The Third Countess Markievicz Memorial Lecture

Problems in The Field of Dispute Resolution

Professor Charles McCarthy

The Countess Markievicz
Memorial Lecture Series

First Lecture 1976

Industrial Relations and Creativity — The Irish Case
Professor Michael P. Fogarty

Second Lecture 1977

The Individual, The Trade Union and The State — Some Contemporary Issues
Professor George F. Thomason

Third Lecture 1978

Problems in the Field of Dispute Resolution
Professor Charles McCarthy

The Third Countess Markievicz Memorial Lecture

Problems in the Field of Dispute Resolution

Professor Charles McCarthy

The Countess Markievicz Memorial Lecture has been established by the Irish Association for Industrial Relations with the support of he 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 Third Lecture was given by Professor Charles McCarthy on November 27, 1978 at the Royal Hibernian Hotel, Dublin. Professor McCarthy has been General Secretary of the Vocational Teachers' Association and President of the Irish Congress of Trade Unions. He is currently Professor of Business and Administration Studies in Trinity College, Dublin. He has wide experience of acting as a conciliator in major industrial disputes. He is the author of several books, including "The Decade of Upheaval", an account of the evolution of Irish industrial relations during the nineteen sixties, and "Trade Unions in Ireland 1894-1960".

Published by the Irish Association
for Industrial Relations,
c/o Irish Productivity Committee,
IPC House, Shelbourne Road, Dublin 4.

Professor Thomason, in delivering the Second Countess Markievicz Memorial Lecture, decided on the happy device of taking up and developing further two major points made by the preceding lecturer, Professor Fogarty, creating as he described it, a continuity. Although he declared that he did not wish to create a precedent, his example nonetheless is one that I propose to follow tonight, both because it permits me to honour those who have preceded me — and to recognise in this way the great honour that has been done me in being asked to follow them — and also because it happens to suit well a certain current preoccupation of my own.

Professor Thomason, in dealing with the topics he had chosen, considered the status of a worker and the status of a trade union particularly in the light of statute, of case law and of the Irish Constitution. This is a necessary part of my topic of dispute resolution — and an excellent starting point as well — since disputes in the industrial field no less than disputes in other areas of society can and are resolved by recourse to the law. However recourse to the law is only one of the ways in which industrial disputes are resolved, and indeed very much the lesser way — although I strongly suspect that the status of the worker before the law, as discussed by Professor Thomason, has influence well outside the legal system. In dealing tonight with dispute resolution, I shall attempt to mark the limits, within our own system of industrial relations, of the operation of the formal legal system, and I shall then go on to deal with the other — what I may describe as the voluntarist — system of dispute resolution, and the jurisprudence that underlies it.

Labour disputes, no less than civil disputes, are an inevitable feature of our society. The vast majority are resolved between the parties without any organisational disruption, and without the intervention of a third party. Our concern therefore is with the minority of instances where a resolution cannot readily be found. In such circumstances, the dispute may broadly follow one of two courses. It may be a matter which is normally justiciable in a court of law; on the other hand, it may be a matter which either in law or in practice is not justiciable in such a manner.

Individual matters of contract are normally justiciable in a court of law, and indeed the law will both imply and vindicate certain rights whether they are explicit in an employment contract or not. Sometimes the work of the courts is supplemented by the establishing of statutory tribunals; examples will be found in the Unfair Dismissals Act 1977, the Redundancy Payments Acts 1967-1973 and the Anti-Discrimination Pay Act of 1974. Much regulation of health and safety conditions falls under this general heading. It is important to recognise however that such matters are not as a rule central to the

problems of industrial relations. Those that are central tend to fall under our second heading: that is to say, disputes not normally justiciable in a court of law.

I think we must distinguish at this point between disputes which are not justiciable *per se* and those which, although perfectly appropriate to our legal system, are not as a matter of practice brought before the courts.

