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RETHINKING LAWS AGAINST STRIKES

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The light of evening, Lissadell,
Great windows open to the south,
Two girls in silk kimonos, both
Beautiful, one a gazelle.
But a raving autumn shears
Blossom from the summer's wreath.
The older is condemned to death,
Pardoned, drags out lonely years
Conspiring among the ignorant.¹

¹ W.B. Yeats, 'In Memory of Eva Gore-Booth and Con Markievicz,' *The Poems* ed. D.Allbright (London, 1990) 283.

Introduction

It is a great pleasure and privilege for me to deliver this lecture named for the remarkable Countess Markievicz, Minister of Labour in the First Dail (1919-22). One of her many contributions to the fight for workers' rights and the allied republican cause was the invaluable support she gave to the unions in the 1913 Lockout, organising and supervising the soup kitchens and clothing distribution for those locked out and their starving families at Liberty Hall during the long months of the dispute. So, when invited to give this lecture, I thought that it would not be inappropriate to choose as my topic the still contentious issue of laws against strikes.

Strikes are once again in the news in Europe. After two decades in which the number of days lost due to stoppages declined dramatically from the high points of the 1970s and 1980s, we are now experiencing general strikes and mass demonstrations from Dublin to Athens, from Brussels and Paris to Madrid and Rome, protesting against austerity measures, cuts to public services, changes in pensions, and severe job losses resulting from the financial crisis. Even in Britain, where there has not been a general strike since 1926, and where sympathy strikes are unlawful, last month's TUC Conference debated a programme of 'co-ordinated action' by unions against the cuts to be announced by the Coalition Government on 20 October.

Anti-strike laws in Britain and Ireland

The Conference also unanimously passed a motion, which reiterates its ‘total opposition to the anti-union laws introduced by Tory Governments in the 1980s and 1990s and deplores and condemns the failure of three Labour Governments to repeal these vicious laws’ which ‘have caused great difficulties for unions considering industrial action.’

Conference condemned ‘the increasing frequency of judges to oversee democratic trade union balloting procedures on spurious legal and moral grounds’ and ‘the intention of the Tories to make these laws even more draconian.’

Over the past year we have seen increasing willingness by High Court judges in Britain to grant injunctions against industrial action on grounds of failure to observe technical ballot and notice requirements, and even to grant injunctions before the result of the ballot is known, so encouraging employers to litigate rather than to negotiate. I am aware that there is a similar problem for unions in Ireland. Section 19(2) of the Industrial Relations Act 1990 provides that where a secret ballot has been held and one week’s notice of intention to engage in industrial action has been given, the court ‘shall not grant an injunction restraining the strike or other industrial action where the Respondent establishes a fair case that he was acting in contemplation or furtherance of a trade dispute.’ The employer also cannot apply for an injunction without giving notice to the union and members who are party to the dispute. Despite these restrictions, some judges have continued to grant injunctions and to permit employers to interrogate the balloting process. This has led in some instances, notably in the building trades, to injunctions

being granted because unions were unable to satisfy the High Court that the ballot which took place complied with the Act.

British strike law was famously described by Tony Blair – who left Thatcher’s laws virtually untouched- as the most restrictive in the Western world.² But even this does not seem to be enough for the CBI which, in response to threats of co-ordinated action against austerity measures in Britain, has demanded that the Coalition Government place yet more restrictions on strikes. These include the right to use agency workers to break strikes, new (as yet unspecified) curbs on wildcat strikes, and higher damages awards against unions that break the law. The CBI says a strike should be permitted only if 40 per cent of those eligible to vote support it. Boris Johnson, the Mayor of London, says a minimum 50 per cent turnout should be required.

If the Croke Park agreement with public sector unions does not hold, and if the withdrawal of the IBEC from wage setting under the national agreement system makes the private sector more strike prone you may expect not only an escalation of disputes but also increasing use of the law. This may severely test the archaic legal provisions such as the distinction (which I shall discuss later) between protected ‘trade’ or economic disputes with an employer, and unprotected ‘political’ disputes about government policies. I understand that there are already demands for the curtailment of strikes in essential services, and air traffic controllers have been specifically mentioned in this regard.

