sup>

In analytical terms, the commodification discourse has the advantage of drawing attention to the structural (or systematic) source of the threats to justice in the workplace. Rather than the product of malevolent employers, injustices are viewed as systematically embedded in a broader structure characterised by power disequilibria, subordination and economic imperatives springing from the logic of business actions oriented towards profitability and efficiency. However, commodification is also a fiction as labour is not a commodity even though it may be treated as one.<sup>163</sup> Labour is not produced for exchange (species reproduction is not dictated by market rules), it cannot be stored and sold as other commodities (labour power is perishable as it cannot be stored for the future if unused), it is inseparable from the human being<sup>164</sup> and, crucially, unlike inert commodities, it possesses the *agential* capacity to act, react and interact. This creates a fundamental tension between the economic imperatives of productivity maximisation and the human nature of labour. The distinct contribution of effective social dialogue in this tension is that it aims to address the link between powerlessness and sense of injustice,<sup>165</sup> *empowering workers' collective agency and voice*<sup>166</sup> in wage setting.

In practical terms, however, how can procedural justice be used as a basis for generating concrete evaluative dimensions? The report suggests the following evaluative framework for social dialogue processes consisting of five dimensions: *autonomy, inclusiveness, effectiveness, justice-sensitivity* and *transparency*. The framework is heuristic in that it operates as a tool for the examination and comparison of these mechanisms. In no way does it imply exhaustivity or a rigid demarcation between these dimensions.

The imperative of *autonomous social dialogue* reflects a long-standing anxiety over the political and social perils of excessive state interference stifling parties' collective autonomy. This fear was at the core of Otto Kahn-Freund's writing on the relation between the rise of fascism in Weimar

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<sup>162</sup> Ruth Ben-Israel, 'The Rise, Fall and Resurrection of Social Dignity' in Roger Blanpain (ed), *Labour Law, Human Rights and Social Justice: Liber Amicorum in Honour of Prof. Dr. Ruth Ben Israel* (Kluwer Law International 2001) 4.

<sup>163</sup> Judy Fudge, 'Labour as a "Fictive Commodity": Radically Reconceptualizing Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011).

<sup>164</sup> See *ibid.*

<sup>165</sup> IPPR Commission on Economic Justice, *Prosperity and Justice: A plan for the New Economy* (Policy Press 2018) 73-74 <[https://www.ippr.org/files/2018-08/1535639099\\_prosperity-and-justice-ippr-2018.pdf](https://www.ippr.org/files/2018-08/1535639099_prosperity-and-justice-ippr-2018.pdf)> (last accessed on 30.10.2018).

<sup>166</sup> For the application of the 'voice' framework in the context of labour law see Alan Bogg and Tonia Novitz, 'The purposes and techniques of voice: Prospects for continuity and change' in Alan Bogg and Tonia Novitz (eds), *Voices at work: continuity and change in the common law world* (Oxford University Press 2014). For the original articulation see Albert Hirschman, *Exit, voice, and loyalty: Responses to decline in firms, organizations and states* (Harvard University Press 1970).

Germany and state intervention in industrial relations under the guise of ‘public interest’.<sup>167</sup> The autonomy of the social dialogue process can be compromised by a variety of interventions. The state can annul or substantively modify the products of social dialogue and thereby render them meaningless. It may paternalistically intervene in the internal affairs of organisations (as a matter of law or fact) and otherwise control the process or the parties to be appointed. However, autonomy is not synonymous with state abstentionism. Social dialogue requires an *enabling* state setting rules for facilitating the process. Bogg and Dukes thus conceive autonomy as a ‘matter of degree’ rather than a strict separation.<sup>168</sup> In the context of collective agreements, Bruun identifies the following dimensions of autonomy encompassing both their relationship to the state and employers: union independence from employers and the state, an independent sphere for parties to act, some balance of power between parties and the availability of instruments and tools for parties to pressure their counterparts.<sup>169</sup> Our framework construes autonomy vis-a-vis social dialogue’s relationship to the state. The critical issue of power balance between parties is considered as part of *inclusiveness*.

Inclusiveness is closely connected to equality,<sup>170</sup> a key component of most theories of justice.<sup>171</sup> In the context of standards for minimum wage-setting models of consultation, the ILO stresses the principle of meaningful participation based on full consultation and direct participation, on an equal footing, of the representatives.<sup>172</sup> Drawing on the ILO, it can be said that inclusion needs to be *encompassing, equal and representative*. Whereas ‘encompassing’ inclusion looks *horizontally* at whether the interests (or preferences) of the relevant parties are taken into account by the structural features of the process, the need for ‘equal’ and ‘representative’ inclusion adds two qualitative features. *Equal inclusion* requires parties to have a (relative) equality of power and possibility of influencing the outcome, as a matter of formal rules and rights but also as a matter of fact. The

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<sup>167</sup> See Otto Kahn-Freund, *Labour Law and Politics in the Weimar Republic* (Roy Lewis and Jon Clark eds, Jon Clark tr, Blackwell 1981), especially the essays ‘The Social Ideal of the Reich Labour Court’ [originally published in 1931] and ‘The Changing Function of Labour Law’ [originally published in 1932]. For this concern in general in Otto Kahn-Freund’s work see in general see Ruth Dukes, *The Labour Constitution* (Oxford University Press 2014) Chapter 4.

<sup>168</sup> See Alan Bogg and Ruth Dukes, ‘The European social dialogue: from autonomy to here’ in Nicola Countouris and Mark Freedland (eds), *Resocialising Europe in a Time of Crisis* (Cambridge University Press 2013) 478-479.

<sup>169</sup> Niklas Bruun, ‘The Autonomy of Collective Agreement’ (2002) Report to the VII European Regional Congress of the International Society for Labour Law and Social Security 5 <[http://www.juridicum.su.se/stockholmcongress2002/bruun\\_english.pdf](http://www.juridicum.su.se/stockholmcongress2002/bruun_english.pdf)> (last accessed on 30.10.2018).

<sup>170</sup> For this link between inclusiveness and primary EU law see Aristeia Koukiadaki and Ioannis Katsaroumpas, ‘Temporary contracts, precarious employment, employees’ fundamental rights and EU employment law’ Study for the Policy Department C of the European Parliament (European Union 2017) 64-67 <[www.europarl.europa.eu/RegData/etudes/STUD/2017/596823/IPOL\\_STU\(2017\)596823\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596823/IPOL_STU(2017)596823_EN.pdf)> (last accessed on 30.10.2018).

<sup>171</sup> See inter alia Michael Walzer, *Spheres of Justice: A defence of pluralism and equality* (Blackwell 1983) and Gerald A. Cohen, *Rescuing Justice and Equality* (Harvard University Press 2008).

<sup>172</sup> International Labour Conference, *Minimum Wage systems: General Survey of the reports on the Minimum Wage Fixing Convention, 1970 (No. 131) and the Minimum Wage Fixing Recommendation, 1970 (No. 135)*, Report III 1B (ILO 2014).

*representative inclusion* requirement assesses the ‘vertical integration’ of the constituents’ views or preferences in the actions of those in charge of social dialogue. In other words, it is about whether the members of an organisation feel that the outcome is ‘owned’ or ‘controlled’ by them. These two aspects, the inclusion on fair terms of the affected parties and the equal influence of negotiators, are famously elaborated as minimum requirements of just negotiations by Mansbridge.<sup>173</sup>

The *effectiveness* dimension focuses on the external impact and sustainability of social dialogue. Is the process meaningful or vacuous? Is it sustainable, that is to say, do its procedural features enable the continuity of the process? From a justice perspective, the distributive impact of the social dialogue outcome is also significant.<sup>174</sup> The fourth dimension is justice-sensitivity. The latter looks at whether issues of justice are thematised as *internal principles of discourse* or at least whether they play a background role. To give an extreme example, a pure technocratic cost-benefit assessment of who should benefit from non-discrimination provisions is an instance of justice-insensitive process. Finally, the transparency dimension relates to the availability, accessibility and comprehensiveness of information and reasoning.<sup>175</sup> Transparency is the basis for accountability and scrutiny of the social dialogue process by the represented constituents.

All these dimensions operate as ideal-types and, in reality, multiple trade-offs may exist between different dimensions.

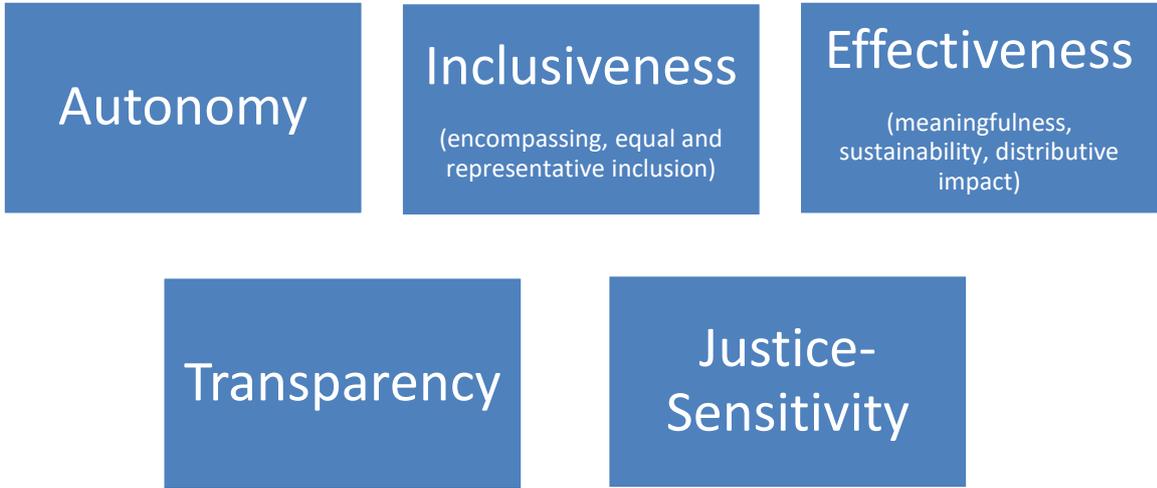
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<sup>173</sup> See Mark Warren and Jane Mansbridge (with others), ‘Deliberative Negotiation’ in Jane Mansbridge and Cathie Jo Martin, *Political Negotiation: A Handbook* (Brookings Institution Press 2015) Chapter 5.

