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The British Labor Government's Industrial Relations Program

A.W.J. THOMSON* AND P.B. BEAUMONT**

In the last two years a new phase has begun in the development of the British industrial relations system, carrying forward a public debate which has now lasted for over a decade. The early 1960's saw the identification of industrial relations as an important component in Britain's poor economic performance. The Donovan Commission of 1965-68¹ pointed out that the largely autonomous "traditional" system, based on industry-wide institutions, had been overtaken to a significant extent by an informal, decentralized system composed of fractional bargaining at the plant level, and that had produced inflationary results. The Commission's analysis was generally accepted, and a search then began for a means of bringing the system under more direct influence and control.

The possibilities for reform of the industrial relations system, which were not mutually incompatible, were: (1) a predominantly voluntary reorganization of the institutions of collective bargaining to formalize the emerging new structure;² (2) incomes policies designed to restrict the

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1. ROYAL COMMISSION ON TRADE UNIONS & EMPLOYERS' ASSOCIATIONS, REPORT OF THE COMMISSION (DONOVAN REPORT), CMND. No. 3623 (1968). There is a helpful symposium on this Report in 6 BRIT. J. INDUS. REL. 275 (1968).

2. This was the main recommendation of the Donovan Commission, which argued that a comprehensive legal framework would be unworkable until voluntary institutional re-

inflationary tendencies of the system; and (3) a reconstruction of the legal basis of industrial relations, including in particular constraints on undesirable bargaining activities. From the viewpoint of 1968, the first of these seemed to have too lengthy a realization span to bring short-term relief, while the second was partially discredited by the experience of incomes policies during the 1960's. Hence, legal reform of the system seemed a sensible development.

To some this approach was even seen as an alternative to a more direct macroeconomic demand management policy, but this soon proved illusory. The confrontations caused by the Labor Government's 1969 legislative proposals and the Conservative Government's Industrial Relations Act of 1971,³ both of which contained restraints on bargaining behavior, are themselves complex stories which have been detailed elsewhere.⁴ Nevertheless, the successful campaigns by the labor movement in these confrontations had important implications for the future. In essence, they helped to politicize the labor movement, driving it to exercise more fully its powerful but hitherto largely latent influence within the Labor Party, and gave it considerable confidence that it could defend itself against attempts to impose restrictions. The movement thus became more willing to give up its old distrust of the law and seek to use the law for its own ends.⁵ In this context it was becoming clear within the labor movement that collective bargaining as practiced in Britain had severe limitations as a means of achieving new rights and standards for large sections of the labor force. The existence of unionization had created narrow rights for a limited group; for instance, it had not prevented many millions of dismissals annually, did not give the right to be a union member, and gave only very limited protection in related fields such as health and safety. By about 1973, therefore, the Trade Union Congress (TUC) saw considerable advantages in legislation in these and other areas.

form had been achieved; the Commission did, however, implicitly assume the existence of a continuing incomes policy.

3. Industrial Relations Act 1971, c. 72 [hereinafter cited as Industrial Relations Act].

4. For the history of the Labor proposals, see P. JENKINS, *THE BATTLE OF DOWNING STREET* (1970). For the story of the Industrial Relations Act, see A. THOMSON & S. ENGLERMAN, *THE INDUSTRIAL RELATIONS ACT: A REVIEW AND ANALYSIS* (1975); B. WEEKES, M. MELLISH, L. DICKENS & J. LLOYD, *INDUSTRIAL RELATIONS AND THE LIMITS OF LAW* (1975).

5. The Trade Union Congress (TUC) had long argued that even favorable legislation would carry with it the danger of the quid pro quo of legislative control of union activities. See the evidence of the Trade Union Congress to the Donovan Commission. *ROYAL COMMISSION ON TRADE UNIONS & EMPLOYERS' ASSOCIATIONS, SELECTED WRITTEN EVIDENCE* 142 (1968). Moreover, the TUC was undoubtedly influenced in its changing views by the success of the "unfair dismissal" sections of the 1971 Act. Industrial Relations Act §§ 22-26.

It was this shift of the TUC which has characterized the new phase in the British system, and its significance can perhaps best be illustrated by utilizing Kahn-Freund's three functions for labor law:⁶ (1) being auxiliary to, or assisting the processes of collective bargaining; (2) restricting or constraining collective bargaining activities; and (3) regulating or providing statutory standards in areas which might be subjected to collective bargaining. Under the traditional system, until the 1971 Industrial Relations Act, there had been very little law and what existed was negative in character.⁷ The Labor proposals of 1969 and the 1971 Act, by contrast, included a mixture of restrictive and auxiliary law, and the present phase comprises regulatory and auxiliary law. The categorization is not entirely clear-cut, but nevertheless the change in emphasis has been very clear. Parallel to these changes in legal approach can be seen a more general move from the traditional *sui generis* British model to what might be termed the American model, *i.e.* decentralization of bargaining involving institutional reconstruction but incorporating a framework of restrictive behavioral law, and to what might be called the European model, *i.e.* greater stress on statutory intervention to set minimum terms and conditions of employment with a movement towards new concepts of industrial democracy and corporate accountability.

