

# The British Industrial Relations Bill – An Analysis

## Une analyse de la nouvelle loi britannique sur les relations industrielles

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### Résumé de l'article

L'adoption, en décembre 1970, d'une nouvelle loi sur les relations industrielles en Angleterre a marqué de façon définitive, un nouveau départ pour le système de relations industrielles de ce pays. L'analyse des intentions du gouvernement sous-jacente à cette législation peut être divisée en trois parties : un examen de sa philosophie, les buts qui découlent de cette philosophie et les moyens choisis pour atteindre ces objectifs.

Deux courts commentaires suffiraient pour résumer la philosophie du gouvernement lors de l'adoption de cette loi. D'abord, nous assistons à une extension du rôle de la loi en société démocratique vers un domaine presque entièrement exclu dans le passé : en second lieu, cette philosophie est en quelque sorte un nouveau départ radical - radical à cause de l'intervention de la loi dans un sous-système de la société dans lequel elle n'avait précédemment joué qu'un rôle très mineur avec le consentement général des parties impliquées. Quant à l'objectif fondamentale de cette nouvelle loi, il apparaît clairement qu'elle a pour but de renforcer l'économie. On a beaucoup mentionné les objectifs économiques et très peu parlé des buts sociaux de cette législation. Ces derniers seraient d'établir des normes nationales pour de meilleures relations industrielles, de protéger ceux qui se conforment à ces normes, de protéger les droits individuels au travail et de fournir de nouvelles méthodes de solution des conflits du travail.

Quant aux moyens utilisés pour atteindre ces objectifs, notons que la réforme du système de négociation collective, le renforcement du syndicalisme, la diminution des grèves et la protection des droits individuels sont les principaux. Plus spécifiquement, citons le droit d'appartenir ou de ne pas appartenir à un syndicat, le droit d'être reconnu sous certaines conditions, l'enregistrement des syndicats, la présomption que toutes les conventions collectives sont contractuelles à moins qu'une des deux parties fasse de la sous-traitance, quelques limites à l'immunité totale des syndicats face aux poursuites légales en matière de dommages, quelques mécanismes de protection pour la communauté comme, par exemple, les votes secrets lors des grèves qui pourraient mettre en danger l'intérêt national, une mise en application sélective des conventions et des mécanismes qui ont pour but de contrôler qui va négocier pour les travailleurs dans certaines usines.

Le gouvernement britannique a présenté un ensemble de propositions qui sont aussi claires qu'on pourrait s'y attendre à l'intérieur du domaine complexe des relations industrielles. Il est évident que l'interprétation de la future loi jouera un rôle important dans le résultat ultime. Une jurisprudence émergera qui guidera les participants au système de relations industrielles.

Évaluer avec précision les conséquences ultimes d'une loi est évidemment très difficile. Les conclusions partielles que nous offrons sont alors basées sur les opinions d'observateurs désintéressés de la réalité anglaise. Un célèbre médiateur américain, Theodore Kheel, a comparé les propositions du gouvernement à la pratique américaine. Kheel justifie la comparabilité des deux réalités en avançant que le modèle britannique empruntait à trois lois américaines du travail, à savoir la Loi Wagner de 1935, le Taft-Hartley de 1947 et le Landrum-Griffin de 1959.

Notre interprétation de Kheel suggère quatre critiques importantes :

- La loi à elle seule, ne suffit pas pour garantir de véritables conventions collectives : celles-ci ont d'abord besoin du respect mutuel et du consentement des parties impliquées. Cet argument semble être très pertinent lorsque l'on considère la proposition de donner à la Commission nationale des relations du travail, à la demande de deux parties, le pouvoir de rendre un accord obligatoire.
- Après examen des propositions, il semble trop facile d'éliminer le précompte syndical généralisé (P.S.G.) (après 2 ans, 20% des employés couverts par la convention, ou l'employeur, peuvent demander un vote secret afin d'annuler la convention). L'élimination fréquente du P.S.G. pourrait sérieusement affaiblir la position financière des syndicats britanniques. Il faut se rappeler que les syndicats anglais sont notoirement pauvres surtout lorsqu'on les compare aux unions américaines.
- Les propositions qui touchent la distinction entre les syndicats enregistrés et les autres organisations peuvent facilement entraîner l'isolation des meneurs des grèves illégales, grèves qui peuvent réussir à aliéner ces leaders. Par exemple, les chefs d'un syndicat enregistré peuvent pour éviter la responsabilité légale, dissuader les leaders locaux de recourir à des actions illégales. De telles pratiques peuvent facilement élargir l'écart entre les chefs nationaux et locaux et, par le fait même, encourager plutôt que le contraire de futures actions illégales.
- Finalement, on doit noter que les ambitions législatives du gouvernement britannique sont peut-être trop grandes. Les Américains ont eu besoin de trois lois entre 1935 et 1959 pour introduire une législation à peu près similaire. Le gouvernement se propose à l'intérieur d'une seule loi de relations industrielles d'éliminer l'immunité légale qui existe depuis presque 100 ans et de corriger presque tous les maux qui sont apparus durant cette période.

# The British Industrial Relations Bill

## An Analysis

T. G. Whittingham  
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*In this paper, the authors attempt to analyse the government intention and to assess some of the possible implications of the proposed measures in the British government's industrial relations Bill passed on December 8, 1970.*

The appearance of the British Government's Industrial Relations Bill on 8th December, 1970 marked a new departure in the industrial relations system. In the real sense of the term the Bill is revolutionary and charts a new course for the British system of industrial relations. It is likely to be converted into an Act with very few changes, since the Government has made it quite clear that it will not be diverted from its purposes as laid down in the Bill. It is highly relevant, therefore, at this point in time to analyse the Government's intentions and to assess some of the possible implications of the proposed measures.<sup>1</sup>

An analysis of the Government's intentions can, for the sake of convenience, be broken down into three parts, although in practice these three parts are interrelated. We intend to examine the philosophy which seems to lie behind the proposals ; the objectives which stem from this philosophy and the means chosen to implement these objectives.