² *The Times*, 31 March 1997.

So the time is ripe for thinking again about laws against strikes. Nearly 40 years ago, at the time of the short-lived Industrial Relations Act came into force in Britain, Otto Kahn-Freund and I wrote a Fabian pamphlet called *Laws Against Strikes*. Our starting point was that the ‘freedom to strike’ or ‘right to strike’ is ‘quite generally recognised as an indispensable ingredient of a democratic society’.³ From there we proceeded to give a broad conspectus of the guarantees of the exercise of that freedom in a number of countries. We were able to reach only one firm conclusion:

‘what legislatures and courts can do to change the habits of people in industrial relations must in democratic societies, always and everywhere be limited. To curb strikes by law may be possible in narrow limits. Those who exceed those limits place themselves outside the democratic tradition.’⁴

The 1971 British Industrial Relations Act, with its battery of restrictions on the freedom to strike in return for a seductive range of new legal rights for unions and individuals, failed because, as Davies and Freedland said, the Heath Government had ‘wholly underestimated the resistance to law that would arise’ and did not recognise that they were ‘challenging a way of life.’⁵ What Kahn-Freund and I did not foresee was the power of a different set of laws, in the new context of industrial relations after the 1979 ‘winter of discontent’. In the 1984 miners’ strike, the Liverpool dockers’ strike, the Wapping and other disputes, the law proved to be a powerful weapon to crush strikes and curb the unions.

³ O.Kahn-Freund and B.Hepple, *Laws Against Strikes* Fabian Research Series 305 (London, 1972) 2,

⁴ Kahn-Freund and Hepple, 60.

⁵ PL Davies and MR Freedland, *Labour Legislation and Public Policy* (Oxford, 1993) 350.

The 1906 Trade Disputes Act framework of property- and contract-oriented common law torts with statutory immunities for acts ‘in contemplation or furtherance of a trade dispute’, restored by the Labour Government in 1974 and 1976, was turned on its head under the Thatcher and Major regimes by drastic ‘step by step’ restrictions on secondary and sympathetic action and picketing, limits on the scope of protected ‘trade disputes’, balloting and notice requirements, and effective sanctions against unions, including sequestration of their assets. The inconvenient truth that the trade union movement has had to face is that New Labour governments kept these restrictions in place, and the immediate prospect is for further restrictions under the Coalition Government. Unions are fearful of legal sanctions and anxious to comply with the law. They are fully aware of their weakness resulting from the sharp decline of manufacturing and extracting industries in which they enjoyed core support, the change to an increasingly part-time and temporary workforce, and the halving of trade union density since 1979. In the UK overall union density in 2010 is only 15.1 per cent in the private sector. Although it is still 56.6 per cent in the public sector, this is likely to be severely reduced by cuts in public employment and privatisation of services. All of this is happening in the context of global competition where threats of strikes by labour can be effectively met by strikes of capital, moving operations to low-wage economies with poorly organised workers outside Europe.

The threat from the Court of Justice of the EU

A further significant legal threat to the right to strike comes from the Court of Justice of the EU. In the ‘Laval quartet’ the Court has severely restricted the ability of unions in the

EU to use collective action to protect national pay and conditions against social dumping. These cases have already resulted in voluminous literature, and I do not seek to add to that. Let me simply remind you that in *Viking*⁶ the Court held that even if collective action is permitted under domestic law, in cross-border situations where EU rules on freedom of establishment and freedom to provide services apply, the action will be lawful only if it satisfies a proportionality test, that is pursuing what the Court considers to be a legitimate aim (such as job protection) and the action must be ‘suitable for ensuring the achievement of the objective pursued.’ and the union did not have other means available to resolve the dispute. In *Laval*,⁷ the facts were that Laval had posted 35 workers from Latvia to work on Swedish building sites. Laval and the Swedish Building Workers’ Union started negotiations with a view to concluding a collective agreement to provide comparable wages and conditions to those under the Swedish building sector collective agreement. However, Laval instead signed an agreement with a Latvian trade union to pay the lower Latvian rates. The Swedish union used the traditional sanction of a blockade at all Laval building sites, and the Swedish Electrician’s Trade Union took sympathy action which prevented electrical work being done for Laval. Laval petitioned the Swedish Labour Court to declare the action unlawful. The Court refused to do so, but referred the matter to the Court of Justice of the EU.