The Labor Party's industrial relations program was explicitly built on a "social contract" with the TUC, whereby the TUC was enabled to incorporate its social policy objectives into Party policy in return for assistance in curbing inflation. We shall return to the "social contract" later,⁸ but for the TUC perhaps the most vital part of the program was the restructuring of industrial relations legislation. After a series of meetings of the TUC-Labor Party Liaison Committee in April 1973 the TUC issued a detailed statement of its statutory objectives.⁹ In June 1973 this was refined in a further statement suggesting the need for three separate pieces of legislation:¹⁰ (1) a "Repeal Bill" to repeal the 1971 Industrial Relations Act, (2) an Employment Protection Bill to extend

6. Kahn-Freund, *Industrial Relations and the Law—Retrospect and Prospect*, 7 BRIT. J. INDUS. REL. 301 (1969).

7. Three leading Acts, the Trade Union Act of 1871, 34 & 35 Vict., c. 31, the Conspiracy and Protection of Property Act of 1875, 38 & 39 Vict., c. 86, and the Trade Disputes Act of 1906, 6 Edw. 7, c. 47, had created restrictions on legal circumscription of union activities. They, in turn, were the result of political action by the union movement. See A. Thomson, *The Reaction of the American Federation of Labor and the Trades Union Congress to Labor Law, 1900-1935* (unpublished dissertation, Cornell University, 1968).

8. See note 150 *infra*.

9. TRADE UNION CONGRESS, INDUS. REL. REV. & REP. No. 54 (April 1973).

10. REPORT OF THE TUC GENERAL COUNCIL (1973) at 106-107.

the rights of workers and unions, and (3) a Companies Bill to include provisions for extending industrial democracy. This three-part framework was duly adopted by the Labor Party in its manifesto for the general election of February 1974, and immediately after it assumed office the new Government announced its intention of implementing these measures. We shall deal with each of these central planks of the Government's program in turn before turning to various other important aspects of legislation dealing with industrial relations issues.

I

THE TRADE UNION AND LABOUR RELATIONS ACT¹¹

When the Labor Government took office in March 1974, its first objective was to repeal the 1971 Industrial Relations Act as quickly as possible, to pave the way for more substantive legislation in succeeding Parliamentary sessions. Some unions wanted a simple repeal measure to expunge the Act from the statute book, but this would not have recreated the pre-1971 legal climate since the unions' pre-existing immunities at law would not have been replaced. There were also some limited parts of the 1971 Act which both the Government and the TUC wished to retain and even strengthen, notably the sections dealing with unfair dismissal. The Parliamentary situation was a further factor, since the Government was a minority one, and thus in no position to introduce major new initiatives. The general intention of the Bill, therefore, was stated by its sponsor, Mr. Michael Foot, the Secretary of State for Employment, as a return to "the excellent laws that prevailed for quite a long time, some of these introduced in 1875 and some of them in 1906."¹²

A. PROVISIONS OF THE BILL

The Bill proposed to repeal the whole Industrial Relations Act and then provide for the reenactment of certain sections. Among the provisions slated for abolition were the institutions other than the industrial tribunals, *e.g.*, the National Industrial Relations Court,¹³ the Commission on Industrial Relations,¹⁴ the Registrar of Trade Unions and Em-

11. 1974, c. 52 [hereinafter cited as Trade Union & Labor Relations Act]. For a detailed analysis of the Act, see B. PERRINS, *LABOUR RELATIONS LAW NOW* (1975).

12. *The Times* (London), May 1, 1974, at 9, col. 8.

13. This Court was created by the Industrial Relations Act § 99. Under the Bill, appeals from tribunals were to be heard by the High Court pending the establishment of an Employment Appeal Tribunal under the Employment Protection Act. See note 42 *infra* and accompanying text.

14. The Commission on Industrial Relations was established by the Industrial Relations

ployer Associations,¹⁵ and the Industrial Arbitration Board;¹⁶ the system of unfair industrial practices except unfair dismissal; the statutory procedures for recognition; the emergency procedures; the framework of rules for registration; the abolition of closed shops; the imposition of new procedures; the obligation to disclose information; the right not to be a member of a trade union; and so on. With these went the American influence which had been so prevalent in the Industrial Relations Act.¹⁷ Four other major sets of provisions were designed to replace the old Act. First, the Bill redefined the status of unions and employer associations, giving them protection against restraint of trade cases but requiring them to register for administrative, accounting, and tax identification purposes. Second, the Bill proposed a series of provisions to deal with legal proceedings against unions and employers associations. Some of these essentially restated the 1906 Trade Disputes Act, giving unions immunity to actions in tort, actions for inducement of breach of contract¹⁸ and suits against peaceful picketing,¹⁹ while others proposed new provisions which placed restrictions on the granting of ex parte injunctions, required the parties to state their intention that collective bargaining agreements be enforceable, and widened the meaning of the

Act § 120. The work of the Commission on Industrial Relations was taken over by a new body, the Advisory Conciliation and Arbitration Service, set up on a non-statutory basis in September 1974 and later incorporated into the Employment Protection Act. See notes 35-38 *infra* and accompanying text.