It is frequently difficult to discover the philosophy lying behind legislative proposals, but, in this case, we have had several clear philosophical statements of which the most important is that made by Mr. Carr in the House of Commons on Monday, 14th December, 1970. «Unfet-

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<sup>1</sup> This article is an amended version of the Editorial Comment for the *Industrial Relations Journal*, Vol 1 No. 4 (Spring 1971).

tered freedom destroys itself. Liberty cannot be maintained nor rights sustained without corresponding duties. » He went on to point out that as personal and group activities impinged more and more upon other people's rights, they become more formal and when they affect the whole of community they become a matter for the law. Speaking specifically about the Bill, Mr. Carr said, « This Bill is essentially about the eternal tension between the desire of the individual person and individual group for complete freedom of action and need for the community to have proper degree of order and discipline ». <sup>2</sup> Apart from this general statement, other more specific aspects of the conservative philosophy appear in *Fair Deal at Work*. In his preface to the document, the Prime Minister wrote : « This report shows how in industry responsible management and trade unionism can make a more constructive contribution to the development and advancement of Britain's economy. It shows, too, how within properly defined rules individuals and organisations can be free to get on with the job without interference by the Government. It will form the basis of Conservative policies to provide Britain's industrial life with a new framework of rights and obligations » <sup>3</sup>.

Within the context of parliamentary democracy such philosophical statements are far from revolutionary since freedom within the law is an axiomatic principle of democratic societies. However, in the context of the British system of industrial relations the introduction of this philosophy is indeed a radical departure from an accepted tradition which began about a century ago. The traditional role of the law in British industrial relations has been summarised as follows. « Traditionally, in the United Kingdom, the law has followed two lines of general policy, one of non-intervention (for example, collective agreements are not legally enforceable between employers' associations and trade unions) ; the other of giving immunities in certain areas of the law when normally illegal action is taken in contemplation of furtherance of a trade dispute (for example, inducement to breach of contract is not actionable). <sup>4</sup> Hence, it is possible to perceive the philosophy in two ways. Firstly, it can be seen as no more than an extension of the role of the law in a democratic society to an area formerly partially immune. Secondly, however, it can equally be seen as a radical new departure – the intrusion of the law into a sub-system of society in

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<sup>2</sup> Quoted in *The Financial Times*, Tuesday, 15th December 1970.

<sup>3</sup> Published by Conservative Political Centre, March 1968.

which it has previously played only a minor role with the general consent of the actors. Given this second view, it is not surprising that some of the actors in the system have reacted strongly. Thus, for example, the T.U.C. has commented, « It ill becomes a government which claims to be concerned with enlarging freedom that its first major political act should be to make activities unlawful that for a 100 years Parliament and the Courts have upheld as right and proper, and to establish an array of new State agencies ». <sup>5</sup> On the other hand, there is some tentative evidence to suggest that public opinion (including trade union members) is not wholly on support of the second view. For example, a poll conducted by Opinion Research Centre for the *Sunday Times* between 10th December and 14th December 1970, on the basis of a quota sample of 994, found that 47 per cent of the 'public at large' 48 per cent of union members approved the Bill while 32 per cent of both union members and the public opposed it. <sup>6</sup>

It can be seen that the Government's philosophical position is clearly delineated as are also the reasons for the reaction of the T.U.C. Equally clear are the Government's objectives. Without doubt the fundamental objective is to strengthen the economy. For example, Mr. Heath has said that the Bill is necessary « for our industrial health and for an expanding economy ». Additionally, he argued that the legislation is vital for dealing with the underlying problems inherent in the pressures of the collective bargaining system which he defined as inflation and the consequences of industrial disputes and disruption. <sup>7</sup> This speech is an obvious reflection of the Consultative Document in which it is argued that, « Poor industrial relations adversely affect output, raise industrial costs, damage the balance

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<sup>4</sup> T. G. WHITTINGHAM and A. W. GOTTSCHALK, « Proposals for Change in the British System of Industrial Relations – an Evaluation » *The Journal of Industrial Relations*, Sydney, Vol. 12, No. 1, March 1970, p. 54.

<sup>5</sup> *Industrial Relations Bill*, Statement by the T.U.C. General Council, 15th October 1970.

<sup>6</sup> Reported in *The Sunday Times*, December 20th, 1970. Perhaps here we should state the obvious. Firstly, the sample size is far too small to make safe generalizations. Secondly, the poll was taken during the electricity supply workers' work-to-rule and overtime ban.

<sup>7</sup> Mr. Heath in the House of Commons on the second day of the debate on the Bill, 15th December, 1970.

of payments, and inhibit industrial investment »<sup>8</sup> Here it should be added that the Consultative Document mentions social as well as economic objectives but the social objectives have not been given the same importance in explanatory speeches.

However, despite the inherent problems of definition and the resulting implications and, assuming that the Government's overriding objective is economic, what are the specific operational objectives which it proposes). These objectives are listed in paragraph 10 of the Consultative Document as follows :

- i) to set national standards for good industrial relations ;
- ii) to safeguard those who conform to them ;
- iii) to protect individual rights in employment ;
- iv) to provide new methods of resolving disputes over the conduct of industrial relations.<sup>9</sup>

Given these, at least admirably clear, objectives, we can now examine the chosen means for achieving these ends.

It would seem, from an analysis of speeches made by Mr. Heath, Mr. Carr and Sir Geoffrey Howe,<sup>10</sup> that the following means are the principal ones chosen to achieve the objectives already outlined :

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<sup>8</sup> *Industrial Relations Bill*, Consultative Document, D.E.P. October 1970, para. 3. This is perhaps the most doubtful statement in the whole document. Apart from the problem of defining 'good' and 'bad' industrial relations both practitioners and students are aware that cause and effect are not so easily established. Economic systems, at all levels, are far too complex to explain differences in performance and efficiency on industrial relations grounds alone since there are far more variables to be taken into account. In some cases industrial relations may be a relatively unimportant variable in this context. Unfortunately, there is a shortage of sound empirical evidence to validate or reject any hypothesis which could be advanced. One micro study, which presents evidence which may refute the Government's apparent hypothesis, is of some interest. See T. LUPTON, *On the Shop Floor*, PERGAMON PRESS, 1963.

