The Fourth Countess Markievicz Memorial Lecture

Irish Labour Law: Sword or Shield?

Dr. Paul O'Higgins

The Countess Markievicz
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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 Fourth Lecture was given by Dr. Paul O'Higgins on November 26, 1979 at the Royal Hibernian Hotel, Dublin. Dr. O'Higgins, currently University Reader in Labour Law and Fellow of Christ's College, Cambridge, is a member of the English and Irish Bars, having been a First Class Moderator in Legal Science at Trinity College Dublin. He is author or co-author of many standard texts, including *Worker's Rights; Employment Law* and the *Encyclopaedia of Labour Relations Law.* He is a member of many bodies concerned with labour and social law and in particular is Bureau Member of the European Institute of Social Security, and Staff Side Panel Member of the British Civil Service Arbitration Tribunal.

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IRISH LABOUR LAW: SWORD OR SHIELD?

Mr. Chairman, Ladies and Gentlemen.

Given that the Countess Markievicz was the first Minister for Labour in an independent Irish State it seemed to me that it might be appropriate for a labour lawyer to say something about the role that law, in particular statute law, may play in labour relations. It would be impertinent of me to make a detailed critique of the rules of Irish labour law when there are so many highly qualified specialists in this field in Ireland but it may be helpful to say something about the problems of law and labour relations in their broad perspectives.

There are many functions which law may play in labour relations. A state may adopt statutes concerning labour relations for the purpose of reassuring foreign investors that their investments are safe and that the labour force will be disciplined and not militant. Statute may establish machinery for the settlement of labour disputes in an expeditious and inexpensive way. Statutes may provide for conciliation, investigative services and advisory services for both sides of industry. However, there are two particular roles which may be played by statute in labour relations, to which I want to devote particular attention. There is the role of statute as a means of establishing basic rights for all workers, below which no worker may fall. One may refer to this role of the law as being a *shield* for workers against poor working conditions. In contrast, one may see the role of the law as a *sword:* legal rules which enable the state, employers or others to limit, to attack, to undermine the strength of workers collectively and of their organisations. An example of the role of labour law as a shield is minimum wages legislation, or legislation protecting workers against arbitrary dismissal. An example of the role of law as a sword is criminal penalties for strikers, or the use of the injunction in labour disputes. What I should like to do is to say something about the prospects for the use of the law in Ireland in future as a shield for workers' rights and as a sword limiting the power of trade unions.

In order to begin this inquiry one has to say something about the tradition of law and labour relations in this country. Ireland's tradition is of course in part that of Britain. The basic features of the British tradition are:

(1) A preference for collective bargaining as the best method for establishing minimum labour standards. Statute is seen as having only a limited role, to supplement collective bargaining where bargaining has failed to establish reasonable standards, and to encourage employers and unions to engage in bargaining. This tradition has begun to break down in the United Kingdom. The first sign of this was the enactment of the Contracts of Employment Act 1963. Since then statutes have established legal minimum standards

over a wide range of subjects. In the Irish Republic there has been a similar development which is not yet complete.

(2) An absence of a detailed regulation of the collective aspect of labour relations. The law on industrial action and on collective bargaining is relatively undeveloped. British law is concerned primarily with individual rights and has proved unable to adapt to the problems of collective relations. There is no conception in Britain of a lawful or unlawful strike. The law is concerned only with the legal liabilities of individuals who organise or take part in strike action.

(3) The role of the law in collective labour relations is limited to encourage collective bargaining, to enable trade unions to exist and not to be destroyed by litigation — the reason for the immunity given by the Trade Disputes Act 1906 to trade unions against claims in tort — and allowing effective industrial action to be taken by workers.

(4) The principle of universality, namely that the rules governing labour relations should, subject to certain limited exceptions, apply to all categories of workers, whether they are agricultural workers, civil servants, local government officials, seamen, etc. Since Irish independence the United Kingdom has steadily reduced the numbers of groups who are treated differently for legal purposes. This is the fairly consistent pattern of modern British labour legislation, e.g. in the case of the law of unfair dismissal to include, for example, civil servants in its coverage. This is a valuable tradition, much admired elsewhere. It is one of the few areas where the British pattern will be followed by other countries in the Common Market, who have extremely complicated systems of labour law, sometimes dividing the rules of labour law into those governing public employees on the one hand and those governing private sector employees on the other; in some systems there may even be three or more systems of labour law in one state, one may have one system for white collar private sector workers, one for blue collar workers, and one for public officials. It is note worthy that recent Irish labour legislation on occasion shows a preference for excluding large groups of workers from the general coverage.