15. Appointment of such a Registrar was authorized by the Industrial Relations Act § 63. Under the Bill, registration functions were returned to the Registrar of Friendly Societies, where it had previously been since 1870.

16. See Industrial Relations Act § 124. The Industrial Arbitration Board (IAB) was to be left in existence under the Bill until its functions were taken over by the Central Arbitration Committee under the Employment Protection Act. See Employment Protection Act 1975, c. 71, § 10, and notes 40-41 *infra* and accompanying text.

17. For an extensive review of the influence of American labor law on the Industrial Relations Act, see Gould, *Taft-Hartley Comes to Great Britain: Observations on the Industrial Relations Act of 1971*, 81 YALE L.J. 1421 (1972).

18. A loophole had been opened in the immunity for inducing breach of contract in the Trade Disputes Act of 1906, 6 Edw. 7, c. 47, § 3, by differentiating between inducing the breach of contracts of employment, which was permissible, and inducing breach of commercial contracts, which was not. *J.T. Stratford & Son v. Lindley*, [1965] A.C. 269; *Torquay Hotel Co., Ltd. v. Cousins*, [1969] 2 Ch. 106. The Industrial Relations Act §§ 128-30, continued this distinction, but the Labor Government's bill made a change in its reenactment of the provision to extend union immunity to the commercial contracts situation as well. For a further elaboration of this highly complex issue, see PERRINS, *supra* note 11, at ¶¶ 310-38.

19. The original intention had been to widen the powers of pickets by giving them the right to stop vehicles, but this was withdrawn when the strength of opposition to it was recognized. See note 158 *infra*. Moreover, the Bill omitted the right to picket a person's home, which had been removed by Industrial Relations Act § 134(1)(b).

term "trade dispute" beyond the narrow definition in the 1971 Act. Third, the Bill proposed some purely transitional provisions to handle the phasing out of the Industrial Relations Act institutions. Fourth, the Bill proposed to reenact and extend various aspects of the Industrial Relations Act, notably the unfair dismissal provisions and the functions of the industrial tribunals. The more important extensions of the previous legislation were to eventually reduce the qualifying period for unfair dismissal applications from two years to six months, to include constructive dismissal in the definition of dismissal,²⁰ to put the onus of demonstrating reasonable cause for dismissal more firmly upon the employer, to raise the upper limit of compensation, and to extend the time limit for making an unfair dismissal complaint. A provision under these sections which caused some dissension between the Government and the TUC was a safeguard for workers with religious objections to trade unionism dismissed in a closed shop situation.²¹

B. PASSAGE OF THE BILL

All this was intended to be relatively uncontroversial. However, the passage of the Bill through Parliament was far from uneventful, degenerating at one stage into what can only be described as a constitutional shambles, and its later repercussions, which still may be far from complete, have produced the extremely rare threat to invoke the Parliament Act of 1911 to override the House of Lords.

The Bill came relatively unscathed through its Committee stage, with the notable exception of the reinsertion of the Conservative Government's Code of Practice²² as a quasi-legal guide to good industrial relations practice. However, it ran into trouble at the Report stage of the House of Commons and in the House of Lords, when Opposition Amendments punched holes in the union legal immunity and closed shop provisions.

At the Report stage in the Commons there were two votes against the Government, the so-called "Lever amendments."²³ The first added safe-

20. Constructive dismissal is defined as the situation where "the employee terminates that contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct." Trade Union & Labor Relations Act sched. 1, ¶ 5(2)(c). Such a definition of dismissal had in fact already been made under the Industrial Relations Act. See *Sutcliffe v. Hawker Siddeley Aviation, Ltd.*, [1973] I.C.R. 560, 564.

21. The term "closed shop" in Britain covers both of the American terms "closed shop" and "union shop."

22. Code of Industrial Relations Practice (1972), reprinted in C. HEATH, A GUIDE TO THE INDUSTRIAL RELATIONS ACT 1971 at 229 (1971).

23. A senior member of the Government, Mr. Harold Lever, was "noddled through" for

guards for workers dismissed in a closed shop situation and added several vague terms to the law which threatened to make nonsense of the whole legal concept of the closed shop.²⁴ The second widened the meaning of a union membership agreement to include not only the signatory unions but also "another appropriate independent trade union."²⁵ The five amendments in the House of Lords continued in the same vein. Three new sections were created, dealing with exclusion or expulsion from union membership, setting out rule requirements for unions and employers' associations, and permitting resignation from a trade union. The effect of these was to recreate some of the much-disliked organizational principles which were a prerequisite for registration under the 1971 Industrial Relations Act.²⁶ The fourth amendment destroyed the extension of immunity for inducing breach of contract to commercial contracts as well as contracts of employment,²⁷ while the last narrowed the meaning of the term "trade dispute" by excluding trade disputes occurring outside Britain.