<sup>9</sup> *Ibid.*, para. 10.

<sup>10</sup> The speeches used for this analysis are :

- a) Mr. Heath in the House of Commons on the second day of the debate on the Bill, 15th December, 1970.
- b) Mr. Carr moving the Second Reading of the Bill on 14th December, 1970.
- c) Sir Geoffrey Howe speaking to the Industrial Society at Glasgow on 8th December, 1970.

- i) to reform the collective bargaining system ;
- ii) to strengthen the trade unions ;
- iii) to curtail strike action ;
- iv) to safeguard individual rights. <sup>11</sup>

But this is not specific enough for our purposes since such general statements do not highlight individual aspects of the Bill. On the other hand, a detailed analysis of the Bill by itself might lead to a confusion of detail, hence it is our intention to relate the four general statements to some of the specific provisions in the Bill. In order to clarify this process we are offering a simple schema. In constructing this schema we have used Mr. Carr's « Eight Pillars of Wisdom » which constitute the essence of the Government's legislative proposals. There are :

- i) the statutory right to belong, or not to belong to a trade union ;
- ii) the right to be recognised under certain conditions ;
- iii) the registration of unions ;
- iv) the presumption that all collective agreements were legally binding unless on side contracted out ;
- v) some limitation on trade unions' total immunity from legal action in pursuit of damages ;
- vi) limited safeguards for the community, e.g. secret ballots in the event of a strike which would cause a national emergency ;
- vii) selective enforceability of procedure agreements ;
- viii) machinery to regulate who should bargain for workers in particular factories – the « bargaining agency » proposal. <sup>12</sup>

These eight specific means can be set against the four general means, as shown in Diagram 1. <sup>13</sup>

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<sup>11</sup> This list is, of course, indicative rather than comprehensive. Further, again to state the obvious, all the items are interrelated.

<sup>12</sup> Extracted from *The Times*, 14th October 1970.

<sup>13</sup> This analysis is, of course, highly simplified since a two-dimensional approach is only partially adequate to explain a complex network of interrelated variables.

DIAGRAM 1

« EIGHT PILLARS OF WISDOM »								
SPECIFIC MEANS	i) Statutory Right to Belong or Not to Belong to a Trade Union	ii) Union Recognition	iii) Registration	iv) Legally Binding Collective Agreements	v) Limitation on Immunity	vi) Limited Community Safeguards	vii) Selective Enforce- ability of Procedure Agreements	viii) Bargaining Agency
REFORM COLLECTIVE BARGAINING SYSTEM			X	X				X
STRENGTHEN TRADE UNIONS		X						
CURTAIN STRIKE ACTION					X	X	X	
SAFEGUARD INDIVIDUAL RIGHTS	X							

## Reform of the Collective Bargaining System

Clearly, this is the fundamental purpose of the proposed legislation. All the eight pillars are related in some way and degree to this underlying aim. A number of new controls over union activities are contained in the Bill of which, perhaps, the most significant is registration. The Bill «... defines an organisation of workers... and provides a new definition of a trade union as an organisation of workers which is registered under (the) Bill with the Chief Registrar of Trade Unions and Employers' Associations»<sup>14</sup>. The most important likely consequence of this new legal definition<sup>15</sup> of a trade union is that in order to qualify for registration trade unions will be required to adapt their rules to certain «guiding principles». These principles are intended to affect the balance of power between the individual and his trade union. For example, the rule-books of registered unions must contain provisions to the effect that «the organisation must not arbitrarily or unreasonably exclude from membership anyone who is reasonably qualified to undertake a kind of work ordinarily done by members of the union»<sup>16</sup>. Secondly, «every member must have an equal right to hold office, to nominate candidates, to vote in elections or ballots, to attend meetings and to participate in the business of meetings – subject to reasonable rules determined by the organisation»<sup>17</sup>. These changes have a number of obvious implications. They include greater inter-union membership mobility (and hence greater competition for members) and an easing of some of the institutional restrictions on labour mobility. However, in our view, it is unlikely that the provisions in Clause 61 will encourage greater participation from the rank-and-file since such is largely dependent upon variables which cannot be controlled by statute. For example, Dr. McCarthy has found average branch attendance figures of 9 per cent and 5 per cent respectively for two major trade unions (A.U.E.W. and N.U.G.M.W.)<sup>18</sup>. Other research has shown that only 24 per cent of a small sample of shop stewards in the East Midlands were opposed after

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<sup>14</sup> *Industrial Relations Bill*, Explanatory and Financial Memorandum. H.M.S.O., 1st December 1970, page vi.

<sup>15</sup> See *Report of the Royal Commission on Trade Unions and Employers' Associations*, H.M.S.O., 1968 Cmnd 3623, page 205, para. 758 for the existing legal definition.

<sup>16</sup> *Industrial Relations Bill*, Consultative Document, op. cit. page 13, para. 90. The more detailed legal provisions can of course be found in the published Bill, op. cit. Clause 61 (2) page 47.



their first year of office<sup>19</sup>. Even in the extremely unlikely event of the existence of widespread restrictions on participation these low figures cannot be solely explained by such restrictions.

