

The Future of UK Labour Law

Report from History & Policy Trade Union Forum seminar 24 June 2017, Kings College, London.

With the prospect of Britain's departure from the EU looming, and its serious implications for the remaining protections of employment and union rights, the TUF arranged this seminar to provide a historical perspective on the issues which could arise.

Speakers - **Jim Moher, Adrian Williamson, Richard Whiting and Sarah Veale** - were invited to provide a chronological account of the evolution of British labour law in four sessions.

These covered, (i) 'the Combination Laws to the Trade Disputes Act 1906';

(ii) 'Trade Union law and practice 1914-1979';

(iii) 'The Thatcher reforms of the 1980s' and

(iv) 'Manifesto for a comprehensive revision of workers rights'

(recent Institute of Employment Rights' book)

The seminar was chaired by **John Edmonds**, former General Secretary of the GMB union and member of the TUC General Council (including a term as President), during much of the later period.

(i) The Combination Laws to the Trade Disputes Act 1906;

Dr James Moher, a former national legal officer with the Transport & General Workers Union (1974-84) and Communication Workers Union (1984-2006), addressed the first topic. He was involved at a senior level during the critical period when the law governing trade unions underwent transformation - his later duties included responsibility for balloting arrangements and legal defence in a union regularly involved in disputes with Royal Mail and BT. This experience has been bolstered by a longstanding study of the history of unions and the law, as it has evolved from the time of the Combination laws. His theme is that the history of the unions and their predecessors, the journeymen trade clubs, was closely aligned with the constitutional development of freedom of association for working people in the UK.

Whilst the Combination Acts of 1799 and 1800 are seen as draconian attempts to suppress the centuries-old associations of mainly artisans, their short life (they were all repealed in 1824), proved the continuing vitality of that model of collective endeavour. The resulting Combination Law Repeal Act of 1825, laid the foundation for the explicit legalisation of 'combinations', (the first in the world), which were to become the associations of the emerging working class of Britain and Ireland, namely, the trade unions. That limited freedom, allowed the new trade unions to organise and achieve recognition from employers and to bargain collectively for their members. However, it was their welfare provision, organisational and industrial strength and a sophisticated political federative lobby - the Parliamentary Committee of the Trades Union Congress, founded in 1868 - which brought public opinion to accept their legitimacy as representatives of their members. This was formally recognised in the legislation of the 1870s by both Liberal and Conservative governments in the Trade Union Act 1871 and the Conspiracy & Protection of Property Act 1875. These reforms, known as *The Charter of British Trade Unionism*, became the bed-rock of union rights.

However, Dr Moher argued that because of the form in which the legislation had been drafted since 1825, and the unions' reluctance to be treated as legal corporations, the protections contained were

couched as (negative) immunities from prosecution under the common law of conspiracy, rather than as positive union rights. These were hedged around with conditions of which an unsympathetic, individualist-minded common law judiciary became arbiters. As the unions grew and expanded into new areas of much larger membership (rail and road transport, mining, docks, factories - 150 unions with over a million members by the 1880s), those conditions again became the basis of legal challenge and narrow judicial interpretation. The law of conspiracy was brought back into industrial relations as a civil offence actionable by employers in disputes and many needed little encouragement to reach for this weapon. By 1901, an infamous House of Lords ruling laid union funds again open to large fines and damages' claims during trade disputes. By now, however, since the extension of the franchise to their members, unions were able to appeal directly to Parliament to restore the protections of the 1870s legislation. Through forming and financing a Labour Party and supporting a progressive Liberal government under their sympathetic leader, Henry Campbell-Bannerman MP, they secured the most comprehensive restoration and extension of those protections in the Trades Disputes Act 1906. For another seven decades, 'trade disputes' were removed from the legal arena and the discretion of the judiciary. This became the consensus of all parties at Westminster. Dr Moher opined that it was this Act and the later Trade Union Act 1913 (which regulated the collection and disbursement of union political funds), which provided the legal basis for the growth and development of trade union power for most of the twentieth century. With their growing strength numerically, industrially and politically, which would be enhanced further by their crucial role in both war efforts of the twentieth century, British and Irish unions felt no need to rationalise their position in the legal and constitutional system.

(ii) 'Trade Union law and practice 1914-1979;

Dr Adrian Williamson QC, a practicing commercial barrister and author of '*Conservative Economic Policymaking and the Birth of Thatcherism, 1964-1979*', subtitled his presentation, 'The Age of Voluntarism' and traced its various phases in relation to the 1906 Trade Disputes Act settlement. That policy found echoes even with Winston Churchill in his Liberal phase (1911) when he said that it was impossible for the courts to command the same confidence in industrial relations conflict as they did when adjudicating on criminal matters. This new policy of keeping the law out of industrial disputes, was re-affirmed after the First World War due to the unions' major contributions to the war effort. Although the judiciary accepted the policy, it was more of a retreat than a surrender as Lord Justice Scrutton signalled in 1921.