(5) Another British tradition of comparatively recent origin, no earlier than 1919, is the role of the State as model employer. That is to say that the state has adopted a positive attitude to trade unions and collective bargaining, setting the example for private employers. Another aspect of this is that while the state should not outbid other employers in the labour market it should seek to provide its employees with terms and conditions equivalent to those enjoyed by comparable workers in the private sector. This has been for many years the basis upon which civil service pay and conditions in Britain are established. This British tradition, to which we in Ireland are heirs, places the emphasis in labour legislation upon the role of labour law as a *shield,* that is upon establishing reasonable minimum

standards; the state in its administrative capacity seeks to achieve the same end.

(6) The neglect of labour law as an academic subject. As Kahn-Freund has commented there is something wrong with a system of legal education which neglects the study of the rules under which a large part of the population has to work. Of course this defect is being remedied in Ireland and in the United Kingdom.

(7) There is a preference for "liberties" as opposed to "rights" in the British system. Thus the law defines the scope of freedom of action traditionally by saying that one is free to do what is not unlawful, rather than by conferring a positive right. There is no right to freedom of speech in the United Kingdom, only a liberty to say what is not unlawful to say. This is the reason for conferring *immunities* on trade unions and strike organisers, under the Trade Disputes Act 1906. Other countries might enact a legal right to strike. In the United Kingdom there is no such right to strike, only situations falling within the phrase "action taken in contemplation or furtherance of a trade dispute" where if certain legal wrongs are committed by those taking industrial action they cannot be prosecuted or sued for damages.

Have we in Ireland any tradition of our own? There are certain features of Irish labour law that deserve mention. The first book devoted to labour law to be published in Europe was published in Dublin, in 1723. It was by Matthew Dutton and was entitled *The Law of Masters and Servants in Ireland,* and was written he explains because existing English texts — and these were either annotations of statutes or general works for use by magistrates — "can be no sufficient authority" — such were the differences between England and Ireland — for use by lawyers, employers and workmen in Ireland. One laments that until recently so few Irish academic lawyers followed his example.

Who was Matthew Dutton? Relatively little is known about him. An examination of the records of the Inns of Court in London extant does not find him enrolled there. This makes it very likely that he was not a barrister. Nor is his name found in the list of *alumni* of Trinity College, Dublin. It seems likely that Dutton was a clerk in some government department in Dublin. In the first decades of the eighteenth century he published a number of legal works, including digests of statute law and a manual for Justices of the Peace.

Dutton's *Law of Masters and Servants* is the only Irish legal work I know published in the first half of the eighteenth century to have a second edition published in the second half. The Library of the Harvard Law School records a second edition of the work published in Dublin in 1768. Harvard seems to possess the only copy of this second edition, which I have not had an opportunity of examining. The publication of a second edition, despite numerous good works on the law applied by Justice of the Peace which often included an

examination of the law of master and servant, suggests recognition by the legal profession and by employers of the continuing need for a specialist work on Irish labour law.

Dutton's work is note-worthy in many respects. It contains an early attempt to define "a servant", the issue which has so bedevilled case law and authors in this area. Dutton says "A servant in the intendment of the law, seems to be such a Person, as, by agreement and retainer, owes duty and service to another, who therefore is called his Master" (page v). It is worth emphasising that this approach with its emphasis upon subordination as a test of the master servant/worker-employer relationship is very similar to that adopted in continental legal systems.

Dutton's book comprises a detailed account of the law governing the employment of people, including apprentices; how the relationship of master and servant is established and how ended; the law governing payment of wages; the reciprocal rights and duties of the parties; the vicarious liability which may be incurred by masters; the disciplinary authority of masters, etc. Nor does the work refrain from giving practical advice on labour relations. "Masters" said Dutton, "should also give due encouragement to good and faithful Servants and Apprentices, they should not use a harsh language and rigorous behaviour towards them, but deal with them in a kind and obliging manner, not roughly and angrily. There is this Justice owing to Servants, to take notice of their care and industry, and to encourage them. This will be advantageous to Masters themselves, because it will be an incitement to their Servants future diligence" (p. 82).