These are important implications of the registration proposals but they are much less significant than the fact that non-registered organisations will no longer be covered by the legal definition of a trade union and, consequently, will suffer all the liabilities under the Act and will receive none of the Act's benefits. Thus, for example, officials of non-registered bodies will commit an « unfair industrial practice » if in contemplation or furtherance of an industrial dispute they induce, or threaten to induce, another person to break a contract to which he is a party. It must be assumed that, for example, a strike called by a committee of shop stewards in a multi-union context will be an unfair industrial practice since the committee will presumably not be a registered trade union. A further assumption must be that a shop steward (or equivalent officer) of a registered union will also be prevented from inducing breach of contract, unless he is specifically authorised to do so (by the rule book).<sup>20</sup> In reality, it is unlikely that this authorisation will be forthcoming since the unions would be required to give financial backing and, in any case, it is not certain that the Registrar would sanction the delegation of such authority through the rule book. As far as national trade union officials of non-registered trade unions are concerned, there will be no legal possibility of inducing a breach of contract. There would seem to be no possibility, in any circumstance, of circumventing the provision against inducement by giving strike notice since Clause 133 of the Bill specifically prohibits this<sup>21</sup>.

Whilst registration is the key proposal in the reform of the collective bargaining system, other proposals are not without significance. For example, the Bill makes provision for the setting-up of bargaining units

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<sup>17</sup> Consultative Document, *ibid.* and the Bill *ibid.* Clause 61 (4).

<sup>18</sup> Royal Commission on Trade Unions and Employers' Associations, Research Paper No. 1, *The Role of Shop Stewards in British Industrial Relations*, H.M.S.O. 1967, page 39, para. 68.

<sup>19</sup> J.F.B. GOODMAN and T.G. WHITTINGHAM, *Shop Stewards in British Industry* MCGRAW HILL, page 94. This research related to a period during 1966 and 1967.

<sup>20</sup> *Industrial Relations Bill*, *op. cit.* Clause 148 (6) page 105.

<sup>21</sup> *Ibid.*, page 91.

and agents. « Clause 42 provides for an interested employer, one or more trade unions or the Secretary of State to present to the Industrial Court an application that the Commission on Industrial Relations should be asked to examine questions relating to the definition of a bargaining unit and recognition of an organisation of workers or joint negotiating panel as sole bargaining agent with exclusive negotiating rights »<sup>22</sup>. Should the C.I.R. be required to intervene then, following its recommendations, the employer or the trade union(s) concerned may apply to the N.I.R.C. to have the recommendations made legally binding, provided that the recommendations are supported by a majority of those voting in a ballot of those concerned, « . . . to be taken by the Commission or . . . under the supervision of the Commission by some other body »<sup>23</sup>.

Clearly, the Bill is addressing itself to an important problem. Professor Clegg has given the most recent observation on this point and lists four general criticisms in which the efficient conduct of industry is impeded by trade union structure :

- i) inter-union disputes which may be of two kinds – over demarcation and jurisdiction ;
- ii) leap-frogging wage claims ;
- iii) a multi-union situation giving rise to complications in plant relations ;
- iv) the effects of union demarcation lines on job organisation.

He then notes that, « Most British industries can provide instances of one or more of these obstacles to efficiency arising out of union structure »<sup>24</sup>.

The question then is how far will this new quasi-legal role of the C.I.R. inhibit its effective functioning in this and other spheres ? The T.U.C., not surprisingly, has strong views on this issue. « The Government's proposal to make the C.I.R. part of the State apparatus makes

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<sup>22</sup> *Industrial Relations Bill*, Explanatory and Financial Memorandum, op. cit., page iv.

<sup>23</sup> *Ibid.*, Clause 46 (3), page 34.

<sup>24</sup> H. A. CLEGG, *The System of Industrial Relations in Great Britain*, BASIL BLACKWELL, 1970, p.. 66-67.

mutual respect meaningless and can only reduce the goodwill and support that the C.I.R. has so far received. It will seriously reduce the C.I.R.'s chances of exerting any influence over the pattern of industrial relations and of helping to get it improved.<sup>25</sup> Whilst it is almost the conventional wisdom to lament over-lapping trade unionism, given the T.U.C.'s opposition to the role of the C.I.R. in this context we must express serious doubts as to the efficacy of the relevant proposals. Nevertheless, it may be that the prestige of the C.I.R. is sufficiently great for it to act as a successful marriage-broker in a voluntary situation and that recourse to the law may rarely arise.

A further proposal needing some comment is that concerning legally binding agreements. « Clause 32 creates the presumption that any written collective agreement entered into after the commencement of the Act is intended by the parties to it to be a legally enforceable contract except in so far as it contains an express provision to the contrary. »<sup>26</sup> Whilst this Clause makes no distinction between substantive and procedural agreements, we intend to examine both types although the procedural agreement will be discussed under those aspects of the Bill intended to curtail strike action. Concerning substantive agreements, the implications of the proposals are highly speculative since there is no element of compulsion on the parties to be legally bound. Perhaps, in the event, certain factors may have to be present to induce the parties to sign such agreements. Such factors could include such *quid pro quos* as the granting of substantial, possibly inflationary, wage increases in return for a fixed term, legally binding agreement. In such cases management would be able to plan ahead on the basis of greater knowledge of future short-term costs. A further possibility is that a productivity agreement could be negotiated as an alternative to a legally binding agreement or that a new hybrid will emerge – the legally binding productivity agreement. Indeed, in our view, this hybrid is likely to occur quite frequently since fixed term legally binding agreements will tend to have some productivity improvements, such as changes in wages structures, built in to them.

### **Strengthening the Trade Unions**

There are a number of ways of measuring the « strength » of trade unions, but perhaps among the more significant, and certainly the more

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<sup>25</sup> « Reason », T.U.C. November 1970, page 20.

<sup>26</sup> *Industrial Relations Bill*, Explanatory and Financial Memorandum, op. cit. page iii.

easily measurable, is the « density of union membership ». <sup>27</sup>, that is actual union membership expressed as a percentage of potential union membership. In these terms there would appear to be much scope for strengthening the unions. This is particularly true of white-collar unions. Professor Bain states that, « In Britain only three out of ten white-collar workers belong to a trade union, whereas five out of ten manual workers are members » <sup>28</sup> Generally, the biggest hindrance to trade unions in their attempts to recruit new members appears to be the unwillingness of employers to recognise unions for bargaining purposes. Consequently, one way of increasing their « strength » is to remove this hindrance. In this context, Professor Bain is again helpful when he « . . . suggests that white-collar unions will continue to grow in the future as a result of increasing employment concentration, but that their growth will not be very great unless their recognition by employers is extended ». <sup>29</sup> He further suggests, « . . . that the strength of these unions will generally not be sufficient in itself to persuade employers to concede recognition ; this will require the help of the government. In short, the future growth of white-collar unionism in Britain is largely dependent upon government action to encourage union recognition ».