Thus, although the major part of the Bill was passed, the Government was far from satisfied, and the Queen's speech announcing the Government's legislation program for the ensuing Parliamentary session promised a bill to remove the offending amendments. The short Trade Union and Labour Relations Amendment Bill followed within a month, proposing to remove or severely modify all the amendments except that dealing with the Code of Practice, which the Government proposed to reissue in a new form. Once again, however, the Government ran into severe difficulties. At the Committee stage of the House of Commons the debate centered around two matters: first, the Bill's proposal that the review body for hearing complaints of workers excluded or expelled from union membership be run according to Trade Union Council rules rather than remain a statutory appeal body,²⁸ and second, the Opposi-

two votes in accordance with House of Commons practice for those Members of Parliament who are ill but on the premises. This produced a tie vote in both cases, and the Speaker again followed normal practice in voting for the Government. It was later proved, however, that Mr. Lever was not on the premises at the time, and his votes therefore had to be discounted, giving victory to the Opposition.

24. This amendment added one provision concerning "reasonable" objections to a particular trade union and another adding memberships of other "appropriate" trade unions to the small loophole of religious objection which the Government had been willing to allow. See text accompanying note 21 *supra*. The problems arose in connection with the vagueness of the terms "reasonable" and "appropriate."

25. The Opposition had not expected these amendments to be passed, and therefore little attention had been given to the difficulty of interpreting the terms used.

26. See, e.g., Industrial Relations Act §§ 61-62.

27. See note 18 *supra*.

28. See Industrial Relations Act §§ 99, 107. Under the Bill proposal the review body

tion's contention that certain employees having special employment duties and responsibilities, notably newspaper editors, should be exempted from a closed shop agreement.²⁹ These two arguments were fused together in the long-debated problem of ensuring "press freedom" in a closed shop situation.³⁰ The Government was loath to concede that the press was a "special case" requiring a special clause under the closed shop dismissal provisions and was even more loath to accept the possibility of a legal clash with a union trying to impose such a dismissal.³¹ However, the Government won the Commons vote by accepting by amendment the possibility that individuals or groups of employees might be excluded from closed shop agreements by agreement of the parties concerned, thus being protected from a closed shop dismissal, and even promised to introduce legislation in the future if a closed shop was used to restrict press freedom. Passage in the House of Lords was quite another matter. The Lords has always had an anti-Labor majority, but on the issue of press freedom the attack on the Bill was led by a Labor sympathiser and close friend of the Prime Minister, Lord Goodman, who was also chairman of the Newspaper Publishers' Association. Thus emboldened, the Lords for the first time since 1949 took their opposition to its ultimate and refused to pass the Commons Bill. There was a long and highly public interchange between Mr. Foot and the Lords and, although both sides made compromises, the end of the Parliamentary session found the difference between them as "narrow but incredibly important."³² In opposition to the Government, the Lords wanted to protect journalists by specifying in advance the broad contents of a charter of press freedom to be negotiated within the industry and by reinforcing the protection which the common law could give to complainants who suffered from breaches of that charter.

The result of this clash may be expensive for the Lords. The Govern-

would also have an independent chairman. The Opposition was opposed since, it argued, the Bill's proposal gave no rights against the employer for an individual dismissed under closed shop provisions.

29. Under such an exemption newspaper editors could not fairly be dismissed for not being union members.

30. The debate reflected the fear of a possible tough line from the increasingly powerful and militant National Union of Journalists (NUJ), which had indicated its desire to impose a closed shop in the industry. However, an NUJ postal ballot during the debate resulted in a vote in favor of allowing editors freedom of choice on NUJ membership. The members also rejected a call for all future national and house agreements to provide for a compulsory 100 percent union membership.

31. According to Government member Michael Foot the best way out of the "press freedom" dilemma was by a charter signed by the involved parties, and not by legal provision.

32. Lord Goodman, quoted in *THE ECONOMIST*, Nov. 8-14, 1975, at 31.

ment has already made clear its intention to invoke the Parliamentary Act of 1911³³ by which a bill passing the Commons in two successive sessions can override the opposition of the Lords. The Bill itself was immediately reintroduced and, by the time this article appears in print, may well have become law. Moreover, the issue reawakened Labor opposition to the structure of the Lords and may well have accelerated constitutional change. It is nevertheless significant that the division between the two sides ultimately went to the heart of the difference between Labor and Conservative philosophies, the one stressing the rights of the group, the other of the individual.

