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The rights of workers

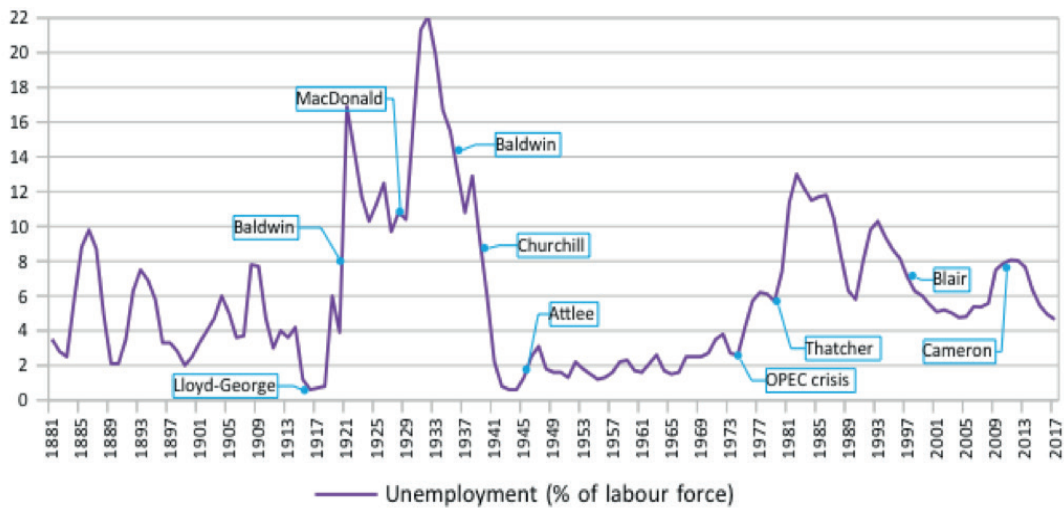
*During the 20th century, developed societies increasingly accepted that democracy could not stop at politics, and had to extend to aspects of the economy as well. Democracy in the economy began – and continues – with workers' rights. **Ewan McGaughey** and the **Democratic Audit team** explore how far they have been handled democratically and effectively in the UK.*

What does democracy require for the protection of workers' rights?

- ◆ A minimum floor of workplace rights, that nobody falls through. It should ensure that everyone has the basic income, time off work, and dignity that they need to pursue the true values of human life: nature, family, participation in community life, science, philosophy, art, music, sport and personal development.
- ◆ Fair pay through a voice at work, above the minimum floor, by collective bargaining through free trade unions and votes in workplace governance, to guarantee productivity, innovation and prosperity.
- ◆ Equality and social inclusion, in all work relations, based on the content of one's character, skills, qualifications and conduct. There must be no discrimination because of unjustified factors: race, gender, orientation, age, belief, union membership, agency, part-time, fixed-term or any other irrelevant status.
- ◆ Job security. This means stopping conflicted or irrational employer dismissals, so that: (i) workers get reasonable notice of termination; (ii) dismissal can take place only on fair terms, judged by one's peers and the law of the land; and (iii) severance pay exists to halt socially unjustified redundancy.
- ◆ Full employment (around 2%) would be central to every government's fiscal, monetary and trade policy. Figure 1 shows how far this was achieved in the UK between 1945 and 2017.

In every democratic society the labour movement has always demanded rights that transcend the market. People at work lack bargaining power. As Adam Smith told us, **employers can ‘hold out’** longer in any negotiation because wealth is unequally distributed. In a democratic society, the goal of labour law has always been to create and protect **universal rights** that are not up for sale.

Figure 1: UK unemployment 1881–2017, with major government changes



Sources: **Denman and McDonald (Jan 1996)**, and ONS, **MGSX (1995–2017)**.

Recent developments

Since a Conservative-led government took power in 2010, a long series of changes to labour law have taken place. The combined effect is that by 2014 British people had seen the **longest sustained wage decrease** in **modern British history**, unseen since the **eras of revolution and plague**. Statistical calculations of this decline show average changes: for the people below the average, the picture is worse. Since then (up to spring 2018) real wages **stagnated**. In democratic terms, it is significant that almost all major changes to workers’ rights were made using executive fiat, bypassing Parliament.