Relating this situation to the Bill, Government actions is indeed proposed through the media of the bargaining unit and bargaining agency. Under these proposals, already discussed, a union or unions can seek recognition through the offices of the N.I.R.C. and the C.I.R. It is possible that many unions, especially white-collar unions and the white-collar sections of manual unions, will avail themselves of this opportunity. <sup>30</sup> On the other hand, they may be wary of incurring the wrath of other unions by trying to establish a bargaining unit and agency for the purpose of securing recognition. <sup>31</sup>

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<sup>27</sup> For a discussion of this concept and its uses see Professor G. S. BAIN, *The Growth of White-Collar Unionism*, O.U.P. 1970, pp. 2-3.

<sup>28</sup> *Ibid.* page 37.

<sup>29</sup> *Ibid.* page 186.

<sup>30</sup> Of course, only registered unions will be able to seek recognition in this way since, as stated above, non-registered unions will have no advantages under the Act but will incur all the liabilities.

<sup>31</sup> To be precise we must add that the C.I.R. may recommend a joint negotiating panel as sole bargaining agent. Given this, unions may jointly apply for recognition and thus achieve an important objective without inter-union conflict.

It is appropriate at this stage to discuss the agency shop proposals. These proposals were not explicitly mentioned in Mr. Carr's « Eight pillars » and therefore are not separately included in Diagram 1. However, it can be argued that they are implied under the first of the specific means in the diagram, that is the statutory right to belong, or not to belong, to a trade union.

Given its assumptions, the Government had, logically to pursue this matter to the point of abolishing the closed shop and replacing it by its version of the post-entry closed shop, that is the agency shop. Clause 7 « makes void any provision in an agreement which purports to prevent the engagement of an employee who is not a member of a trade union or other organisation of workers or whose engagement has not been recommended or approved by a trade union or other organisation of workers ».<sup>32</sup> According to the T.U.C., some 750,000 workers at present covered by closed shop agreements, will be affected.<sup>33</sup> These workers will have to have their closed shop agreements renegotiated and replaced by agency shop agreements. Such agreements are defined as follows. « in this Act 'agency shop agreement' means an agreement made between an employer and one or more trade unions whereby the employer agrees, in respect of workers of one or more descriptions specified in the agreement, that their terms and conditions of employment shall include a condition that every such worker must either –

- a) be or become a member of that trade union or of one of those trade unions, as the case may be, or
- b) agree to pay appropriate contributions to that trade union, or (as the case may be) to one of those trade unions, in lieu of membership or (where permitted to do so in accordance with section 9 or section 10 of this Act) agree to pay equivalent contributions to a charity. »<sup>34</sup>

The agency shop agreement differs from the present post-entry closed shop agreement<sup>35</sup> in a number of ways. Some of these are :

- i) Workers would have the right not to belong to a union but to pay contributions to the union (as though they were members) less optional extras.

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<sup>32</sup> *Industrial Relations Bill*, op. cit. page i.

<sup>33</sup> « Reason » op. cit. page 14.

<sup>34</sup> *Industrial Relations Bill*, op. cit. Clause 11 (1) page 9.

- ii) An agency shop would only come into being following a ballot. In the ballot a majority of those eligible to vote, *not those voting*, must, to secure implementation, vote in favour of the agency shop<sup>36</sup>.
- iii) An agency shop would be legally binding for a minimum period of two years. A corollary to this is that if the vote goes against the agency shop proposal the issue cannot be raised again for a minimum period of two years.

Whatever the merits or demerits of these proposals in terms of individual rights, they would appear to weaken, rather than strengthen, the trade unions in collective bargaining. The abolition of the closed shop, whatever the case for or against this measure, must remove some power from the trade unions. Furthermore, given the fact that it is possible to opt out of trade union membership without undue difficulty in an agency shop situation, the proposals might, in some cases, undermine union bargaining strength. For example, if a substantial proportion of workers in an establishment opted out of membership then union leverage through sanctions would be diminished.

In general, the question of trade union bargaining power is important and it is not our intention, in this commentary, to take sides. Nevertheless, we cannot avoid the conclusion that the agency shop proposals will weaken rather than strengthen trade unions in collective bargaining.

### **Curtailling Strike Action**

Certain parts of the Bill address themselves to the attempt to curb strike action<sup>37</sup>. We have already discussed Clause 85 which proposes to

<sup>35</sup> At present, according to the T.U.C., some 3,000,000 workers are now covered by post-entry closed shop (« 100 per cent union shops ») agreements. « Reason » *op. cit.* page 15.

<sup>36</sup> *Industrial Relations Bill*, *op. cit.* Clause 13 (1) page 10.

<sup>37</sup> For purposes of simplification we use the word « strike » as a catch-all. It is also intended to cover irregular action short of a strike. Thus, « In this Act 'irregular industrial action short of a strike' means any concerted course of conducts (other than a strike) which in contemplation or furtherance of an industrial dispute –

a) is carried on by a group of workers with the intention of preventing, reducing or otherwise interfering with the production of goods or the provision of services, and

b) In the case of some or all of them, is carried on in breach of their contracts of employment. »

*Industrial Relations Bill*, Clause 6 (2) page 5.

make it "an unfair industrial practice for anyone other than a trade union or employers' association or a person acting within the scope of his authority on behalf of such an organisation to induce or threaten to induce a breach of contract »<sup>38</sup>. We can now turn to the « Emergency Procedures » contained in Part VIII of the Bill. Hence Clause 124 « enables the Secretary of States to apply to the Industrial Court for an order if he considers that industrial action has begun (or is likely to begin) which is likely to endanger the national economy, national security, public health or public order, and that a continuance or deferment of the industrial action would be conducive to a settlement by negotiation, conciliation or arbitration »<sup>39</sup>. Further, Clause 125 « empowers the Industrial Court to make an order directing that no person specified in the order shall call or support a strike or lock-out, or threaten to do so, for the period of the order (not exceeding 60 days). It sets out the matters which the Court is to consider before it makes an order, the items to be specified in the order, its scope and the steps to be taken to secure its effective application »<sup>40</sup>.

