The Second Countess Markievicz Memorial Lecture

The Individual, The Trade Union and The State — Some Contemporary Issues

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The Countess Markievicz Memorial Lecture has been established by the Irish Association for Industrial Relations with the support of the Department of Labour. Countess Markievicz was first Minister for Labour of the newly-independent Irish State. The object of the Memorial Lecture is to provide an occasion for a substantive contribution to discussion in the Industrial Relations area by a distinguished practitioner or academic.

The Second Lecture was given by Professor George F. Thomason on November 28th, 1977, at the Royal Hibernian Hotel, Dublin. Professor Thomason holds the Chair of Industrial Relations at University College, Cardiff. He has been a member of several Committees of Inquiry into industrial disputes, and has written widely on Industrial Relations and Personnel Management.

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THE INDIVIDUAL, THE TRADE UNION, AND THE STATE — SOME CONTEMPORARY ISSUES

I greatly appreciate the honour you do me in inviting me to deliver this, the Second Markievicz Memorial Lecture. Constans de Markieviczis rightly renowned and remembered for her dedicated pursuit in her various capacities of a renewed dignity for the Irish nation and the Irish worker. In paying homage to her memory, I have therefore sought, in what I want to discuss, to indicate in a fairly provocative way the choices in the development of a new order in industrial relations in Ireland at this present time, as a contribution to the debate which both internal developments and new international alliances have generated.

I also appreciate the opportunity to follow Professor Michael Fogarty — who was, incidently the engineer of my first visit to Ireland in the late 1950's. In delivering the First of these Memorial lectures last year, he raised two very important issues within the current debate on industrial relations, and I want to develop these further — without necessarily intending to creat a precedent which might require future Lecturers to establish a continuity with those who have passed before.

The one suggestion which he made was that we could expect the nature of modern enterprise to change under the impact of European Economic Community policies and of changing cultural values within both the Irish and the western European societies. The other was that in both Ireland and Britain, the public policy responses to these developments would perforce have to acknowledge the special place attained in the social structure by local trade union leaders or activities (whether referred to as shop stewards or not) and attempt to accommodate them in any "harmonisation" process. (Fogarty, 1976, pp.2-4). There are important differences between Ireland and Britain in current position and likely response to the new developments: the Employer-Labour Conference, for example, is a central labour market institution of which there is no British equivalent and the extent to which trade union power is devolved to local activists may also be different (Hillery, 1975; McCarthy, O'Brien & Dowd, 1975). But the shared tradition of English common law (even if it has diverged somewhat since 1922) (McCartney, 1964, p.54) and the implications which it carries for the structuring or guidance of trade union purposes and activities, is a feature which adds a dimension to the problem of harmonisation which is not shared with most of our European partners.

The particular manifestations of "contemporary issues" which I have in mind include those of the directions to be taken by social policy in the future (EIRR, 1977, No. 46, pp. 14-17) and the "problems" seen to be associated with the actions of unions and other groups of workers undertaken in pursuit of (or in reaction to) employer recognition and union security. The one is closely associated with EEC harmonisation: even before we joined the EEC, the desire to be thought "good Europeans" spawned a number of Statutes — Redundancy Payments, Minimum Notice and Terms of Employment. Anti-Discrimination (Pay) — which have since been added to — Employment Equality, Unfair Dismissals, and Worker Participation (State Enterprises) — to give the Irish worker a "floor of rights" in employment more comparable to that enjoyed by Continental counterparts. The other is more closely associated with a process of developing rights on a more local and domestic basis within employment-providing undertakings on the basis of a simpler "power struggle" (in the common phrase) even if that is guided or channelled by existing law and convention (see Blagdh, 1974), and indeed by "rule" as established by the labour market organisations themselves (FUE, 1971, pp. 11 & 13; McCarthy, 1973, pp. 172-5).

I want to suggest that these particular examples are generally and in various ways, concerned with status — of the worker per se. in some instances, and of the worker's trade union organisation, in others — and this concept of status provides the connecting theme for this lecture. By "status", I mean "that condition of the individual that is denned by a statement of his rights, privileges, immunities, duties and obligations . . . and obversely, by a statement of the restrictions, limitations and prohibitions governing his behaviour" (Barnard, 1946, pp. 207-43). For the rest of the paper, however, I shall refer to "status" in the briefer manner using "rights and duties" as a shorthand for the longer list given by Barnard.

It is possible to achieve status by a self-help process, involving negotiation of rights and duties as between two (or more) parties and this could, indeed be regarded as part of the intention of trade unions over their history. But that process is itself often directed or channelled by the "status" which society accords to those parties, and much of what I want to discuss here is directed towards this aspect of "status", developed through the Constitution, and the actions of the legislature, the judiciary and the executive, and related both to "the worker" and his organisation, "the trade union".

The worker's status

Firstly, what is the worker's current status in Ireland? The worker

shares a number of such rights and duties with any other adult citizen of the nation. These exist prior to his becoming or being a worker within that society, and are better thought of as basic freedoms or civil liberties, by which the individual interest is co-ordinated with the exercise of state power. The Irish citizen may find these stated in the 1937 Constitution where they appear as "fundamental rights" in respect of the person (Article 40), the family (41), private property (43), education (42), and religion (44). Those of most direct relevance to my theme are those of Article 40, to be held equal before the law (40.1) and to express convictions and opinions freely (40. 6. 1° (i)) to assemble peaceably and without arms (40. 6. 1° (ii)), and to form associations and unions (40. 6. 1° (iii)) subject always to considerations of public order and morality, to laws which may be enacted to regulate and control these in the puplic interest, and those of Article 43, which acknowledges the natural right to ownership of external goods, guarantees that no law will abolish this right or the general right to transfer, bequeath and inherit property, but reserves the power to regulate their exercise in the interests of social justice and the exigencies of the common good. (Article 43. 1. 1° & 2° and 43. 2. 1° & 2°). These constitutional rights do not exhaust all the rights of the Irish citizen, but they are antecedent to other rights and, in contrast to the position in Britain where there is no written constitution, (cf. Padfield, 1972, p. 17; and Street, 1972), they can be changed only by following a constitutional procedure which upholds the sovereignty of the people in these matters. (Articles 46 and 47).