Another notable Irish contributor to the development of labour law — but in the United States not here — was William Sampson, one of the nineteenth century's most influential jurists so far as America is concerned. In 1810, in the *Case of the Journeymen Cordwainers of New York,* Sampson helped to establish for American law that an agreement amongst workers as to the wages they were prepared to work for should not be indictable as a criminal conspiracy.

Another important figure in labour law — but in Australia — was the Irishman, Judge Henry Bournes Higgins, who placed the Australian system of compulsory labour arbitration on its modern footing. He was born of a Mayo family at Newtownards, Co. Down in 1851, and was brought up in the South West of Ireland. He went to school in the Methodist School, St. Stephen's Green, Dublin. After his father's death, he emigrated at the age of 19 to Australia, where he practised as a lawyer for many years, taking a particular interest in constitutional and industrial matters. He was appointed first President of the Commonwealth Court of Conciliation and Arbitration in 1901, a post from which he retired in 1921.[1] Judge

1. See N. Palmer, *Henry Bournes Higgins: A Memoir,* London. 1931.

Higgins, who was a firm believer in the divergence of interest between workers and employers, said in 1922 "the war between the profit-maker and the wage-earner is always with us". By "war" he meant "conflict". He himself did more than anyone else in this century perhaps to substitute a legally organised dialogue for ordeal by battle in labour relations through the Australian conciliation and arbitration system.[2]

More recently of course in Ireland new traditions, post-independence traditions have been developing. There is first of all the Constitution which has played a potent role in the judicial development of labour law. This can be seen in the development in cases such as *Educational Co. v. Fitzpatrick*[3] of a right not to join a trade union, putting in question the whole legal status of the closed shop; *Murphy v. Stewart** where it appears that the Courts here may protect an implied constitutional right, the right to work; *Murtagh Properties Ltd. v. Cleary*[5] where the constitutional guarantee of equality for men and women rendered unlawful picketing pursued with the object of securing the dismissal of bar waitresses because they were women.

Outside the Constitutional area there have been decisions of importance, such as *Glover* v. *BLN Limited*[6] which applied the rules of natural justice to the dismissal of a technical director of a company in his capacity as officeholder, and *Carville v. Irish Industrial Bank Ltd.*[1] which very sensibly decided that in a claim for wrongful dismissal the employer could plead in his defence only the misconduct of which he was aware at the time of the dismissal.

However there is one feature of Irish development which does give rise to concern. This is the willingness of the Irish courts to adopt as Irish law the latest judicial decision in the English courts. In the nineteenth century, W. H. Curren tells us of the Irish judge who challenged a proposition of law propounded to him by counsel in the Four Courts saying, "Mr. Curran are you sure that that is what the law says on this point?" To which counsel replied, "Yes My Lord, but of course it may have changed since the last mailboat from England came in". Thus one finds in *Becton Dickinson Ltd. v.* Lee[8] the Supreme Court adopting the view of the English Court of Appeal in *Morgan v. Fry*[9] that the giving of notice to strike of a length equivalent to notice to terminate the contract of employment has the

2. See his important work *A New Province for Law and Order,* London, 1922, reprinted London, 1968.
3. 1961 I.R. 323.
4. 1973 I.R. 97.
5. 1972 I.R. 330.
6. 1973 I.R. 388.
7. 1968 I.R. 25.
8. 1973 I.R. 1.
9. 1968 2 Q.B. 710.

effect of suspending the contract of employment. That case of course has since been declared to be unsound in England.

