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DEREGULATION AND LABOUR LAW IN BRITAIN AND WESTERN EUROPE

Professor Lord Wedderburn FBA*

This is an important moment at which to attempt the task of evaluating what has been happening to labour law policy in Britain. It is just twenty five years ago that the Donovan Royal Commission, after three years’ profound study of the law and practice of England’s industrial relations system, concluded in its Report:

We emphasize that we are not suggesting a sharp break with the policies which Government has hitherto pursued. The policy of providing support for the collective bargaining system has long been established and remains as sound today as it was at the end of the last century. We suggest rather how that policy can be made fully effective in modern circumstances.¹

Those words have a strange ring about them today, when policy demands “deregulation”, an end to “burdens on business”, and the replacement of the “going rate” by the “market rate.”

It is useful, therefore, to first ask what the traditional labour law policy of England was and how it contrasted with other such policies in Western Europe, before assessing some of the major differences in British policy today.

Perhaps the primary and often overlooked point is the strength which sustained the old policy until relatively recently. The policy was supported by different ideological and political groups who interpreted it differently but who affirmed its central tenets even in the midst of their partisan strife. For example, the controversial legislation of 1971 by the Conservative government, the Industrial Relations Act (the “Act”), which was bitterly contested and hotly criticised by many (including myself), was always proffered by its authors as a programme of reform to make concrete the old virtues.

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It aimed at "good industrial relations" and its comprehensive new regulation—"neo-corporatist" according to my sociological colleagues—was enacted in order to integrate employers and trade unions (the "social partners", in modern Eurospeak) and ensure that they played their proper role. Although individual employment rights played a part, employees and non-unionists perceived the centre piece of the Act's strategy to be the attempt to change and organise collective industrial relations.

Law was to play a new role up front in this strategy, and the State—with powers that owed something to a study of the American Taft Hartley Act—was to have unprecedented powers of direct intervention. It is well known that the Act failed to achieve its central objectives in its short life of three years not only because of the opposition from trade unions but also because of the unwillingness of management to use its new legal rights and alter its practices. This led many in Britain to readily accept the thesis that because law is a "secondary force" in industrial affairs, its interventions could never "work" unless they expressed a consensus of the collective parties in bargaining. We had forgotten, because we had not experienced it for decades, that things may be different if one side, especially the employers, opts out of the customary procedures and is willing to pursue its interests in the courts with the support and encouragement of government.

However, it is true that this period between 1971 and 1974 saw relatively little change in the bases of English classical labour law, which reaches back to legislation passed from 1871 to 1906. The status quo was maintained when the Labour Government of 1974, using rhetoric not dissimilar to that of a few years earlier, sought to legislate for a renewal in modern form of the "non-interventionist" structure. Several of the many facets of that structure, that are of particular comparative interest when we discuss deregulation, are set forth below.

Primarily, the system is founded on freedom of contract without much legislative intervention and certainly without the aid of a legislative code. So far did legal regulation seem to abstain that some talked of it before 1980 as a system "without law." However, no


industrial labour relations system can ever be “without” law. What matters is the residual law found in place if the legislature does not specifically intervene and create law. In Britain the common law is the residual and—as I shall suggest later—it is the common law’s structure of freedom of contract expressed in an extreme form that is an important difference between the residual law in Britain and that of many other systems of labour law. It is a critical difference from the American system where the individual employment contract has largely given way to collective patterns, particularly in those areas where unionisation still makes the labour law of the Wagner Act relevant.

Secondly, even with the dominance of the individual contract of employment, Britain has also had the phenomenon—strange to observers European and Transatlantic alike—of collective agreements which normally are not binding as contracts because the parties do not intend to give them force as legally binding instruments. This too elevates the position of the individual employment contract. Some or all of the terms of such a collective agreement only achieve legal effect when incorporated by and into the individual employment contract, quite different from the automatic effect granted collective agreements in France or the supremacy of the collective contract in the United States. Thirdly, the individual contract of employment is the basis of the British law on collective industrial disputes via the fundamental tort of “inducing a breach of contract,” in particular, inducing the breach of an employment contract. Thus, there is no more difficult task than explaining to a colleague from France, Italy or Germany how it is possible that a modern system of labour law in the home of collective bargaining never adopted the principle that in an industrial dispute the strike suspends, rather than breaks, the worker’s contract of employment. Yet so it has been, and is, in Britain.