The first group can be dealt with quite quickly, that is to say, the notion of disputes which are not justiciable *per se*. These disputes may arise in two areas, in the area of contract and in the area of tort, which, in industrial relations, largely concerns activities associated with industrial action. As far as contract is concerned, Ireland and the United Kingdom shared, until 1921, a common legal system. Originally, under the common law of England, contracts of trade unions were void where, as was frequently the case, such trade unions were regarded as unlawful. In 1971 such contracts were legalised but a limit was placed on their enforceability; in particular, agreements between one trade union and another including a trade union of employers, are not directly enforceable, althouth they may be enforced indirectly. There are certain statutory exceptions to this, and the case law in this country is far from clear. As far as tort is concerned there are the protections for tortious activity provided by the Trade Union Act 1906, some being related to activities 'in contemplation of furtherance of a trade dispute' (as the now famous phrase runs) but others, as with section 4, providing to a trade union a quite remarkable and wide-ranging indemnity.

My major pre-occupation however is with disputes which in practice are not brought before the courts whether they are justiciable or not; and here I propose to deal primarily with disputes as such (that is to say their nature and the means by which they may be resolved) and only in a secondary way with various coercive activities adopted by the parties in order to enforce their will, that is, strikes, lock-outs, and other forms of industrial action. This must be for another day; for the purposes of this paper I propose to confine myself to the procedures by which disputes may be resolved without recourse to such action.

Disputes, therefore, not strikes, are our major focus of attention; and here again I must recognise that that although my concern is with disputes which are not justiciable in practice, this practice refers to the courts of law. Such disputes are in fact frequently jusiticiable, but by some other means, that is they are referable to some form of adjudication in the light of a recognised code and therefore capable of generating the idea of jurisprudence. My first distinction has therefore a legal ring to it, that is the rather difficult distinction between disputes as to interest and disputes as to rights. It is a point of long-standing, being first written about in this country in 1947 by the then newly-appointed chairman of the Labour Court Mr. R. J. P. Mortished. The

Swedish model was the one he mentioned at the time, although later commentators have tended to look to the American experience; and perhaps I can best quote from McCarthy and Ellis in describing what is meant by these terms. 'By (disputes of right) is meant disputes over the interpretation and application of a given agreement that arise during the period of its operation. By (disputes of interest) is meant disputes over the renegotiation of such an agreement at a time when it is due for renewal.' The next phrase is of considerable significance for our purposes. 'American unions usually accept that "disputes of right" ought not to be settled by the use of industrial action of any kind. They are prepared to accept mediation, leading-if necessary to a form of mutually binding arbitration as a final means of settlement. Strikes and other forms of industrial action are supposed to be kept in reserve for use in "disputes of interest" which only tend to arise when a collective contract is up for renewal.' There are two things that I have taken note of here; firstly, certain disputes, that is to say disputes as to rights, are essentially justiciable, and secondly, as we anticipated, they tend to be justiciable in a manner other than the normal legal process.

When the Labour Court was established in 1946 under the Industrial Relations Act of that year it was faced with many problems. While it was given certain powers of enforcement, these in fact were very limited. Its essential character was voluntarist; it acted judicially, but its judgements had the force of recommendations, no more. This was a deliberate choice of the government's reflecting the general view of the time, and it attempted as an alternative to give the Court substantial status in other ways. But there were others who would say that the major problem lay not so much in the absence of enforceability, but rather in the absence of a guide or a rule by which judgements could be made. Irish industrial relations were straight conflicts of interest. There were no agreements of a general kind the interpretation of which could be referred to the Court. At an early stage therefore R. J. P. Mortished, stimulated no doubt by his wide international experience, promoted in 1948 a national agreement between all employers and all trade unions in the country which, in covering procedure no less than pay, attempted to convert the industrial relations system into one based on conflicting rights rather than conflicting interests. Within two or three years the experiment collapsed and the Court in practice, from the early 1950s until 1970 acted — quite successfully as it turned out — largely as an honest broker offering commonsense solutions in a quite pragmatic way. The great watershed of the 1970 agreement had the effect of doing largely what Mortished intended, converting the system into one based on the resolution of clearly understood rights and obligations.