That policy, came to be described as 'collective laissez-faire', (law should be abstentionist in industrial relations). It later developed with labour law becoming an independent area of legal study which saw the role of trade unions as necessary actors balancing the relationship of individual workers in relation to powerful employers. It was a Professor Otto Kahn-Freund (1900-1979) at the London School of Economics who contributed most to this development intellectually. He had been a judge in Germany before he fled the Nazis in 1933. His influence on the British scene by the 1950s was compared with 'Lenin's arrival at the Finland Station' by one of his disciples, the late Lord Bill Wedderburn.

The General Strike of 1926 had re-energised judicial interest and the judges questioned the legality of such sympathy strikes across industries. However, it was the legislative reaction of the Trade Union and Trade Disputes Act 1927 was more significant, seeking to outlaw such union actions and to limit the scope for political funding. Although 'Voluntarism' nonetheless continued until 1939, it was not much tested as the Depression caused a massive collapse of trade union membership and limited the zest for industrial conflict. Although World War 2 was again a period of war-time cooperation by the unions, it also witnessed the high point of non-interventionist judicial acceptance when Lord Wright upheld the right to strike in the case of *Crofter v Veitch* of 1942, albeit that the war-time regulations had largely

suspended the right for the duration. Union membership had by then recovered from the depths of the Depression (4.4m), indeed had doubled to 8.6million by 1946.

The next phase (1945-68), Dr Williamson called the 'Golden Age' of voluntarism as trade unionism (density and spread of membership) expanded massively. The policy of non-interventionism became substantially common ground amongst the parties, exemplified by the close relations with the unions of the Conservative Minister of Labour, Walter Monckton. One of his successors, Iain McLeod went so far as to describe them as 'an estate of the realm'. Enoch Powell MP was one of the few senior Tories who stood out against this consensus. However, Conservative back-benchers of the Bow Group, ('A Giant's Strength' pamphlet 1957), the right-wing press and films like the Boulting Brothers' 'I'm Alright Jack', increasingly complained about the exercise of collective shop-floor union power in a new era of unofficial strikes in the car industry, docks and other industries. In a leading case - *Rookes v Barnard* 1964 - the judges returned to the fray, holding against the action of the draughtsmens' union at Heathrow who sought to enforce their 'closed shop'. Although this impingement on established trade dispute law was quickly overturned by the Labour government with the Trade Disputes Act 1965, it was in return for the TUC agreeing to participate in a Royal Commission of Inquiry on the state of industrial relations. The Report of this Donovan Commission, dominated as it was by Kahn-Freund and another IR expert of the 'Oxford School', Professor Hugh Clegg, reaffirmed the voluntarist approach in 1968. Nonetheless, it was that Labour Government who first departed from Donovan's core recommendations in their hugely controversial White Paper, *In Place of Strife*. Their Industrial Relations Bill 1969 proposed compulsory ballots before strikes, compulsory 'pauses' before actions when required by government Ministers and other non-voluntarist measures. Although that Bill was 'killed' by union and Labour cabinet-level opposition, the issue of 'union power' had gone electoral, leading to a Conservative government more determined to make in-roads on the voluntarist system of industrial relations with their Industrial Relations Act 1971. Although it got to the statute books, that Act also was soon still-born in the face of massive union protest and, ironically, judicial reluctance to engage with its new National Industrial Relations Court. The Conservative government fell in 1974 and they replaced their leader soon after with Margaret Thatcher, with a very different philosophy towards unions and economic policy. The remainder of the 1970s saw the new Labour Government restoring the voluntarist system and the unions working with them, trading wage-restraint for individual employment law reforms in a 'Social Contract'. This voluntary pay policy alternative only lasted a short time as massive strikes, especially by low-paid public service workers in the NHS and local government, (dubbed 'the Winter of Discontent'), brought Mrs Thatcher to power in 1979. Her government would soon tear up the voluntarist policy.

Dr Williamson thought that the age of voluntarism had had a good run for over seventy years, but the manner of its demise, begged the question as to whether it could have survived with compromise at different periods e.g., over *In Place of Strife*?