The individual employment contract is critical to the British experience of “deregulation”. In contrast, Italy, in 1984, attempted to make the law more “flexible” on part-time employment by passing legislation. Until then difficulty had arisen because the law in the Civil Code concerning working hours and the contract of employment, and, no less, regarding social security provisions, had leant against this form of hiring. According to one view it was not permitted and even the majority of commentators found themselves distinguishing part-time work from reduced-hours shift work or from temporary work that was within the given legal category of normal
employment. The 1984 Italian effort is, to British eyes, regulatory; it prescribed the form and content of part-time contracts, it gave such workers certain basic rights in relation to full time employees, even rights of priority to such employment. Certainly that law regulated an area not before subject to regulation. In Italy, however, its function was largely deregulatory.

Italian labour law begins with legally prescribed descriptions not merely of the "employee," as do all systems (though in Britain, the common law definition leads in modern practice to maximum uncertainty) but with terms that stem from the basic laws of 1919 and 1924; for example, "white collar workers" or "office holders" (impiegati), "workers" (operai), and "managers" (dirigenti). It then added, in 1985, a further category of quadri intermedi, a group created by social change, and then had its 'definition' necessarily inserted by the law between the definitions of managers and impiegati. The difficulty of definition and translation into English of the term quadri is exceeded only by the mysteries of the French term, cadres. The point, however, does not turn only upon the accident of legal history that gave such system residual definitions which the common law system lacks. The collective bargaining which grows out of such cultures inevitably incorporates aspects of that residue. An Italian collective agreement is incomprehensible without an understanding of those and other terms, like the concept of inquadramento that relates a worker to his "job" and "category" (i.e. mansions and categoria, both also found in the Civil Code). When the law of 1985 legitimized the new quadri, it was "limited to a very general idea of the new group." It did, however, further establish some legal content—a legal definition in this case—which existed at the outset of any Italian collective bargaining process; thus the law and free bargaining interconnected.

The relationship of Italian collective bargaining to "the law" is very different from the British relationship. If a British manager considers the problems of staff-status for manual workers there will be legal dimensions—contractual notice, continuity of service or (today more important) the pension scheme—but the main agenda is in


5. See B. Napier, Labour Law in Britain, Ch. 12 (Lewis ed. 1986) [hereinafter "Labour Law""]; and K. Wedderburn, The Worker and the Law, Ch. 2 (3d ed. 1986) [hereinafter "The Worker"].

terms of the enterprise and its industrial relations. An Italian manager who enters equivalent discussions about *l’ inquadramento unico* immediately finds legal restrictions already incorporated into the bargaining process.

Furthermore, it is too easy to say that British labour law knows of little regulation. In certain areas that has never been true. In the nineteenth century, the British Parliament gradually elaborated—or some would say was forced to elaborate—statutory control of health and safety at the workplace. At first it had a limited range—e.g. mines, cotton mills, workshops—but later a more general protection of the worker’s person was attempted in all “factories”, and just two decades ago, in offices. To the techniques of criminal prosecution and civil actions for the injured were added, from the early years, an administrative Inspectorate, some would say the most useful British contribution to labour law. The increased powers and better organisation of the Inspectors in the 1970’s were matched by legal rights for the workers’ union safety representatives. Similarly, the hours of women and young workers were limited by statute, and deductions from the wages of workmen were subjected to legal limitations.

How can we say that British labour law does not regulate especially when the last two decades have seen the addition of a “floor of rights” for individual employees, unionised or not, in other areas—rights against unfair dismissal, maternity rights, rights in insolvency, and rights to minimum notice of dismissal? The usual answer is to point to the character of all these rights. Few if any of the legal norms impinge on collective bargaining. They are a “floor” from which bargaining may—and, it was assumed, will—begin. In some cases, unfair dismissal for example, it is even possible for a collectively bargained scheme that meets certain standards to be negotiated out of the statutory scheme altogether, a recognition by the ‘floor of rights’ legislation of the primacy of voluntary collective methods.