<sup>174</sup> Distributive concerns are central in Nancy Fraser’s account of social justice as ‘parity of participation’. See Nancy Fraser, ‘Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation’ in Larry Ray and Andrew Sayer (eds), *Culture and Economy after the Cultural Turn* (Sage Publications 1999). See also the UN’s broad understanding of justice as ‘fair and compassionate distribution of the fruits of economic growth’ in United Nations Department of Economic and Social Affairs/The International Forum for Social Development, *Social Justice in an Open World: The Role of the United Nations* (New York 2006) 7 <<https://www.un.org/esa/socdev/documents/ifsd/SocialJustice.pdf>> (last accessed on 30.10.2018) and Amartya Sen, ‘Social Justice and the distribution of income’ in Anthony B. Atkinson and François Bourguignon (eds), *Handbook of Income Distribution Volume 1* (Elsevier 2000).

<sup>175</sup> Anoeska Buijze, ‘The Six Faces of Transparency’ (2013) 9(3) *Utrecht Law Review* 3, 4.

**FIGURE 1. THE FIVE DIMENSIONS OF THE EVALUATIVE FRAMEWORK**



**4.2. THE LOW PAY COMMISSION**

As discussed above, the minimum wage architecture is based on a statutorily regulated interaction between the Government, the party with ultimate minimum wage-setting power, and the LPC, the social partnership body advising the Government on minimum wage rates. This design resulted from the Labour Party’s abandonment in the 1990s of an automatic indexation formula (50% of ‘half median male earnings’) <sup>176</sup> in favour of a flexible model of determination ‘according to the economic circumstances of the time and with the advice of an independent low pay commission, whose membership will include representatives of employers, including small business, and employees’.<sup>177</sup>

**4.2.1 AUTONOMY**

The LPC occupies an intermediate space between ordinary (legislative-electoral) political and collective bargaining processes. While the state decided to politicise wage setting by enacting a statutory scheme that excluded unacceptably low wage valuations, the LPC offered an instance of what Flinders and Buller call ‘institutional depoliticisation’,<sup>178</sup> a term indicating the shift of the political arena rather than

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<sup>176</sup> See Julia Lourie, ‘National Minimum Wage Bill’ (Bill 90 1997/1998) Research Paper 97/133 (House of Commons Library 1997) 7-8 <<http://researchbriefings.files.parliament.uk/documents/RP97-133/RP97-133.pdf>> (last accessed on 30.10.2018).

<sup>177</sup> Labour Party, *Manifesto for 1997 General Elections* (n 76).

<sup>178</sup> Matthew Flinders and Jim Buller, ‘Depoliticisation: Principles, Tactics and Tools’ (2006) 1 *British Politics* 293, 298-303. The authors explicitly consider LPC as an example of this form of depoliticisation (see 300).

the absence of politics.<sup>179</sup> The New Labour Government viewed positively this arena-shifting as a conduit for decentralising power closer to the people. As expressed by one of New Labour's Ministers, Lord Falconer:

What governs our approach is a clear desire to place power where it should be: increasingly not with politicians, but with those best fitted in different ways to deploy it. (...) Minimum wages are not determined in the DTI [Department of Trade and Industry], but by the Low Pay Commission... This depoliticising of key decision-making is a vital element in bringing power closer to the people.<sup>180</sup>

The LPC is an advisory non-departmental public body operating at arm's length from government. Its independence in a politically sensitive area is highly commended as an essential factor for its effective operation, to the extent that it gives the Commission a 'high degree of credibility with stakeholders'.<sup>181</sup> All Commissioners serve in a personal capacity and enjoy full personal independence from the Government. William Brown, the first Chair of the Commission, exalted the independence of the process by saying that although various 'special advisors' tried to get preferences through various channels in the early years of the LPC, they were 'neutralised by the process whereby the Commission made its decisions'.<sup>182</sup>

In our interviews, all Commissioners emphasised the importance of keeping politics out of the LPC. While not necessarily in disagreement with the principle behind the introduction of the target-based NLW,<sup>183</sup> they voiced concerns regarding its potentially harmful effect of 'bringing politics into the LPC' (Sarah Brown) and the lack of consultation prior to its adoption. Neil Carberry commented:

You should always start with the principle that the Commission does not set the minimum wage. The government sets the minimum wage on the advice of the LPC. So, I would never criticise any minister for wanting to do that [adopt a 60% target]. But you cannot have your cake and eat it. You either have political control of the minimum wage or you have a process like the LPC.

This opinion is shared in academic literature. Karamessini and Grimshaw regard the NLW as significant to the extent that the government for the first time 'asserted control over the fixing process, thereby strengthening government power and diminishing the voice of employer and trade union

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<sup>179</sup> Ibid 296.

<sup>180</sup> Quoted in ibid 312.

<sup>181</sup> Paragraph 4 of the Framework Agreement between the Department of Business Innovation and Skills and the Low Pay Commission annexed to the Department of Business Innovation & Skills, *Triennial Review of the Low Pay Commission* (LPC) (March 2013) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/153606/13-p181-triennial-review-low-pay-commission.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/153606/13-p181-triennial-review-low-pay-commission.pdf)> (last accessed on 30.10.2018).

<sup>182</sup> Brown, 'The Process of Fixing the British National Minimum Wage' (n 84) 431.

<sup>183</sup> See Part 3(3) above.

organisations'.<sup>184</sup> William Brown goes as far as describing it as a form of 'toxic politicisation',<sup>185</sup> which 'by laying this political cuckoo's egg in the LPC's nest, [...] threatened its independence, its credibility, and the acceptability of the NMW'.<sup>186</sup>

However, the Commission's independence is combined with important channels of (indirect) state control. Firstly, the Government has the power to appoint Commissioners in accordance with the standard process for public appointments.<sup>187</sup> The process<sup>188</sup> is overseen by an advisory assessment panel comprising a high-level civil servant of the sponsor department, an external independent member and the Chair of the LPC (or, for the Chair appointment, another senior civil servant). This panel is responsible for shortlisting candidates, conducting interviews and making final recommendations to the Secretary of State. Ministers, at least in theory, are involved or can be involved at each stage. They should agree on the panel composition and are invited to offer their views on the candidates, as well as interview them if they wish. Very importantly, they are not bound by the opinion of the panel. If not satisfied, they can request the re-running of the competition or even appoint someone who has not been recommended by the Panel. In the LPC context, however, this ministerial discretion has not been exercised and is significantly constrained by an inability to dilute the balance between independents (two academics and the Chair) and Commissioners with an employer and union background. Secondly, and more importantly in practice, the Government enjoys a form of substantive control over the process by determining the LPC's remit. The remit frames the question for advice, including the factors to be taken into account. For the NLW applying to those over 25 years old, it is linked to the ambition of 'continu[ing] to increase to reach 60% of median earnings by 2020, subject to sustained economic growth'. For other workers aged 16-17, 18-20 and 21-24 as well as apprentices, the remit remains that of 'helping as many low-paid workers as possible without any adverse effect on employment'. The third form of state control is through the Government's ultimate power to accept or reject recommendations, subject only to the requirement to produce a report to Parliament explaining its reasons for doing so.<sup>189</sup>

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<sup>184</sup> *Karamessini and Grimshaw* (n 157) 349.

<sup>185</sup> Brown, 'The toxic politicising of the National Minimum Wage' (n 47).

<sup>186</sup> *Ibid* 787.

<sup>187</sup> The so-called *Nolan report* sought to promote merit-based appointments (for NDBP), including having one independent member in each panel, prior advice and general appointment on merit. See further Lord Nolan, *Standards in Public Life: First Report of the Committee on Standards in Public Life* (HMSO 1995) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/336919/1stInquiryReport.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/336919/1stInquiryReport.pdf)> (last accessed on 30.10.2018).

<sup>188</sup> See Cabinet Office, *Governance Code on Public Appointments* (December 2016) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/578498/governance\\_code\\_on\\_public\\_appointments\\_16\\_12\\_2016.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/578498/governance_code_on_public_appointments_16_12_2016.pdf)> (last accessed on 01.11.2018).

<sup>189</sup> Sections 5 and 6 of the National Minimum Wage Act 1998.

While two recommendations, none of which was the main headline rate, have been rejected thus far by the Government,<sup>190</sup> one could expect that the ‘acceptability’ of recommendations establishes a form of influence. In relation to this potential constraint, Simon Sapper observes:

It would be rather strange if a government agency set up specifically to offer advice on the scope and value of the National Minimum Wage and National Living Wage, broadly representative of economic stakeholders apart possibly from the public, came to a unanimous set of recommendations [and the Government said] ‘No, thank you. I do not want to do that’.

On whether the Government’s power to reject recommendations acts as an incentive for consensus, he remarks that ‘at the moment, it can only be conjecture whether consensus improves the chances or is a necessity for Government to adopt the recommendations’. However he continues by saying ‘the chances of successful adoption by Government of the LPC’s recommendations are boosted if there is buy-in from all stakeholders’.

Sarah Brown considers the target-based NLW as a factor making consensus easier, to the extent that ‘unless you have very strong evidence otherwise, it is hard not to get a consensus moving along a straight line target’.

Simon Sapper also highlights the role of the Secretariat of the Commission, consisting of civil servants seconded from the sponsor Government department. He characteristically suggests that the LPC could be argued to be ‘quadripartite’ rather than tripartite:

You’ve got the employers, you’ve got the unions, you’ve got academics and you’ve got the Government represented by the Secretariat. The Secretariat is very clear that they do not make policy. But there will be times when they will challenge us and they will provide information to us. And if we say ‘Well, we think we should do this,’ they will ask questions. They will often play devil’s advocate. So they are very clear that they do not make the decisions. But they are nevertheless in the room. Their role is crucial.

