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Book Review: The Democratic Aspects Of Trade Union Recognition, by Alan Bogg

Book Review

THE DEMOCRATIC ASPECTS OF TRADE UNION RECOGNITION, by Alan Bogg¹

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IT IS NOT DIFFICULT TO SEE why Alan Bogg's book, *The Democratic Aspects of Trade Union Recognition*, won the 2010 Peter Birks Prize for Outstanding Legal Scholarship (awarded by the British Society of Legal Scholars). Bogg has written a highly engaging account of the origins, political foundations, and operative law of collective bargaining in Britain, particularly in relation to the contested terrain of trade union recognition for bargaining purposes.

The book skilfully combines perspectives drawn from political theory, legal and policy analysis, and comparative labour law. It is the last of these—namely, the book's contribution to international debates about the effectiveness of statutory collective bargaining systems—that I wish to focus on in this review. This dimension of Bogg's work will appeal especially to North American readers, as his study of British law is rich with Canadian and American comparisons.

Bogg's primary focus is on the statutory trade union recognition procedure introduced in 1999 by Tony Blair's "New Labour" government.³ The Schedule A1 recognition procedure and its predecessors are portrayed as departures from the British tradition of collective laissez-faire in employment relations. This approach of minimal or indirect state support for collective bargaining—immortalised in the work of Otto Kahn-Freund—is Bogg's preoccupation in chapters one and two. He discusses and analyzes the challenges to collective laissez-faire, including the various experiments in "direct methods of auxiliary

1. (Oxford: Hart, 2009) 303 pages.

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3. *Employment Relations Act 1999* (U.K.), 1999, c. 26, Sch. A1 of the *Trade Union and Labour Relations (Consolidation) Act 1992* (U.K.), 1992, c. 52 [Schedule A1].

intervention" in collective bargaining in the 1970s.⁴ These historical reflections⁵ pave the way for an in-depth evaluation of the Schedule A1 procedure in chapters five to seven, making up the last third of the book. Throughout the book, Bogg anchors his examination of the British collective bargaining framework to an evolving discussion and critique of liberal, neo-liberal, and civic republican discourses and their influence over British labour law.⁶

These political frames of reference enable Bogg to depict Britain's statutory recognition procedure as "a kind of cultural marketplace for unions," whereby "[b]argaining rights are allocated on the basis of workers' majority preferences, either through membership evidence or ballot procedures."⁷ However, he argues that a democratic process like this can only be legitimate if both unions and employers have "equality of opportunity to compete" for workers' allegiances.⁸ Bogg then demonstrates the many ways in which Schedule A1 fails, in practice, to live up to this ideal.

As an example, he shows how the British legislation does not adequately address the problem of employers engaging in unfair practices with the intention of dissuading employees from voting in support of union recognition. This is the case even after amendments to the ballot procedure in 2004⁹ have left open "the prospect that employers can still subvert worker free choice in many cases," thereby undermining Schedule A1's "liberal objective of a level playing field."¹⁰

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4. *Supra* note 1 at 37-38. This includes the first two attempts by Conservative and Labour governments, respectively, to introduce a statutory recognition procedure in Britain. *Industrial Relations Act 1971* (U.K.), 1971, reprinted in *Trade Union and Labour Relations Act 1974* (U.K.), 1974, c. 52; *Employment Protection Act 1975* (U.K.), 1975, c. 71.
 5. Other reviews of Bogg's book by British academics do these sections greater justice than I have done here. See Ruth Dukes, Book Review of *The Democratic Aspects of Trade Union Recognition* by Alan Bogg, (2010) 73 Mod. L. Rev. 691; Keith Ewing, Book Review of *The Democratic Aspects of Trade Union Recognition* by Alan Bogg, (2010) 69 Cambridge L.J. 411.
 6. For further discussion of these aspects of the book, see reviews cited *ibid.*; Sian Moore, Book Review of *The Democratic Aspects of Trade Union Recognition* by Alan Bogg, (2010) 39 Indus. L.J. 95.
 7. *Supra* note 1 at 159. The "cultural marketplace" concept, derived from the work of Will Kymlicka, is explored further by Bogg at 93-101.
 8. *Ibid.* at 159.
 9. *Employment Relations Act 2004* (U.K.), 2004, c. 24.
 10. *Supra* note 1 at 186.