II

THE EMPLOYMENT PROTECTION ACT

The Employment Protection Act³⁴ is a voluminous, multifaceted piece of legislation, the Labor Party's substantive replacement for the Industrial Relations Act. Its two main objectives are to create a new structure of union rights and employer responsibilities in collective bargaining and to provide a range of individual rights at work by giving statutory minimum standards in areas where collective bargaining had produced a patchwork effect. While it was attacked for several reasons—for being one-sided in its bias towards the unions, for the costs it would impose on industry, and for the effect it would have on smaller businesses—most of the individual provisions were not strongly disputed in themselves, and indeed the majority were generally accepted as being desirable in principle. Certainly there was nothing like the opposition that the Industrial Relations Act or even the Trade Union and Labour Relations Act and Amendment Bill had produced. At the same time, the Act is just as complex and formalistic as the Industrial Relations Act.

A. THE INSTITUTIONS

The Act has a number of "auxiliary" provisions, designed to strengthen collective bargaining. The institutions have a distinctly familiar ring, although they are not the exact counterparts of the Industrial Relations Act institutions. The Advisory Conciliation and Arbitration Service (ACAS), set up in 1974 and given statutory backing under the Act,³⁵ was a juncture of the Commission on Industrial Rela-

33. 1 & 2 Geo. 5, c. 13.

34. Employment Protection Act 1975, c. 71 [hereinafter cited as Employment Protection Act]. For a previous discussion of the Act, see CCH DOING BUS. IN EUROPE ¶ 30,780 (1975).

35. *Id.* §§ 1-5 & sched. 1.

tions and the Conciliation Service of the Department of Employment, but has powers greater than both combined. It is charged with "the general duty of promoting the improvement of industrial relations, and in particular of encouraging the extension of collective bargaining and the development and, where necessary, reform of collective bargaining machinery."³⁶ More specifically, its functions are conciliation and arbitration services, to give advice on any other matter concerned with industrial relations, to investigate and recommend solutions to various issues arising under the legislation, and to provide Codes of Practice for guidance, some of which are explicitly written into the legislation. It is independent of the Government,³⁷ and indeed for many of its decisions the Service is answerable to no one, not even the higher courts. Since its inception, it has been notably successful in its conciliation and arbitration roles, significantly increasing its caseload in both areas largely as a result of strong backing from several unions including the powerful Transport and General Workers Union.³⁸

The ACAS also acts as an administrative base for two other institutions: the Certification Officer, whose major functions are the registration role and the certification of trade union independence,³⁹ and the Central Arbitration Committee, which performs arbitration functions and acts as the final procedural stage for union recognition, disclosure of information, and arbitration of union appeals over local pay norms.⁴⁰ The latter institution is potentially a very powerful one since it will have the authority to dictate binding terms and conditions of employment for groups of workers without any further recourse of appeal for employers.⁴¹

The final new institution is the Employment Appeals Tribunal with High Court status to hear appeals from industrial tribunals and the Certification Officer.⁴² Although the Tribunal does not have original

36. *Id.* § 1(2).

37. The ACAS is controlled by a council of ten, six of whom are nominees of the TUC and the Confederation of British Industry. The other four are public members. Employment Protection Act, sched. 1, ¶ 2.

38. Despite its current position, the service will have to walk a narrow tightrope in the future since it will become unacceptable to the unions if it becomes involved in the operation of incomes policy. It has so far rebuffed attempts to give it a monitoring function in this area, but it may become difficult to prevent some arbitration issues from having incomes policy implications. On the other hand, the Service will become unacceptable to the employers if it appears to be too pro-union in such areas as recognition and disclosure of information. The employers have, in fact, already threatened to withdraw.

39. Employment Protection Act §§ 7-9. This is likely in practice to be considerably more than a nominal function, since the TUC has given notice of attack against the many small unions which are akin to staff associations, especially in the white-collar field.

40. *Id.* § 10 & sched. 1, ¶¶ 14-27.

41. *See id.* §§ 10-21 & sched. 1, ¶ 27.

42. *Id.* §§ 87-88 & sched. 6.

jurisdiction and cannot issue injunctions, it is the recreation in other respects of the much-vilified National Industrial Relations Court of the Industrial Relations Act period.⁴³ The lower industrial tribunals are not changed substantially by the Act other than being given the additional function of interpreting and enforcing the individual rights aspects of the legislation.⁴⁴ By the continued expansion of their jurisdiction, these tribunals are rapidly becoming general local labor courts.⁴⁵

In summary, the Employment Protection Act creates a complex framework of specialized industrial relations agencies, operated almost exclusively by people with direct knowledge and experience of industrial relations rather than lawyers or judges, of whom there is still considerable distrust within the labor movement. There is an obligation upon employers and employees to conciliate, and a good deal of scope for discretion exists to accommodate particular situations. Much depends on what is reasonable and equitable in the circumstances, and the defense of impracticability is frequently available to the employer.⁴⁶ At the same time, the rights created are positive ones, and when the question of enforcement finally arises the sanctions are generally more direct than the "cease and desist" orders so typical of the American system.