These then are the disputes which are justiciable, but not in the traditional courts of law and it is this area which I shall explore first, basing the account as I must on the developing role of the national

pay agreements. Let us approach the system as we would any legal system, by taking account of the code of law, the institutions established to administer it and also the sanctions that are available. The code of law is found of course in the successive national pay agreements, which, in the substantive sense, provide for actual increases in pay and provide in addition for certain other special increases or benefits which the parties may negotiate. It will be recognised immediately of course that such agreements to increase are also agreements to delimit claims, inviting inevitably the occasion for disputes both in regard to interpretation and in regard to practice. Consequently, as well as the substantive matters, the national pay agreements also provide for procedures by which such disputes might be resolved. It is in these procedures that we find our major interest. In 1948 the national pay agreement negotiated under the chairmanship of R. J. P. Mortished did not provide for any terminal date, as we now understand the term; it continued until by due notice one party or another brought it to a close; it therefore provided for adjustment either on a national basis — as in the case of a shift in the cost of living — or on the basis of an individual employment, where the onus of proof was on the claimant. In all circumstances of dispute, the agreement provided that normal procedures should be observed, including reference to the Labour Court. This latter is the significant point. It is true that there was no undertaking that the Labour Court's recommendation should be accepted; there was no undertaking to refrain from industrial action but there was an undertaking that the case would be referred to the Court before industrial action could take place. This brings us to the key problem: the substitution of some judicial process for a trial of industrial strength, and while this early agreement merely required reference to an adjudicating body, not acceptance of the adjudication, it was an important first step. Having established by agreement an elementary code of law, the Court, also by agreement became the institution of adjudication, and while sanctions were not explicitly imported into the system, we must not underestimate the strength of the commitment which employers and trade unions had to an agreement to which they were individually subscribers, this being the practice at the time.

From the autumn of 1949, right throughout 1950 and 1951, the Court came under considerable criticism from certain influential trade unions. One can distinguish in these criticisms two quite different categories of complaint. The first was that the Court was imperious, refusing for example to reopen a case when its recommendations were clearly unacceptable and anxious about its dignity in other ways as well — its status, perhaps, as we would now describe it. The second was that the chairman, in a period of national economic difficulty pronounced personally on what he believed to be the appropriate level of income in the public interest. There was no question of his independence of the government, and yet in this period

when no national pay agreement was in existence (the 1948 agreement having been abandoned) he appeared to generate himself a view of what was right. In this he was rejected. (Indeed in more recent times another chairman had a not dissimilar experience). It was suggested therefore, in relation to both these counts, that the Court should act not as a judicial body but as a conciliation body. I have described the situation at some length, since I believe that in these early days — and perhaps simpler days — we can see more clearly the issues that are at stake. Let us take them one by one.

In the case of the procedural difficulty, we see a hint of an important dilemma which we shall later develop, the tendency to uneasiness when an adjudication service and a conciliation service coexist in the same institution. The adjudication service seeks a code of rule, perhaps a growing body of precedent, if it is to develop a system. The conciliation service, however, finds that it must, above all else be pragmatic, eschewing guide, rule and precedent. One tends to undermine the other. In the years to 1970 the Labour Court, acting in a climate in which all disputes were disputes as to conflicting interests, not rights, with in general, no agreements to provide a code of law, deliberately avoided precedent or rule, making a virtue of the pragmatic character of its adjudications; that is to say it deliberately avoided the development of a sophisticated judicial role. There are perhaps some here who will remember the puzzlement — indeed bafflement — of bodies like the NIEC intent on providing some machinery for a prices and incomes policy when they were faced with such unabashed pragmatism. Within this context the conciliation service of the Labour Court developed, often providing a very useful introductory clarification to the Court's hearing of a case. Therefore the sharpness of the institutional tension which might be expected to exist between the adjudication and the conciliation roles was not experienced in those years, at least not in any major way. In the case of the chairman's pronouncements on what might be described as the ethic underlying a pay claim, we are I believe confronted with difficult questions of jurisprudence. If we were to take the definition offered by McCarthy and Ellis at a superficial level, we would have to conclude that the only code, the only law, which the industrial relations system may make reference to is the private law agreed between the parties, and that this is where our corpus of rights and obligations springs from. However if we were to pursue the analogy between this and the law of contract, we would find that the law in the public interest while respecting in a primary way the mutual obligations set out in the contract nonetheless implies certain things, often very basic things, whether they appear in the contract or not. In the case of pay bargaining then we must ask ourselves whether a view expressed by the government concerning the limits beyond which wages should not rise — whether such a view should be imported as a term into the proposed agreement. The Labour Court in the past has noted such