In its preliminary ruling the Court of Justice held that the industrial action was in breach of Article 49 of the EC Treaty (now Art 56 TFEU) which prohibits Member States from creating obstacles to the freedom to provide services, and also contrary to the

⁶ Case C-438/05, [2008] IRLR 143.

⁷ Case C-341/05 [2008] IRLR 160.

supplementary Article 3 of the Posted Workers' Directive. The Court further decided that the Swedish 'Lex Britannia', which gave trade unions the right to take industrial action in order to set aside or amend an existing foreign collective agreement, was discriminatory and could not be justified on grounds of public policy. Consequently, the industrial action was unlawful. When the matter went back to the Swedish Labour Court to implement this ruling, punitive damages of about 55,000 Euros were awarded against the unions. In *Rüffert*⁸ and *Luxembourg*⁹ the Court ruled that Member States cannot require foreign contractors to observe the terms of collective agreements that are not universally applicable.

Following a Swedish government inquiry and intense political and constitutional debate, the Swedish Parliament has now passed a law to bring the Swedish regulations in line with the *Laval* quartet, but critics maintain that this has gone further than was necessary to fulfil the requirements of EU law. Not only has the Court of Justice struck at the very heart of the Swedish 'model' of industrial relations, but it has had a major impact on the ability of unions across the EU to bargain and to take collective action to defend national standards. The door has been opened for a 'race to the bottom' as businesses from the new EU Member States compete on the basis of low labour costs.

Commentators¹⁰ have pointed out that the judgments also have the potential to reintroduce into common law systems the *Taff Vale* principle, (which the Trade Disputes

⁸ Case C 346/06 [2008] IRLR 467.

⁹ Case C-319/06. [2008] IRLR 388.

¹⁰ K.D.Ewing and John Hendy QC, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 ILJ 1 at 39.

Act 1906 [now s 13 of the Irish Industrial Relations Act 1990] reversed) by making unions liable in unlimited damages (and ultimately liquidation) for any collective action in breach of EU law.

To sum up so far: global competition, changes in the workforce, and the financial crisis have tilted the balance in industrial relations significantly towards the management side in both the private and public sectors. The freedom to strike has been severely undermined by the economic freedoms of the EU as interpreted by the Court of Justice of the EU. And judges in Britain and Ireland are showing an increasing willingness to grant injunctions on the basis of infringements of technical balloting and notice requirements. New restrictions on strikes are being demanded by some politicians and employers.

The right to strike as a fundamental human right

What should the response to this be by democratic pluralists who still believe, with Kahn- Freund, that

The power to withdraw their labour is for the workers what for management is its power to shut down production, to switch it to different purposes, to transfer it to different places. A legal system which suppresses that freedom to strike puts the workers at the mercy of their employers.¹¹

Keith Ewing has pointed out that one of the most significant developments since Kahn-Freund and I wrote our pamphlet has been ‘the colonization of much of the legal system by human rights lawyers.’¹² So it is natural that some labour lawyers now put their faith in the developing case law on freedom of association of the other European Court – the

¹¹ Kahn-Freund and Hepple, 8.

¹² Keith Ewing, ‘Laws Against Strikes Revisited’ in C Barnard, S Deakin and GS Morris (eds) *The Future of Labour Law: Liber Amicorum Sir Bob Hepple* (Oxford, Hart Publishing, 2004) at 46.