Perhaps the most significant development of the Irish tradition in labour law is the enormous importance of the use of the "labour injunction" as a means of controlling industrial action by trade unions. The use of the injunction in other jurisdictions, such as Canada, the United States of America etc., has been very much restricted by legislation because of its undesirable effects on the attitude of workers to courts and the law. Given that the rules applied by the courts in deciding whether or not to grant an injunction, to last until the date on whether the court can decide on the merits, whether or not what the workers were doing by way of picketing or other industrial action was unlawful, must necessarily lead the courts in most cases to resolve any doubt in the employer's favour, and given that the grant of such a temporary injunction very often resolves the dispute in the employer's favour regardless of the merits of the dispute, there is much to be said for outlawing or limiting the use of the injunction in labour disputes. Recently, the House of Lords in Britain in a case *NWL Ltd. v. Nelson*[10] for precisely these reasons, indicated that courts should exercise great care in the use of the "labour injunction" and should bear in mind that the issue of such injunctions in many cases would involve deciding the dispute in the employer's favour.

One of the basic problems about the development of labour legislation concerns the reasons for the enactment of labour legislation. If labour legislation is enacted in response to internal pressures from within the state; if it reflects a balance of forces between labour and management internally, it is more likely to be in step with public opinion and the current social needs of that state. On the other hand if the rules of labour law are imported from outside there may be a more substantial gap between the legal rules and what actually happens in practice.

It is a feature of underdeveloped — that is underdeveloped in a social sense — countries that many of the rules of labour law may be imported from outside. There are a large number of different systems of labour legislation which have been developed by particular countries in the light of their own social and economic traditions and development. Examples include the very different systems of labour legislation in the USA, Australia, France, Germany and the United Kingdom. Other systems of labour legislation have been imported for political reasons from outside, such as in some African and Asian countries, Turkey, Japan, etc. Here there are real problems not only because the countries concerned may not have reached the state of economic development to enable them to afford the new labour standards — for there is a high economic cost for some labour

10. 1979 I.C.R. 867.

standards — they may not have the personnel trained to operate the imported institutions, and the rules that worked well in a different historical and social context may have surprisingly different effects when transplanted.

Ireland and the United Kingdom are now members of the European Economic Community, not to mention the Council of Europe, and other similar international organisations and the most persistent and potent cause of the adoption of new labour legislation in these two countries is not the internal needs of the countries themselves, but the pressure from outside the two countries to come into line with the more advanced economic and social systems with which they are now associated. An interesting example of this phenomenon is the case of Spain which is in process of joining the EEC. The Spanish Constitution, typically for a modern democratic state, of course, in Article 37, "recognises the right of workers and employers to adopt collective labour dispute measures", i.e. to strike and to lock-out. More significant however is the draft Workers' Statute Bill, which gives Spanish workers very extended minimum labour standards across the board, with the exception of civil servants and, in certain cases, domestic workers and commercial travellers. Extensive new or improved rights are given protection against discrimination on grounds of race, sex, political or religious opinion, trade union membership and activities; the grounds of dismissal are defined and the right given to claim for unfair dismissal; maternity rights are given to women employees; a minimum wage is established for many workers; maximum working hours laid down; holiday entitlement improved; protection given to workers in case of their employer's insolvency or bankruptcy; limits are imposed on the power of the employer unilaterally to change working conditions — in some cases he must obtain the consent of a labour ministry official to such changes; leave must be given for the purpose of marriage, death of a relative, etc. and many other rights are defined. In the area of collective labour relations employers must consult workers' organisations in respect of impending collective redundancies; workers have a right to participate in the activities of the undertaking in which they work *via* elected workers' delegates and works councils. Machinery is provided for the conciliation of labour disputes. In certain disputes there is provision for compulsory arbritation.

The main thrust of this new Workers' Statute is to shield workers, to give them basic rights of an individual character. There is little doubt that these mark substantial improvements upon past practice. On the collective side, the provision for works councils, etc. has met with greater scepticism, as has continued provision for compulsory arbitration of labour disputes. Spanish employers have generally welcomed the individual aspects of the draft statute as have the trade unions.

When one looks at recent British and Irish labour legislation one

finds that much of it is due in large part to these countries' membership of the International Labour Organisation (ILO), the Council of Europe and the European Economic Community (EEC). Other countries have been progressing so fast in the areas of labour standards that Britain and Ireland have been left behind and now must, because of their membership of these organisations catch up with the standards achieved elsewhere. For a variety of reasons the standards achieved elsewhere and laid down in their legislation have concentrated on the shield aspect of labour law, that is to say on laying down minimum standards for workers.