Bogg examines the Central Arbitration Committee (CAC) decisions regarding unfair practice complaints brought by unions and the Committee's supervisory role over the recognition ballot process. This analysis highlights that the wording of the statutory provisions, combined with the CAC's conservative approach to their interpretation, has allowed employers to counter union recognition campaigns through tactics such as "captive audience" speeches to the workforce, inducements to remain non-unionised, the dissemination of robust campaign material, and the use of anti-union consultants.¹¹ In contrast, Bogg finds that the CAC has adopted more constructive positions on certain issues, such as allowing union recognition claims without a ballot where the union can show majority membership in a bargaining unit,¹² deciding when union membership can be equated with employee support for recognition/collective bargaining,¹³ and determining the relevant bargaining unit.¹⁴

Bogg also exposes the British legislation's limitations in failing to provide, as between employers and unions, "parity of access" to employees for communication purposes during recognition campaigns.¹⁵ A government "code of practice" facilitates limited union organizational access during the ballot period, but in the crucial build-up phase prior to the ballot, the common law protections of employers' property rights (barring union access) remain intact.¹⁶ Even so, the CAC has facilitated access once the ballot has begun—for example, by allowing employees to attend union meetings during working time on full pay—to a much greater extent than the US system that is premised on "the sanctity of private property."¹⁷

This finding partly informs Bogg's conclusion that, "[o]verall, Schedule A1 approximates more closely to the liberal ideal of a fair cultural marketplace than the US legal procedure" for union recognition.¹⁸ He identifies some of the US model's other deficiencies, including the prevalence of "spiralling employer unfair

11. *Ibid.* at 166-73.

12. *Ibid.* at 175-86.

13. *Ibid.* at 210-12.

14. *Ibid.* at 239-44.

15. *Ibid.* at 193.

16. *Ibid.* at 193-96.

17. *Ibid.* at 186-93.

18. *Ibid.* at 160.

practices that the law is ill-equipped to stem"¹⁹ and the enshrinement of a passive rather than "active" duty to bargain once recognition is secured. The latter enables employers to engage in "surface bargaining" and other strategies to avoid the making of a collective agreement.²⁰

For Bogg, the Canadian system is preferable as it possesses certain significant design differences that provide unions with greater success than their US counterparts in invoking statutory recognition rights. For example, Canadian law minimizes the opportunity for employer influence both by accepting union membership cards as evidence of majority support for recognition and by expediting ballots (where they are required) through strict time limits. Thus, Canada's "reconstructive" statutory design overcomes the chief flaws of the US "regulatory" model—"legal delay and employer hostility."²¹ And while in Britain "Schedule A1 has integrated many of the best features of the Canadian legal model," according to Bogg this "should not breed complacency. Schedule A1 still falls short of parity in significant ways, and these regulatory failings require urgent reform if the liberal aspiration is to be realised fully."²²

It should not be thought, based on the above, that Bogg is capable only of identifying problems. His book is long on solutions as well, with various civic strategies and reform strategies set out in chapters six and seven. These include the idea of a "staged" approach to affording recognition rights, whereby a union would obtain recognition for certain purposes where it has, say, only 10-20 per cent support among the workforce (with full recognition flowing for bargaining purposes once greater levels of support are achieved).²³ Bogg also calls for an expansion of the required scope of bargaining under Schedule A1 beyond "pay, hours and holidays"; a broader obligation upon employers to disclose information relevant to bargaining negotiations; a shift from "single employer bargaining" to "a multi-level approach to industrial governance" (that is, sectoral or industry-level bargaining); and a liberalizing of restrictions on strike action.²⁴ However, these proposals are unlikely to be implemented in the foreseeable future, as the prospects of this occurring were already minimal under Gordon Brown's Labour

19. *Ibid.* at 175. See also 161-64.