European Court of Human Rights in Strasbourg, which interprets the European Convention on Human Rights- or even in the constitutionalisation of the right to strike in a new British Bill of Rights.

The case in respect of the ECHR is forcefully put in some detail by Keith Ewing and John Hendy in the *Industrial Law Journal*.¹³ They discuss the landmark cases of *Demir and Baykara v Turkey*¹⁴ and *Enerji Yap-Yol Sen v Turkey*,¹⁵ which reversed earlier jurisprudence under Article 11 ECHR (freedom of association, including the right to belong to and take part in the activities of trade unions). In the first of these cases, the Grand Chamber of the ECtHR held that the right to collective bargaining is an essential element of the right to freedom of association, and in the second the Second Section of the Court held that strike action is an important method by which trade unions protect their members' interests. It follows that any restriction on the freedom to strike can be justified under Article 11(2) ECHR only if 'prescribed by law', in pursuance of one or more legitimate aims, and 'necessary in a democratic society' for the achievement of those aims.

There are said to be 'dramatic implications' in the developing ECtHR jurisprudence. First, there is in effect a reversal of the burden of proof as to whether a strike is justified. While the Luxembourg Court in *Viking* and *Laval* asks whether restrictions by collective action on the economic freedoms of establishment and to provide services can be justified, the Strasbourg Court asks whether the interference with trade union rights can

¹³ (2010) 39 ILJ 1; see too their article in (2010) 15 *Canadian Labour and Employment Law Journal* 165..

¹⁴ (2009) 48 EHRR 54.

¹⁵ App No 68959, judgment 21 April 2009.

be justified, and applies a strict test. Although the Luxembourg Court has acknowledged that the right to take collective action, including the right to strike, is a 'fundamental right which forms an integral part of the principles of Community law' (para 44), it ruled that this right had to be reconciled with the fundamental economic freedoms guaranteed by the EU treaty. It was for those taking the action to establish that this was 'suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve this objective.' (para 90). By contrast Article 11(2) ECHR treats the freedom of association (impliedly including the right to take collective action) as the primary rule, with the onus being on the State to show that restrictions are justified.

A second implication of the ECtHR judgments is said to be that in determining what restrictions are justifiable under Article 11(2) ECHR, regard must be had to the opinions and recommendations of the ILO supervisory bodies, and the Council of Europe's Social Rights Committee which supervises the European Social Charter. This is because in the Turkish and other cases, the ECtHR referred extensively to the ILO reports in order to determine the scope of freedom of association. This, it is argued by Ewing and Hendy, opens the way for a frontal attack through the Strasbourg court on many of the restrictions placed on British strikes, such as the complex balloting and notice requirements, and the inadequate protection of workers dismissed for taking part in lawful industrial action, which have been repeatedly criticized by the expert bodies. It might even be possible to bring proceedings against the EU in the Strasbourg Court (if the EU signs up to the ECHR as the Lisbon Treaty envisages) on the grounds that actions for unlimited damages, which could bankrupt unions, for breach of EU law violates

Article 11 ECHR. The ILO bodies have never permitted restrictions on the right to take collective action by assessing proportionality in terms of the freedom of establishment and the freedom to provide services. They have only suggested that, in certain cases, restrictions on strikes may be permitted in order to avoid damages which are irreversible or out of all proportion to third parties.

Skepticism about rights litigation

I would like to believe that an effective right to strike can be achieved by further litigation which embeds the worker-friendly ‘soft’ law of the ILO and European Social Charter into national legal systems. I shall give two cheers if it is. But I have to confess myself to be a skeptic, for a number of reasons. First, it will be necessary to persuade national courts to apply the reasoning of the ECtHR to fact situations that involve less blatant violations of the freedom of association than *Demir and Baykara* (prohibition on collective bargaining by a civil service union) and *Enerji* (prohibition on participation on one-day strike by public sector employees demanding right to collective bargaining). Since the ECtHR judgments in November 2008 and April 2009 respectively, these arguments have not succeeded in English courts. In particular, in *Metrobus v Unite, The Union*,¹⁶ where the union was found to have failed to comply with the information and notice requirements because of a misunderstanding on the part of union officials as to exactly what was required of them, the Court of Appeal rejected the argument for the union that *Demir* required the Court to decide the substance and nature of the right to strike (assuming there is such a right) with reference to ILO and ESC principles. The

¹⁶ [2009] EWCA Civ 829, [2009] IRLR 851, followed in *EDF Energy Powerlink Ltd v National Union of Rail, Maritime and Transport Workers* [2010] IRLR 113.