B. COLLECTIVE BARGAINING PROVISIONS

As is the case with the institutions, some of the Act's substantive "auxiliary" rights strengthening collective bargaining replace provisions of the Industrial Relations Act. The new machinery for union recognition, though substantially similar to the old Act in that it is based on a loosely structured investigation by a tribunal, differs in two important respects.⁴⁷ First, only an independent trade union has the right to have a recognition situation investigated by the ACAS, although the Service

43. Insofar as legal problems of industrial conflict do arise outside the functions of the institutions, they will be dealt with by the ordinary courts. It is to be hoped that the Employment Appeals Tribunal, as well as having specialized knowledge, will also be able to reproduce the speed and informality of the National Industrial Relations Court as opposed to the ponderous formality found in the ordinary courts.

44. See, e.g., Employment Protection Act §§ 27, 32, 38, 46, and 54.

45. The industrial tribunals were originally established under the Industrial Training Act of 1964, c. 16, and since then a number of pieces of employment legislation have used them for enforcement purposes. For purposes of the present legislation it is anticipated that they will need to expand their membership from 1600 to 2500.

46. Thus, in Employment Protection Act § 101(2), dealing with redundancy procedures, "it shall be for the employer to show—(a) that there were special circumstances which rendered it not reasonably practicable for him to comply with any requirement of section 99 above; and (b) that he took all such steps towards compliance with that requirement as were reasonably practicable in those circumstances."

47. *Id.* §§ 11-16.

can take up an employer's reference at its discretion. Second, an application can be made for "further recognition" to cover situations where an employer may refuse to bargain on some topics while recognizing the union in general terms.⁴⁸ Upon receipt of the union application, the Service conciliates by consulting with all "parties who it considers will be affected by the outcome of the reference" and makes "such inquiries as it thinks fit."⁴⁹ It may ascertain the opinions of workers "by any means it thinks fit," but must follow certain procedures if it decides that a formal ballot of the workers is necessary.⁵⁰ Its findings are set forth in a written report. If the Service recommends recognition and the employer refuses to comply with the order, the union may appeal to the ACAS within two months.⁵¹ If conciliation does not produce a satisfactory result the union may appeal to the Central Arbitration Committee and obtain an award specifying the terms and conditions of employment of those employees to whom the complaint relates.⁵² Such an award is binding. The Act also provides for the revocation of a recognition order, and on this occasion the employer is given the opportunity of making an independent application.⁵³ Nevertheless, employers have strongly argued that the whole recognition process is unfairly one-sided.⁵⁴

The provisions relating to the employer's duty to disclose information for collective bargaining purposes are very similar to those contained in the Industrial Relations Act,⁵⁵ although the relevant sections of the latter were in fact never activated. The Act does not contain specific disclosure requirements; rather, the ACAS is instructed to produce a Code of Practice on the subject.⁵⁶ The employer, however, does not have to provide "any information the disclosure of which would cause substantial

48. *Id.* § 11(3). This additional recognition is limited to matters regarded as potential subjects for trade disputes. The constraint on the extent of recognition has obvious parallels to developments in the United States under Labor Management Relations Act § 8(d), 29 U.S.C. § 158(d) (1970).

49. Employment Protection Act § 12(1).

50. *Id.* § 14.

51. *Id.* § 15(2).

52. *Id.* § 16(6).

53. *Id.* § 13(2)(b).

54. *The Times* (London), Sept. 14, 1974, at 3, col. 4.

55. Employment Protection Act §§ 17-21. *See* Industrial Relations Act §§ 56-57.

56. The extent of information which must be divulged was a contentious issue under the earlier legislation, and this was largely responsible for the non-activation of the provisions. The Commission on Industrial Relations did, however, issue a somewhat bland and noncommittal report on the subject. COMMISSION ON INDUSTRIAL RELATIONS, DISCLOSURE OF INFORMATION (Report No. 31, 1973). The TUC has put forward an extensive "shopping list" in this area, and its proposals will certainly carry considerable weight in the formulation of the new code of practice.

injury to the employer's undertaking for reasons other than its effect on collective bargaining,"⁵⁷ and need not allow inspection of specific documents, nor compile information which would involve work or expenditure "out of reasonable proportion to the value of the information in the conduct of collective bargaining."⁵⁸ Union complaints on employer unwillingness to disclose are presented to the Central Arbitration Committee,⁵⁹ and the same procedure and sanctions apply as in the case of refusal to recognize.

One element of the Act which has created considerable concern among employers is the provision that pay levels and other terms and conditions of employment may be raised to the norms in a local area if ". . . an employer is, in respect of any matter, observing terms and conditions of employment less favourable than the recognised terms and conditions or, where . . . there are no recognised terms and conditions, [to] the general level of terms and conditions."⁶⁰ On an application by a union, and failing successful conciliation, the claim goes to the Central Arbitration Committee, which may impose new terms on the individual contract of employment.⁶¹ This concept of extending terms is not new,⁶² but the Act extends laws previously applicable only to industry-wide collective agreements. Even so, the provisions are not likely to have a widespread effect since most groups of workers already have industry-wide "recognised" terms and conditions and unions are unlikely to abandon these agreements for the dubious benefits of the new procedure. However, in the poorly-organized industries at the bottom of the pay hierarchy, and also in the white collar field, there are possibilities for making use of the new procedures.