In addition, the individual citizen acquires other rights and duties through the common law and through legislation, but they depend for the most part in these cases upon the individual assuming or acquiring a position or role in some system of social relationships, which it is then the function of the common or statute law to regulate in the interests of equity or natural justice. In this fashion, for example, the rights and duties of buyers and sellers, or principals and agents, and (importantly for my theme) employers and workers (or employees) become established in law and can, in appropriate circumstances, be upheld by the law.

In order to establish what are the current rights and duties of "the worker" we need to establish, firstly, how the status of worker is acquired by the otherwise ordinary citizen, and secondly, what this means in terms of rights and duties.

"Worker" is the generic term applied to all who work — the economically active population — but it is normally used to identify those of them who are not employers or managers. Even then, there are a number of different categories of worker, professional workers,

workers in the Civil Service, family and domestic workers, as well as those who are commonly thought of in the popular use of this term, manual and clerical workers in industry and commerce. In fact, what is normally meant by "worker" in the context in which I am using the term in this paper, is "employee", the person who works under or has worked under a contract of employment with an employer who is neither the State nor a "professional client" nor some one in a similar type of position (cf. Minimum Notice and Terms of Employment Act, 1973, Ss. 1 and 3). The question we must ask is, therefore, how does a citizen become an "employee"?

This translation is effected by the "act of contracting" with an employer: the individual agrees to work for, or to serve, another — the employer — in some capacity in return for remuneration or reward for that contribution of work or service. What may be actually said at the time, and what in the process of saying it may be explicitly agreed, may be very little, but the fact of something being said and agreed about service and consideration therefore, is important from the point of view of establishing that an employment contract exists, (cf. Hepple & O'Higgins, 1976, p. 77). It was the major change ushered in by the industrial revolution, that this process of forming a contract of employment was made freer, embracing more citizens than had been allowed this "freedom to contract" before. Since then, the common law has been zealous in defending the freedom of contract, whether it was applied to buyers and sellers of goods or buyers and sellers of labour power. But very early, Adam Smith had cast some doubt on the real value of this "freedom": as he saw it, the greater power of the employers to "wait" to establish acceptable contract terms, meant that he could normally be expected to "force the other [the worker] into a compliance with their terms" (Smith, 1904, p. 68). Much later, Kahn-Freund referred to this same concept of freedom to contract (when applied to employment) as "the term which the law uses for the subjection of the worker to the power of management" (1972. p. 15). The associated concept of "inequality of bargaining power", well recognised in discussions of labour relations over many years and often held to have had casual significance for the development of trade unions, has not, however, been acknowledged in the common law (or at least not until Lord Denning applied it in commercial contract situations — D & C Builders Ltd. v. Rees (1966) 2 QB 617; Lloyds Bank Ltd. v. Bundy (1974) 3 a11 ER 757).

Rather we have taken consolation from the dictum of Maine, to the effect that "the movement of progressive societies has hitherto been a movement from *Status* to *Contract"* (1931, p. 141). It has

been regarded as progress to give the adult worker the right to regulate the incidents of the employment contract, no matter how constrained he may be, or have been, in any attempt to avoid entering a contract which resulted in him accepting the status of employee.

But having accepted this status, what did and does it mean for him? One clue is in fact offered by Maine's conclusion already quoted: he was no longer to be "bound" as was the mediaeval peasant to the manor or the lord, but rather was to be committed to providing his willing labour in return for remuneration — an apparently much more limited set of duties and obligations than obtained previously.

The employer's obligations (as upheld in the common law) were and are restricted to a fairly narrow range — to provide remuneration (but not necessarily work, except in a limited number of situations), to exercise care for the employee in his employment, (although this was not interpreted in any way as broadly as the obligation of the feudal master) and one or two other more limited duties (cf. Gayler & Purvis, 1972, pp. 69-85). The duties of the employee, however, were much more extensive — to co-operate with the employer, which includes the duty to obey his lawful instructions, and to render faithful and satisfactory service, and to exercise care in carrying out his work. As is so often remarked, it is not possible to state either in a contract of employment or in a job description, exactly what will be required of the worker in carrying out his work role, and therefore, the common law has sought to recognise "commercial convenience" in this respect by standing ready to interpret what is reasonable in a way of worker duties of co-operation and satisfactory service. In only slightly oversimplified form, therefore, the contract terms became to work generally as required by the employer in the interests of his business in return for a monetary reward called a wage. To the "inequality of bargaining power" already noted, there was thus added as "imbalance of mutual obligation", brought about, as Fox (1974, pp. 187-8) has argued by marrying contractualism with the traditional masterservant relationship of the preceding period of history. This marriage is still alluded to in the common law with its propensity to use the concept of "service" in preference to that of "employment" in spite of the fact that the last piece of legislation to include the terms "Master and Servant" was repealed in 1875. In effect, the contract to which an employee agrees has much in common with the standard form contract which is recognised in commercial transactions and subjected to modified rules.