Court went on to find that the UK provisions were reasonable. There is as Ruth Dukes has commented, ‘a reticence [in British courts] to engage with arguments based on international human rights and labour standards’.¹⁷ Although an opening may have appeared, I am not persuaded that much has actually changed in Britain since the notorious *GCHQ* case¹⁸ in which (as one of the legal team for the Council of Civil Service Unions) I can remember our careful arguments based on ILO Conventions being summarily rejected by the English courts and the European Commission on Human Rights..

Secondly, there are the difficulties which flow from deriving the right to strike from the freedom of association. Let me mention but two limitations. One is the need for symmetry or equal treatment of employers and workers. You are familiar, from the *Ryanair* case, with the suggestion (it was no an issue in the case) by the Supreme Court of Ireland that the implied constitutionally protected right not to associate means not only that workers are entitled not to join a trade union but also that employers have a right not to recognize one.¹⁹ In the context of strikes, the argument would be that if workers have the right to associate so do employers; and if workers can derive from this the right to strike, employers can derive the right to lock-out. Even the ILO supervisory bodies have allowed these rights to be equated. One may object that except in the most mechanistic sense, there is no symmetry between the right to strike and the right to lock-out. This was

¹⁷ (2010)39 ILJ 82 at 90. However, in *British Airways plc v Unite, the Union* [2010] IRLR 423, Mrs Justice Cox (who is a member of the ILO Committee of Experts on the Application of Conventions and Recommendations) said that ‘sooner or later, the extent to which the current statutory regime is in compliance with..international obligations and with the relevant international jurisprudence will fall to be carefully considered.’ In view of the Court of Appeal decision in *Metorbus* this issue was not pursued .

¹⁸ *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Council of Civil Service Unions* [1985] AC 374.

¹⁹ *Ryanair v Labour Court* [2007] 4 IR 189.

recognized by the South African Constitutional Court, when certifying the right to strike in the final Constitution of the Republic of South Africa is compatible with the right to equality. It was argued that the absence of a right to lock-out, in parallel with the right to strike, meant that the employers' freedom to associate and bargain was accorded less weight than the workers' rights. The Court rejected this argument on the grounds that while the rights to collective bargaining and to strike are necessary for workers to counteract the greater economic and social power of the employer, employers have a range of other economic weapons at their disposal, including the right to dismiss, to engage replacement labour, to exclude workers from the workplace, and unilaterally to impose new terms of employment.²⁰ Would the ECtHR take a similarly sophisticated view of lockouts? No, it will not: the European Social Charter, art 6.4, like the EU Charter of Fundamental Rights, expressly recognizes the right of employers to take collective action, although State Parties may opt-out of this provision..

Another limitation in deriving the right to strike from the freedom of association, from which is implied the right to engage in collective bargaining) is that this can lead to the view that collective action is legitimate only if it is aimed at the conclusion of a collective agreement. This is the case in Germany where no strike is considered as 'socially adequate' and therefore lawful unless it is a step in an effort to reach a collective agreement. Although in *Demir and Baykara* the ECtHR widened the meaning of 'collective bargaining' to encompass any bargaining between one or more employers and a body of employees aimed at solving a problem of common interest, the concept is still an economic one involving a dispute between employers and their workers. As you