Finally, Sarah Brown gives the example of the review of minimum wage rates for young workers, which was not part of the Commission’s remit, as an initiative of the LPC that was then welcomed by the Government. This shows that the remit is not always unilaterally imposed by the state on the LPC.

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<sup>190</sup> From the beginning up to 2010, the Government consistently rejected LPC recommendations that the adult minimum wage rate should apply from the age of 21 instead of 22. In 2015, the Government also rejected the apprentice rate set by the LPC by legislating a much higher increase than the one recommended by the LPC. In particular, the Government raised the apprentice wage from £2.70 to £3.30 (21% increase). The size of the increase was ten-fold compared to the 2.6% rise advised by LPC (to £2.80 per hour). The Government justified the rejection of the LPC recommendation on the basis of its general intention for apprenticeships to ‘deliver a wage that is comparable to other choices for work’. Government press release of 17th March 2015, available at <<https://www.gov.uk/government/news/new-national-minimum-wage-rates-announced>> (last accessed on 30.10.2018).

#### 4.2.2. INCLUSIVENESS

Our evaluative framework construed inclusiveness as referring to *encompassing, equal and representative inclusion*. This section considers the LPC along these sub-dimensions before exploring the nature of the process as a unique combination of ‘evidence-based deliberation’ with some elements of negotiation.

The *encompassing* nature of inclusion is primarily attained by virtue of the LPC’s composition and input. The fact that Commissioners are drawn from employer (including one from small business) and union backgrounds secures the expression of the diverse perspectives of employers and employees. Simon Sapper makes this point by stressing that ‘where there is divergence is in the experience we bring to the table and in the experience of the sectors in which we are involved’. He continues:

Through my other activities I also keep in touch with the stakeholders in my constituency. And in that way, I feel that my contributions are necessarily coloured by my experience. That’s why you have different stakeholders around the table, because evidence can be interpreted in different ways.

As for independents, their inclusion was justified on the grounds of their competence. Sarah Brown says that they play a ‘balancing role’ in bridging academia and policy-making, while Simon Sapper notes that they bring a ‘certain forensic skill in terms of examining and assessing information’, especially when assessing academic studies such as statistically-oriented papers coming before the Commission.

The *encompassing nature of evidence* is another important mechanism for the inclusion of employer and employee perspectives. The LPC generally relies on three sources of evidence: academic (mainly economic) research, both in-house and commissioned, written and oral consultations with stakeholders and ‘on-site’ visits with low-paid workers and employers. The first LPC report in 1997 underlined the inclusive function of these visits:

[They] provided an opportunity to talk with small employers who are less likely to attend formal oral hearings, and with low-paid workers and the unemployed who similarly could have remained unheard. Their stories illuminated and illustrated the formal evidence and increased our belief in the benefits of introducing the National Minimum Wage.<sup>191</sup>

Along similar lines, Sarah Brown describes these visits as ‘humbling experiences’:

We are meeting employees, some of whom are struggling on low wages. We are meeting small business owners who are very stressed because it looks as though for whatever reason their business is in danger. People can get quite emotional when they are providing their evidence to us. So in a sense, it is a reminder throughout the year of the

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<sup>191</sup> Low Pay Commission, *The National Minimum Wage: First Report of the Low Pay Commission* Cm 3976 (June 1998) 29 <http://webarchive.nationalarchives.gov.uk/20070628230000/http://www.dti.gov.uk/files/file37987.pdf> (last accessed on 30.10.2018).

responsibility that we have all got. And because we go on the visits in groups of two or three, we are experiencing all of this together. If you go on one visit, when we come to a Commission meeting, you will be reporting back to the other Commissioners who did not go on that visit. So because you are sharing these experiences throughout the year, I think it is the interaction that is really important.

The *equality of inclusion* is guaranteed by the balanced tripartite structure underpinning the composition, functions and proceedings of the Commission, as well as by the equal rights of all Commissioners. Sarah Brown contrasted the equal rights of all members to the German Minimum Wage Commission model where academics have an advisory role but no voting rights. She also specifies that she does not 'mediate' between the parties as this is a role of the Chair. This is an important comment insofar as it is the role of the neutral party in a tripartite arrangement that determines, to a large extent, the overall nature of the process as akin to collective bargaining or otherwise. Neil Carberry confirms the point by noting that the academic group has its own voice and its starting position may differ from either or both other groups.

Let us now discuss the representativity of inclusion. Unlike in collective bargaining, Commissioners do not have an 'active mandate' from their groups, subject to the discussion, debate and scrutiny of an internal democracy mechanisms and backed by the availability of industrial action. The Code of Conduct for Commissioners explicitly enshrines their independence from their organisations by requiring them to 'act solely in terms of the public interest' ('selflessness').<sup>192</sup> In addition, it reminds them that they are not appointed to 'represent the interests of any organisations by whom [they] are employed or with whom [they] may be associated, but rather, to consider all views and evaluate them in an objective manner, contributing to the Commission's work'.<sup>193</sup> From the point of view of representation, this is one of the key deficits of the LPC as it does not allow the integration of minimum wage setting in a broader context of active struggle and internal democracy. For example, the Bristol Trades Union Council representative said that he did not have any awareness of the details of the LPC and had not received any communication from it. As a result, workers may not feel that the minimum wage-setting outcome is 'owned' or 'controlled' by them in a direct participatory sense. However, the absence of direct representation can also be regarded as a productive condition creating a space for Commissioners to reach agreements unencumbered by the vagaries and *realpolitik* of collective bargaining, potentially associated with the threat of industrial action.

This does not imply a total lack of communication of Commissioners with their respective constituencies. Employer and worker representatives come from and live within their respective communities. Neil Carberry says that after leaving the Confederation of British Industry (CBI) for the LPC there was the

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<sup>192</sup> Code of Conduct for Members of the Low Pay Commission (2014) 3 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/342383/LPC - Code of Conduct for Members of the Low Pay Commission - July 2014.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/342383/LPC_-_Code_of_Conduct_for_Members_of_the_Low_Pay_Commission_-_July_2014.pdf)> (last accessed on 30.10.2018).

<sup>193</sup> Ibid 4.

expectation on me to keep in touch with CBI in terms of understanding their views and bringing that to the table. Although I always interpreted my job as an employer Commissioner as being one of requiring me to be in touch with all the business organisations. So one of the first things I did, for instance, when I was appointed, was to reach out to the other business organisations and take their views on the Commission.

He continues:

I think it is very important that Commissioners hear the widest possible range of views. For an employer Commissioner, I would say that the normal course of the meetings where we have the written evidence and the oral evidence, as well as looking at economic data, is to reach out to sectoral organisations and the affected sectors and to the major business organisations in the country because their views can differ.

Simon Sapper also mentions the presence of communication channels with workers but perceives the absence of mandate as enabling him to assess the evidence without restraint:

I am particularly mindful of low pay issues involving the staff of those organisations, so [I have] a greater awareness. People will approach me because they know of my work for the Low Pay Commission and will want to discuss issues that are of concern to them. But I do not have a conflict of interest in the sense that I am not employed by a trade union, and therefore I do not have the risk of having a mandate from the organisation that employs me, as opposed to what the evidence is telling me in the Low Pay Commission.

The discussion on the inclusive dimension needs to address the nature of the process adopted by the Commission. Is it one of deliberation or negotiation? Deliberation is a term referring to parties' argument, dialogue, persuasion and being 'amenable to changing their judgments, preferences and views during the course of their interactions, which involve persuasion rather than coercion, manipulation, or deception.'<sup>194</sup> In contrast, bargaining (or negotiation) is generally understood as a more strategic form of interaction based on promises and threats<sup>195</sup> within a zero-sum game associated with preference rigidity, secrecy and withholding of information. Paul Magnette thus summarises the difference:

Bargaining is usually defined as a process between a) actors with stable interests who try to maximize their benefits, b) through promises and threats, leading to exchanges of concessions. By contrast, the advocates of deliberation argue that this process takes place

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<sup>194</sup> John Dryzek, *Deliberative Democracy and Beyond* (Oxford University Press 2002) 1.

<sup>195</sup> For the distinction between 'arguing' (as a form of communication about 'valid' statements) and 'bargaining' (as a form of strategic threat-based communication) see Jon Elster, *Explaining Social Behavior. More Nuts and Bolts for the Social Sciences* (Cambridge University Press 2007).

among a) actors who are ready to change their preferences in order to reach ‘common interests’, b) through the exchange of rational arguments and mutual listening.<sup>196</sup>

All Commissioners singled out the ‘evidence-based’ nature of the process as a defining feature thereof. However, slight variations existed in their views regarding the presence of negotiation elements. Before examining them, it is important to remember that minimum wage rates are decided annually by Commissioners after a two-and-a-half day ‘retreat’. Due to the closed nature of this process, Commissioners’ public statements are the principal source available for the characterisation of the actual process.

Sarah Brown’s comments evince the presence of classic deliberative features. Rejecting the description of the process as one of collective bargaining, she describes it as

more of a discussion and a dialogue where we get together and start thinking: ‘Well, should it be this amount? Should it be that amount?’ So I do not personally see it as bargaining or collective bargaining. It is really thinking about what are the consequences of this rate versus that rate.

She also refers to Commissioners’ openness to altering their views, a key deliberative feature:

I think what is important about how the LPC operates is to have respect for each of the Commissioners and to respect each other’s ideas and so on, and have the ability to step back and think about it from different perspectives. And have the ability to say ‘Well, actually no, I’ve heard what you’ve said. I’ve had another thought about the evidence. I’ve changed my mind.’