These are, on paper, far-reaching proposals which give to the Secretary of State and the N.I.R.C. wide discretionary powers. Much depends, of course, upon the frequency with which these clauses are invoked. If they are used sparingly, that is as a « long-stop », then there will be little change from the use of existing, non-statutory, procedures. However, if they are frequently invoked, it is possible that the remedy will be worse than the disease. On the general use of the fixed cooling-off period the Donovan Commission has commented : « If the more rigid arrangements of the fixed cooling-off period had been used in their place (i.e. our existing flexible procedures) strikes might have taken place which were in fact avoided »<sup>41</sup>. The Commission in commenting on the use of compulsory strike ballots — a proposal which forms part of the Emergency Procedures<sup>42</sup> — has made a number of criticisms. Perhaps the two most relevant to the Bill's proposals are firstly that available evidence does

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<sup>38</sup> *Industrial Relations Bill*, page viii.

<sup>39</sup> *Ibid.* page xi.

<sup>40</sup> *Ibid.*

<sup>41</sup> Royal Commission Report, *op. cit.* page 114 para. 424.

<sup>42</sup> See *Industrial Relations Bill*, Clauses 127-130, pages 87-90 for the detailed proposals.

not confirm the view that trade union members are less likely to vote for strike action than their leaders (evidence from the U.S.A. and Canada is quoted to support this view, as well as findings from their own workshop survey). Secondly, a vote in favour of strike action may hamper the freedom of action of trade union leaders to, for example, order a return to work <sup>43</sup>.

Finally, under this heading, we now look at the measures to promote legally binding procedure agreements. Of course, this is only one aspect of the issue since legally binding substantive agreements may also contribute towards the curtailment of strike action. We have already commented on the highly speculative implications of this proposal. Concerning procedure agreements, the Government's intentions are quite clear. In referring to the absence of satisfactory procedure agreements in some sectors of industry, the Government has commented that, « In some cases this may be an important contributory factor to poor industrial relations. This possibility has led the Government to examine other proposals for securing the introduction of clear and legally enforceable procedural provisions » <sup>44</sup>. These intentions are made operational in Clauses 35 and 39 of the Bill <sup>45</sup>. Clause 35, « enables the Secretary of State or any other person to whom it applies to make application to the Industrial Court for remedial action where a procedure agreement is defective or does not exist, or where action is taken contrary to an agreement. The clause lays down criteria for acceptance of such applications and empowers the Court to refer them for examination by the Commission on Industrial Relations to determine what defects exist and to recommend suitable remedies ». Clause 39 « enables the Industrial Court on application, subject to a time limit, from any employer or trade union covered by recommendation in a report under clause 38 to give the recommendations effect as a legally enforceable contract ».

Once again, it seems that the role of the C.I.R. is likely to be crucial in obtaining the consent of the parties to the introduction of new procedure agreements and the improvement of existing agreements. If it proves to be unsuccessful in this role then the whole process is in danger of becoming mechanistic with the law being used as a means of first rather than

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<sup>43</sup> Royal Commission Report, *op. cit.*, page 114 paras. 428-429.

<sup>44</sup> Consultative Document, *op. cit.*, page 16, para. 118.

<sup>45</sup> *Industrial Relations Bill*, pp. iii and iv.



last resort. However, it is likely that the incidence of usage of these measures will be concentrated in those industries where procedure agreements are a special problem<sup>46</sup>.

Finally, the procedure agreement proposal has attracted strong adverse comment from the T.U.C. « And the enforceable procedure agreement might not just put the union under a legal obligation on the way disputes are handled, but could also put it under a legal obligation on how wages and conditions are to be negotiated. Then, if the union opposed that, it could be sued for damages for being in breach of something it had never agreed to and never wanted to have anything to do with »<sup>47</sup>. This point of view, whilst admittedly not disinterested, offers further support for our emphasis on the key importance of the role of the C.I.R. as an honest broker.

### Safeguarding Individual Rights

Under this heading, the two most important provisions would seem to be the right to belong, or not to belong, to a trade union and the proposed safeguards against unfair dismissal.

On the first provision the Bill says : « Every worker shall, as between himself and his employer, have the following rights, that is to say —

- a) the right, if he so desires, to be a member of such trade union as he may choose ;
- b) subject to subsection (3) and (4) of this section, the right, if he so desires, to be a member of no trade union or other organisation of workers or to refuse to be a member of any particular trade union or other organisation of workers »<sup>48</sup>.

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<sup>46</sup> Evidence in support of this contention can be found in Professor H. A. TURNER'S *Is Britain Really Strike-Prone?* C.U.P. 1969. Turner argues that the incidence of industrial conflict (as measured by strikes) tends to be concentrated in specific firms in specific industries. Perhaps it should be added that such conflict inevitably stems from many causes of which an important one is often defective or non-existent procedure agreements.

<sup>47</sup> « Reason », *op. cit.* page 22.

<sup>48</sup> *Industrial Relations Bill*, Clause 5 (1) page 3.

The Bill then goes on in the same clause to make it an unfair industrial practice for an employer, or anyone acting on his behalf, to interfere with these rights. This is obviously a direct reflection of the Government's basic philosophy and leads on to the rights of individual participation in union affairs and the closed and agency shop provisions. These we have already discussed. A discussion of such issues is not really possible here since the view one takes reflects the long, historical debate over the nature of rights and obligations in democratic societies. This is clearly demonstrated by the T.U.C.'s outright rejection of the proposal to give people the right to belong or not to belong to a trade union. « The non-unionist is a 'free rider' who takes all the benefits of collective negotiations, makes no contribution of any kind, plays no part in the machinery, and accepts none of the obligations of a union member »<sup>49</sup>.