²⁰ *In re Certification of the Constitution RSA 1996 (4) SA 744, para 66.*

know, in Ireland the purposes of a ‘trade dispute’, in respect of which there is immunity from actions in tort, must be between employers and workers and be ‘connected with the employment or non-employment or the terms or conditions of affecting the employment of any person.’²¹ Disputes which further a ‘political’ purpose have no immunity. In Britain the dispute must related ‘wholly or mainly’ to one of the listed objects of collective bargaining,²² and this makes it even more difficult to bring the dispute within the immunity. The definition of a ‘trade dispute’ in both Britain and Ireland is oddly out of place in the modern world in which challenging job cuts or wage restraint or resisting privatisation is often directed at broader government policies. It is difficult to draw the line between a strike to induce an employer not to cut wages and a strike to press the government for measures which would enable the employer to maintain or increase wages. I can see nothing in the *Demir and Baykara* case that would make it easier to take collective action against such policies.

Reducing the autonomy and effectiveness of labour law

In addition to my doubts about the willingness of courts in the common law countries to embrace ILO jurisprudence, and the limitations involved in deriving a right to strike from the right to freedom of association, there is a third and more fundamental reason for my skepticism. This is that the application of abstract principles by judges, allowing them to decide complex issues of ‘proportionality’ or ‘justification’, hardly seems a suitable way to settle labour disputes in the modern globalised economy. A litigation strategy involves long delays: the *Demir and Baykara* litigation started in the domestic courts in 1993 and

²¹ Industrial Relations Act 1990, s.8.

²² TULRCA 1992, s 244(1).

ended only 15 years later, in November 2008, when the Grand Chamber of the ECtHR delivered final judgment. Ewing and Hendy acknowledge that ‘it may be some time before the impact of *Demira and Baykara* is fully felt in Turkey.’²³

Unions normally use arguments based on the right to strike defensively to protect themselves against applications by employers for interlocutory injunctions. In Britain cases are often heard at short notice, the legal issues cannot be fully argued and very rarely get to full trial. The ‘balance of convenience’ is generally found to favour the grant of an injunction. Decisions turn on particular facts and the exercise of discretion by particular judges. In Ireland, the 1990 Act places some restrictions on the grant of labour injunctions but unions still face difficulties in satisfying judges, on the basis of an unclear standard of proof, that balloting and notice requirements have been fully observed.

Ewing and Hendy ask whether the ECtHR decisions ‘now invite a different kind of political action, which directs attention in the first instance to the courts rather than the legislature.’²⁴ Indeed, there is in many countries a shift from legislative politics to rights litigation. Judy Fudge comments that this ‘mirrors a broader transformation of the justificatory discourse for labour’s collective rights from social democracy and industrial pluralism to human rights’.²⁵ The fundamental question is whether this shift can make a real contribution to reducing the disproportionate impact of the financial crisis and the growing inequality in wealth and power in our societies. In the 20th century, the historic

²³ (2010) 39 ILJ at 49.

²⁴ (2010) 39 ILJ at 49.

²⁵ Judy Fudge, ‘The Supreme Court of Canada and the right to Bargain Collectively. The Implications of the *Health Services and Support* case and Beyond’ (2008) ILJ 25 at 27

tendency of labour law, as a means to defend and improve working and living conditions, was towards autonomy from the ordinary legal system. This involved legal support for autonomous bargaining and other forms of workers' participation backed by autonomous sanctions and, where the law did intervene, tripartite labour courts and the use of conciliation, mediation and arbitration. This autonomous system was a reaction against hostile common law judges and their values deeply embedded in laws of 'masters' and subordinated 'servants'. The need for a body of autonomous norms is not unique to labour relations – we find it in many kinds of commercial relations. Although statutory employment rules have multiplied in recent years, they still on the whole deal with pathological situations such as discrimination and dismissal. Autonomous rules, outside the legal framework, govern many issues such as wage-fixing above the minimum wage, conditions of engagement, job description and allocation, working practices and so on. Collective bargaining and other forms of workers' representation allow individual workers to participate in the continuous process of autonomous norm-setting and enforcement. From this it follows, that those who have made the autonomous rules should also wield the sanctions, and not leave the enforcement to those who did not participate in the rule making. This is one reason why, in Lord Wright's famous words, 'the rights of [workers] to strike is an essential element in the principle of collective bargaining.'²⁶