The government withered most minimum rights by stopping their enforcement, either in court, or by public bodies under government control in four ways. First, a **2013 Order** introduced employment tribunal fees of £1200 for the typical claimant. This deterred **almost 80% of claimants** at these tribunals. In July 2017, the UK Supreme Court considered the introduction of tribunal fees and **declared them unlawful**, forcing the government to pay back £32m in fees, but providing no redress for people who had not launched tribunal cases because of the fee burden. Second, even when people can afford tribunal fees, the statutory right to claim unfair dismissal (that is central to most claims) was cut by a **2012 Order**. People now have to **work for two years**, instead of one, to qualify for this right. Third, in 2014, the government stated that **Jobseeker’s Allowance** would be refused if people turned down (non-exclusive) ‘zero-hours’ contracts. These contracts mean an employer purports to have an arbitrary, unilateral power to vary working hours down to

zero. Used like this, zero-hours contracts have been found in court to be an **unlawful sham**. They **violate the common law** duty to fulfil the reasonable expectation of stable work.

Fourth, under Treasury orders, Her Majesty's Revenue and Customs has not enforced income tax, National Insurance or minimum wage duties against 'gig economy' corporations. One **exception (proving the rule)** has been Deliveroo. But Uber, CitySprint, Mechanical Turk, and more have been left alone to engage in mass tax fraud. It is fraud because their lawyers know the workforce has employment rights (see below). They deliberately wait for someone to sue before they pay.

Fifth, the government delayed all sorts of laws being brought into force, or did not activate them at all. In the Pensions Act 2008, the right to automatic enrolment in basic pensions was **delayed between two and ten years** – that is, for many people the right to an occupational pension was destroyed for a fifth of their working lives. Under the Work and Families Act 2006, the right of parents to share childcare leave with one another was delayed until 2011, and implemented only in 2015. Last, Theresa May as Home Secretary scrapped the Equality Act 2010 duty on public bodies to promote socio-economic equality. It was, she said, '**ridiculous**'.

Some changes fluctuate. As Home Secretary May **halted virtually all investigations** by the Gangmasters Licensing Authority into the exploitation of migrant and agricultural workers. However, as new issues of 'slave' labour continued to emerge, the agency was renamed the Gangmasters and Labour Abuse Authority in 2016 and its powers were expanded to all industries, and there followed an **increase in reporting** of suspected cases. Its **2018 report** noted that: 'The UK is described as being one of the main destinations of trafficked workers in Europe'.

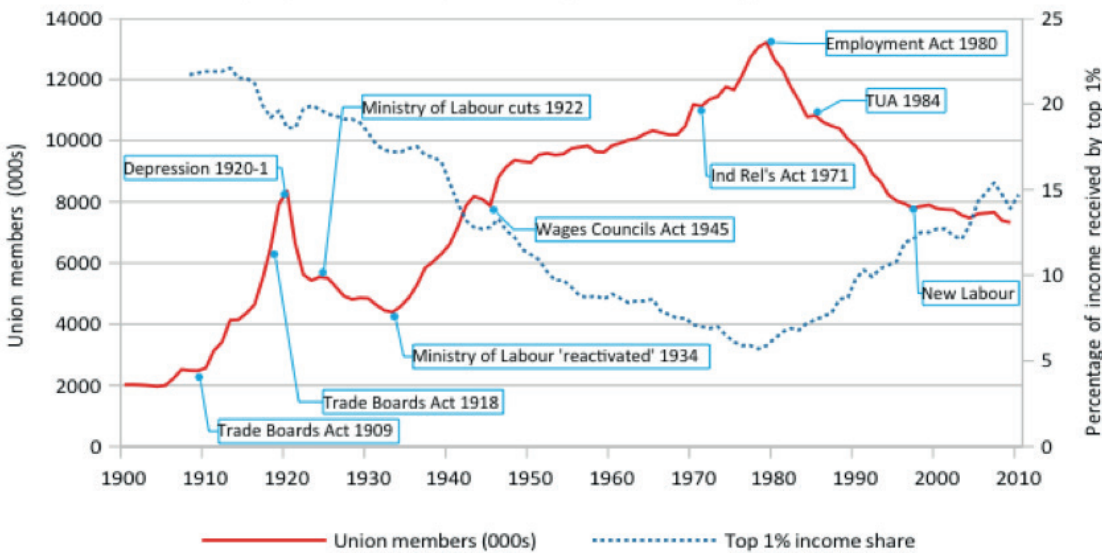
The methods used by Whitehall and ministers to frack the floor of minimum rights has often bypassed representative democracy by using '**Henry VIII clauses**'. Increasingly, Acts of Parliament are passed with the ability of any Secretary of State to amend legislation at will. Social rights are being treated like an on-off switch, to be varied at the executive's whim. The minimum wage itself has been cut like this for people aged under 25. This is the most vulnerable worker age group because they are most likely to be on zero-hour contracts, or in precarious work. The economic theory the government uses to justify it seems to be that if employers can make young people unemployed more easily, there will be less youth unemployment. **This 'Milton Friedman** theory has no basis in evidence, and has been maintained solely by ideology. Parliament did use primary legislation, the Enterprise and Regulatory Reform Act 2013 section 78, to abolish the Agricultural Wages Board of England and Wales. This board maintained a higher scale of minimum wages, based on experience, for people doing hard manual labour on farms. When the Welsh Assembly decided to keep a board for Wales, the Attorney General brought court action. **The government lost** in the UK Supreme Court.