statements, has been impressed by them, but has declared itself to be independent of them, particularly since the amendment of the Act in 1969, and has given emphasis instead to its obligation to offer a recommendation which may find acceptance with the parties in dispute. But there is much uncertainty regarding the reality behind all this, and much tension at times between all the parties on its account. None of the national pay agreements has run into such a difficulty as yet, since the government on each occasion has indicated its broad approval of the terms; and indeed it is probable that if there were grounds for such a conflict no agreement in practice would be concluded, because of the government's influence at the bargaining table, although strictly speaking it is not a party to the negotiations. Consequently, th& simple definition of McCarthy and Ellis would appear still to provide a total statement of the rights and obligations involved. And yet, in commonsense it is clearly inadequate to say that the rights and obligations set out in a national pay agreement spring exclusively from the strictly bipartite agreements of employer and trade union. Nor do I refer merely to the more shadowy tripartite arrangements which of late formed a background to the bipartite bargaining; I think I must recognise that the expression of assent by the government to national pay agreements, however much discounted by the trade unions because of their commitment to free collective bargaining — that is bipartite bargaining — such assent must be seen as a real dimension to the agreements, making the government in every sense a partner to them. This is what makes national pay agreements such public instruments, and the observation of their terms almost a matter of public law.

Although there were a number of national agreements between 1948 and 1970 the 1964 agreement was the only well-developed one and this was remarkable in that while it set out the maximum increases which could be negotiated and the limits in what could not, it did not provide in any special way for institutional adjudication or for sanctions although it did provide that the usual machinery for the peaceful settlement of disputes, including 'if necessary' the Labour Court, should be utilised before any stoppage should occur. This was more a recognition of current practice than a special agreement on procedure, and I suspect, looking back on it now, that at least some major employers at the time saw the agreement in large measure as a contract between two parties, the functions of adjudication and enforcement lying elsewhere, perhaps with a labour court of much extended powers, deriving its validity not from any agreement between the parties but from a wider statutory source. This was much in contrast with both the 1948 agreement and those from 1970 onwards which are necessarily charters more than contracts, providing within themselves for adjudication, administration and at least limited sanctions.

When we consider the national pay agreements since 1970 we can

devote the major part of our discussion firstly to the obligation to embrace due procedures, (with the sanctions that attend such obligations) and secondly to the institutions that are necessary for the purpose. I do not need to delay I believe on the substantive matters that were negotiated other than remarking that they provided three areas for adjudication broadly, firstly the observance of the specific terms, secondly the manner of implementation of discretionary terms (exceptional circumstances, inability to pay, productivity agreements and so forth) and thirdly, the question of malperformance or non-performance by any of the parties. These categories of adjudication imply the possibility of a number of different institutions of adjudication and this in the event is what occurred.

Let us take first the obligation to observe certain procedures and the sanctions such as may exist, for non-observance; and I should like to approach the discussion from the point of greatest difficulty, the question of sanctions. We are of course discussing a voluntarist system, and it is therefore in a sense surprising that the idea of sanctions, should arise at all, since sanctions are the penalties by which in a compulsory system conformity is effected. Because this is in fact the case, we find that in order to make sense of the system we must approach it not from the negative aspect of penalties but rather from the positive aspect of self-regulation which arises from a personal commitment to the system and its procedures. True, we no longer find a personal subscription to the agreement by each union and employer involved in the negotiations; indeed the trade unions from the outset — that is from 1970 onwards — proceeded by majority vote at special conference. Nevertheless the commitment was both seriously urged and seriously regarded. I believe there lay behind it as well a recognition by the leadership of the organic nature of the commitment, a recognition that in a situation which was so extensive in its democratic character such a commitment could both wax and wane. It could be reinforced by involving larger and larger numbers in the debate and in voting, and by 1974 we see major unions balloting their own members, holding special conferences and involving themselves in various other consultative and decisive practices before they in turn cast their vote at the special conference of the Irish Congress of Trade Unions. If we understand the commitment in this organic way, we can appreciate how tentatively it all began. In the first three arrangements, those of 1970, 1972 and 1974, all that was agreed by way of commitment to due procedure was that no party would 'encourage, support or assist any of the persons involved in a strike or lock-out or other form of industrial action intended to contravene the processing or settlement of such claims in the manner described.' The question moves into the area of sanctions proper when we ask ourselves what penalties are available in the event of such a breach. As far as the trade union side is concerned (and this is the area which as yet has received most