There is also the rather different area of legislation on race or sex discrimination where the legislative intervention has been more complex in the last two decades. In matters of sex equality the influence of the EEC regulation has been of great importance. However, that is a dimension which for the moment we must leave aside.7

The same broad picture emerges if we look at another feature which concerns a different type of legislation, namely that which created the machinery and/or minimum standards supportive of collec-

7. See *The Worker*, supra note 5, Ch. 6.
tive bargaining, or which created the measures whereby government provided the machinery for conciliation and arbitration when employers and unions choose to use it. The voluntary character of British arbitration has long been regarded as a source of strength for the initiation of third party intervention. This was only one of the points which differentiated it from the weakness of conciliation and arbitration machinery in such countries as France, with its little used Court of Arbitration.\(^8\) The Act of 1975 which modernised the structure, and speaks, of the functions of the agency entrusted with these tasks, the Advisory Arbitration and Conciliation Service ("ACAS"; not dissimilar to the Federal Mediation and Conciliation Service). The Act of 1975 included "encouraging the extension of collective bargaining and the development and, where necessary, reform of collective bargaining machinery."

Legislation setting minimum standards has also been traditionally regarded as limited to what is required when collective bargaining is inadequate. The Trade Boards of 1909 which oversaw the "sweated trades" have given us the tripartite Wages Councils that set minimum conditions for three million workers (if one includes the Agricultural Wages Board). However, to the French observer's astonishment, there is no overall national minimum rate or wage. If collective bargaining becomes effective in any sector, its Wages Council is abolished. An extended right to unilateral arbitration on terms and conditions was given to unions in 1975, building upon machinery developed since such arbitration was introduced in 1940; but it was still strongly linked to minimum wage rates achieved by collective bargaining in that industry or district. A similar link was prominent in the obligation required of the Executive by the House of Commons in the "Fair Wages Resolutions." This resolution was passed from 1891 onwards to oblige contractors making public contracts to observe conditions for their workers not less favourable than such minima. Local municipal authorities operated within similar rules.

Limited rights on disclosure of information for unions recognised by an employer were enacted in 1975, as were rights of consultation over redundancies. Furthermore, in 1981, similar rights were enacted in case of the transfer of the enterprise, but all of these were the consequences of EEC Directives which the United King-

\(^8\) On France, see G. Camerlynck, G. Lyon-Caen, & J. Pelissier, DROIT DU TRAVAIL, at 987-96 (13th ed. 1986); on Britain, see Dickens & Cockburn in LABOUR LAW, supra note 5, at 553-9.
dom, as a member state, is obliged to obey. There were, however, no institutions in this country similar to those in France or West Germany whereby the English Minister could "extend" a collective agreement to workers in enterprises whose employers are not parties to it. The British do not have an equivalent to Article 36 of the Italian Constitution which allows judges to take account of collective agreements in deciding whether a worker is receiving remuneration "sufficient to provide him and his family with a free and dignified existence." Supportive legislation was a crucial part of the system, but this was secondary to industrial relations based upon voluntary collective bargaining. It is astonishing to note, looking back at the 1960's and early 1970's, that even when government intervened with legislation to control wages in pursuit of an "income policy", this did not change the fundamental characteristic of British labour law, which is voluntary collective bargaining.

Lastly, it is worth noting that the British system was not built on any positive rights for trade unions or for trade unionists. In this it is unlike every other major jurisdiction in Western Europe where positive rights of some kind are fundamental. For example, in France the right to organise and to join the union of choice, the right to strike, and since 1982, a limited right to bargain; in West Germany the right to organise for occupational interests; in Italy the rights to organise and to strike; in Sweden the rights to organise and to bargain, and on some matters the union's right of "priority in interpretation". True, none of these rights gives more than a framework. The French right to "strike" does not comprehend a go-slow or work to rule. Neither Italy's constitutional right to strike nor its remarkable Statuto dei lavoratori of 1970 (which outlaws all "anti-union" acts by an employer) make it unlawful for the employer to initiate a defensive lock-out if articulated industrial action threatens the very "productive capacity" of the plant. Codes must be tested by what happens in reality.

However, British law has never put such positive rights to the test because they have never been adopted. Even the rights given to unions (such as disclosure and consultation) or to union shop stewards (such as the right to time off from work for industrial relations duties) depend upon "recognition" by the employer; and legally, an employer is free to withdraw recognition from a union. Between 1975 and 1980 an exception was made when the law required that

an employer subject to an ACAS recommendation to recognise a union and “take reasonable steps” to negotiate with it. But the criteria for the recognition of unions was never agreed upon by the tripartite Council of ACAS (a critical matter in a multi-union industrial culture); ACAS sanctions were inadequate; and the courts interpreted the legislation in ways that made it virtually impossible for ACAS to be effective. When the provision was repealed in 1980, trade union protests were muted. We had inadequate experience of such a law to know how we would have resolved the problems of a duty to bargain in good faith.