However, these deliberative elements are complemented by accounts incorporating more visibly the *negotiation* aspect. Referring to the period of 1997-2007, William Brown describes a process with two sides (those with an ‘employer’ and those with an ‘employee’ background) polarised on lower and higher proposals<sup>197</sup> before reaching an agreement. As he says, consensus is the result not of ‘sweet reason’ but ‘hammered out through extended negotiations – albeit carefully orchestrated, well informed and largely good-humoured negotiation’.<sup>198</sup>

Without departing significantly from the deliberative picture, Neil Carberry mentions some forms of strategic action but based on persuasion rather than sanctions:

The first basis to reaching a unanimous decision is understanding where the majority is. It does make persuading members of the other two groups of a position that you feel the evidence can stack up a critical part of what we’re doing. For me as an employer Commissioner, actually, it is quite handy. Because I usually find that you’re trying to

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<sup>196</sup> Paul Magnette, ‘Deliberation or Bargaining?’ in Erik Oddvar Eriksen, John Erik Fossum and Augustin Jose Menendez (eds), *Developing a constitution for Europe* (Routledge 2004) 209.

<sup>197</sup> Brown ‘The Process of Fixing the British National Minimum Wage (n 84).

<sup>198</sup> *Ibid* 441.

persuade the trade unions on justice and fairness and equity arguments, and you persuade the economist on impact arguments.

Similarly, Simon Sapper (who was appointed in 2018 and had not been involved in an annual retreat at the time of the interview) describes the entire process as ‘a negotiation’ but whose end-point must be agreement and consensus. Importantly, however, he goes on to distinguish between his personal views and the need for evidence-based justification:

Even though I am a worker representative, the decisions that we collectively as a nine-person body make are actually based on the evidence. Philosophically, crudely speaking, I would want to raise the National Minimum Wage, and actually raise it to the highest possible point without causing a detriment to employment. That is the brief. You might think that the employers would have the opposite brief and that they would want to restrict the increase. So far, three months in, I have not found that to be the case. I have found that whichever constituency the Commissioners come from, there is a common understanding that we need to base our findings on what the evidence says.

From a justice perspective, the advantage of this procedural focus on dialogue, persuasion, openness and preference fluidity is its potential for power neutralisation<sup>199</sup> and, consequently, more equal inclusion. This is because the deliberative environment can be seen as having the effect of insulating the minimum wage-setting question from the influence of power and fluctuating labour market dynamics, ordinary politics and horse-trading. In Habermasian terms, this setting could be seen as enabling the ‘unforced force of the better argument’<sup>200</sup> to determine the minimum wage question. However, this deliberative position has also been criticised in the context of collective bargaining. Novitz attacks deliberative accounts of collective bargaining as obscuring the ‘conflicts of interests’ between employers and employees and presenting a unitary view of the employment relationship.<sup>201</sup>

The LPC’s evidence-based approach should be considered in the broader context of evidence-based policy-making. The latter was championed by New Labour,<sup>202</sup> which famously declared in its 1997 manifesto that ‘what counts is what works’.<sup>203</sup> However, the merits of this approach are contested. Proponents argue that good evidence is a way to ‘neutralise’ politics as well as ensuring a robust and well-informed debate beyond political ideology and sectional interests and the associated

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<sup>199</sup> Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press 2004) 50; See also Joshua Cohen and Joel Rogers ‘Power and Reason’ in Archon Fung and Eric Olin Wright (eds), *Deepening democracy: Institutional innovations in empowered participatory governance* (Verso 2003).

<sup>200</sup> Jürgen Habermas, *Between Facts and Norms: Contributing to a Discourse Theory of Law and Democracy* (William Rehg (tr), Polity Press 1996) 306.

<sup>201</sup> Tonia Novitz, *International and European Protection of the Right to Strike* (Oxford University Press 2003) 20-22.

<sup>202</sup> See Peter Wells ‘New Labour and evidence based policy making: 1997-2007’ (2007) 1(1) *People, Place & Policy Online* 22.

<sup>203</sup> Labour Party, *Manifesto for 1997 General Elections* (n 76) (emphasis added).

risk of falling back on intuition, ideology or conventional wisdom alone.<sup>204</sup> However, these arguments can attract two main critiques. The first is that the evidence-based approach produces a ‘de-politicising’ and ‘technical’ effect by casting a fundamental question of power and distributive conflict as amenable to a single economic answer to be reached by experts unrestrained by vertical democratic control.<sup>205</sup> It can thus result ‘in a dramatic simplification of the available perceptions, in flawed policy prescriptions and in the neglect of other relevant world views of legitimate stakeholders’.<sup>206</sup> In the interviews, however, Commissioners did not share a view of evidence as monolithic and subject to a ‘single answer’. Instead, they all acknowledged that it can be interpreted in various ways.

Indeed, Neil Carberry argues that one of the greatest misunderstandings of the LPC’s work from people outside the LPC is that its decisions are based on a purely economic analysis. Its evidence-based nature seems to function more as a justificatory requirement filtering out mere value judgments or aspirations. This point is made by Sarah Brown who says that the evidenced-based condition means that disagreements should not be just in the form ‘I think it should be Y’ but ‘I think it should be Y because this batch of evidence supports this’:

And obviously, how you interpret evidence can be different. I am not just saying that you have a batch of numbers. How you interpret it into the labour market can differ across groups. But it’s not just the case of kind of debating or discussing principles, it’s always supporting what you are saying.

Neil Carberry concurs:

You will still see differences of opinion within the mandate. So the business group will tend to be cautious in the outlook for the economy and for business profitability and particularly in the low-paid sectors. The trade union group will tend to be more robust. What is interesting is that [as William Brown, who was a Commissioner in the initial Commission used to say] in tough times, the trade union group acts as a lift to the mood of the employer group and in good times, the employer group tempers the enthusiasm of the trade union group. And because of the relationships we have at the Commission, we talk those starting points out. And one of the most important assets of the visit programme and the meetings we do here is the Commissioners build up personal relationships, which go across the lines of which group we come from.

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<sup>204</sup> Gary Banks, ‘Evidence-based policy-making: What is it? How do we get it?’ (Productivity Commission 2009) 5 <[https://www.pc.gov.au/\\_data/assets/pdf\\_file/0003/85836/cs20090204.pdf](https://www.pc.gov.au/_data/assets/pdf_file/0003/85836/cs20090204.pdf)> (last accessed on 30.10.2018).

<sup>205</sup> The Triennial review concluded that the ‘LPC’s role contains significant technical elements, in the management of economic evidence, and these form a core part of its operation’ *Triennial Review* (n 181) 4.

<sup>206</sup> Andrea Saltelli and Mario Giampietro, ‘What is wrong with evidence based policy, and can it be improved?’ (2017) 91 *Futures* 62.

An alternative line of critique of evidence-based policy points to the danger of *biased* selection of evidence sources.<sup>207</sup> This is because evidence-based policy produces a ‘hierarchy of evidence prioritising statistics, economic modelling and expert knowledge’,<sup>208</sup> favouring quantitative over qualitative methods of information acquisition. The monopoly of positivist evidence over what is seen as useful knowledge<sup>209</sup> is claimed to privilege those with the power to frame<sup>210</sup> and exclude the views of weaker and socially ‘marginalised groups’ with less access to research and less ability to impose their interpretation of research evidence.<sup>211</sup>

The danger of bias, however, is at least partly addressed by procedural features mixing statistical input with story-telling and other narratives, such the tripartite composition of the Commission, the use of qualitative data in written and oral consultations and, very importantly, the ‘on-site’ meetings with low-paid employees and employers. These complement the other evidence, effectively distancing the LPC from a purely technocratic process of mere arithmetic calculation.

#### 4.2.3. EFFECTIVENESS

The LPC is widely seen as an example of successful social partnership in the UK. The transformation of minimum wage issues from a partisan proposition (resisted by the Conservative Party in the 1990s) into a common-sense proposition of mainstream political and public discourse is a testament to the Commission’s success.

Commissioners emphasised personal interaction and diversity as key for its effectiveness. In a comment denoting a form of ‘collective intelligence’, Simon Sapper describes the contribution of LPC to social dialogue as ‘a recognition that by working collaboratively, both sides in industry and independents such as academics will come up with a better solution than just a solo view of one constituency or the other’. Neil Carberry also evoked a ‘shared group analysis’:

Because we have been on the ground hearing the same evidence and then discussing it together, through the year, we are investing and moving from having individual analyses to having a shared group analysis and building personal relationships.

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<sup>207</sup> Justin Parkhurst, *The politics of evidence: from evidence-based policy to the good governance of evidence* (Routledge 2017) 7-8 and Part II.

<sup>208</sup> Greg Marston and Rob Watts, ‘Tampering With the Evidence: A Critical Appraisal of Evidence-Based Policy-Making’ (2003) 3(3) *The Drawing Board: An Australian Review of Public Affairs* 143, 145.

<sup>209</sup> Julian Neylan, ‘Social Policy and the Authority of Evidence’ (2008) 67(1) *Australian Journal of Public Administration* 12, 13.

<sup>210</sup> Sarah Maddison, ‘Evidence and Contestation in the Indigenous Policy Domain: Voice, Ideology and Institutional Inequality’ (2012) 71(3) *Australian Journal of Public Administration* 269.

<sup>211</sup> Alex Stevens, ‘Survival of the Ideas that Fit: An Evolutionary Analogy for the Use of Evidence in Policy’ (2007) 6(1) *Social Policy and Society* 25, 29.

Simon Sapper singles out two features for the LPC success, namely its social partnership structure and its effectiveness as an intervention shaping the wages of millions of workers.