This suggests that, in reality, the upholding of the worker's

freedom to contract amounts to a fostering of his freedom to subject himself to the diffuse obligations of a servant to a master or employer. The support of the employer's freedom to contract with workers in employment, on the other hand, amounts to a fostering of his freedom to make the rules of employment and to demand loyal and satisfactory compliance with them, but to avoid the diffuse obligations associated with contracts of "status" by limiting consideration to payment for services and exercise of general care for the well-being of the human instrument whilst he has it under hire. Under these circumstances, the rights of the worker under the contract of employment, are little or nothing more than those of a "wage-earner", but the duties are extensive and changeable. He can expect little more than a wage payment for his services and a reasonable amount of care to be taken of him, so as not to damage him as a person capable of earning a wage whilst he is in that employment. The doctrine of freedom of contract helps to ensure that this limited "status" (that of a wage earner) is however subject to his initial agreement to it.

Once the employee has embarked upon a contractual relationship with an employer, however, he is in a very different position from that of the seller of goods. The latter relationship is usually established and developed in relation to a limited purpose "at arm's length", whereas the former is developed in a close and dynamic system of expectations and obligations which, in so far as they relate to the work rather than the wage, extend well beyond the confines of a transaction to exchange a commodity for payment. In particular they are constantly changing in response to the exigencies of the 'business' to which the labour is contributed, and it could be represented that what is initially agreed by the worker as his contribution is constantly being re-negotiated with each employer-initiated change which is accepted by the employee by his remaining in employment. This constant re-negotiation of the detailed terms of the individual contract is the one factor which distinguishes the employment contract from the normal commercial contract and necessitates a very different approach to its understanding and regulation. Only very recently has this aspect of the employment contract been acknowledged in legislation, in the provision for "trial periods" in any new employment offered by the employer.

But what has more recently been attempted in public policy and statute law has been the creation of an "independent" worker status in society in spite of his continuing freedom to contract. One major part of this has been sought by the pursuit of full employment and new employment-creation policies, which may respond to Article 45.

2 (i) of the Constitution, but which have an effect of increasing worker status both generally and vis a vis the employer. For the rest, much has been stimulated in both Britain and Ireland by the desire (initially) and the compulsion (latterly) to be considered good Europeans by virtue of our harmonising the worker's status with that obtaining in other parts of the Economic Community. What, in effect, we have done, therefore, is create transcendental rights in employment for those who do exercise their freedom "to contract", by which, whenever the agreed terms of the contract are less favourable to the worker, it is to be deemed that the statutory terms will have been intended by the contracting parties. Thus, the Minimum Notice and Terms of Employment Act, 1973, by S. 4(5) provides that any provision in a contract which provides for a period of notice less than that specified in S. 4(2) "shall have effect as if that contract provided for a period notice in accordance with this section" and by S. 5(3) "any provision in a contract which purports to exclude or limit the obligations imposed on any employer" by S. 5 and the Second Schedule of the Act "shall be void" and in the Employment Equlity Act, 1977, S. 4 (1) has the effect of reading "an equality clause" into any contract under which a person is employed. The fiction of freedom of contract may thus be maintained, "the parties to the contract of employment are, by a statutory fiction, deemed to make the contract on the basis of the statutory terms". (Kahn-Freund, 1972, p.34). This continues the fiction established in connection with minimum wage legislation. Thus, "the only effect of the statute on that contract is to insert against, it may be, the overt agreement of the parties, the proper rate of wages" (Lord Wright MR in Gutsell v. Reeves (1936) I KB 272 at p. 283). "The terms of the statute can be contracted out only for the benefit of the worker and if the parties purport to agree on terms less favourable to him, they are nevertheless deemed to have contracted for the minimum, and the worker's claim for the difference is accordingly (by fiction) a contractual claim". *(Kahn-Freund* 1972, p. 34).

In contrast to what is possible under the Truck Acts and the Factories (or Health and Safety legislation) the effect of such statutes is to modify the contract terms in the employee's favour, even against his expressed wishes and those of his employer, and the worker can, accordingly make a contractual claim against the employer rather than (as in the two older statutes mentioned) a statutory claim, (cf. Kahn-Freund, 1972, p. 34). The prerogative and privilege of the employer to dictate the terms from his position of superior is thus directly reduced by such legislation, and by the same statutory fiction.

By a similar process, the minimum terms negotiated by the trade union with the employer, on behalf of the trade union members who may otherwise have contracted to work at lower terms, will be deemed to re-mould the terms of the individual contract. This cannot, of course, apply to everything which is negotiated by a trade union, and it is normally held that only those terms which could normally apply to the individual, will be so incorporated into his contract (Hepple and O'Higgins, 1976, paras. 244-53). However, there is a fairly close correspondence between the list of such terms which could be incorporated from collective agreements, and the list of new 'rights' or 'minimum terms' which have been established by legislation in the past few decades. As Rideout expressed this relationship, in 1969, in respect of early British legislation similar to the Redundancy Payments and Minimum Notice etc. Acts in Ireland, they form "a series of Acts of Parliament importing statutory regulation directly into the contractual relationship between employer and employee" and "stand apart, since they affect what has hitherto been regarded subject to certain protective statutory provisions, as the negotiable part of the contract. In the same sense they may be said to impinge on the field of voluntary collective bargaining". (Rideout, 1969, p 7). Even if we had no other supportive evidence, this might suggest that what is being developed by way of worker status through legislation at the present time rests upon the essentials of it as national trade unions have sought in the past through industry-wide collective bargaining to develop it.