Instead, British collective labour law was founded not on positive rights but on “immunities.” The fabric of the structural legislation was fashioned at a time when the emergent labour movement was relatively strong but, unique among European movements, wholly industrial; the union in Britain had no political party avowedly basing itself upon the growing political franchise of the (male) working class; the Labour Party was formed only in 1906. The votes of artisans and workers began to matter after the reforms of 1867 and 1884, and after basic legislation was enacted between 1871 and 1906. The unions had no political Charter in this period to present to politicians. The programmes of the old “Chartists” had died and they curiously left no legacy before 1870. By then, the trade unions cry, consistent with the rhetoric of the age of freedom, was a demand that the injustices of the law (the doctrines of restraint of trade, of conspiracy, of inducing breach of employment contract) simply be removed from their shoulders.

This was demanded and done primarily by the “immunities”, not by a constitutional right to associate or to organise (indeed, there was no constitution in which to enshrine it). Instead, Parliament declared that the law on restraint of trade should not apply to unions. Even today, the lawful civil status of unions depends on the section which prevents the doctrine of restraint of trade from applying to them. So too, there is no right to strike. Striking remained a breach of the worker’s contract. Instead, legislation provided that liability for conspiracy to injure or inducing a breach of employment contract was not to apply to anyone organising action “in contemplation or furtherance of a trade dispute,” and the funds of the unions were not to be subjected to liability in the law of tort. It was a curious way to do things but at the time it seemed quite natural. It is fashionable today to say it was the wrong way to do it but that may overlook some of the difficulties which were in the path of introducing autono-
mous positive rights into our common law legal system.10

The apparent form of British industrial liberties on the collective level, therefore, was that of privilege. The social substance, however, was parallel to Continental positive rights or the Wagner Act in the United States. Without some “immunity” in trade disputes from the common law tort of inducing breach of contract, no British union or group of workers has been able to organise a lawful strike. Yet even today there are commentators—and even more pundits—who call for the complete abrogation of the “privileges” of the trade unions or, as the Director General of the Institute of Directors has recently called for, “the repeal of the Act of 1906”, which first gave that immunity from tortious liability.

Nothing has been more unfortunate in the history of British labour law than the semantic accident which associated Britain’s modern industrial liberties with “immunities” and therefore, in the minds of the untutored or the mouths of the mischievous, with “privilege.” This, was the structure which the Donovan Report wanted to support and make more effective. It concluded that issues like the introduction of systematic positive rights might have to be considered some time in the future; but in 1968 it was more important to get on with the job of making the collective bargaining structures more orderly and efficient. The Donovan Report was in favour of extending the rights and protection of workers, both with respect to their trade unions and to their employers in regard to unfair dismissal. Indeed, the legislation of the 1970’s, which is now sometimes represented as having placed upon British employers a groaning weight of legal obligation, was really a modest application of the Donovan approach. In all of the western European countries mentioned above, workers are protected by legal rights to a greater degree than their British counterparts, whether it be their rights against dismissal, regarding discrimination as trade unionists, or with respect to their access to avenues of influence through Works Councils or enterprise committees, or to their right to collective bargaining on certain matters. Nor is it true that the implementation of rights—which is what matters—is everywhere defective. At any rate, the industrial tribunals of Britain which enforce the individual worker’s statutory rights do not compare well with the Italian Pretore who, in the labour jurisdiction, can act more swiftly and

more broadly to protect individual workers, especially under the "anti-union" provisions of Italy's Article 28 of the Law of 1970.

It now appears to us that the Donovan Report overlooked the long term problems set by the common law basis of the system. We have seen how a system which departs from a more legalistic base has to deal with the need for greater flexibility in the labour market. The Law of 1984 in Italy, like Germany's Employment Promotion law of 1985, demonstrates that these systems are compelled to pass additional legislation for an adjustment of new features in employment as a natural part of "deregulation." In Britain, just as collective liberties assume the form of immunities, legislative regulation of the individual employment relationship has all too often been given the status of an exception from the "freedom of contract". Deregulation thus presents itself as simply a matter of removing legislation.

This is what is at the root of our inability to cope with the "atypical" employment relationships, such as the part-timer, casual, seasonal, temporary or home worker, the fixed-term worker, or the labour supply contract. Without the rigidities of a legal code, we are swept along by the fluid changes of the market. Our inability to adapt the old common law definitions even prevents us from determining who is an "employee" and who is not, for the traditional test concentrating on 'control of the work to be done' and gives uncertain answers. We base our legislation upon this uncertainty in a way that actually encourages a withdrawal of protection from such workers.