Neil Carberry attributes the LPC's success to incentives that have pulled Commissioners together owing to two factors. The first is that their recommendations have been consistently accepted by the Government, which gives parties a sense that they (rather than politicians) control the process. The second is that there has 'never been a sense that anyone would get a better deal from taking any other route'. For Sarah Brown, the success of the LPC is a result of its clear and focused remit, the commonalities of experience and a sense of responsibility since 'if we get it wrong, people may well lose their jobs'. Timothy Thomas praises the prudent approach of the LPC which has meant that EEF members have remained largely unaffected by minimum wage increases. He observes that 'because the LPC has always been conservative with a small C, it has been careful as to what is recommended and as to the rate of rises over time, it has not greatly affected or at all affected EEF members'.

Since the Government has consistently accepted LPC recommendations (but for two cases),<sup>212</sup> the meaningfulness of the process is not in doubt. The generally positive feedback on LPC recommendations, accepted in public and political process and the success in reaching agreements by consensus are positive factors for its sustainability. Having said that, the introduction of a target-based NLW rate that needs to reach 60% of median earnings in 2020 raises questions over the role of the LPC post-2020, since its existence requires at least a quantum of discretion.

With regard to its distributional impact, the LPC-recommended rates have greatly contributed to tackling excessively low pay.<sup>213</sup> Academic literature has reported a strong minimum wage effect in reducing wage inequalities at the bottom of the pay scale. Butcher et al (2012) thus attribute a significant role to the minimum wage in the decline of wage inequalities between 1998-2010 in the bottom end.<sup>214</sup> Lindley and Machin similarly find that while during Conservative Governments in the 1980s and 1990s wage growth was higher at the top than the bottom, growth assumed a U shape after the introduction of the minimum wage.<sup>215</sup> They conclude that it is 'likely that the NMW acted to prop up wages at the bottom end of the wage distribution and therefore to moderate any underlying trends towards increased lower-tail wage inequality'.<sup>216</sup> There is also evidence that the minimum wage has accelerated the reduction of the gender pay gap.<sup>217</sup>

However, the (nearly) universal scope of the minimum wage should be contrasted with its *limited* effect on low paid workers. The exact size of minimum wage effect depends on its 'spillover

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<sup>212</sup> See n 190 above.

<sup>213</sup> Conor D'Archy, Adam Corlett and Laura Gardiner, *Higher Grounds: Who gains from the National Living Wage* (Resolution Foundation September 2015).

<sup>214</sup> Tim Butcher, Richard Dickens and Alan Manning, 'Minimum Wages and Wage Inequality: Some Theory and an Application to the UK' (Centre for Economic Performance 2012) CEP Discussion Paper No 1177.

<sup>215</sup> Joanne Lindley and Stephen Machin, 'Wage inequality in the Labour years' (2013) 29(1) *Oxford Review of Economic Policy* 165.

<sup>216</sup> *Ibid* 174.

<sup>217</sup> *Archy et al* (n 213) 6.

effect' on workers that are directly or indirectly affected by minimum wage increases. Available data indicates that the NLW rate influences the pay of many more workers than those with wages at or below the rate (in April 2017, direct coverage was estimated to be 6.4%).<sup>218</sup> In 2017, the LPC estimated that the minimum wage affects up to seven million jobs.<sup>219</sup> Research on its initial period detected spillover effects reaching up to the 25<sup>th</sup> percentile.<sup>220</sup> More recent studies taking into account the introduction of the NLW raised this to the 30<sup>th</sup> percentile.<sup>221</sup> This would still mean that around 70% of workers are not affected by the minimum wage.

The redistributive effect of the minimum wage can of course be lessened if a negative effect on employment is found. However there is currently no evidence demonstrating a robust negative relationship between minimum wages and overall employment rates in the UK, with the exception of concerns in relation to some groups, notably part-time employees.<sup>222</sup> Another danger is that the minimum wage may become a norm rather than a floor, especially in the absence of strong collective bargaining institutions. This was mentioned by Simon Crew, who observed that 'when the minimum wage went up quickly a lot of the McDonald's were all then, "Just pay the minimum wage to people"'.

#### 4.2.4. JUSTICE-SENSITIVITY AND TRANSPARENCY

The economic criteria used by the Commission for minimum wage setting (target-based for the NLW and maximising the rate without adverse effect on employment in the other cases) may be regarded as operating at the expense of value, rights-based criteria or ones that take living standards into account. This is due to the Commission's remit, which does not incorporate such dimensions, as well as to the economics background of independents which facilitates the consideration of economic input (over, for instance, human rights or legal perspectives). However, all Commissioners noted that morality and fairness considerations enter the discussions. Sarah Brown and Neil Carberry thus gave the example of the reduced minimum wage for young workers as an example of treatment that should be reviewed on fairness grounds. The whole process can also be regarded as a *practical* application of a principle of justice. As Simon Sapper observed in relation to the positive effects of the minimum wage for millions of workers, 'in terms of being able to make a contribution towards economic justice or

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<sup>218</sup> Low Pay Commission, *National Minimum Wage: Low Pay Commission Report 2017* Cm 9536 (Crown Copyright 2017) 101 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/661195/Low\\_Pay\\_Commission\\_2017\\_report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/661195/Low_Pay_Commission_2017_report.pdf)> (last accessed on 30.10.2018).

<sup>219</sup> Ibid 76.

<sup>220</sup> *Butcher et al* (n 214).

<sup>221</sup> *Low Pay Commission Report 2017* (n 218) 76.

<sup>222</sup> Marco Hafner et al, '*The impact of the National Minimum Wage on employment: a meta-analysis*' (Rand Europe 2016) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/601139/The\\_impact\\_of\\_the\\_NMW\\_on\\_employment\\_-\\_a\\_meta-analysis.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/601139/The_impact_of_the_NMW_on_employment_-_a_meta-analysis.pdf)> (last accessed on 30.10.2018). See also for the US John Schmitt, *Why Does the Minimum Wage Have No Discernible Effect on Employment?* (Center for Economic and Policy Research 2013).

towards lessening the inequitable effects of capitalism, then that's clearly an important and worthwhile thing'.

Finally, LPC recommendations evince strong elements of transparency as their evidence base is reflected in the annual report. The report offers carefully formulated reasons, exposed in the broader context of academic debates and stakeholder views. While the deliberations themselves are not public, the accessibility of its writing enables scrutiny by non-specialist workers and employers. Simon Sapper identifies as one of the Commission's impressive features that 'you always know why certain conclusions have been drawn'.

### **4.3. COLLECTIVE BARGAINING**

Collective bargaining constitutes the classic form of worker collective participation and 'joint rule-making'<sup>223</sup> in wage setting by collective negotiations between an employer or a group of employers and employees. It embodies the idea 'of employees as agents or participants, and not merely recipients of the law's largesse'.<sup>224</sup> While the effect of collective agreements is the outcome of a complex and variegated interaction between social and legal norms, collective agreements can either set standards through a 'common rule'<sup>225</sup> or fix minimum wages at national, sectoral or firm-level to be more favourably regulated by individual agreements (principle of favourability). UK law defines collective bargaining as any negotiations between employers (or their organisations) and employee representatives, connected with employment matters such as terms and conditions of employment, work allocation and discipline, union membership and negotiation and consultation machineries.<sup>226</sup> Within British normative discourse, collective bargaining has historically been linked to the pluralist goal of controlling absolute state power through intermediate organisations.<sup>227</sup>

#### **4.3.1. AUTONOMY**

Unlike with the LPC, in collective bargaining parties enjoy (at least in theory) broader autonomy in relation to the process, content and scope of negotiations, subject to legal permission. As discussed earlier, however, autonomy is not synonymous with state abstention.

One form of state intervention is the law itself. This point came up in all interviews with employee representatives, who identified the general hostility of UK law as a major hindrance for collective bargaining especially at sectoral level. Diana Holland raised the circular problem that while

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<sup>223</sup> Allan Flanders, *Management and Unions* (Faber and Faber 1970) 220-221.

<sup>224</sup> Brian Langille, 'Labour Law's Theory of Justice' in *The Idea of Labour Law* (n 163) 110.

<sup>225</sup> Sidney Webb and Beatrice Webb, *Industrial Democracy* (Longmans 1902) Part II. The other mechanisms identified by them were 'legal enactment' and 'mutual insurance' of the members.

<sup>226</sup> Section 178 of Trade Unions and Labour Relations Consolidation Act 1992.

<sup>227</sup> Bogg, *The Democratic Aspects of Trade Union Recognition* (n 25) Chapter 1 .

employers say that they are open to recognising the union if it persuades enough members,<sup>228</sup> they also

make it very difficult, if not impossible, to even speak to workers or to have access in a proper, open and fair environment. Or there are others who just blatantly threaten you with legal attacks if you raise anything, if you try to talk to the workers either on the employer's premises or outside and they will not let you in.

This point illustrates both the chilling effect of the restrictive legal framework and the catch-22 situation arising from the fact that the law does not stipulate any right of union access to a workplace until a request for statutory union recognition is made but also requires the union to demonstrate a 10% membership in the unit for making such a request. Bill MacKeith also criticised the restrictive law on industrial action:

Anti-union laws passed by the Government make it more difficult for trade unions to act. It is said by many people, including the ILO, that Britain has the worst trade union law in Europe, or certainly in Western Europe. And it is a huge influence on what happens in the workplace. It is colossal because union membership has halved over the decades. The law stops people taking strike action. Unions protect their money by being very conservative, sometimes, about supporting strike action, because the law exposes the official trade union to having their money sequestered if they break the law. It is absolutely appalling.

Some employee representatives also highlighted the negative links between precarious arrangements and unionisation due to workers' (perceived) lower attachment to the job. Secondary industrial action was also mentioned as a disabling factor of mobilisation at sectoral level. This absence is significant since secondary and solidarity industrial action can be seen as a form of self-regulation of low-wage competition that offers an alternative to the minimum wage by 'obstructing employers who pay less than union wages'.<sup>229</sup>

#### 4.3.2. INCLUSIVENESS

Does collective bargaining promote encompassing, representative and equal inclusion of the parties? In theory, it offers a more representative form of active inclusion and participation. This is because negotiators are nominated by, and bargaining on behalf of, their respective organisations according to an active mandate. In practice, of course, members' influence in each organisation varies, but in trade unions it is usual for collective bargaining proposals or final offers to be put to union members for discussion or at least approval. Even in the absence of these mechanisms, members typically have the

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<sup>228</sup> Under the current statutory union regime, the union needs to have at least 10% of membership in the unit to make a request for recognition. It then needs to secure a majority in the unit either by membership or by ballot.