attention) the difficulty could occur at either of two levels, at the level of the union, (that is to say a refusal by the members to carry out union policy, in a word unofficial action) or at the level of the Congress, where an affiliated union chose to act in breach of the agreement. With regard to the first, Congress, in 1970, both adopted its all-out strike policy — which gave it far greater and more highly legitimated control of the extent if not the onset of industrial action — and it also circularised its members with a statement to the effect that 'the obligations accepted . . . can be endangered if any support is given to unofficial strikes . . .' and therefore affiliated unions were requested 'to take all necessary steps to advise their members that under no circumstances will strike pay be given to any of their members who directly, or indirectly, become involved in unofficial strikes, or refuse to work in observance of unofficial pickets.' With regard to the second, that is to say a breach of the agreement by a union, the Congress policy both in relation to the all-out strike proposals and in particular in the observance of the national pay agreement was put in challenge by two craft unions in the summer of 1971 in the case of a holiday claim for mechanics in CIE, which in the event Congress and its policies survived. One became conscious therefore, at this time, of the growing seriousness of the commitment to industrial peace, despite the difficulties and uncertainties, many of which were inevitable. The commitment furthermore could be protected and it could be fostered by developing institutions which would counter — or at least reduce — the difficulties (something which was not recognised at all in 1964) and this the Employer-Labour Conference set out to do, causing Ruaidhri Roberts to remark in 1972 'This continued activity within the Employer-Labour Conference, the constant monitoring of the Agreement, the provision through both the Congress and the Employer organisations of a channel through which different issues could be brought to the attention of the Conference and resolved, was a novel feature in relation to Irish National Agreements which, in its effect, has proved of considerable importance. The provision for interpretation means, in effect, that the National Agreement as it now stands consists not only of the original text, but all that text and all the interpretations which have since been added to it.' I take up later, as I have said, the discussion on institutions; my object just now is to note that even if the sanctions are indeed very mild, nonetheless there is a substantial attempt at self-regulation and at the amelioration of areas of conflict. The recession, the effect? of which became dismayingly obvious in 1975, reinforced the need for a commitment to industrial peace and here we find a dramatic increase in the extent of the undertaking given by the parties, particularly the trade unions. 'It is particularly important at the present time,' stated the agreement, 'that both employers and trade unions shall not take or support actions which would be contrary to the terms of the Agreement.' And the

commitments to industrial peace were surprisingly explicit and unambiguous. The trade unions undertook 'not to enter into a strike or promote or encourage any form of industrial action calculated to bring pressure to bear on an employer to concede increases in pay in excess of the amounts set out .. .' and in the very difficult area of discretionary increases the agreement required that in the event of disagreement the matter be referred to the Labour Court or to a public service arbitration board, and furthermore that the award of such a body 'shall be accepted by both parties and processed for implementation; in these circumstances neither party shall take any form of industrial action, unless the award is not implemented.' To this there were only certain limited exceptions. The agreement however gave particular emphasis to the institutional arrangements which had developed to relieve the sharpness of the conflicts that might arise, and in order that such institutions should be availed of, it was agreed that 'where employers or trade unions consider that a dispute may arise which might be in contravention of the terms of this agreement they will advise the Steering Committee of the Employer-Labour Conference of the position and seek their advice.' In a word the emphasis was on commitment and good management, and not in any major way on sanctions. The 1976 agreement repeated all these provisions, and indeed gave the Employer-Labour Conference an additional adjudication role in relation to productivity agreements, and the 1977 agreement continued in the same mould. But by 1978 the commitment which supported the rather unusual and very categoric prohibition on industrial action began to fade, largely one suspects as affluence grew in the economy, and men began to doubt the rationality of any restraint which they might have exercised. The 1978 agreement therefore, softened greatly the prohibition on industrial action, in large part indeed removing it altogether; but the commitment to industrial peace was still very marked although it was now expressed in a somewhat different way. Instead of these prohibitions, there was set up a series of procedures before strike action could take place which were aimed at making the possibility of strike action very remote. These procedures, as you know, bear on questions of balloting and substantial notice before a strike can take place and it was widely believed that they would probably be more effective in securing industrial peace than explicit prohibitions would. Their legitimacy — that is to say their acceptability — was somewhat weakened by their being included in the terms of the national pay agreement, some unions claiming that balloting and notice were domestic matters in which employers should not have a part. Nonetheless it was a development of considerable ingenuity and has on the whole worked reasonably well despite the notoriety of certain recent disputes. The difficulty I would imagine at the present time lies not so much in those special aspects of the 1978 agreement but in the widespread deterioration of commitment to national pay