Employees, for instance, need a certain period of continuous service (two years in Britain) before they qualify for the right to complain about unfair dismissal. Take the case of the bar-lady who regularly worked at race meetings for some six years. Each time she worked, it was for just one or two days. She took holidays when there were fewer race meetings and told the employers she was going. In one year she worked 16 hours a week (the minimum normally required) except for two weeks (one of which she was not offered work and the other of which she was on holiday), and nine other weeks when she worked less than 16, but more than 8 hours per week. She wanted to count the whole year as a period of "continuous employment" in order to complain of unfair dismissal. The Act said she could if the breaks were temporary cessations of work or if by "arrangement or custom". The court rejected her claim, holding that if work was not offered, there could be no cessation of work; and since she was employed under separate contracts each time she was hired, there could be no arrangement comprehending continuous employment; nor could the 8 hour weeks count since she was hired only
for a few days and each time without any “umbrella” contract.\textsuperscript{11} Such an approach compounds freedom of contract which in a fragmented labour market gives the employer the power to offer work in whatever little packets he chooses, with a common law attitude to statutes that aim to protect those employed against arbitrary deprivation of livelihood.

More importantly, such cases are common, and they illustrate how English law is already deregulated before deregulation begins. The residual law, which is waiting for the victims of a statutory protection denied or removed, does not, like many of its Continental counterparts, understand the need to protect the employee. It is not labour law, but common law. Its concept of freedom of contract treats the employment contract as just another contract. The recognition of the imbalance of power behind the employment contract, which is the very basis of modern labour law systems, is not a factor which fits English doctrine.

This is not a matter of ancient precedent alone. The doctrine of “economic duress” in its present form is one known to English law only since 1976. It is applied, for example, to give restitutionary remedies to a large corporation whose “will is overborne” by industrial action. But it is not applied to an employee complaining of unfair dismissal since that did not subject him to the “necessary degree of economic duress,” and he could complain to a tribunal “and draw social security meanwhile.”\textsuperscript{12} The subordination of the employee finds its recognition in British labour law only in statutes restrictively construed and in the collective organisation whose legality rests on “immunities.” Both the subordination of employee and the legality of the unions are precarious guests in the castle of the common law.

One might ask why a system like this needs much “deregulation” to meet the needs of changing market conditions. Its very nature seems to have the virtue—and it can be a virtue—of not fixing rigid legal categories. Indeed, the whole debate about the need to “deregulate” in order to adapt labour law for purposes of “flexibility” has been challenged outside of Britain, as well as within, as a “rigged debate”, since the traditional systems are inherently flexible.\textsuperscript{13} The question is how far different interests are to be respected.

\begin{itemize}
\item \textsuperscript{11} Letheby v. Bond, [1986] Indus. Cas. R. 480 (Employment Appeals Tribunal).
\item \textsuperscript{13} See G. Lyon-Caen, \textit{La bataille truquée de la flexibilite}, Droit Social 801 (1985).
\end{itemize}
This is the context in which we must set the new policies for the administration in office since 1979 in Britain. Except in one area, it has set about changing the structure and very objectives of traditional labour law. That exception is the area of Community law in which, by virtue of the European Community Treaties, the writ of Westminster must give way. English courts must apply the law of equal treatment and equal pay between the sexes as stated in the Rome Treaty and the Directives along with, and on occasion in preference to, the British statutes. When the British legislature has failed to implement those Directives it has been compelled to do so by judgments of the Court of Justice at Luxembourg.

The British Government has, however, done its best to hold up further regulation in Community law in other fields. It has promoted the establishment of a “task force” in Brussels to draft Directives for unnecessary “burdens” on employers; it has prevented the adoption of regulatory Directives to give employees and unions rights to consultation and information from corporate group employers, especially multi-national ones, and to shape a framework of rights for part time workers; and British influence was significant in the decision to exclude the ‘rights of employees’ from the new procedures for majority voting on Directives in the recent Single European Act. All of this is consistent with the drive in Britain to sweep away what are perceived as obstructions restricting the operation of the economic market—both legal regulations and the impediments of collective arrangements. This new policy has seen its labour law manifestation in the Employment Acts of 1980, 1982, and 1988, the Trade Union Act 1984, and various other Acts and Orders. This is not the place for a full itemisation, but we may note four general areas.