Finally, under this heading, we discuss the unfair dismissal proposals. The Government intends that employees shall have the right of appeal to an industrial tribunal against unfair dismissal<sup>50</sup>. The Bill « sets out the criteria for determining whether a dismissal is fair or unfair ». Hence, « . . . the dismissal of an employee shall be regarded as having been fair if the reason for it (or, if more than one, the principal reason) —

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<sup>49</sup> « Reason. », *op cit.*, page 13.

<sup>50</sup> Here it is appropriate to give a brief outline of the legal machinery proposed. There will be two types of court, the National Industrial Relations Court and the Industrial Tribunals. The N.I.R.C. will deal with cases arising from disputes between organisations — trade unions, employers and employers' associations. It will sit in divisions and can operate in different parts of the country. In every case, it will be presided over by a triumvirate of a legally qualified chairman and two lay assessors with « relevant industrial relations experience ». Appeal will lie to the Court of Appeal and then the House of Lords.

The Industrial Tribunals, which already exist but with more limited functions, will examine disputes between individuals and organisations. Again, the triumvirate approach will be used and appeal will lie to be N.I.R.C. in the first instance, followed by the Court of Appeal and the House of Lords. Both the N.I.R.C. and the Tribunals would be able :

- « — to award compensation
- to determine the rights of a part
- to make orders to refrain from unfair industrial action
- to make speedy but temporary orders.

The N.I.R.C. would have power to enforce any of these orders ». (Consultative Document, *op. cit.*, page 5, para. 30.)

- a) related to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do, or
- b) related to the conduct of the employee, or
- c) was that the employee was redundant, or
- d) was that the employee could not continue to work in the position which he held without contravention (either on his part or on that of this employer) of a duty or restriction imposed by or under an enactment »<sup>51</sup>.

This part of the Bill does, in fact, belatedly bring British practice into line with other advanced, industrial countries. As Andrew Shonfield pointed out, in 1965, « The whole trend in European law in recent years, except in Britain, has been to put employers increasingly under the necessity of providing evidence to show why the dismissal of a worker in any particular case was unavoidable »<sup>52</sup>. A similar protective, legal situation is to be found in the U.S.A.<sup>53</sup> It should be noted, however, that the proposed protection only applies after two years continuous employment, except for dismissal for reasons of membership or non-membership of a trade union or for participation in trade union activities. This will be a temporary measure, « because of limitations on the rate at which the Industrial Tribunals can be expanded for their additional functions »<sup>54</sup>.

One important aspect of the unfair dismissal proposals is that the onus rests with the employee to show unfair dismissal which may deter some individuals from seeking the protection of the law.

Finally, it is possible that some employers may seek to by-pass the legal machinery by offering aggrieved employees straight cash payments. A pointer to such possible situation was recently reported in « The Times ». A nationally-known company ended a seven-week strike over

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<sup>51</sup> *Industrial Relations Bill*, page iii and Clause 22 (1) pp. 15-16.

<sup>52</sup> *Modern Capitalism*, O.U.P. 1965, page 114.

<sup>53</sup> See Theodore KHEEL, « What Future for the Industrial Relations Bill ? » *Times Business News*, 2nd November, 1970.

<sup>54</sup> Consultative Document, *op. cit.*, pp. 7-8, para. 53.

a man's dismissal by paying his family « rehabilitation money ». As that newspaper's reporter pointed out, « A precedent has been established, which other employers wishing to by-pass the elaborate (and expensive) legal machinery being established by the Government, will not be slow to appreciate »<sup>55</sup>. Further instances may follow this financial precedent in cases where employees are seeking the maximum compensation under the Bill, that is £4,160 — 104 weeks at £40 per week.

## Conclusions

Without doubt, the Government has presented a set of proposals which are as clear as one could expect in the complex field of industrial relations. Of course, interpretation of the future Act will play an important part in the ultimate outcome and hence a corpus of case law will emerge to guide the participants in industrial relations.

Assessing, with any precision, the ultimate implications of a Bill is obviously very difficult. Such tentative conclusions as we offer are therefore based upon a leading, disinterested observer of the British scene. Theodore Kheel, a prominent American mediator, has contributed a detailed critical comparison of the Government's proposals (in the Consultative Document) with U.S. practice<sup>56</sup>. Writing in « The Times Business News »<sup>57</sup>, Kheel indicates the validity of the comparison when he points out that « The Government's model . . . relies heavily on three American laws on labour relations » (Wagner Act 1935, Taft-Hartley Act 1947, and the Landum-Griffin Act 1959).

Our reading of Kheel suggests four major lines of criticism :

- a) Viable labour agreements need more than legal enforceability, they primarily need the mutual respect and consent of the parties. This point would appear to have especial relevance to the proposal to allow the N.I.R.C., on the application of *one* of parties, the power to make a procedure agreement legally binding.

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<sup>55</sup> By Paul ROUTLEDGE, 30th December, 1970.

<sup>56</sup> To all intents and purposes, with some generally minor exceptions, the Bill is a mirror-image of the Consultative Document, although much less readable !

<sup>57</sup> Theodore KHEEL, *op. cit.*, 2nd November, 1970.

- b) Under the proposals it seems too easy to eliminate the agency shop (after two years, 20 per cent of employees covered by the agreement, or the employer, can seek a secret ballot to reverse the agreement). The frequent elimination of agency shop situation could seriously weaken the financial standing of British trade unions. Here it should be remembered that British unions are notoriously poor, especially when compared with their U.S. counterparts.
- c) The proposals, in making a distinction between registered trade unions and other organisations, may well result in isolating the leaders of unconstitutional strikes which may succeed in alienating these leaders. For example, the leaders of a registered trade union might, to avoid liability in law <sup>58</sup>, use their best endeavours to dissuade local leaders from illegal actions. Such action could well widen the gap between national and local leaders and hence encourage, rather than inhibit, future illegal actions.
- d) Finally, the Government's legislative ambitions may be too great. It took three Acts (from 1935 to 1959) for the Americans to introduce broadly similar legislation. « . . . the Government proposes in one Industrial Relations Bill to eliminate the legal immunity that has existed for almost a hundred years and to correct practically all of the ills that have cropped up during that period of time ».