Several facets of job security are extended by the Act, including the obligation of employers to consult with trade unions before dismissing any employees "as redundant."⁶³ Consultation is required before all

57. Employment Protection Act § 18(1)(e).

58. *Id.* § 18(2)(b).

59. *Id.* § 19.

60. *Id.*, sched. 11, ¶ 1. See also *id.*, § 98. "Recognised" terms and conditions refer to industry or district-wide collective agreements, *id.* sched. 11, ¶ 2(a), while the "general" level refers to comparable employers in the same industry and district. *Id.* sched. 11, ¶ 2(b).

61. *Id.*, sched. 11, ¶ 10.

62. The present legislation, in fact, replaces the Terms and Conditions of Employment Act of 1959, 7 & 8 Eliz. 2, c. 26, § 8. The concept is also recognized in Europe, and, with specific reference to federal contracts in the construction industry, in the Davis-Bacon Act in the United States. 40 U.S.C. §§ 276a to 276a-5 (1970). For the problems and effects of this type of legislation, see J. GOULD, DAVIS-BACON ACT: THE ECONOMICS OF PREVAILING WAGE LAWS (1971).

63. EMPLOYMENT PROTECTION ACT § 99(1).

redundancy dismissals, although the time period varies with the number of workers involved.⁶⁴ The employer must submit a statement containing the numbers of employees to be dismissed, the method of selecting them, and the procedure for dismissals, together with the reasons for the proposals, considering and replying to any representations made by the relevant unions.⁶⁵ In addition to consulting unions about redundancies, employers must also notify the Secretary of State where there are ten or more redundancies proposed, with time limits similar to union consultation noted above, and failure to do this can result in both a fine and a reduction of rebate from the Redundancy Fund.⁶⁶ In these various obligations, the employer may offer the defense of special circumstances which "rendered it not reasonably practicable for him to comply" with the requirements,⁶⁷ but such a defense is unlikely to be successful.

The last major set of provisions dealing with collective bargaining relates to the position of wages councils, which are statutory bodies covering lower-paying and poorly-organized industries.⁶⁸ Instead of proposing wage rates to the Minister, wages councils are now able to create their own enforceable agreements, and, unlike in the past, have authority over terms and conditions of employment other than pay and holidays. The Act also furthers the intention of phasing out wages councils by allowing the parties to establish statutory Joint Industrial Councils which have some of the features of the voluntary Joint Industrial Council traditional to the British system but retain the wages council power of enforceable orders.⁶⁹ Such statutory Joint Industrial Councils can also be abolished by the Employment Secretary if he believes that purely voluntary machinery would be sufficient.⁷⁰

C. INDIVIDUAL RIGHTS

Important as are the collective rights created in the Act, it is the

64. *Id.* § 99(3).

65. *Id.* § 99(5)-(7). If these procedures are not followed, an industrial tribunal may issue a "protective award" as a result of which the employees must be paid in for a period, not to exceed 90 days, decided by the tribunal. *Id.* § 101(1)-(5).

66. *Id.* §§ 100(1), 104(1), 105(1). The Redundancy Fund recompensates employers for half the redundancy pay given to workers under the Redundancy Payments Act 1965, c. 62.

67. Employment Protection Act § 101(2)(a).

68. *Id.* § 89-96 & scheds. 7 & 8. See generally F. BAYLISS, *BRITISH WAGES COUNCILS* (1962).

69. Employment Protection Act §§ 90-91. The intention of phasing out the wages councils was also expressed in the Industrial Relations Act.

70. Employment Protection Act § 93.

individual rights enumerated there which create the main regulatory framework. Several of the rights created either reconstitute or extend existing rights, but others are quite new, at least in the statutory sense, since many similar and often more generous provisions exist in collective arrangements. As a necessary complement to the collective rights noted above, and as an extension of the Trade Union and Labour Relations Act,⁷¹ individuals are given the right not to have action short of dismissal taken against them in connection with membership of or activities in an independent trade union and can appeal to an industrial tribunal against any such actions.⁷² An exception exists where the union in question is not party to a union membership agreement.⁷³ This latter term may require further interpretation, since it includes both "agreements" and "arrangements," and some of the "arrangements" which currently exist in Britain are, to put it mildly, far from clear-cut.

Another area of extended rights relates to the "unfair dismissal" provisions.⁷⁴ These sections make several changes in prior law. They cover several groups of employees previously omitted,⁷⁵ allow a dismissed employee to demand a written statement of the reasons for his dismissal,⁷⁶ permit the remedy for unfair dismissal to be based on the complainant's wishes and to include complete reinstatement,⁷⁷ change the method of computing the award,⁷⁸ and authorize interim relief when dismissal is ostensibly for reasons connected with union membership or activities.⁷⁹ This last innovation is intended to revive or continue the contract of employment until the case is heard, so that the employee is in effect suspended rather than dismissed, and was introduced to head off industrial action as a result of union-related dismissal.