There has been progress for people over 25, in that the minimum-living wage has risen since 2010, and is promised to be £9 an hour by 2020. But people do not want the minimum-living wage, which provides only a 'basic' income. People want a fair day's wage for a fair day's work. Most people have no voice at work. They get told what their pay

and conditions will be. They are told to ‘take it or leave it’. When people protest about reductions in pay, their corporate managers can still easily say, ‘You’re fired.’

Figure 2 shows the consequences of labour rights reductions since 1980 (and wider ‘deindustrialisation’ trends) for union membership and inequality. In 1979, collective agreements covered 82% of the British workforce, and now the figure is around 20%. Union membership has continued to wither, and continuous calls for more anti-union laws are still made in the Conservative Party. Figure 2 also shows a useful measure of social inequality, the share of total incomes in the UK going to the top 1% of the population. Correlation is not always causation. But in the UK, the relationship is clear. The loss of voice at work contributed to making inequality soar.

Figure 2: UK trade union membership, and income inequality



Sources: [Piketty \(2014\) Table S9.2](#), and [Brownlie \(2012\) DBIS](#)

Three main changes were made to collective labour rights since 2010. First, as an employer itself, for seven years the government simply refused to engage in meaningful collective bargaining. Instead, from 2010, it froze public sector pay to a maximum 1% increase, cut pensions and made mass-redundancies: all to shrink (without any particular principle) the size of the state. In the 2017 general election the backlash against these austerity policies impressed even Tory MPs and the pay freeze began to be partially and slowly lifted by 2018 – chiefly because of staff shortages and the economic damage that gradually accrues when workers can only increase wages by moving between jobs.

Second, the government fought human rights challenges to its statutory ban on solidarity action by trade unions, threatening to leave the European Convention on Human Rights. In *RMT v United Kingdom* [2014] [ECHR 366](#), the Strasbourg Court caved. It held that the right to freedom of association in article 11 of the Convention did not protect the right of workers in a subsidiary company to strike against the parent company, or vice versa. The UK was ‘at the most restrictive end of a spectrum of national regulatory approaches on this point’

(along with Turkey and Russia). The reasoning was thin. With the Tory threat of leaving the Convention, the judges found the law within the UK's 'margin of appreciation'.

Third, after a majority Cameron government returned in 2015, the **Trade Union Act 2016** was passed. This introduced a requirement for a 50% turnout in strike ballots, and a 40% total support rate (80% turnout in close votes) if strikes were to be legal in health, school education, fire, transport, nuclear waste and border services. The Act maintains a ban on electronic voting in union ballots. A **review** has been conducted into e-balloting for unions by retired fire chief Sir Ken Knight. It recommended **a pilot of e-balloting** for some non-statutory votes. The Act requires that at any strike picket, a union supervisor holds an 'approval letter' from the union, and 'must wear something that readily identifies' them. It wraps collective action in more red tape and pointless form-filling obligations, all designed to slow collective action and weaken bargaining power.