20. *Ibid.* at 257-69.

21. *Ibid.* at 175-76, 203.

22. *Ibid.* at 160. See also 186, 204-05.

23. *Ibid.* at 227-35.

24. *Ibid.* at 282-87.

government. Given the election of the Conservative-Liberal Democrat coalition government since the book's publication, any labour law reforms pursued in Britain will almost certainly head in the opposite direction.²⁵

While reading Bogg's comparative account of British and North American collective bargaining law, I was struck by the degree of commonality of issues confronting policymakers, unions, employers, courts, and tribunals in many industrialized countries. These parallels can now be seen in Australia as well, where a statutory duty to bargain in good faith was recently introduced. This duty, however, is not based on a union recognition process but rather on the establishment of "majority employee support" for collective bargaining.²⁶ Already, after almost two years of this new law's operation, we have seen the emergence of some US-style tactics to counter union organizing campaigns. However, the Australian legislation does not rely exclusively on employee ballots to establish bargaining rights, and the federal industrial tribunal's interpretation of "good faith" has limited some, but not all, unfair practices by employers.²⁷ Those designing Australia's new collective bargaining framework appear to have avoided some of the features identified by Bogg that bedevil similar systems overseas.

My only criticism of Alan Bogg's fine book is that, for the non-British reader, the explanation of the requirements that a union must satisfy in order to gain Schedule A1 recognition is somewhat disjointed. For example, we are only told in passing about the admissibility thresholds for a recognition application on pages 100 and 196, with some further treatment on page 209. Additionally, part three of the book would have been well-served by a preliminary chapter outlining the key elements of the Schedule A1 process, the timeline that a recognition application typically follows, and the alternative route of "voluntary recognition."²⁸ This would have been more effective than leaping straight into

25. See e.g. Alan Jones, "Unions Fear 'War' with Government over Strikes" *The Independent* (5 July 2010), online: <<http://www.independent.co.uk/news/uk/home-news/unions-fear-war-with-government-over-strikes-2018668.html>>; Hélène Mulholland, "Government Accused of Declaring War on Unions over Strike Law and Redundancy Plans" *The Guardian* (5 July 2010), online: <<http://www.guardian.co.uk/politics/2010/jul/05/government-war-unions-strike-redundancy>>.

26. *Fair Work Act 2009* (Cth.), Part 2-4.

27. See further Anthony Forsyth, "The Impact of 'Good Faith' Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the United States" C.L.E.L.J. [forthcoming in 2011].

28. For a discussion of the use and limitations of the voluntary recognition process, see *supra* note 1 at 147, 151-54, 223-27, 272-77.

a discussion of the problem of unfair practices and the desirability of ensuring equal campaign opportunities.

On a recent trip to the United Kingdom, I came across a newspaper report about “a ‘bitter struggle’ for [union] recognition” that had been taking place for a year at Cranberry Foods in Derby. According to the report, the employer had recently engaged The Burke Group, a US-based labour relations consulting firm that specialises in “‘union avoidance’ strategies.”²⁹ Some employees claimed to have been “warned by supervisors that the company could go bankrupt if the union won recognition.”³⁰ The workers’ experience at Cranberry Foods is yet another illustration of the shortcomings—so convincingly articulated in Bogg’s book—of Britain’s statutory union recognition procedure as an expression of the liberal promise of workplace democracy.

29. Matthew Taylor, “‘Union-busting’ Company Employed by Turkey Plant before Recognition Vote” *The Guardian* (8 September 2010), online: <<http://www.guardian.co.uk/politics/2010/sep/08/union-busting-company-employed>>.

30. *Ibid.*