<sup>229</sup> Brett Meyer, 'Learning to Love the Government: Trade Unions and Late Adoption of the Minimum Wage' (2016) 68(3) *World Politics* 538, 546.

power to hold accountable and remove those in charge when concerned by the process itself or its outcome.

Simon Crew viewed direct participation as a chief advantage of collective bargaining compared to a tripartite sectoral commission, as it is ideal for unions

to get workers more knowledgeable about how they can change things, about how unions work and, hopefully, they would feel ownership of it because they would elect their reps. They would elect the senior reps who would be on the bargaining teams.

Moving to inclusiveness, the bipartite nature of the process is an enabling factor for *encompassing* the interests of both employers and employees. However, two important forms of exclusion may arise: *exclusion of scope* for workers not covered by its outcome and *exclusion of representation* for some workers, notably minorities.

If there are no mechanisms in place to extend collective agreements, the process is liable to produce an ‘insider/outsider’ effect unless coverage is achieved on the basis of union strength, which is a rare occurrence.<sup>230</sup> A system based on firm-level bargaining typically grants more opportunities for fragmentation than sectoral negotiations while also allowing employers to use forms of organisational fragmentation (franchising, outsourcing, establishing subsidiaries) in order to bypass collective agreements or divide bargaining units.<sup>231</sup> In general, as Bosch and Lehndorff explain:

Decentralised bargaining at company level may even support the growth of dualistic labour markets, since negotiations only take place in big companies. National or industry-wide collective agreements are significantly more inclusive than company agreements, since the collectively agreed standards are extended to employees in companies with weak bargaining power, such as small firms in particular.<sup>232</sup>

The second type of exclusion, that of actual representation of workers, relates to whether there may be workers whose interests are not represented by the union. For example, women’s views may not find expression in the union as they are more likely to be concentrated in part-time or other atypical arrangements and also because of their perceived lower attachment to the labour market. While this was a legitimate concern for British unions, there is evidence that the latter are increasingly aware of

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<sup>230</sup> On this see Thorsten Schulten, Line Eldring and Reinhard Naumann, ‘The role of extension for the strength and stability of collective bargaining in Europe’ in *Wage bargaining* (n 94) 366-367.

<sup>231</sup> One of such examples is franchising. See *Koukiadaki and Katsaroumpas* (n 170) 81-97.

<sup>232</sup> Gerhard Bosch and Steffen Lehndorff ‘Autonomous bargaining in the shadow of the law: From an enabling towards a disabling state?’ in *Making work more equal* (n 157) 36-37.

the need to represent vulnerable workers<sup>233</sup> and have taken various measures in this respect, including the provision of organising and learning structures for ethnic minority workers.<sup>234</sup>

Rosa Crawford offered many examples of internal democracy mechanisms attentive to the issue of minority representation. She discussed the existence of minority committees (women, Black, Asian and Minority Ethnic, disabled, LGBT) providing a structured form of representation and able to submit motions to the general assembly. But she also highlighted the barrier of the lower attachment of people on very insecure contracts, 'who do not often feel like the union is going to be there in the long term, because they are not going to be in employment for the long term'. Diana Holland explained that UNITE had representation quotas for various minority groups in the conference (such as young women and migrants) and that the move towards community membership meant that members now included not only workers but also the unemployed, carers and disabled people who for various reasons were not in paid work. This opening has allowed the union to campaign on benefit issues. On the employer side, Timothy Thomas discussed how EEF communicates with its members through constant surveys leading to industry reports but also through meetings for testing ideas. With a few exceptions, he states that decisions are reached by consensus.

But is inclusion *equal* between parties? In order to answer this question, the nature of the process needs to be examined. Collective bargaining is usually cast in power-sensitive terms as a strategic and pragmatic game of power and price.<sup>235</sup> While this picture overlooks the importance of dialogue, compromise and deliberation in collective bargaining, it correctly points to the critical availability of sanctions for both parties. Unlike the LPC, workers have at their disposal the tool of industrial action (and the threat thereof) for securing higher wages. The ability to strike is essential for effective collective bargaining – without it workers have no real means to exert pressure on employers.

The other side of the coin is that workers may be more vulnerable to labour market fluctuations and the outcome will reflect the influence of power and economic circumstances. As Guttman and Thompson observe, 'to the extent that the political struggles take place on the basis of deliberation rather than power, they are more evenly matched [and] [b]ecause moral appeals are the weapon of the weak, a deliberative playing field is more nearly level'.<sup>236</sup> While workers in a collective

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<sup>233</sup> Trade Union Congress Commission on Vulnerable Employment, *Hard Work: Hidden Lives* (TUC 2007) <[http://www.vulnerableworkers.org.uk/files/CoVE\\_full\\_report.pdf](http://www.vulnerableworkers.org.uk/files/CoVE_full_report.pdf)> (last accessed on 30.10.2018). See also Chris Wright, 'The response of unions to the rise of precarious work in Britain' (2013) 24(3) *Economic and Labour Relations Review* 279.

<sup>234</sup> See Heather Connolly, Stefania Marino and Miguel Martínez Lucio, 'Trade union renewal and the challenges of representation: Strategies towards migrant and ethnic minority workers in the Netherlands, Spain and the United Kingdom' (2014) 20(1) *European Journal of Industrial Relations* 5, 14-16; see also Heather Connolly, Miguel Martínez Lucio and Stefania Marino, 'Trade Unions and Migration in the UK: Equality and Migrant Worker Engagement without Collective Rights' (2012) <<http://www.research.mbs.ac.uk/ewerc/Portals/0/Documents/LeverhulmeUK.pdf>> (last accessed on 30.10.2018).

<sup>235</sup> Jack Barbash, 'Price and Power in Collective Bargaining' (1977) 11(4) *Journal of Economic Issues* 847.

<sup>236</sup> *Guttman and Thompson* (n 199) 50.

bargaining process may feel part of a 'struggle', this also creates the possibility of defeat and acute alienation and frustration when unfavourable circumstances make their tools for exerting power less effective (e.g. due to high unemployment rates, economic crises, economic restructuring and/or business relocation).

Seen from a pragmatic perspective, the equal status of parties can diverge significantly between centralised and decentralised structures. Sectoral collective bargaining has the advantage of *aggregating* the bargaining power of all workers for the benefit of the most vulnerable and preventing a race-to-the-bottom competition between different types of workers. They also promote solidarity between workers, which can reduce the scope for wage-driven competitive advantages. By contrast, firm-level bargaining (unless perfectly coordinated) naturally produces fragmentation and leaves more scope for employer abuse such as the transformation of business structures aimed at dividing bargaining units.

All employee representatives viewed sectoral agreements as more effective than company-level ones. Referring to the attachment of union recognition to the workplace in UK law, Rosa Crawford argued that

what we need to see is this form of sectoral negotiation. Because at the moment in the majority of the economy you have recognition agreements between unions and employers just workplace by workplace, which of course is a lot weaker and allows for different employers to just compete with each other in terms of worsening conditions. And it makes unions very weak. Where you do have those sector-wide agreements you have much stronger power of the union. In education, in health, you can still take industrial action, which obviously we're not going to take easily, particularly with this current legislation. But when you do take it, you have to think about where you are going to be effective, *and where you have sectoral agreements you really are effective* (emphasis added).

This point was made also by Bill MacKeith, who described the key advantage of sectoral agreements as follows:

The whole membership, all workers in the sector or the industry benefit from the leading role played by the strongest areas. They are an attempt to outlaw rogue employers. With the national agreements being smashed up you get more rogue employers, more low wages, bad insecure employment, etc, etc.

Simon Crew echoed them:

I support sectoral bargaining which will help drive standards up. There are a lot of redundancies going on at the moment and it is quite alarming when you think some of the people looking for jobs in the finance sector and there are 18,000-19,000 jobs being advertised. So, I think with sectoral bargaining that would hopefully go up and bring standards up rather than bring them down.

When accompanied by extension, sectoral agreements can reduce incentives for the ‘undercutting [of] reasonable employment conditions’<sup>237</sup> and enhance solidarity between workers by preventing competition undermining wages through different wage structures.<sup>238</sup> This is important for the effectiveness of the mechanisms, as ‘collective bargaining and representational support will not work in the long term if some workers have substantially less to gain from the process than others’.<sup>239</sup>

While recognising the major advantage of sectoral agreements, Bill MacKeith also raises the concern that centralised (i.e. national or sectoral) negotiations ‘are conducted at a higher level in the union structure and less close to the individual members, so that the group of workers in a particular workplace has less direct impact on the negotiations although they may have a vote’.

Indeed, sectoral (and *a fortiori* national) negotiations may raise issues around the representative nature of inclusion, to the extent that they provide less opportunities for workers to exert direct influence on the outcome. In short, there seems to be a trade-off between the inclusiveness and uniformity achieved by a higher level of bargaining and the possibility of involvement in the process. By contrast, firm-level negotiations (assuming they are genuine) lessen the distance between the worker and the decision unit, thus facilitating in principle a more direct involvement. In his historical account of collective bargaining in the UK, Howell makes the argument that industry-level bargaining ‘left managerial prerogatives largely alone, and permitted employers to limit union activity and influence inside the firm’.<sup>240</sup>

Sectoral agreements divided employer and employee representatives. While acknowledging their benefits, Timothy Thomas also expressed his scepticism by referring to their constraining effect on business flexibility:

But what if that common platform [i.e sectoral agreement] does not suit my company? I am stuck with it. I cannot do anything to change it. There are pros and cons. We would oppose the introduction of [sectoral] collective bargaining for the simple reason that it does not give you enough company-level flexibility.