Strengths, Weaknesses, Opportunities and Threats (SWOT) analysis

Current strengths	Current weaknesses
Compared to the United States, Eastern Europe, China or other quasi- and non-democratic jurisdictions, the UK has a relatively sound system of minimal labour rights. In the past the UK worked inside the European Union to ensure that many rights apply continent-wide.	Compared to Sweden, Denmark, Norway, Germany, France, the Netherlands, or other western European countries, Australia, Canada, New Zealand or other developed Commonwealth countries, the UK has serious deficiencies in every respect in its labour rights. It systematically fails core labour standards of the International Labour Organisation, ratified by and binding on the UK in international law.
A national minimum wage covers most people in law. There are 28 days of paid holidays a year, and health and safety at work has improved with the transition towards a service economy.	The UK has failed to sustain a policy of full employment since it accepted that some joblessness was 'natural' after the 1974 OPEC crisis. Since then, unemployment has ranged between 4% and 11.9%. This has led to millions of hardened lives, in poverty and precarity, and squandered trillions of pounds in lost prosperity.
Almost everyone has the right to not be discriminated against on grounds of their race, gender, sexual orientation, religion or belief, age, union membership, part-time, fixed-term or (after 12 weeks) agency status.	The UK fails to guarantee votes at work through enterprise governance and sectoral collective bargaining. It is in a minority of EU countries with no workers' voice in the governance of firms (outside universities).

Current strengths	Current weaknesses
There are clear rights to join a union; for unions to be recognised for collective bargaining with majority support in an enterprise; and for unions to take collective action for the defence of workers’ interests.	UK laws, as Tony Blair said in 1997, are ‘the most restrictive on trade unions in the western world’. This has lowered the ability of people to achieve fair wages, beyond the minimum, in their sector. By 2018 low wage growth was a main restriction on the UK economy’s capacity for economic growth.
On job security, before any dismissal UK employees have the right to one week’s notice after one month’s work (and two weeks after two years, three after three, up to 12). After two years there is a statutory right to be dismissed only for a good reason, and a severance payment for redundancy.	The UK fails to ensure enforcement and universality of core labour rights, particularly on dismissal protection, childcare rights and the state pension. The pursuit of ‘flexible’ labour markets has shot the welfare state with holes, damaging growth, increasing stress and depriving people’s dignity in childhood, in their working lives and retirement.
	For many decades the UK maintained state-sponsored sex discrimination in childcare leave, even after the 2010 Equality Act. Historically, there was very low paid maternity leave, and virtually nothing for paternity – which had potent effects in harming women’s economic advancement. However, from 2015 the government introduced shared parental leave and shared parental pay that can be taken up by either mothers or fathers. The UK’s normal minimal standard of income replacement remained, however.
	Dismissal law lets employers act on conflicts of interest, and make irrational decisions, fuelling recessions and damaging sustainable enterprise. The UK has not yet made legislation for elected work councils to defer flawed decisions to dismiss colleagues.

Future opportunities	Future threats
<p>Evidence is mounting, driven by big data across countries (like the Centre for Business Research's Labour Regulation Index, at the University of Cambridge), about the positive relationship that better labour rights have in improving prosperity. Against escalating inequality and political instability, the opportunity for evidence-led policy is greater than ever.</p>	<p>Under the European Union (Withdrawal) Act 2018 the EU's Charter of Fundamental Rights no longer applies in the UK, potentially opening the way for a post-Brexit Britain to transition further towards a low-wage, minimal labour regulation (even tax haven) economy – a development path enthusiastically foretold by some prominent Brexiteers.</p>
<p>On a limited but significant number of issues, there is growing political consensus, including some Conservative MPs, about the need to improve labour rights. This covers particularly (i) raising the minimum wage; (ii) tentative proposals about workers having a voice in company board rooms; and (although now expired) (iii) a commitment to report on getting full employment included in the Welfare Reform and Work Act 2016, section 1.</p>	<p>Major corporations, both UK and multi-national, lobby for international deregulation treaties (including TTIP, CETA, TPP, and thousands of Bilateral Investment Treaties). All aim to remove financial regulation, liberalise the public sector, cut the cost of privatisation, but charge compound interest for public ownership plans. This has the knock-on consequence of weakening labour's relative bargaining power, and redistributing wealth from people at work to asset managers, banks and corporate boardrooms.</p>
<p>Through new social media trade unions have gained unprecedented capacity to pursue an active strategy to expand membership, demand new routes to voice at work through collective bargaining, and in corporate governance, pension and asset management reform. This new reach can operate independently of politics, and potentially reach social groups previously hard for unions to contact – such as part-time or 'gig economy' workers.</p>	<p>Long-lived and organisationally conservative trade unions may fail to seize the chance to pursue an active strategy to expand their membership, independently from politics. They may also lag in demanding new routes to achieving a voice at work through collective bargaining, and in corporate governance, pension and asset management reform.</p>
	<p>Global billionaires and corporate lobbies advocate a theory that mass unemployment is an inevitable consequence of automation and robots. Whether intentional or not, this psychological attack on full employment accompanies an apparently progressive call for a (minimal) basic income – and it threatens policy for fair incomes.</p>