agreements in their present form. Where commitment deteriorates, men naturally enough turn once again to sanctions. I have described the sanctions at present as mild — as indeed they are. I believe furthermore that they must necessarily remain so when they are exercised internally, that is to say within the trade union movement itself. Where men go on unofficial strike a union is slow to condemn publicly, whatever its private stance; it must continue in practice to have some relationship with them of a kind that can be built back into good order; otherwise a dispute becomes virtually intractable. This is what makes unsung heroes of quite a number of trade union officials at the present time. The sanctions therefore which a trade union may impose on those taking unofficial action cannot in the nature of things be great. Equally at the national level, where Congress exercises such sanctions as are open to it — suspending a union and ultimately expelling it from Congress for action in breach of agreement — the effect on the union may indeed be very limited, and in any event, under our system, it can in no way diminish the union's legitimacy. Of course one should not underestimate the occasional anger of the trade union movement as a whole as expressed through Congress when a group of workers behaves in a particularly cynical or disruptive manner; but if this is to have effect — and we have seen such on a number of occasions — it requires a widespread feeling of outrage, and therefore the occasions are necessarily few. The sanctions therefore which normally are available to Congress are also very mild. It is for these reasons that men suggest what I may describe as exogenous sanctions, sanctions coming from outside the system and deriving their legitimacy therefore from the only authority which could validly be offered from outside, that is the government. Indeed the government has already moved in that direction in the case of the commercial banks where because of their claim to be independent of the national pay agreement, even the mild internal sanctions did not apply. The Director General of the Federated Union of Employers has suggested the form which these exogenous, government-imposed penalties might take, largely a varying of the tax system and the social welfare system so that additional liabilities would arise for those engaged in unofficial action or involved in breaches of the agreement. If we have a care for jurisprudence we must be cautious about such a proposal. There is the larger question (which is not my immediate concern here) that if one regards contributions to taxation and to social welfare insurance as penalties (which they cannot be in any sense of the term) then one is in danger of damaging the legitimacy of these systems, particularly as they are already sorely tried. In the narrower field of industrial relations, one would run the risk of diminishing further the legitimacy of the agreements since the penalties would come from outside the scope of the agreement and would therefore depend on no explicit code to give them legitimacy other than the public interest as the government at its discretion from

time to time interpreted it. I am not suggesting that the government would not be effective in doing so, but if it were it would be at a high cost in respect for due procedure.

Our second area of discussion in this exploration of national pay agreements is the area of institutions; and indeed the first thing that strikes one about them is their diversity. Firstly, the agreements provide, as we have seen, that certain matters should be referred to the Labour Court or to certain other domestic tribunals where appropriate and these exercise a judicial role in relation to the matters thus referred. Certainly as far as the Labour Court is concerned this growing practice of referring to it cases under the national pay agreements has obliged it to develop a certain consistency regarding interpretation and decision — that is to say, a certain adherence to precedent — which did not exist in the past. However this is only one way in which disputes are handled; the most interesting development has been within the Employer-Labourer Conference itself. Here a different and very interesting form of procedure has emerged. Let us recognise first that the Labour Court and also the conciliation and arbitration scheme in the civil service follow the well-established traditional methods of English law and adhere to the practice of adversary proceedings with which we are all familiar, a practice which requires the parties to dispute before the tribunal as adversaries, leaving the tribunal to make judgement between them. While greatly respecting the procedure, I have often questioned its relevance in all circumstances — in family law cases for example, or in the case of some investigations into restrictive trade practices, where the cause of truth might be better served by an inquiry into the circumstances as a whole rather than promoting, sometimes quite artificially, a confrontation of conflicting points of view. It is this alternative procedure of non-adversary inquiry which appears to me to have developed to some extent in any event within the Employer-Labour Conference, permitting it the substantial flexibility which it enjoys. It no doubt springs in large part from the fact that those who make up the Employer-Labour Conference not only come from both sides of industry but are also the major figures in their own organisations, are highly experienced and bring considerable knowledge to bear on the actual problems to hand. In this the Steering Committee appears to be the key. As a matter of first instance, it deals itself with all difficulties and conflicts, if necessary referring them to the Interpretation Committee or the Adjudication Committee, all sub-committees of the Conference. This is by no means a largely automatic reference; on the contrary a very substantial majority of interpretation cases and adjudication cases are resolved by the Steering Committee itself. In particular, the provisions in the 1975 and subsequent agreements, which invited employers and trade unions who apprehended that a strike might arise, to seek the advice of the Steering Committee greatly increased