(iii) 'The Thatcher reforms of the 1980s

Richard Whiting (retired Professor of Modern British History and the history of trade unions, University of Leeds), took up this theme by outlining the 'formidable programme' (nine Acts including a 1992 consolidation) of Conservative legislation of this era, under five headings: i) the restriction and then elimination of the 'closed shop', ii) Redefining strikes and restricting activity to narrow the range of strike action, iii) Putting in place union rules governing the internal position of members (making individual contract law also override), iv) Strengthening the position of individual members; v) establishing controls over political funds. The two chief characteristics of this 'step by step' approach was firstly, its cumulative effect i.e., it started in an area and later built on the restriction eg on 'secondary' strike ac-

tions and in making funds available initially for ballots, later withdrawing them and making postal ballots only permitted. Secondly, that it had no obvious stopping point' as for example, the 1988 Employment Act prevented unions disciplining members who ignored their rules, even though a lawful ballot had agreed strike action - i.e., the primacy of the individual's contract. This relentless programme was justified as a series of necessary reforms on account of how unions had misbehaved over the previous twenty years. Even pro-union academics like Lord Bill McCarthy thought that it was impossible to exaggerate the damage done by the public sector strikes of the late 1970s, dubbed 'the Winter of Discontent', to the union reputation. Others saw examples of 'car park democracy', 'defiance of court orders', 'expulsions from closed shops' as justification for 'taming union power'. McCarthy, though Secretary to the Donovan Commission, later assisted the Labour Minister, Barbara Castle MP in drafting the interventionist *'In Place of Strife'*. He had also sat with Professor Bill Wedderburn, a key adviser to the TUC, on their Independent Review Committee aimed at heading off state intervention over expulsions from 'closed shops'.

Professor Whiting saw Mrs Thatcher's conservatism as deriving from a twofold influence. Friedrich von Hayek's *'Road to Serfdom'* was extremely influential with her generation of Tory political mentors, such as Sir Keith Joseph. His theory of 'the impersonality of the market' was preferred to vain intervention by government to manage the economy through incomes policy. But it was her belief in the paramount role of *individualism* that he regarded as her key theme and von Hayek had never been much interested in that. She believed that there was 'no common goal' which everybody aimed for in society but rather all pursued their own interests and so what was needed was simply a framework, protected by law, to enable them to do so. Collective bodies like unions were a hindrance to this and their immunities from common law were seen as totally unjustified. Conservative beliefs in 'equality before the law' had always questioned 'collectivism' and those immunities. Her preoccupation with individualism as people's mainspring seemed extremely eccentric at the time, even to many Conservatives, who thought it would undermine their support for community, middle class professional associations and civil society. As it turned out, her anti-union policies overrode any reservations they might have had and united all Tories. In any case, Mrs Thatcher's emphasis on individualism featured in all her campaign speeches and its force with her was undeniable and this probably reflected changes taking place in the working class at the time which she exploited skilfully.

Professor Whiting also highlighted the interesting role which Lords McCarthy and Wedderburn played on the Labour front-bench in the Lords' debates on the various 'Employment' Bills of the 1980s. Interestingly, they encountered some reservation for their defence of the union position from their own bench - former Labour Chief Whip and union official, Lord Douglas Houghton, who had teamed up with James Callaghan to defeat *In Place of Strife*, now became critical of union practices on picketing, the resistance to individual balloting before strikes and the 'closed shop'. He thought that unions lacked a capacity for self-analysis and had not reflected on the fact that union members were not displaying great concern over the legislation. Significantly, however, (Lord McCarthy especially), they now changed their arguments from a restoration of union immunities to positive rights for individual workers. Lord Wedderburn in his book, *'The Worker and the Law'*, stressed individual rights to join trade unions (Labour Prime Minister, James Callaghan's in the late 1970s had stressed that Labour 'must not lose out to the individual'). This trend, with its presentational virtues, soon spread to all TUC and Labour policy documents of the 1990s. By the late 1990s and the prospect of a New Labour government, the terrain had changed entirely and there was no commitment to restore the immunities of the past, as previous Labour governments would have done. The emphasis was now on improving individual rights as part of the EU Social Charter, with very limited nods towards collective rights (just union recognition). The power and influence of the trade unions had waned and the working class were seen as more complex in their outlook and needs.

(iv) 'A Manifesto for a comprehensive revision of workers rights'

Sarah Veale CBE, former Head of the Equality and Employment Rights Department at the Trades Union Congress, recalled that she had served the trade union movement in the period from the tail end of the Major government, through the Blair years and into the time of the Coalition government. She now spoke as an Executive member of the Institute of Employment Rights, whose 2016 'Manifesto for a revision of workers rights' her talk would be based on. She was pleased to note that many of its recommendations had figured in the Labour Manifesto for their highly successful 2017 general election campaign. It was the IER's contribution to a long overdue debate on the future of labour law.