It would not be necessary, however, for the State to legislate into existence a 'worker status' by a proliferation of legislation which states specifically what the rights and obligations of the 'worker' are to be if the common law took cogniscance of the degree of inequality of bargaining power in the establishment and/or re-establishment of the contract. This, of course, flies in the face of current interpretations of the common law, and indeed, I think this as a solution would prove extremely difficult, not to say litigious, to apply. But if we must apply the concepts of 'contract' to employment, it might be interesting to look at Lord Denning's doctrine of inequality of bargaining power in contract law, touching on those doctrines which lawyers know as 'unconscionable transactions', duress of goods, and the rest. He has been accused of having spawned a benevolent giant (Carr, 1975, p. 466). But if this doctrine were to be applied to the employment contract, however, protective legislation for the individual and the trade union would not be so imperative.

Trade Unions and worker status

The role and function of the trade union in the industrialising period has been seen, generally, as closely related to this worker/servant status. As voluntary bodies, created by workers in the status of wage earners, they have pursued, in some order of priority which may have varied with the times and circumstances,

three distinguishable, but linked objectives which bear upon that status: firstly, the regulation of competition in the labour market itself, an aim which is usually sought through the rule book and the development of what is usually referred to as "solidarity"; we might remind ourselves that it was this aspect which ran foul of the Common Law during last century until given immunity in 1871 and 1906.

secondly, the development of a mechanism to ensure that the *continual renegotiation* of the individual contract, remarked by Commons, back in 1924, as a characteristic feature of the employment contract, which is necessary to the dynamics of industrial activity or to "comercial convenience", is carried out *jointly,* and, in so far as collected power can achieve it, *fairly,* in the interest of the worker who is, in this respect, ever at a disadvantage by virtue of his dependence on the employer.

thirdly, the change of the supporting institutions of society (the law, economic organisation, the franchise) in so far as they serve to leave the worker in an unacceptably dependent status position in relation to his employer.

Of course, trade unions may be many more things than this, and they may have other objectives than those which I have listed, but I have selected these as being particularly relevant to some of the current policy concerns which exist in relation to trade unions and their activities.

It is the second of these objectives which usually receives most attention in policy discussions. Trade unions are seen to be somehow concerned with "collective bargaining" (or, in the words of Flanders, (1965) with "job regulation"). This involvement is, I think, more perceptive of the worker's need for continual renegotiation of his employment contract than is the common law of contract. What the trade unions have developed there is a whole panoply of structures, policies and practices, which deal with the bargaining element in the contracting process, but more significantly, allow this to be done on a continuing basis as changes in the work requirements of the employer offer opportunity to "re-negotiate" the terms of the relationship.

To reach this position, however, the trade unions have had — in their usual phrase — to "struggle". For the greater part of the

industrial period of our history, no one has compelled the employer to negotiate and re-negotiate with them, so that whether the employer did so or not was dependent upon the power of the union, and the employer's power and attitude to joint regulation. The trade union's power, in conditions of less than full employment and of employer organisation in defence of their interest, was best mobilised on an industry-wide basis, and our traditional pattern of collective bargaining has had this association. Not surprisingly, therefore, what has fallen to be negotiated at that level has been the "consideration" element of the employment contract — the wage, the hours of work, the holidays — and the worker's *obligations* under the contract was left for local resolution, either collectively where the local union organisation was strong enough, or individually through mechanisms of the type described in such studies as those of the Hawthorne plant (Roethlisberger & Dickson, 1939).

In relatively fuller employment conditions of the past 30 years, however, the trade union's local organisation has generally increased its power (via the greater independence which full employment gives to the individual worker vis a vis his employer). What we have therefore witnessed is an extension of collective bargaining to a wider range of *subjects* to include those domestic regulations which are, and can only be, determined at the local level, and a reduction in the normal *time-interval* between negotiations as local activists seek to match employer-initiated changes in work activity with attempts to subject these changes to joint regulation. This development was indentified by the Donovan Commission with the second "informal system" of industrial relations which they saw as paralleling the national, formal, industry-wide system in Britain. The Commission also noted a number of "problems" associated with this duality, many of them attributable to its novelty and consequent non-incorporation into an acceptable system of regulation, and offered suggestions as to the manner in which such regularisation of the haphazard activities might be achieved. (Donovan Commission Report, 1968). In Ireland, some at least of the difficulties experienced by the Employer-Labour Conference in ensuring that their writ runs in localities, might be regarded as reflecting a similar process of change. Certain other developments, often appearing as inter-union conflicts in single-employer establishments, might also be regarded as responding to a growing desire on the part of the employees to have this greater and more continuous voice in the determination of their local terms and conditions of employment, regardless (almost) of what the national institutions for regulating the labour market might want to say about them.

We must recognise, however, that local groups of workers have traditionally been more vulnerable than "the national union" — an observation which has remained true from the days of the "trade club" to the present time. The very conversion of the "trade clubs" into "trade unions" on a district and later national basis, sought to provide a means of dealing with part of this difficulty of mobilizing bargaining power. If, therefore, there is a reverse movement of the kind just described, in which the unionists domestic to the undertaking seek to develop more participation in job regulation, there is likely to be an associated concern with "security".