First, the floor of employment protection rights has been significantly eroded. The continuity qualification for an employee’s right to complain of unfair dismissal has been raised to two years (from six months) thereby eliminating millions of workers from its scope. Maternity rights have been weakened as have rights to be consulted over redundancy; social security protection for the unemployed has been weakened, as have the protections against unfair deductions from wages. It is now proposed that we repeal dozens of sections protecting young and women workers’ hours and conditions of work (the Government hastened to denounce the ILO Convention on women’s

underground work in mines before the consultation period has ended). It is also proposed to charge a deposit to workers who complain of unfair dismissal if their case is regarded as weak. Such measures are said to be necessary to relieve employers of burdens which inhibit new posts in employment, a claim which research has regularly demonstrated to be poorly founded.

Moreover, the style of deregulation is as important as the fact. When the Italian legislature moved to ease the restrictions on women's work in 1977, an area where old concepts of protection have, it is true, come into conflict with more modern ideas of equality, it referred night work and certain heavy work to the arena of collective bargaining (a device which has become a hallmark of Italy's laws during the 1970's and 1980's). The British Sex Discrimination Act of 1986 repeals the protections—and for good measure repealed the protection of men's hours in night baking—without any provision for the maintenance of conditions at work.

The same feature is apparent in the second area, the disestablishment of collectivism. Virtually a century of measures supportive of collective bargaining have been repealed. The Fair Wages Resolution has been rescinded, and the unilateral arbitration law repealed. Wages Councils have been restricted to setting one basic rate (in place of employment conditions as a whole) and, more significant, workers under 21 years have been withdrawn from their protection, even in the modern sweated trades. Two ILO Conventions have been denounced in order that these repeals should not conflict with international obligations. This aspect of the policy, like the rest, is single minded and logical. But its character is not widely appreciated even in Britain. As the new labour law policy sees it, there is no point in retaining measures to support collective bargaining when collective negotiation threatens to be inimical to the workings of the market. The old Donovan objective of "good industrial relations" is not a primary target. The target is the good, individuated market.

But it should not be thought that such measures imply withdrawing the State from industrial and economic affairs. On the contrary, the job of the State in this policy is to ensure that the market exists under the rules of the game which it sets. Thus, in place of the requirement that public contractors must pay "fair wages", for the most part collectively determined, Britain now has a statute of 1988 which makes it illegal for a municipal authority even to take into

15. For a comparative review, see K. Wedderburn & S. Sciarra, Collective Bargaining as Agreement and as Law, in LAW IN THE MAKING, Ch. 6 (A. Pizzorusso ed. 1988).
consideration the employment practices of those with whom it makes public contracts. Further, when the long established collective bargaining system for the teachers in public sector schools produced unwelcome results, a long period of strikes, the response of the British Government was to enact the total abolition of collective bargaining for teachers and their unions in 1987. This gave the Minister power to fix employment terms for four years and proposing a system for the future which the ILO Committee of Experts has already denounced as infringing the teachers' right to "free and voluntary negotiation."

It is interesting that the intervention of this character, which has received the greatest attention, was the peremptory denial in 1984 of a trade union's right to public servants working in the government secret communications center ("GCHQ"). Like other civil servants, the staff had long been encouraged to join unions with which management could consult with as practiced in the rest of the civil service for many decades past. The strength of unionisation and negotiation in the public service has, for many decades, been a central feature in British arrangements, and has never encountered the difficulties met in both Western Europe and the United States. Doctrines such as the "sovereignty" of the State or the obligations of loyalty demanded of State officials have impeded the emergence of industrial rights for the public sector in Western Europe and the United States. But at GCHQ in 1984 the right even to be a union member was suddenly withdrawn on grounds of security, and despite widespread protest the British Government still insists it will dismiss those who refuse to give up their membership. Other Acts and administrative measures have witnessed an increase in the powers of the State and the police with respect to public order. The impact on industrial relations has been to increase restrictions on the liberty to take industrial action and to designate serious industrial conflict as a form of public disorder.