Neil Carberry also argued that a flexible labour market creates employment and an inflexible labour market creates unemployment. He was thus unconvinced that ‘enhancing collective bargaining would enhance wage growth in the UK’.

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<sup>237</sup> Olivier Blanchard, Florence Jaumotte and Prakash Loungani, *Labor Market Policies and IMF Advice in Advanced Economies during the Great Recession* (IMF Staff Discussion Note 2013) 12 <<https://www.imf.org/external/pubs/ft/sdn/2013/sdn1302.pdf>> (last accessed on 30.10.2018).

<sup>238</sup> See David Metcalf, Kirstine Hansen and Andy Charlwood, ‘Unions and the Sword of Justice: Unions and Pay Systems, Pay Inequality, Pay Discrimination and Low Pay’ (2001) 176(1) *National Institute Economic Review* 61, 63-64.

<sup>239</sup> Lydia Hayes and Tonia Novitz, *Trade Unions and Economic Equality* (Institute of Employment Rights and Class 2014) 15.

<sup>240</sup> Howell (n 13) 56.

### 4.3.3. EFFECTIVENESS

In any legal system that recognises (either automatically or by contractual incorporation as in the UK) the effect of collective agreements, these are meaningful in the sense identified above. Unlike the statutory minimum wage scheme where the LPC operates in the shadow of state regulation, the sustainability of collective bargaining arrangements is more precarious as it operates in the shadow of individual regulation. Collective bargaining does not guarantee a collective agreement. Its bipartite nature also increases the possibility of deadlock and eventual failure to reach an agreement, with the consequence that employees are exposed to the (usually) unfavourable individual bargaining.

Compared to the statutory minimum wage, collective agreements have a major advantage. Their ability to set broader terms and conditions than wages allows more room for positive trade-offs between wages and other terms and conditions (e.g. working time, family-friendly measures). This enables a broader multi-dimensional leveraging of power by both workers and employers. It can also allow for various interactions between wages and non-wage conditions leading to a positive-sum outcome for both parties, as for instance when higher wages are accompanied by productivity-increasing measures or, conversely, a lack of wage increase is balanced by more favourable working time arrangements.

Sectoral bargaining is particularly prone to collapse without state intervention providing forms of extension to non-covered parties. The availability of extension radically alters the structure of incentives as to membership of sectoral associations. Whereas employers derive a positive benefit from non-membership in a system without extension since they are unrestrained by the outcome of sectoral negotiations, in a system with extension they are incentivised to be members of their association in order to have a voice in a binding outcome. This is the reason why Schulten et al identify two important factors underpinning the spread and stability of multi-employer bargaining institutions: strong encompassing institutions to guarantee coverage and the 'existence of supporting policies and regulations on the part of the state'.<sup>241</sup>

Beside the immediate effect of rebalancing power between employers and employees, the distributive impact of collective agreements is highly varied and context-specific. Their effect depends on a range of institutional and non-institutional factors, such as the legal framework distributing rights and powers, the complementarity of institutions, the labour market (unemployment rates, inflation, growth rates, etc.), strength of actors, mobilisation and enforcement. Multiple pieces of research demonstrate a link between falling bargaining coverage and declining wage share and wage equality.<sup>242</sup> Higher bargaining coverage has been found to reduce the incidence of low pay and compress wage

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<sup>241</sup> Schulten, Eldring and Naumann (n 230) 362.

<sup>242</sup> OECD, 'Labour Losing to Capital: What Explains the Declining Labour Share?' in *Employment Outlook 2012* (OECD 2012). See also for the UK, Joe Dromey, *Power to the People: How stronger unions can deliver economic justice* (IPPR Commission on Economic Justice 2018) <<https://www.ippr.org/files/2018-06/cej-trade-unions-may18-.pdf>> (last accessed on 30.10.2018); Susan Hayter and Bradley Weinberg 'Mind the gap: collective bargaining and wage inequality' in Susan Hayter (ed), *The Role of Collective Bargaining in the Global Economy: Negotiating for Social Justice* (Edward Elgar and ILO 2011).

structures by gender, race and occupation,<sup>243</sup> a finding borne out by the fact that low-pay industries have lower union density in the UK.<sup>244</sup> Research has also found that collective agreements set minimum wages at higher rates than statutes.<sup>245</sup> Based on a comparative analysis of 18 countries between 2007–2009, Garnero et al conclude that ‘the combination of sectoral minimum wages and high coverage of collective bargaining can, at least for earning inequalities, be regarded as a functional equivalent to a statutory minimum wage at national level’.<sup>246</sup>

#### 4.3.4. JUSTICE-SENSITIVITY AND TRANSPARENCY

Collective bargaining is a procedural device which does not need to be justice-sensitive in its internal organising principles. Although Flanders is right to see trade unions as both ‘swords of justice’ and ‘vested interest’,<sup>247</sup> the thematisation of justice in the collective bargaining process is far from guaranteed. But equally, collective bargaining is also a practical realisation of the principle of justice in the form of representation and voice.

Transparency is not a requirement for collective bargaining arrangements. Unions may publish their positions or address them in the course of internal democratic proceedings of accountability and justification to its members. Yet when agreements are at sectoral or national level negotiators may have to articulate their justification publicly because of their broader macro-economic effects. In his deliberative defence of centralised bargaining, Bogg argues that they can ‘promote more encompassing behaviour by producer groups because these groups are forced to argue in public forums’.<sup>248</sup>

#### 4.4. THE INTERPLAY OF MINIMUM WAGES AND COLLECTIVE AGREEMENTS: POSITIVE AND NEGATIVE COMPLEMENTARITIES

The previous discussion offered a separate exposition of each regulatory instrument. This section provides an integrated perspective by looking at the *interplay* between different forms of social dialogue. Alongside the minimum wage, there have been multiple calls in the UK for increasing the density of collective bargaining institutions (by using an active state for mainstreaming participatory institutions at all economic levels) and promoting collective bargaining (especially by strengthening

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<sup>243</sup> Metcalf et al (n 238).

<sup>244</sup> Dromey (n 242) 16.

<sup>245</sup> Tito Boeri, ‘Setting the minimum wage’ (2012) 19(3) Labour Economics 19(3) 281.

<sup>246</sup> Andrea Garnero, Stephan Kampelmann and François Rycx, ‘Minimum Wage systems and earnings inequalities: Does institutional diversity matter?’ (2015) 21(2) European Journal of Industrial Relations 115, 127.

<sup>247</sup> Flanders (n 223) 15.

<sup>248</sup> Bogg, *The Democratic Aspects of Trade Union Recognition* (n 25) 286.

sectoral agreements for rebalancing power).<sup>249</sup> Critics of this position draw attention to the value of the minimum wage as a single ‘external non-market factor’ with the rest decided ‘voluntarily’ by the parties. The abolition of the AWB, partly justified by the Government on the grounds that a statutory minimum wage was already in place, is an example of this view.

The integrated approach builds on the positive complementarities between collective bargaining and the statutory minimum wage. Before looking at the complementarities, a word of caution is necessary. In a seminar article, Grimshaw et al highlighted that complementarities between minimum wages and collective bargaining are shaped by multiple factors including the relative levels of minimum wages and collectively bargained base rates, the role of social dialogue in minimum wage policy, competing government policy goals and compliance with wage-setting rules.<sup>250</sup>

With this caveat, three positive complementarities can be identified: (i) distributive equality (ii) increased union power in collective bargaining and (iii) enforcement.

The presence of strong collective agreements determines whether the minimum wage acts as a ‘pull’ or a ‘push’ factor for wages beyond the low end of the distribution. Grimshaw et al found this complementarity lacking in the UK system, described as having an ‘isolated’ minimum wage policy.<sup>251</sup> While the UK minimum wage is rising every year both in absolute terms and relative to the median wage, Karamessini and Grimshaw identify a ‘passive disconnect with collective bargaining’<sup>252</sup> as these rises are not accompanied by policies designed to prop up collective bargaining or to establish stronger ‘participatory standards’ in the UK labour market.<sup>253</sup> Germany’s minimum wage, which is pegged to increases in collective agreements,<sup>254</sup> provides a recent example of linkage between these two levels of regulation.

There is evidence that the combination of statutory minima *and* strong bargaining institutions would drive up the relative level of minimum wages.<sup>255</sup> This is because ‘wages tend to be more compressed and low wages are generally higher than in labour markets with weak labour market

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<sup>249</sup> Özlem Onaran, *State intervention for wage-led development* (Centre for Labour and Social Studies 2014); Ewing et al (eds), *A Manifesto for Labour Law* (n 18); IPPR, *Prosperity and Justice* (n 165).

<sup>250</sup> Damian Grimshaw, Gerhard Bosch and Jill Rubery ‘Minimum wages and collective bargaining: What types of pay bargaining can foster positive pay equity outcomes’ (2014) 52(3) *British Journal of Industrial Relations* 470, 488.

<sup>251</sup> *Ibid* 479; see also Gerhard Bosch, ‘Shrinking collective bargaining coverage, increasing income inequality: A comparison of five EU countries’ (2015) 154(1) *International Labour Review* 57, 62-63.

<sup>252</sup> *Karamessini and Grimshaw* (n 157) 344.

<sup>253</sup> *Ibid*.

<sup>254</sup> This ‘quasi-indexation’ is subject to a 2/3 override by the Minimum Wage Commission consisting entirely of employer and union representatives. See Gerhard Bosch, ‘The making of the German minimum wage: A case study of institutional change’ (2018) 49(1) *Industrial Relations Journal* 19.