This brings back into the picture, the first of the trade union objectives listed on page 10 above, that of regulating competition in the labour market. This objective ante-dates the bargaining objective -in fact and in logic: if a collectivity is to negotiate terms for members, those members must first agree to present a "common front" to the employer. This was the basis of the "conspiracy" recognised in common law actions during the first three-quaters of the last century, and is the foundation for the "immunities" granted by law to trade unions in 1871, 1875 and 1906. But these *were* "immunities", more akin to the civil liberties of the constitution than to the recirocated rights and duties associated with "contract", in that they did not require any corresponding action from the employer to uphold them. Even with those immunities, the trade unions still had to secure the acceptance by the employer of their wish or will to share determination or job regulation, and the only "compulsion" on the employer was that which could be mobilized by the union itself.

In the context of local, domestic bargaining, this remains the case. Any local trade union organisation seeking to extend the range of negotiable subjects and the frequency with which they may be negotiated, must still endeavour to persuade the employer to accept these ends. But where on the national plane, the basic immunities were the necessary foundation for any trade union action, so on a local plane, the possibility (at least) exists that the equivalent foundation will be seen and sought in the development of "union security" — an American term which subsumes a range of accepted rights ranging from recognition in its various forms of agency, union and closed shops. The local union organisation, seeking a protected base from which to develop a joint relationship with the employer, will see this kind of agreement as the most relevant "protection" it can achieve. In the pursuit of it, however, the local organisation must establish a closer and firmer control of competition amongst workers for employment in that situation, such that the negotiated terms and conditions which it secures shall be the only ones on which that

workforce (or members of that bargaining unit) will accept work.

The fact that this kind of issue is becoming more urgent is attested both by the difficulties experienced by member-unions of the Employer-Labour Conference, (ELC, 17 January, 1975, para. 25; McCarthy, 1973, passim) and by the stream of recognition and other union security cases being brought before the Courts (Educational Company of Ireland v. Fitzpatrick, 1962-3; Becton Dickinson & Co. Ltd. v. Patrick Lee & ors. 1972; Meskell v. CIE, 1972; Murphy v. National Union of Vehicle Builders, 1972). The specific conditions of recent years which may have contributed to these issues becoming important are likely to be numerous — changing attitudes and values, full employment, changing international competitive conditions, are some which have been advanced to account for the change. These are, however, of somewhat lesser importance than the consequence produced and the probability that the "trend" may be expected to continue.

Given a strong likelihood that the trends towards a devolution of power to determine terms and conditions to the domestic level will continue, organised labour is likely to seek changes in the institutions which support the present structure of employment and industrial relations — consistent with the third objective identified above on page 10. Although some of these institutions are, as it were, "creatures" of the trade movement itself (alone or in conjunction with employers' organisations) and are therefore to be presumed to be capable of modification by itself or themselves, there are others which must involve the trade unions, nationally or locally, in attempts to change "the law" and "State policy". This was, of course, necessary, and undertaken, at different times and stages of development in the past — for example to secure the removal of the "old illegality" by immunities, or to establish the "right" of organised labour to be consulted by Government on many different aspects of policy and practice. This may come about either as a direct verbalised request for changes, or as society is brought to deal with "problems" which the current and emerging behaviour of trade unionists creates for that society — both avenues of encouraging such changes having been much in evidence in the past. But what will thereby be put at issue is the status of the trade union in a modern society.

The status of the trade union

The public status of the trade union has remained, for most of its existence, nebulous. It began life as a criminal conspiracy by virtue of its purposes and after 1824 was at least a tortious body, which was later to be given immunity from indictment and action which might

arise from what was regarded as its essential nature — an unincorporated body necessarily dedicated to the restraint of trade. By virtue of these same immunities, the trade union is not even now treated differently in law (cf. McCarthy, 1973), p. 34). The value of "trade" may have been established for much longer than have trade unions, but it was *created by* society, and could therefore be devalued by society if it so wished. For this reason, restraint of trade must be regarded as criminal or tortious only because State policy in the middle ages, and particularly in Tudor times, made it so and society continues to accept this; it is not "naturally" unlawful.

But even before trade unions were accorded their basic immunities — in the 185O's and 1860's, for example, — they were already performing functions which were not necessarily antithetical to the public interest or the public good. Had trade unions not, at that time, engaged in regulation both of labour market competition and of worker activity at work, it might well have fallen to some "larger and higher organisation to arrogate to itself functions which can be performed efficiently by smaller and lower bodies" (Quadragesimo Anno, 1931, para. 79). More certainly, as time passed, trade union representatives were drawn more fully into these regulative activities and into the deliberations on the development of public policy and law. Consequently, as Kahn-Freund argued, "they are private, voluntary and autonomous organisations, but they discharge indispensible public functions. Some of these have been conferred on them by legislation or administration practice, through innumerable governmental institutions, committees, tribunals and through rights of consultation through the legal system. But some public functions have been assumed by them through their own practice" (1970, p. 243).

By virtue of their engagement in "public functions", the State came, as McCarthy expresses it, to a view that they should "play their part in an integrated way within the State". To this end (he continues), the State sought to legislate "both for their protection and their performance", particularly in 1941 (Trade Union Act) and 1946 (Industrial Relations Act). (McCarthy, 1973, p. 34). Legislation for performance, however, proved to be easier to accomplish and sustain (as for example, in the provisions for registration and licensing, and for machinery to facilitate the orderly settlement of differences and disputes) than that for protection (much of which was held to be offensive to the Constitution).