## UNE ANALYSE DE LA NOUVELLE LOI BRITANNIQUE SUR LES RELATIONS INDUSTRIELLES

L'adoption, en décembre 1970, d'une nouvelle loi sur les relations industrielles en Angleterre a marqué de façon définitive, un nouveau départ pour le système de relations industrielles de ce pays. L'analyse des intentions du gouvernement sous-jacente à cette législation peut être divisée en trois parties : un examen de sa philo-

<sup>58</sup> Although there will be statutory limits to be compensation payable by *registered* unions, these limits may still be inhibitory and induce the «best endeavours » route. The limits are :

TOTAL MEMBERSHIP		COMPENSATION LIMIT (£)
up to and including	4,999	5,000
5,000 to	24,999	25,000
25,000 to	99,999	50,000
100,000 and over		100,000

sophie, les buts qui découlent de cette philosophie et les moyens choisis pour atteindre ces objectifs.

Deux courts commentaires suffiraient pour résumer la philosophie du gouvernement lors de l'adoption de cette loi. D'abord, nous assistons à une extension du rôle de la loi en société démocratique vers un domaine presque entièrement exclu dans le passé : en second lieu, cette philosophie est en quelque sorte un nouveau départ radical – radical à cause de l'intervention de la loi dans un sous-système de la société dans lequel elle n'avait précédemment joué qu'un rôle très mineur avec le consentement général des parties impliquées. Quant à l'objectif fondamentale de cette nouvelle loi, il apparaît clairement qu'elle a pour but de renforcer l'économie. On a beaucoup mentionné les objectifs économiques et très peu parlé des buts sociaux de cette législation. Ces derniers seraient d'établir des normes nationales pour de meilleures relations industrielles, de protéger ceux qui se conforment à ces normes, de protéger les droits individuels au travail et de fournir de nouvelles méthodes de solution des conflits du travail.

Quant aux moyens utilisés pour atteindre ces objectifs, notons que la réforme du système de négociation collective, le renforcement du syndicalisme, la diminution des grèves et la protection des droits individuels sont les principaux. Plus spécifiquement, citons le droit d'appartenir ou de ne pas appartenir à un syndicat, le droit d'être reconnu sous certaines conditions, l'enregistrement des syndicats, la présomption que toutes les conventions collectives sont contractuelles à moins qu'une des deux parties fasse de la sous-traitance, quelques limites à l'immunité totale des syndicats face aux poursuites légales en matière de dommages, quelques mécanismes de protection pour la communauté comme, par exemple, les votes secrets lors des grèves qui pourraient mettre en danger l'intérêt national, une mise en application sélective des conventions et des mécanismes qui ont pour but de contrôler qui va négocier pour les travailleurs dans certaines usines.

Le gouvernement britannique a présenté un ensemble de propositions qui sont aussi claires qu'on pourrait s'y attendre à l'intérieur du domaine complexe des relations industrielles. Il est évident que l'interprétation de la future loi jouera un rôle important dans le résultat ultime. Une jurisprudence émergera qui guidera les participants au système de relations industrielles.

Évaluer avec précision les conséquences ultimes d'une loi est évidemment très difficile. Les conclusions partielles que nous offrons sont alors basées sur les opinions d'observateurs désintéressés de la réalité anglaise. Un célèbre médiateur américain, Théodore Kheel, a comparé les propositions du gouvernement à la pratique américaine. Kheel justifie la comparabilité des deux réalités en avançant que le modèle britannique empruntait à trois lois américaines du travail, à savoir la Loi Wagner de 1935, le Taft-Hartley de 1947 et le Landum-Griffin de 1959.

Notre interprétation de Kheel suggère quatre critiques importantes :

a) La loi à elle seule, ne suffit pas pour garantir de véritables conventions collectives : celles-ci ont d'abord besoin du respect mutuel et du consentement des parties impliquées. Cet argument semble être très pertinent lorsque l'on considère

la proposition de donner à la Commission nationale des relations du travail, à la demande des deux parties, le pouvoir de rendre un accord obligatoire.

b) Après examen des propositions, il semble trop facile d'éliminer le précompte syndical généralisé (P.S.G.) (après 2 ans, 20% des employés couverts par la convention, ou l'employeur, peuvent demander un vote secret afin d'annuler la convention). L'élimination fréquente du P.S.G. pourrait sérieusement affaiblir la position financière des syndicats britanniques. Il faut se rappeler que les syndicats anglais sont notoirement pauvres surtout lorsqu'on les compare aux unions américaines.

c) Les propositions qui touchent la distinction entre les syndicats enregistrés et les autres organisations peuvent facilement entraîner l'isolation des meneurs des grèves illégales, grèves qui peuvent réussir à aliéner ces leaders. Par exemple, les chefs d'un syndicat enregistré peuvent pour éviter la responsabilité légale, dissuader les leaders locaux de recourir à des actions illégales. De telles pratiques peuvent facilement élargir l'écart entre les chefs nationaux et locaux et, par le fait même, encourager plutôt que le contraire de futures actions illégales.

d) Finalement, on doit noter que les ambitions législatives du gouvernement britannique sont peut-être trop grandes. Les Américains ont eu besoin de trois lois entre 1935 et 1959 pour introduire une législation à peu près similaire. Le gouvernement se propose à l'intérieur d'une seule loi de relations industrielles d'éliminer l'immunité légale qui existe depuis presque 100 ans et de corriger presque tous les maux qui sont apparus durant cette période.

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