<sup>255</sup> European Commission, *Industrial Relations in Europe: 2008* (Office for Official Publications of the European Communities 2009) Chapter 3 reviewing the literature.

institutions'. Strong social partners can also 'push for higher minimum wage in order to avoid low wage competition which might undermine centralised and all-embracing collective agreements'.<sup>256</sup>

Grimshaw et al find that where social dialogue mechanisms are not effectively incorporated in minimum wage setting or where unions have a low presence in low-wage sectors, minimum wages could displace collective agreements, thus exposing workers 'to any reversal of a policy of improving minimum wages in line with or faster than other rates'.<sup>257</sup> They also associate pay equity with the ability of high minimum wage rises to translate into 'strong ripple effects', which depend on unions' ability to maintain positive wage differentials at different levels through collective bargaining.<sup>258</sup>

The minimum wage can also raise the 'springboard' for unions in collective negotiations. This point is made by Levin-Waldman: 'In that the bargaining process may entail making concessions, the minimum wage by creating a wage floor effectively limits the concessions workers have to make in the bargaining process, thereby offering them a slightly greater measure of bargaining power'.<sup>259</sup> This effect is expected to be more pronounced where the principle of favourability applies, so that each regulation can only *ameliorate* terms and conditions set by other levels.

The third complementarity concerns enforcement. Brown et al find that collective bargaining appears to facilitate 'both access to and improvement on statutory rights'.<sup>260</sup> Dickens similarly argues that 'social regulation through collective bargaining can make legal regulation based on statutory individual rights less necessary, and/or can assist in making it more effective'.<sup>261</sup> Schaffer and Gottschall confirm that labour market structures and regulations, such as collective bargaining institutions and minimum wage regulations, tend to offer an enabling condition for gender pay equity but this varies in value depending on whether a given sector is male-dominated.<sup>262</sup>

However, various accounts also expose negative complementarities. The first relates to the traditional union fear that statutory minimum wages will reduce incentives for collective bargaining and unionisation as it restricts the union wage premium. Aghion et al also advance that statutory minimum wages may produce a 'crowding out effect' of participatory wage mechanisms in that they

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<sup>256</sup> Ibid 83.

<sup>257</sup> Damian Grimshaw, Jill Rubery and Gerhard Bosch, 'The Pay Equity Effects of Minimum Wages: A Comparative Industrial Relations Approach' in Deirdre McCann et al (eds), *Creative Labour Regulation* (Palgrave MacMillan 2014) 149.

<sup>258</sup> Ibid.

<sup>259</sup> Oren Levin-Waldman, 'The Minimum Wage and the Cause of Democracy' (2003) 61(4) *Review of Social Economy* 487, 498.

<sup>260</sup> *Brown et al* (n 15) 627.

<sup>261</sup> Linda Dickens, 'Making employment rights effective' (2012) 21 *IRRU Briefing* 1,3; see also *TUC* (n 233).

<sup>262</sup> Andrea Schäfer and Karin Gottschall, 'From wage regulation to wage gap: How wage-setting institutions and structures shape the gender wage gap across three industries in 24 European countries and Germany' (2015) 39(2) *Cambridge Journal of Economics* 467. On collective bargaining coverage and pay gap, see also European Commission, *Industrial Relations in Europe: 2008* (n 255) Chapter 3.

give workers less reason to join and provide less opportunities for interaction.<sup>263</sup> Secondly, Grimshaw et al stress that the substitution of legal interventions for joint regulation made workers ‘peculiarly vulnerable to government reforms and reliant on employer goodwill to upgrade employment conditions’.<sup>264</sup> Overall Bosch argues that collective bargaining is more effective than minimum wages for equality, but both require state intervention with participative standards to prevent the erosion of industrial relations institutions.<sup>265</sup>

The final point concerns complementarities between collective agreements at various levels. This is known as the degree of coordination between levels. Coordination can be structured by law, including through the ‘favourability principle’ providing for the application of the more worker-favourable provision in cases of concurrent collective agreements, or achieved autonomously by the parties. In their excellent study on the business case for social dialogue, Grimshaw et al find that effective social dialogue at sectoral level needs

clear mechanisms and processes for articulation between firm and sector levels to provide a suitable balance in negotiations between meso- and micro-level flexibility on the one hand and standardisation on the other. Many studies support the contention that it is not so much the level of bargaining that matters but effective coordination between and among levels, in mitigating the effects of adverse economic shocks and improving the capacity for business adaptation to changes in market conditions.<sup>266</sup>

According to Rubery and Grimshaw, coordinated bargaining systems may do more to reduce gender wage penalties than minimum wages, largely due to their better capacity to reduce overall inequality as a result of their broader scope.<sup>267</sup>

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<sup>263</sup> Philippe Aghion, Yann Algan and Pierre Cahuc, ‘Civil Society and the State: The Interplay between cooperation and minimum wage regulation’ (2011) 9(1) *Journal of the European Economic Association* 3.

<sup>264</sup> Grimshaw, D., Johnson, M., Keizer, A. and Rubery, J., *Reducing Precarious Work through Social Dialogue: An analysis of ‘protective gaps’ facing people at work in the UK* (European Work and Employment Research Centre 2015) 24.

<sup>265</sup> *Bosch* (n 254).

<sup>266</sup> Damian Grimshaw, Aristeia Koukiadaki and Isabel Tavora, ‘Social Dialogue and Economic Performance: What matters for business- A Review’ (International Labour Office 2017) 57 <[https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_571914.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_571914.pdf)> (last accessed on 30.10.2018).

<sup>267</sup> Jill Rubery and Damian Grimshaw, ‘Gender and the Minimum Wage’ in Sangheon Lee and Deirdre McCann (eds), *Regulating for Decent Work* (Palgrave MacMillan and ILO 2011) 243.

## 5. CONCLUSION

This report has offered a historical and evaluative account of social dialogue in wage setting in the UK, focusing on collective bargaining and the LPC. It finds that post-crisis developments have reinforced and deepened pre-crisis trends associated with the decentralisation and de-collectivisation of employment relations. This effect is manifest in the continuing decline of collective bargaining coverage and unionisation and the abolition of the last Wages Councils (AWB) at national level in 2013. These developments are complemented by legal reforms placing additional constraints on unions' already heavily circumscribed ability to act as effective collective bargaining and political actors. In the opposite direction, the minimum wage has been strengthened in terms of legitimacy and value, with the LPC playing a central role.

The report then offered an assessment of two social dialogue mechanisms (LPC and collective bargaining) based on a suggested analytical framework comprising five dimensions: autonomy, inclusiveness, effectiveness, justice-sensitivity and transparency. Concerning autonomy, the LPC combines independence with some forms of indirect state influence, most notably through the determination of its remit (and by extension the substantive factors to be taken into account in minimum wage rate determination). In relation to inclusiveness, the *encompassing* nature of the process is facilitated by the LPC's tripartite composition and its inclusive evidence base, drawn from research, oral and written submissions from different stakeholders and 'on-site visits' where Commissioners meet low-paid workers and employers. However, the process evinces deficits in terms of *representativity*, at least in the classic sense of the term. This is because the LPC differs from 'mandate-based' collective bargaining where negotiators act on behalf of their organisations and their actions and mandate are subject to internal democratic mechanisms of scrutiny, debate and accountability. The analysis highlights the formally equal status of all parties within the Commission and its evidence-based process as a unique mix of 'deliberation' (in the sense of collaboration, preference flexibility and openness) and 'negotiation' relying on persuasion rather than threats of sanctions. While the report reviews two criticisms of evidence-based approaches (de-politicisation and the biased nature of evidence sources), it suggests that the LPC offers ways to address them. The LPC process is *effective* in that it is meaningful, sustained by the positive feedback on its outcomes and has a positive record on reducing extremely low-paid work. The evidence-based nature of the process means that it is not explicitly justice-sensitive as it is more dominated by economic considerations. However, the whole exercise can itself be seen as the practical realisation of a justice imperative. Finally, the transparency of the process is secured by the accessibility and well-reasoned nature of the Commission's annual reports.

By contrast, collective bargaining is a more autonomous form of social dialogue, though its precise effect is highly conditioned by state rules, economic conditions and the legal framework. It offers an encompassing 'mandate-based' form of inclusion of employers and employees through negotiators acting on behalf of their respective organisations. However, the analysis highlights two forms of *potential* exclusions associated with collective bargaining: (i) exclusion of some workers from the scope of regulation and (ii) exclusion in the actual representation of non-union members. In collective bargaining, the *equality* of inclusion between parties is more power-sensitive than in the

LPC, as it is contingent on labour market circumstances but also underpinned by the possibility of industrial action. As a result, collective bargaining may give the appearance of a 'struggle' that is 'owned' by the workers to a greater extent than the LPC. The report draws attention to the different effects of centralised, mainly sectoral, and firm-level negotiations. Sectoral negotiations tend to strengthen the position of workers by aggregating power among all employers and workers. If they constitute the only level of social dialogue, however, they may come at the cost of workers' direct participation. While the collective bargaining process leads to a more equal distribution by potentially affecting more workers than the statutory minimum wage, its sustainability is more precarious because of the higher possibility of deadlock with detrimental consequences for workers eventually exposed to individual negotiations. Justice-sensitivity and transparency are not required for collective agreements but the process itself, like the LPC, may be considered as a practical realisation of justice. Transparency may be achieved by internal democracy mechanisms or, in the case of sectoral agreements, because of the wide-ranging effects of the regulation for the national economy. The final section of this part considers the interplay between these two social regulatory mechanisms by identifying positive and negative complementarities between minimum wages and collective bargaining and between various levels of collective bargaining.

Overall the LPC has provided a valuable, well-functioning and effective form of social dialogue, constituting itself as a notable exception rather than the rule in the broader UK landscape of de-collectivisation. Due to its restricted scope and remit however it cannot single-handedly address the weaknesses produced by the scarcity of collective bargaining institutions (mainly collective bargaining). What is therefore needed is an integrated strategy for building on complementarities between minimum wages and collective agreements. Such a holistic approach would inject ideas of equality, democracy, justice and power equilibrium back into the sterile and one-sided economic discourse currently dominated by the goals of competitiveness and flexibility.

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