Early legislation for the "protection" of unions was essentially permissive. Impressed by the "responsibility" of the new model unions of the day, the legislators of the 1870's provided immunities

to them to allow them to pursue their objectives and to engage in certain forms of collective action without let cr hindrance from the law. Although not completed until 1906, these measures involved recognition that the bargaining power of the individual worker was less than that of the employer, but they did not entail a comparable recognition of the imbalance of mutual obligation in so far as they did not seek to impose any additional obligation on the employer or to grant any new right to the worker or his trade union. It was regarded as sufficient to provide necessary immunities and allow trade unions to develop their regulatory role (in conjunction with the employer) on a free and autonomous basis. The basic freedom of the individual to form unions was later to be incorporated in the Irish Constitution, but Court decisions have subsequently involved a stricter interpretation of this earlier legislation (McCartney, 1964, p. 54) and reflected a keener concern with individual rights and duties under the Constitution and Common Law, so that in a number of directions (e.g., in connection with recognition disputes and actions in support of them) the freedoms of the Irish unions have been restricted more than in Britain, even before account is taken of a different pattern of legislative enactment since 1922 (Casey, 1972).

Apart from the Constitutional guarantee the main attempt by Oireachtas to legislate for "protection" of unions was contained in Part III of the Trade Union Act, 1941, the aim of which was to provide a means whereby a trade union could secure a degree of "security" in respect of its attempts to regulate competition in the labour market of any indentified class of workmen. This was declared unconstitutional in NUR v. Sullivan and IT&GWU (1947) IR 77 (High Court) 91 Supreme Court) as repugnant to Articles 40. 6. 1° and 2°, although much more recently, Blaghd has suggested that S.6 of the 1941 Act "did form a useful procedure for preventing trade unions who wished to refuse prima facie suitable intending members from being, as they are now, the sole judges in their own cause, and could it is submitted be a valuable guideline for future legislation" (Blaghd, 27 January 1973, p. 24). What supports this conclusion is the view that it is not an unqualified right as it is subject to "public order and morality" considerations, and to the issue of what is "freedom" in the context of freedom of contract in employment (or what in lawyers' language amounts to "unconscionable transaction" or "duress" in some form.

Trade unionists *had* rather assumed that the constitutional guarantee of the individual's right to form associations and unions would also guarantee the acceptability or the status of the unions themselves. In particular, it was considered that Article 40. 6. 1° (iii)

would at least remove some of the underlying suspicion of unions associated with the Common Law's emphasis on individual rights and duties. The Educational Company case was, however, to shatter this view, and convince many trade unionists that the interpretation placed on the Article had stood it on its head. The judgement turned on the questions of whether the citizen has a "correlative right not to form or join associations or unions if he does not wish to do so", and whether "in the case of associations or unions already formed, he is free to associate or not as he pleased". (Educational Company of Ireland Ltd. v. Fitzpatrick (1961, IR, 343, per Budd, J. at p. 345). It may be questioned as it was by Maguire, C. J. in a dissenting judgement in this case, whether, given the form of words employed in the Constitution, it is appropriate to link together "forming" and "joining", as a right to form (or not) might involve a very different set of considerations from a right to "join" (or not) whether a new union or an existing one. Maguire C. J. held that a union acting bona fida in its own interests and refusing to work with non-unionists, had as much right to the protection of the constitution as the non-unionist.

Following this line of reasoning might lead to a resolution of the problem, but it would raise also the question of the relative statuses of the employer and the worker. Haugh J. in the same case referred to the adumbration of the "unqualified right of each citizen to associate with others of his choice for any objection agreed upon by him and them", and that this could therefore apply to a temporary association formed to resist union membership. But as Casey has concluded from his review of the constitutional implications of the reform of collective bargaining law, "the right to form such an association is itself subject to regulation and control in the public interest. The Oireachtas could thus validly prevent the formation of such associations" (Casey, 1972, p. 16).

But if this disposes of the question of the association formed to pursue dissociation with a regular trade union, would it also dispose of the problem of the *individual* seeking to avoid union membership? On Mr. Justice Budd's argument above, this would not be so. But the question remains as to whether the constitutional acceptance of trade unions places them in any different, and specifically in an inferior, position to the employer, whose right to determine with whom he will associate in his business does not appear to be questioned in the Consitiution or in the cases cited on the trade union question. The issue of individual right vs. trade union security is a question of morality as well as of law, which, following Lord Denning's line of argument into the realms of employment contracting, could be answered very differently. Since "one's well-being may easily

coincide with one's being deprived of a constitutional right" (Blaghd, 1974, p. 78) it could be argued, as it is implied by Kahn-Freund (quoted above), that the well-being and freedom of a worker could only be enhanced, either by the enactment of status-enhancing legislation (of the kind already referred to) or by granting the trade union sufficient "protection" (at least to the extent of giving a right to recognition and of permitting a closed shop condition for new employees if not existing ones) to enable it to match the power of the employer. These last are the currently contentious issues, along with the method of picketing which appear to present problems for resolution in law which would not prove repugnant to the constitution.

However, in Ireland as in Britain, this resolution is likely to be attempted via legislation for performance in the hope that by regulation of the trade union's approach to its "public functions", the ends of morality and the public good will be served. Historically, legislation which has served this end is confined to the Trade Union Act, 1941, (particularly in so far as this supported registration of trade unions and required negotiating bodies to be licensed) and the Industrial Relations Act, 1946, (particularly in so far as it established the Labour Court machinery as an alternative avenue for the facilitation of disputes settlement without recourse to strikes and lockouts which the parties might otherwise have engaged in to resolve their differences), and the subsequent amendments to these two Acts. There is, however, some *current* concern with "performance", and it has been proposed to establish a committee to examine two questions, one specific and related to the role and function of the Labour Court in the modern context, and the other general and concerned with methods of fostering "good industrial relations" (EIRR, No. 46, 1977, p. 16). The equivalents to both these questions were posed to the Donovan Commission in 1965, and led eventually to the creation of the Advisory, Conciliation and Arbitration Service (on the one score) and to various performance regulating Bills and Statutes, only some of which remain extant (on the other). (See Weekes, et al., 1975). It is, however, also important to note that along-side this, went a considerable amount of Government exhortation and administration practice, aimed at "improving performance" or "achieving good industrial relations".