It is an understandable response, at a time when labour is weak, to be tempted by the Trojan Horse of the ECHR unexpectedly filled with judicial gifts of pro-worker decisions. It is true that autonomous institutions are not what they used to be, tripartism

²⁶ *Crofter Harris Tweed v Veitch* [1942] 1 All ER 142 at 157.

has been seriously eroded, and valuable machinery for conciliation and arbitration has been starved of resources. But I endorse the warning given by Professor Harry Arthurs, the leading Canadian labour lawyer, that ‘the present shortcomings of the labour law system will not be remedied by its reincorporation into the general legal system, especially if this is to be accomplished by judges *ad hoc*, and on the basis of broad principles, on the specific conflicts they are asked to adjudicate.’²⁷

An alternative strategy

Although litigation may, from time to time, result in moral or symbolic victories, the courts are an inadequate forum in which to win and secure long-term changes in labour markets so as to secure ‘decent work’. Rights litigation should never be more than a strategy that complements but does not take priority over the strategy of persuading democratic legislatures to protect the right to strike. There is no time in this lecture to develop ideas for such an alternative strategy. I simply leave you with a wish-list of legislative policies that would strengthen and reinvigorate the autonomy of labour law, to which others could be added .

- (1) Secret ballots must be seen as the right of trade union members and not a weapon of employers or the state to halt strikes on technical grounds .It may be tempting to think that even stricter balloting laws can reduce industrial action, but as the Chairman of ACAS has pointed out, the harder it is made to get a majority in a ballot, the more likely it is that there will be unofficial strikes.²⁸

²⁷ Harry Arthurs, ‘Constitutionalising the Right of Workers to Organise, Bargain and Strike: The Sight of One Shoulder Shrugging’ (2010) 15 *Canadian Labour and Employment Law Journal* 372 at 379.

²⁸ *Financial Times*, 11 October 2010.

- (2) Consideration should be given to compulsory conciliation periods as a pre-condition of lawful collective action. Just as employers should negotiate before litigating, unions need to negotiate before announcing strike action.
- (3) The law should support good faith concessionary bargaining in both the public and private sectors, for example to encourage agreements on short-time, part-time and term-time working so as to minimise redundancies, and to phase in necessary changes in pension provisions gradually.
- (4) There should be status quo provisions to prevent unilateral changes in terms of employment without going through prescribed procedures.
- (5) There should be a legal requirement for employers and unions to negotiate minimum level service agreements in advance of collective action in essential services and maintenance services. The South African Labour Relations Act, modelled to some extent on Italian law, provides for an essential services committee to prescribe services where the interruption of services ‘endangers the life or personal safety or health of the whole or any part of the population’. ‘Maintenance’ services are those whose interruption can lead to material physical destruction of workplaces, plant or machinery. The South African Act makes both employers and unions in such services responsible for coming up with a minimum level services agreement. But this kind of law can work only if the parties show goodwill. Unfortunately, as the South African Human Rights Commission found, in the recent strike by government employees, including health service workers, some medical patients died and others were left without access to medication. The Commission found that these unacceptable

consequences could have been avoided had the Government been willing to negotiate an agreement setting out what basic services would continue to be delivered during the strike.

- (6) There must be full protection from dismissal and disciplinary action for workers who peacefully participate in a lawful strike.

Legislative policies such as these may not be achievable in the short-term. But let us take inspiration from the defiant words of Countess Markievicz in 1921, when opposing the Treaty: ‘I have seen the stars, and I am not going to follow a flickering will-o’-the-wisp.’²⁹

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²⁹ Quoted by Jacqueline Van Voris, *Constance de Markievicz: in the cause of Ireland* (Manchester, 1967) at 304.