There is another feature which interlocks with the demolition of collectivism, and that is the withdrawal of Government from tripartism. Britain, like many Continental countries (Sweden is perhaps the best example), had developed in the post-war period practices and machineries in which government officials or appointees sat with employers and union representatives in organizations ranging from the National Economic Development Council to the Council of ACAS. These neo-corporatist structures have been reduced in importance and the Government has withdrawn from many. A remarkable example occurred in 1988. The tripartite Manpower Services Commis-
sion, which had the function of organising the all-important programme of training employed and, above all, unemployed workers, was transformed into the “Training Commission” by the Act of 1988. But the opportunity was taken to reduce to a minority status, the number of trade union representatives. Soon afterwards the Trades Union Congress criticised the new programme by refusing participation in the programme’s present form. Within a week the Government abolished the Training Commission and announced that the training arrangements would be run directly by the Government Ministry.

The third and fourth aspects of the new policy are better known. They respectively concern the reduction of the liberty to take industrial action and the direct control of trade unions. Predictably, the legislation on the first has been justified on the ground that it is “removing privileges.” But just as important has been the theme that the collective rights of unions, or, occasionally, the rights of the majorities within the unions, must be restricted as part of an increase in the rights of “individual” workers or members. We can do no more than touch upon what is now a highly complex body of law about industrial conflict. One in which a court has to ask three questions: Was the union action unlawful at common law? Was there an immunity given against relevant tort liability in a trade dispute? Has that immunity been removed by the legislation after 1979? Those are the questions, for instance, when an employer brings an action for an interim labour injunction, as many have done in this period after 1979. The court, it must be noted, will grant an injunction to such an employer if he proves, not a clear case, but a case which is seriously arguable, and if it exercises its discretion in his favour on the “balance of convenience,” as it usually will.

In general terms the “immunity” which protects lawful industrial action in trade disputes has been removed over a wide area. This includes, for example, sympathetic or “secondary” action (1980); picketing locations other than the workers’ own place of work (1980); industrial action of which one purpose is to maintain a closed shop or to act against an employer because of the “fact or belief” that he is, in any aspect of employment, not discriminating against a non-unionist (including those who will accept lower rates than the going rate, 1988); action which induces an employer to adopt commercial practices in order to persuade another employer to consult or negotiate with a union (even if he has a legal duty to do so, as in safety matters: 1982); and action to induce a municipal authority to consider the employment conditions of its contractors’
workers (1988). The restriction of industrial action within the boundaries initiated by the ban on "secondary" action is also found in the redefinition of "trade dispute," which now requires the dispute to relate to the workers' own conditions in a dispute with their own employer (1982).

In addition, the crucial step was taken of exposing the union and its funds, once again to tort liability, with a special code of vicarious liability legislated for the acts of its officials and shop stewards. This is the step which has resulted in several unions suffering sequestration of property in contempt proceedings following labour injunctions that ordered a cessation of strike action.

In 1984, the legality of worker industrial action which had union support was permitted to continue only if preceded by a ballot of the members involved, voting on questions set by the statute. But the 1988 Act now requires a majority vote in each separate workplace for immunity to be retained, except where, in provisions of extraordinary complexity, the Act allows an aggregate ballot if the workers have links of occupational description or "common factors" in employment conditions. The position of the union is even more precarious if it has a dissident member who demands a ballot for any form of "industrial action." Here the 1988 Act defines "industrial action" as any "strike or other industrial action" by employees as a breach of employment obligations without requiring any form of wrongdoing. It seems clear, for example, that if a group of union members with the support of their union official decides not to cooperate with an employer by refusing to take on any more voluntary overtime work, a dissident member can obtain a court order barring such employee action if no ballot has been held according to the statutory procedures.

The ambiguous place of ballots in the developing policy is important. After 1982, for example, the requirement was developed that no action could be taken by the employer to dismiss or discipline non-unionists in a closed shop, pre-entry or post-entry, or agency shop unless it had been approved by some four-fifths of the workers in the employment unit. But in 1988 it was enacted that neither the employer, by dismissal or discipline, nor the union, by industrial action, may lawfully take action to support such an agreement. The ballot was abolished. Furthermore, the dissident member was given further rights to override ballots or union rules. For certain forms of conduct the union was not permitted to apply its (lawful) rules to discipline a member, and if it did so in any way, it had to pay compensation. That conduct included the refusal to join or
support union industrial action, even if there had been a ballot of members with a majority in favour.