It is in this connection that the various harmonisation proposals of the European Economic Community, in both Ireland and Britain, assume a particular significance. The main templates employed there (e.g. German Works Constitution and Co-determination Laws) are statutory and performance-oriented and for these reasons seem to

offer a possible route out of the present difficulties experienced or perceived in the Anglo-Irish context. If that route were to be indentifiable in a single phrase, it would be that of "constitutionalising" relationships within industrial and commercial undertakings. Working on from our recent and current concerns with the development of adequate structures and procedures for industrial relations, we seem to detect in the EEC harmonisation proposals the possibility of stitching all these together into a works constitution which will identify respective rights of the parties and establish adequate procedures to permit orderly resolution of any differences. The concept of worker and trade union status is then seen to be dealt with in the arrangements for worker participation or industrial democracy — as envisaged in the Worker Participation (State Enterprises) Act, 1977, in Ireland and as reported and recommended on by the Bullock Committee in Britain (1977). This, on the face of it, will deal with two important questions: firstly, the scope of the worker's (or trade unionist's) right to a democratic voice in his own works rules; and secondly, the corporation or integration of the local activists into the structure of joint decision and regulation.

But in so far as the proposition succeeds on the second of these scores, and thus shifts the centre of gravity in trade union structures to the local and domestic organisation, it is likely to make the local activists' concern for union security even greater than it is at present (when the national organisation, as through the Employer-Labour Conference, provides some kind of "protection" albeit on the basis of "persuasion"). The contemporary problems of the union's rights in relation to the employer in recognition and "bargaining in good faith" and relation to the labour market in union security not only remain for resolution, but may become more strident because there is more to be lost or gained.

Status-enhancing strategies

One way of handling this problem would be, of course, to do nothing and leave these questions to what Sydney Webb referred to as "the arbitrament of private war" to effect a solution which could then, in each and every case *if anyone thought it desirable,* be tested in the Courts. The handling of the problem which led eventually to the Meskill v. CIE case of 1973 has been said to have been a sensible approach in view of the divided views expressed in the Supreme Court in the Educational Company v. Fitzpatrick case (19623) (Blaghd, 1974). To follow this line, however, is to leave the question for resolution in terms of either "constitutional justice" or the current doctrines of the common law. Whilst the latter are susceptible to

change, with changing social and moral values, they have tended to hold strongly to labour market conceptions which are somewhat outmoded in the rest of society, and which have fallen to be changed by external legislative means rather than by internal ones — with a few exceptions, one of which has been mentioned already.

The major alternative to this strategy is that which involves grasping the nettle of trade union status defined in relation to the employer and this, I think, probably means modifying our thinking which is based upon doctrines of contract (however imperfectly they may be applied to collective agreements) and looking for solutions more appropriate to administrative law. On the one hand, the trade union (and its local brantches, etc.) will require to be "protected" by the grant of rights of recognition by the employer, and of some freedom to agree a degree of "union security" with him, even if this is restricted by requirements of employee ballot in the first instance and possibly of periodic re-election, and coupled with the exercise of a bargaining licence in the particular case. On the other, any extension of collective bargaining or participation will have to be contained within a framework of permissive legislation, which will delimit and restrict the "rights" and "prerogatives" of the parties, whilst still serving generally to be more restrictive of those currently enjoyed by the employer by virtue of his "property rights". (I think this must be described as a common law right or doctrine as the Constitutional right does not seem to give unqualified rights in the "employment" or utilisation of property). An employer therefore quite properly relies upon the *common* law rights of private property to determine whom he would associate with him in employment. But in the light of what I have rehearsed above, we might have to ask what is the meaning of "agreement" — as implied in a contract — in this context: if it were to be defined as agreement between equals and not an "unconscionable transaction" or an agreement made under duress of the differential need for employment, then the "agreement" of "them" might have to be effectuated in other terms than currently. Where such a conception existed, it would then be equally proper for a trade union nominated by "them", the employees, to determine, between themselves and with their employer, whom they would work with. This, by itself, of course, is insufficient, since it really forms the basis of the situations described in the Meskill v. CIE, Becton Dickinson & Co. Ltd. v. Lee and Others, and Murphy v. Stewart and Others, cases in which some workers showed themselves "reluctant to accept for themselves a "closed shop" or a "union shop" agreement which was quite agreeable to their employers" (Blaghd, 1974) and presumably also to the unions involved. What *more* is necessary, is I

think a change in the conception of what we currently identify as the collective agreement, particularly as that is concerned with procedural rules, (Flanders, 1965, Ch. 2), to give them the status of "by-laws" or "articles of association", as defined in Company law.