Future opportunities	Future threats
	<p>The slow collapse of American democracy weakens labour rights in the US, and its debased standards are increasingly exported to the UK. The Congress and President have been incapable of legislating on labour rights in any meaningful way since 1974, meaning an ‘ossification of American labour law’ – so that the USA is experiencing de-development. Hard-line managerial practices are spread by US corporations worldwide, including standard form contracts denying labour rights, union busting, blacklisting, and aggressive tax fraud in the gig economy.</p>

The gig economy, robots and precarity

New technologies raise no new issues for labour policy: the difference today is failure to deal with aggressive management practice of emerging tech firms, and evasion of labour rights and tax. In the ‘gig-economy’ the typical work and payment method is ‘piece-work’, not a yearly salary or hourly pay. People are paid for individual taxi rides, food deliveries, bits of programming, and so on, as if they were self-employed. A gig firm purports to be a neutral agency, linking worker and consumer, but not in an employment or consumer relationship, to evade tax and rights. In most cases, this qualifies as civil law fraud. It is **objectively dishonest** by the standards of reasonable and honest people. This does not mean the predatory business in the gig-economy is new, but simply that existing law seems not to be being enforced in these areas.

A prevalent ethos in Silicon Valley recommends ‘move fast and break things’ – and especially pushing regulatory systems to a limit hoping to create a customer base that will help companies resist regulatory pushback. For example, the ‘ride-sharing’ company Uber knew the majority of legal opinion states that it is an employer of its drivers. But just as it ran as an illegal, unregistered taxi company until it was banned in Germany, it generally refused to abide by the law and pay tax until made to do so. Arguably this qualifies as civil dishonesty, under the **Fraud Act 2006 section 2**. It does not matter that HMRC, under a Conservative administration, has failed to act itself. In the UK, it is possible for HMRC to change its position immediately. The ‘Taylor Review’ was **unable to alter this**, but in any case appears to have sided with multi-national corporations, and failed flexibility theory, over human rights and social prosperity. Fortunately, reviews are not law.

Technological change is also predicted by some pop-writers to mandate mass redundancies in future: from driverless cars to financial advice or journalism. One piece of now ‘viral’ academia from two theorists speculated that 47% of all US jobs are **‘potentially’ at risk** ‘over some unspecified number of years’. By contrast, a report from Obama’s White House suggested this was **a wild exaggeration**. Even if so many jobs were at risk, and the losses were concentrated into a few years, the social problem would be considerably smaller in scale and kind compared, for instance, to demobilisation after the Second World War.

The true problem is not only a fraction of the size of that historic challenge, but also of considerably less social complexity. For instance, automation will not create massive numbers of disabled or dead people. The only important question is whether ownership of patented technology, and capital goods, is sufficiently distributed through the shareholding system in corporate governance – particularly through pensions – to guarantee everyone shares in the gains of growth. For this, collective bargaining, votes at work, votes in the economy, and an active democratic state, are crucial.

Free movement and immigration

As globalisation intensifies, and especially before every society reaches comparable levels of human development, the quantity of migration may increase. The UK has swung from being the most open country since 1997 to attempting to be one of the most closed since 2010. Current political debate has some echoes of those that surrounded the reverse of the British Nationality Act 1948, including the restrictions implemented against citizens of Commonwealth countries by the Commonwealth Immigrants Act 1962, and Enoch Powell's 'rivers of blood' speech in 1968. Within the EU, the UK and Ireland were the countries most open to the ten new member states in 2004. Britain declined to apply transitional restrictions on free movement, but changed its stance when Romania and Bulgaria joined in 2007.

Since 2010 and Theresa May's 'hostile environment' for immigration in pursuit of unattainable reductions in net immigration, the climate has hardened. Even though the war and the rise of 'Islamic State' partly result from the US/UK invasion of Iraq in 2003, Conservative governments were slow to respond to the resulting refugee crisis. By 2018, ministers had agreed to take **23,000 refugees by 2020** from the civil war in Syria (of which 11,000 have been admitted to date after the first scheme **began in earnest** in autumn 2015). The missing element of immigration policy is any serious commitment to international, regional and full employment. People move between states because of wars, persecution, economic necessity, and sometimes out of choice. Truly 'free' movement is much rarer than 'unfree movement'.