its work. Such flexible procedures — which still remain essentially judicial in character — are a happy development. But having said that I must recognise as well the place that exists for a judicial system of a highly formal adversary character. It occurs in this form in a very dramatic way at the arbitration level in the civil service conciliation and arbitration shceme, and in other schemes within the same family. The procedure there appears to carry with it a great deal of legitimacy, even though the disputes have traditionally been disputes as to interests and not as to rights. The reasons for this I cannot deal with tonight. I must content myself with noting the advantages of diversity in an adjudication system, taking account thereby of very different traditions and expectations.

I now come finally to a very difficult area and one which in the last analysis is probably the most topical at present, that is to say the area which comprises disputes which are not justiciable even by the special and informal procedures which we have discussed up to now — disputes, in a word, as to interests where there is no guide, no rule, no body of laws to which the parties can make secure reference. These are the cases which are most likely to degenerate into industrial action.

I shall attempt first to establish a general setting for the discussion. The usefulness of the judicial process in industrial relations — however informally exercised — is necessarily limited. There will always remain a corpus of disputes as to interest where there are no rights — except those general rights which society might enforce — where there are no duties and where it is difficult to contemplate how there could be an adjudication (although there might be a recommendation) and where in such circumstances, the idea of penalties is clearly out of place. It might be urged that in the public interest the government by statute or some similar means might impose on such a situation a structure of rights and duties and a means by which they could be vindicated; and perhaps there can be circumstances where the major characteristics of a judicial system can be created from outside. The only example we have of such a system occurred in the war years when wages tribunals were established by emergency powers order under the Emergency Powers Act of 1939. Broadly one sets down by law certain limits on pay and one then provides machinery by which exceptions can be met, any departure from the system incurring a penalty. Some such system was attempted in the United Kingdom in the early years of this decade with rather unfortunate results. The rule of law is a rule supported by a general consensus, and where legislation is introduced in its absence it is notoriously fragile. Simpler remedies by statute are even more fragile, devices such as declaring a maximum as the Prices and Incomes Bill did in 1970, or outlawing strikes and lockouts. These procedures are directed primarily towards the protection of the public interest, not, in any major way, towards the just resolution of

the dispute and so are limited in their legitimacy. I would not wish to suggest that in the short term they would not be effective; in public interest matters there is a powerful presumption — quite correctly — that the government is right. What I do suggest is that in such interventions because of the absence of an objective and agreed code of law, the procedures cannot have any longer-term legitimacy than one based on a passing administrative concern with the public interest.

Secondly although I have spoken of a code of law devised by agreement between the parties, I must recognise that behind such a grand phrase there lies something which is necessarily simple and limited, and something which cannot be extended to all the circumstances of industrial relations, reinforcing the point which I made earlier that the usefulness of the judicial process in these matters must remain itself limited. The reason for the simple and limited scope of the code of law lies in what I might describe as strong normative differences between the parties.

It seems strange to speak on the one hand of so much that is not justiciable and on the other of important normative influences in the system. Yet this in fact provides us with an important insight. Despite the fact that so much lies outside formal — and even informal judicial procedure, the system is by no means lawless; indeed the contrary is the case. Among trade unions in particular there are phrases in common usage which manifest this, phrases such as 'good trade union practice' or the reliance on 'custom and practice.' It is not suggested that such norms or conventions are not frequently broken; what is significant is that they exist as a respected guide to action. The difficulty arises because of a tendency for the norms, or expectations of proper conduct, of the employer to differ on occasion from the norms of the workers. It can occur quite prosaicly on the sharing of what one might describe as the usufruct. It can also occur because of notions of hierachical prestige assumed by the management and not shared fully by the workers. A lot of this is uncertain and unexplored territory. However in so far as these different normative systems exist they raise problems in jurisprudence. The dilemma might be met either by endeavouring to create a common normative system or by creating a type of procedure which recognises normative diversity — or by a combination of both. The national pay agreements are an example of the first — necessarily limited as we have seen. But the second device, that of establishing a form of procedure which recognises the diversity of these normative systems is what gives its special character to industrial relations. It is yet a further reason why the parties are reluctant to have recourse to the courts; but in particular it throws emphasis on those institutions or arrangements which can readily bridge normative systems, that is those institutions or arrangements which tend to eschew principle, to eschew a code of rule, to eschew precedent and to rely on the pragmatic requirements of each situation. It is not surprising

therefore that for many years the conciliation officers (or industrial relations officers) of the Labour Court itself acted in this pragmatic way.