This means, I think, that a particular form of co-determination will be required in the Anglo-Irish context, if any kind of harmonisation with Europe is to be achieved — and paradoxically, my suggestion will produce a different structure from that found in Germany. The form which co-determination might take in Britain, and for constitutional reasons would probably have to take in Ireland, if the local union organisations are to go along with it, will have to be a partnership, conceived in *business* not social terms. What I mean by this is that I think the rights of property will have to apply not merely to the owner and shareholder in their current conception, but to the worker too. The one will base his rights upon the ownership of external things, and the other upon his ownership of rights in the job — or in the more usual phrase used, in "job property rights" (Porter, 1954). What must develope from this is a partnership of equals — a partnership of shareholders and trade unionists, both of them, of course, voluntary associations, operating through a single-tier Board, which, as now, would have the rights and duties of the Directors under the Companies Act, 1963. However, coincidentally, it will be necessary in this context to re-consider the concept of "limited liability" within a comparable framework of "equality" of status. This has two relevant elements: the straightforward limited liability of the owner/shareholder which is not matched by a limited liability of the worker in common law but only in so far as the trade union has effected some limitation; and the allocation of liability as between the "corporation" as fictional person in law and those who act in its name, the Board of Directors, which subject has been much discussed in recent years without much consequential action being taken on it.

The creation of a new "partnership" Board or Council would require, inter alia, that procedures for appointment or election would have to be instituted, even if they were in some respects to be copied in their essentials from the existing Companies Legislation. But on the worker side, the main problems are likely to be encountered in connection with the unionist — non-unionist issue, as they have in the old-style "consultative machinery". Since in some analogues employed to describe trade unions, they are depicted as a "permanent opposition" to the governing "management", it might be sensible to conceive the election procedure in political science terms, and by coupling this in Ireland with the negotiating rights processes under

the Trade Union Act, 1941, develop a mechanism for testing the support of the recognised bargaining agent (or participation agent) on a set period basis.

The granting of equal status would, in effect, mean two things. Firstly, that the employer would be seen more clearly to be licensed to employ capital for the public good, which is, in principle, the case now, even if it is overlain with social theories about the role of profit in defining enterprise purpose. Secondly, that the employee would, in fact if not explicitly in law, be regarded as having correlative rights of property in his labour, or his labour power — a conception which is beginning to be established in the current legislation on contracts of employment and redundancy and dismissals. Taken together, I suppose this would, in the lawyers' categorisation, transfer the law of employment from the realms of contract to those of administrative law, and that being the case, it would not be possible to continue the exclusion of trade union internal agreements (the constitutions and rule books) from the purview of external adjudication. But unlike the attempt to control these in the Industrial Relations Act of 1971 in Britain, an integrated development of the new conception of a co-ordination of property rights in both labour and external goods, might stand some chance of proving acceptable.

To proceed in this way is not to remove the problem of the individual's rights in relation to the new joint, by-law-making entity which might be one product of thinking in these terms. It might remove the element of a worker's necessary subjugation to the unilateral authority of the employer, but it might also render the worker subject to the new by-law-making entity. This could avoid constitutional offence only if it were to be regarded as a voluntary bady, capable under the constitution and the law as it now stands of determining by its own rules (and within its own rules) who might be entitled to "join" that voluntary association — following the dictum of Welsh J. in Murphy v. Stewart and Others in which he denies that there is a constitutional right to join a union of one's choice, but merely to form such unions, that right being qualified by the requirement that one must be entitled either by law or rule to join.

This, of course, suffers from the major flaw that it places a condition upon the individual's right to work. In order to do so in the particular case, he would have to be acceptable to the joint body, including the union as one of the equal-status acceptors of the by-laws or rules making up the works constitution. Two provisos might be entered, however, to avoid offence to the Constitution. Firstly, if it were to be provided that the joint body would exercise should powers as are currently asserted to be a part of the right to determine the use

of property, and that the by-laws or rules so developed "jointly" should be operated reasonable and intra vires for the good of the undertaking as a whole, would this be any more discriminatory or arbitrary than the present system in which the employer is in a position to exercise this power as a prerogative, subject only to challenge after the event?

It also secondly suffers from what some would see as a disadvantage in that it incorporates the union in the administrative system, and would both reduce its autonomy and probably subject it to external adjudication of its own internal procedures and activities — in much the same way that the Industrial Relations Act, in Britain, sought to impose an external constraint of this kind upon the union as a "public body carrying out which has come to be "security", and the arbitrament of private war might thereby prove preferable, and, of course, it is just this possibility that the greater autonomy currently enjoyed by trade unions and their local organisations in the British Isles allows power bargaining to be utilised effectively, which tends to distinguish the industrial relations systems in Britain and Ireland from those of some of our main Continental partners. They do not face the same local organisation and local autonomy amongst trade unions, and although some industries feel that they are moving this way, it is one thing to head off Indians at the pass, and quite another to confront them head-on on the plains.

This brings us back to where we started — with the problem of finding a place, or establishing an acceptable status, for the trade union as a voluntary body carrying out which has come to be regarded as a "public function" but not yet, apparently, as a trustworthy body. But the desire to be "good Europeans" expressed by the will of the people (Article 29. 4. 3° of the Constitution) forces us, as I have tried to show, to consider (a) the nature of the business or work enterprise, (b) the status of the worker within it, and (c) the status of worker representative organisations in relation to both of these. And it is the last of these, the status of the trade union and particularly of its local branches or organisations, which forces us to consider anew the extent to which society will provide "protection" as well as require or exhort "performance", when, in extending this protection, we may have to alter our longstanding conceptions of what constitutes "freedom" for the individual, and "good" for the public. Whatever brief may be given to the proposed committee to review industrial relations in Ireland in the context of current problems and of EEC harmonisation, therefore, it will inevitably find itself concerned to find a balance of rights and duties, freedoms and

limitations, within industrial relations for the better ordering of industrial relations and the preservation of acceptable status relations between the individual, the trade union and the State.

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