Workers' rights and Brexit

The referendum on EU membership in 2016, and the extreme confusion over UK policy following the disappearance of the Tory majority at the 2017 general election, poses an existential threat to all workers' rights, including those deriving from EU law. Historically, when the EU has agreed new directives or regulations that create worker rights, the UK has put some into primary Acts of Parliament. Many were already in UK law, but other rights were put into secondary legislation. The European Communities Act 1972 section 2(1) empowers the Secretary of State to make regulations to comply with standards applicable throughout the EU. These include:

- ◆ Working Time Regulations 1998 (28 paid holidays, rest breaks and limits on working week)
- ◆ Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000
- ◆ Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002

- ◆ Agency Workers Regulations 2010
- ◆ Information and Consultation of Employees Regulations 2004
- ◆ Transfer of Undertakings (Protection of Employment) Regulations 2006

If the UK leaves the EU in a 'hard' or a 'no deal' Brexit any workers' rights that are not already contained in primary legislation (an Act) could be repealed at will by a secretary of state. In any Brexit, British workers also lose the right to vote on the standards that apply across borders. Like the UK itself, they consequently lose bargaining power in a global economy. This does not necessarily mean that workers' rights will be repealed, but so long as any major political party proves consistently and ideologically hostile to labour rights, nothing is safe.

This Brexit vulnerability does not mean that all EU law has been good for workers' rights. The extent of EU law's impact on the UK is disputed. If labour rights and public services are not equally supported everywhere, then the four core EU freedoms (movement of people, capital, services and establishment, or goods) can exacerbate underlying inequality of bargaining power. The Court of Justice of the EU in three major cases (*Viking*, *Laval*, *Rüffert*) held that trade unions' collective action capabilities, and pro-labour government procurement policies, might both have to be used proportionately to (ostensible) business freedoms. Its theories of 'market access' were largely derived from arguments developed by British academics and lawyers (particularly in *Viking*). The results included marginal limits on cross-border union action, workers posted in from other EU countries being used to undercut domestic collective agreements, and some governments abandoning procurement policies that banned contractors to the public sector paying their workers 'poverty' wages.

Within the EU, the Court's interpretations were resisted by all European trade unions and social democratic parties, so that regressive policies were sometimes changed or circumvented. In this way, 'social Europe' generally proved more resilient than 'social Britain'. However, the European Central Bank and Commission have also pursued a massive assault on collective labour rights, minimum wages, public sector employment, and job security in its debt collection agreements with Greece, Portugal, Spain and Ireland. Again, however, the political consensus turned against austerity, because of overwhelming evidence that it has failed.

Because Brexit is a European problem, and the causes of Brexit are shared across Europe and the wider world (falling incomes, failure of development policy, deficient democratic structures) any solution must be an international one. Securing a fair day's wage for a fair day's work for all would mean reversing escalating inequality through voice at work; reversing regional decline through credible public investment; ending financial oligarchy with greater transparency and corporate governance reform; and restoring dignity and hope through returning to full employment policies.

Democratising enterprise governance

A critical issue in 21st-century society will be how votes in the economy become democratised. The UK is in the minority of EU countries (generally the poorer ones) without

general rights of workers to **vote for representatives on company boards**. Out of 28 EU member states, 16 have worker-participation laws across private and public sectors. The UK lags behind, and only maintains votes at work (without transparency, in highly imperfect ways, but still there) in its most globally successful enterprises: universities.

On the capital side, asset managers take almost all the votes on company shares, even though these are bought with **other people's retirement savings**: in pensions, life insurance and mutual funds. Unions and employee-elected pension trustees are beginning to demand that their shareholder voting rights are only exercised according to their instructions. Discussion has begun about the legitimacy of asset managers and banks voting at all in company AGMs. In private enterprise, a new democratic constitution for the economy would ensure that workers have votes in their companies; that all votes on capital are exercised by the true investors; and that the public and consumer interest is far better represented in network and natural monopolies than presently.

Conclusions

Workers' rights are at a critical juncture in the UK in 2018, reflecting major challenges faced by trade unions (and allied social democratic parties) worldwide. The globalisation consensus around 'flexible' labour markets, major reductions of job security, restricting collective bargaining narrowly within individual enterprises, and hostility to workers having any voice in corporate governance has begun to crack. Empirical evidence has mounted that hostility to labour rights and economic democracy, on the basis that markets will solve every problem, has been a deeply self-harming belief. Law makes markets exist or fail. Workers' rights are the first step towards making markets work for society, not the other way round.

Ewan McGaughey (@ewanmcg) is a Senior Lecturer in Private Law at King's College London.