If one considers the role of labour law as a sword; that is to say the rules to resist the freedom of workers' organisations to take industrial actions, some important points stand out. First of all the possibility open to British and Irish employers to take legal action against trade unions and the organisers of strikes, picketing etc., does not have a parallel in other Western European countries. It is sometimes for purely practical reasons that no Spanish, French or Italian employer would regard as sensible practical politics to seek injunctions or damages against union or employees, or because legal doctrine as in France has not recognised the possibility of claims for damages for civil industrial wrongs like intimidation or interference with contractual relations. Secondly, in so far as there are restrictions on the capacity of workers to take industrial action in some European countries, as in Germany where there may be no lawful industrial action over subjects that are dealt with by a Works Council, or the obligation to resort to compulsory arbitration in Spain, these restrictions form no recognisable common pattern. Whereas in the area of individual labour standards there are general levels of rights recognised in most Common Market countries. The result of this is that when international agreement is reached on labour matters it is almost exclusively in the area of individual labour standards. There is no common denominator in the area of control of industrial action so that there is unlikely to be any Common Market instrument in the near future laying down minimum conditions to be fulfilled by workers and trade unions before taking industrial action.

The result of this is that this country's membership of the Council of Europe, the ILO and the EEC will mean that it will be increasingly bound to adopt legislation governing the recognition of higher minimum labour standards. Secondly since the continental European countries prefer the "rights" approach to the "liberties" approach, this country will be under increasing pressure to enact a legal right to strike, which will inevitably involve a recasting and revision of the role of the courts in the area of industrial conflict.

We can already see the pattern of future labour legislation emerging as a result of this country's international legal obligations. To date much modern Irish labour legislation is there to give effect to international standards, e.g. the legislation on sex discrimination in

employment, on young people in employment and on unfair dismissals. In this area one cannot but express the hope that the Irish Republic will look to the source of these ideas in the relevant international instruments and base its legislation on that instrument, instead of basing Irish legislation on English Acts, in turn based upon international instruments. Thus it might have resulted in a better law of unfair dismissals in this country if the legislators had followed more closely the International Labour Organisation's Recommendation 119 on Termination of Employment instead of following British unfair dismissals legislation. By all means we should learn from the British example, but the British model, when it comes to implementing a common international labour standard, is no more relevant and is likely to be no better than the Spanish, the German or the Dutch model.

This country's adherence to the International Labour Organisation's Convention on Freedom of Association and Collective Bargaining means that a *right* to strike has to be recognised in this country. This is now more explicit in this country's adherence to the Council of Europe's Social Charter, Article 6 of which requires Ireland to enact a legal right to strike. This will not be easy. But it is not a desirable feature that this country should not take its international obligations in the labour relations area seriously. Year after year the Committee of Independent Experts who supervise member states' implementation of the European Social Charter draw attention to the Republic's breach of its obligation to recognise a legal right to strike (not to mention other breaches such as its failure to provide for 12 weeks paid maternity leave for all women employees; its failure to recognise freedom of association by still requiring unions to have a negotiating licence, etc.). Of course it is not only governments who do not take the Social Charter seriously. Employers' organisations and trade unions are invited to comment on their own government's compliance with the Social Charter, but so far only the British Confederation of Industry, the French Employers' Association and the French and German Trade Unions have ever submitted comments to the Committee of Experts.

If one looks at the labour law implications of this country's membership of the EEC one sees the necessity for better protective legislation in respect of: employer's insolvency or bankruptcy; longer holidays; shorter working hours with an upper maximum permitted number of weekly hours of work; the obligation for employers to consult over impending redundancies; longer periods of notice over dismissal; more positive action in the area of sex discrimination, etc.

Whatever views one may take over the capacity of labour legislation to equip states, employers and others with weapons to be used to restrict certain forms of industrial action, the future trend of labour legislation is likely in the area of industrial action to increase the freedom to take industrial action by pressuring Ireland to

recognise a legal right to strike, and in other areas the law is likely to concentrate on laying down more and better minimum standards for all who work.

The moral seems to be clear. Future Irish labour legislation will follow the model of the *shield*. There is little immediate future role for the *sword* model of labour legislation in this country.