But the situation which I have described — where there are no really explicit rights and duties and where there is always a real possibility of strong normative difference — such a situation will readily deteriorate. It is not surprising then that as a first step the parties do all they can to inhibit industrial action and to resolve the disputes by discussion. And so we have arrangements such as peace pledges, cooling off periods and reference to third parties. It is the role of the third parties that I wish first to discuss — the role of a
conciliation service.

If there is a spontaneous reference by both parties to a conciliator or mediator, there are reasonable prospects for success. The reference in these circumstances implies a willingness on the part of both to shift position, and a further presumption of some respect for the mediator or the mediation service. But there may be on the part of one party or both a reluctance to go to conciliation, a reluctance that is overcome only because of an earlier commitment. The difficulties are even greater where a conciliation service such as the Labour Court has some public obligation to intervene, that is to say to enter the dispute, however gently and diplomatically, without invitation. The Labour Court rightly regards this as a most delicate and difficult matter and there is quite a graphic description of the problem in its most recent report.

What I have said makes clear, I think, the need for an institution to deal with mediation and conciliation; individual persons of repute may act effectively when both sides spontaneously request them to do so; but this is the less difficult area. Where however one proposes to rely on a prior undertaking to refer, and in particular where one seeks to provide for intervention, then some institution is essential whose legitimacy in such difficult matters has already been conceded by the parties at least in principle. The nature of the conciliation service therefore becomes clearer; it must be an institution and above all else its approach must be pragmatic.

This last — the pragmatism of the conciliation service — raises a serious difficulty. There is a view held by some that if, in a voluntarist system, one and the same body offers a judicial function and a conciliation function, one will tend to undermine the other. On the one hand one may have a situation where an adjudication is rejected and where the matter must, because there is often no alternative, be referred back to conciliation, tending to weaken the finality of the adjudication process; this indeed was a major dilemma particularly in the early years of the Labour Court. On the other hand the conciliation service can be undermined by importing into it some of the flavour of adjudication, defeating its pragmatic character. I suspect that the attempt of the Labour Court to maintain both has meant that

neither had developed, the Court itself increasing its business but developing no real basis in jurisprudence, and the conciliation service remaining firmly *ad hoc* and, interestingly, structured within the civil service, so that its recruitment policies were severely limited. I suspect as well that such institutional arrangements as these have inhibited the development of sophisticated inquiry into the nature of disputes, partly because it would imply a review of the Court's own role; indeed — and this I cannot pursue tonight — our state of knowledge of industrial relations is quite woefully inadequate, making useful discussion on policy extremely difficult.

It is noteworthy that the Northern Ireland Labour Relations Agency, confronted with these difficulties, opted essentially for a pragmatic service which emphasised the conciliatory role and the role of information and facilitation. It has deliberately avoided being drawn into the judicial role, providing merely a panel of arbitrators from whom the parties may choose at their discretion. If one has to make a choice — and I believe one must — between conferring institutional status on the conciliation function or on the judicial function, then I would choose the former. And indeed experience in the United States over many years would appear to support such a view. In other words I feel obliged to raise a serious question about the Labour Court's judicial role, understood in the widest sense of the term. And yet I am very conscious of the fact that the Labour Court has a long and honourable history, that organisation can be valued for reasons other than institutional logic, and that the Court at present provides, despite occasional criticism, an important and widely-respected service.

In this paper I have tried to explore the area of industrial relations which lies beyond the normal judicial system, either *per se* or by common understanding. My endeavour has been to demonstrate that while there is much evidence of stress it is not lawless; on the contrary there is a strong disposition to normative behaviour. It is on this we must build, and in fact we have done so already with some success. I believe however that future work along these lines will be gravely hampered by a lack of information on what is actually taking place and this is, in my judgement, the area which primarily requires remedy at the present time.