A wide range of similar interventions in union affairs was included in the 1988 Act. Building upon a 1984 statutory requirement for regular ballots in prescribed form for election of the principal union committee, the 1988 Act included elections of those who attend such committees without votes. No indirect election machinery was allowed (something commonly found in British union structures in order to represent different groupings of members at the top level) and the elections had to be conducted by postal ballot (the evidence in many unions is that workplace ballots produce a wider participation). Rules were enacted concerning election addresses, and outside scrutineers who met qualifications set by the Government were required to conduct the elections. The same Act forbids unions certain rights available to all other associations, such as discretionary indemnification of officials who have incurred fines for offences. Individual members also have the legal right to inspect the accounting records including, it seems, those held at any branch, reaching back over six years.

It must be stressed, especially in a context of comparative inquiry, that these measures of 1984 to 1988 to control trade union rules and practices have not in any way been preceded by scandals of ballot rigging or corruption such as those which have prompted the American enactment of the Landrum Griffin Act of 1959 and the “Labor Racketeering Amendments” of 1984. Complaints have been made but no case of this kind has been proved, certainly nothing like the ballot rigging fraud in the electricians’ union in 1959, the one instance of its kind in modern British union history. Nor has the case for the legislation been argued in that way. The case made has been more general, pointing always to the need to restrain union “power” and to defend the rights of “individuals.” It is legitimate to see these measures also as a means of harrassment which will defeat any coherent collective strategy.

The “deregulation” involved in the new policy naturally takes the British form. Bands of legislative intervention protecting the employee are removed revealing the residual common law that restores to the employer the managerial prerogatives and power to shape and control employment, the “burdens on business,” that have featured in the analysis of the Government from 1980 onwards, are being dismantled. Because collective regulation is inferior to market forces, the structures in the law that supported the regulations, albeit partial and merely auxiliary ones, must be removed.
The intervention against trade unions is not merely deregulatory, although it certainly appears to be, removes obstacles to voluntary group activity. The restrictions on lawful industrial action have the appearance of removing exceptional privilege only by reason of the peculiar form of immunity. In fact, the limitations on industrial liberty in Britain have long ago passed the point where in most major countries of Western Europe they would have required constitutional amendment. Yet the British government's policy stands today and its interventions in trade union autonomy continue. Notably, the policy is aimed at more than trade unions' pro-employee positions. In the words of the chief ideologue on whose writings much of the policy depends upon and who sees unions as special "monopolies": "much enterprise monopoly is due to the result of better performance, while all labour monopoly is due to the coercive suppression of competition." The trade union thereby becomes a unique institution against which restrictive measures may regularly be taken, indeed must be taken, for the very purpose of protecting a version of freedom which is itself identified with an a priori model of the economic market.

On the international level, this idiosyncratic policy immediately meets obstacles. In terms of international standards, many of the measures trespass across the boundaries set by instruments ratified by the United Kingdom, such as the European Social Charter or ILO Conventions. Thus, where the Government has not withdrawn from ILO Convention (as with wage protection) it suffers condemnation that would normally be embarrassing at the hands of the ILO Freedom of Association Committee and Committee of Experts (as with GCHQ and the Pay and Conditions of Teachers Act 1987).

Similarly, Britain finds its partners in the European Community adopting very different approaches to deregulation. As we have seen, this is partly due to the different structure of their labour laws, especially the character of the residual law inherent in their systems. But it also arises from different and conscious policies. Again, although France and even Germany might be cited, the immediate contrast is with Italy, where the introduction of greater "flexibility", which has proceeded rapidly since the "crisis laws" of the 1970's, is accompanied not by reductions in collectivism and restrictions to exclude the unions, but by an extension of tripartism and the articulated use of collective negotiation as a conscious social mechanism of change and

16. 3 F. Hayek, LAW, LEGISLATION AND LIBERTY, 83 (1979) and see Freedom, supra note 14.
adaptation.

Lastly, the labour law differences have emerged as a central issue inside the European Community itself. Having committed themselves to the “single internal market” in 1992, member States now have to decide upon the structure of Community law that will accompany it. The British position is clear. Parallel to the national policy, it sees the internal market as an area in which regulation must be reduced to the lowest possible level. On the other side, however, is the view of the Commission, represented especially by the President Jacques Delors, that the competitive market must be accompanied by a “social dimension.” There must be new rights for workers—rights to training, to information and consultation, and other “social rights” which plainly require representation through their unions. Who can doubt that the later view would have been more acceptable to the Donovan commission in 1968? We cannot tell whose vision of a deregulated market society will have prevailed in the EEC twenty five years from now. But the fate of the policy adopted by these countries in 2113 is likely to be of some moment for the United States and the rest of the world.