Sarah began by outlining the dire situation most of Britain's 31million workers found themselves in today as a result of changes in the nature of the UK and global economy and the legislative changes imposed by successive Conservative governments of the 1980s and 1990s. She described them as amongst the most 'insecure unhappy and stressed-out workforces' in Europe, who had suffered a devastating decline of living standards. The largely peripatetic nature of today's workforce posed massive problems for trade unions seeking to organise workers and she thought that most trade union models were out of date in terms of servicing members in such individualistic rights' situations. The loss of funds from member donations on which unions depend and the severe weakening of their position through highly restrictive legal 'immunities', had gravely weakened all unions. This created the need to place them on a much more secure footing of actual solid legal rights, including a positive right to strike, which the IER were see as 'an essential element of collective bargaining'. Their central recommendation is for a radically new system of collective bargaining, buttressed by extensive State support. Sarah appreciated that this would be a huge challenge for unions and employers and would only come from a government in which such a policy fits with their macro economic strategy. Legislation would still have a role in underpinning this collective bargaining process and protecting workers' rights. Sarah highlighted the other main IER recommendations:

1. A new Ministry of Labour with powers ('legal prompts' for employers) and new procedures to promote collective bargaining on a multi-employer sectoral basis. It would work with a rejuvenated ACAS which would be duty-bound to promote collective bargaining;
2. Sectoral collective bargaining on Joint Industrial Committee (JIC) lines, with all employers required to honour the terms and conditions agreed in their sector of the economy;
3. Application of the statutory recognition procedures to unions with 10% membership and evidence of majority support; recognised unions to have the right to check-off facilities;
4. Workers to be also entitled to effective union representation on an individual basis where unions are not yet recognised;
5. Regulatory legislation would continue to underpin collective bargaining on discrimination, equality, health and safety, minimum pay and working time;
6. A re-named Living Wage Commission to eliminate rather than entrench low pay;
7. Labour Inspectors with powers to cancel unfair dismissals instead of Employment Tribunals with excessively legalistic but ineffective processes;
8. Employment Tribunals should be re-energised so as to enforce universal statutory standards e.g., an expanded definition of 'worker'. Fees to be abolished;
9. The law of freedom of association to be reformed to ensure a fairer balance between trade union autonomy and democracy. There would be with more reliance on unions' own rules and procedures; a less interventionist role for the Certification Officer but still certifying less restrictive union industrial action rules, particularly on ballots.
10. 'Blacklisting' by employers should be stamped out and attract criminal penalties;
11. A new Labour Court system with specialist judges should be established with exclusive jurisdiction on all employment and labour-related matters;
12. The Trade Union Act 2016 should be repealed in its entirety.

Sarah realised that this list was 'quite an ask' for even a sympathetic government to implement in its entirety (the IER Manifesto has twenty-five points), but she argued that the thrust of the programme is required to address the scale of the problems. She was encouraged by the degree of commitment shown to much of this programme already in Labour's election manifesto.

Her 'whistle-stop tour' should encourage all to read the full IER book.

Conclusion

These varied but well-informed contributions to this historical exploration of unions and UK Labour Law, should help provide a clear basis for debate and discussion across the political scene. In organising this programme our aim was to explore the evolution of the complex common and statutory law and the different outcomes which have flowed from Royal Commissions of Inquiry, Parliamentary party consideration and different governments' actions.

One clear distinction between the historical and current situation is that whereas the unions were closely involved in the development of the legal framework governing their activities in the past, certainly since the 1870s, that has not been the case since the 1970s. That involvement helped to secure their cooperation in the operation of the law, by and large, for a very long time (including its suspension during two world wars in which their now, largely forgotten, contribution was immense), and for a consensus to emerge between the parties.

Since that consensus broke down, all the changes have been imposed in a one-sided party basis without significant consultation with the trade unions. Even in the lengthy period of Labour government (1997-2005), the changes imposed did not become the subject of serious inquiry, despite union pressure. The unions clearly still feel a deep sense of grievance and continue to campaign to redress the situation, largely in the way suggested by the IER Manifesto. The adoption by the Labour Party of much of the IER's radical programme in the 2017 general election, has brought the issue back to the Parliamentary agenda. If nothing else, it ensures that the unions will be consulted on any future framework of law governing their activities which a Labour government might install. The likely separate constitutional relationship with the EU after 2019 also affords an opportunity for such reconsideration, perhaps initially through a representative independent inquiry before then.

Jim Moher 13th March 2018