Of the Act's new individual rights, that giving certain rights of guaranteed pay for short-term layoffs⁸⁰ is the most costly. It was estimated

71. See section I *supra*.

72. Employment Protection Act §§ 53-56.

73. *Id.* § 53(4)-(5).

74. *Id.* §§ 70-80. The Industrial Relations Act also contained some "unfair dismissal" provisions in §§ 22-26.

75. Several classes of employees were excluded from protection of the "unfair dismissal" provisions of the Industrial Relations Act. See Industrial Relations Act §§ 22(2), 27-31. The Employment Protection Act contains no such exclusions.

76. Employment Protection Act § 70.

77. *Id.* § 71. Reinstatement may not be ordered, however, where it would be impracticable or where "the complainant caused or contributed to some extent to the dismissal . . ." *Id.* § 71(6)(b)-(c).

78. *Id.* §§ 73-76. The amount of the award is divided into (1) a basic award, which varies with the employee's length of service, and (2) a compensatory award based on the loss suffered by the employee.

79. *Id.* § 78.

80. *Id.* §§ 22-28.

that some four-fifths of the expected total cost of the Act, 100-120 million pounds on the basis of 1974 estimates,⁸¹ would be taken up by this single provision, even though many companies already have more generous provisions in this area. The guarantee is for the employee's pay up to a maximum of six pounds per day for any day during the whole of which there is insufficient work for him. It is, however, limited to a maximum of five days' pay in any calendar quarter, and there is no right to the guarantee if the layoff is caused by a trade dispute involving that employer or an associated employer. As with all the individual rights, an employee may complain to an industrial tribunal on grounds of improper treatment, and moreover any payment the individual may obtain through a collective agreement or other contractual source will be deducted from his statutory rights.

Another set of new individual rights which also has implications for collective bargaining is concerned with rights to time off from work.⁸² Time off is permitted for four different reasons. First, official union representatives are entitled to reasonable amounts of time off with pay to enable them to carry out their industrial relations duties and to undergo industrial relations training.⁸³ Second, employees who are members of recognized trade unions are permitted time off without pay for union activities during working hours.⁸⁴ For both of these the ACAS is instructed to produce a Code of Practice containing guidelines for determining the time which may be reasonable.⁸⁵ Third, there is a right to unpaid time off for carrying out public duties, a range of which are specified in the Act.⁸⁶ For these activities no Code of Practice is proposed; instead, three somewhat nebulous criteria are proposed for interpretation by industrial tribunals—how much time off is required, how much time off the employee has already had for union-related purposes, and "the circumstances of the employer's business and the effect of the employee's absence on the running of that business."⁸⁷ Fourth, if an employee is to be declared redundant, he is entitled to reasonable time off to look for alternative work, providing he has been employed for at least two years. He is also entitled to be paid for this time off, but the employer is not liable before a tribunal for more than two-fifths of the

81. The figure was given by the Minister of State at the Department of Employment, Mr. Albert Booth. HANSARD (Parliamentary Debates), April 28, 1975, at col. 34.

82. Employment Protection Act §§ 57-62.

83. *Id.* § 57(1).

84. *Id.* § 58.

85. *Id.* §§ 6(2)(b), 57-58.

86. *Id.* § 59.

87. *Id.* § 59(4).

employee's weekly pay, indicating that two days is the period the Government has in mind as a reasonable allowance.⁸⁸

The last major category of individual rights deals with the maternity of women workers,⁸⁹ granting the rights of pay⁹⁰ and also return to work after the birth, provided minimum conditions of two years' employment and continuous employment until the eleventh week before the expected birth are met.⁹¹ There is also a general explicit right not to be dismissed during pregnancy even for a presumptively fair reason such as incapability if there is a suitable alternative vacancy.⁹² Maternity pay amounts to nine-tenths of a week's pay for a period of six weeks, being the first six weeks of absence before the birth. A national Maternity Fund is established based on employer contributions to ensure that the cost of these payments is evenly shared by all employers. The right to return to work exists for 29 weeks after the week of the birth; the woman may return to the job she previously held, under the terms of the original employment contract, together with any further privileges which might have accrued in the interim. The employer may postpone the return for up to four weeks, but failure to permit a return is treated as a dismissal. If the employer has hired a replacement, the replacement may fairly be dismissed upon the mother's return provided the employer originally informed the replacement of the potential dismissal.

The other individual rights can be treated more briefly. The Act grants employees extensive rights upon the insolvency of their employer, a situation which has affected some 30,000 to 40,000 employees a year, by authorizing the Secretary of State to pay employees the remuneration due them out of the Redundancy Fund.⁹³ Employers must also pay workers up to 26 weeks of wages if they are suspended on medical grounds⁹⁴ by reason of any statute or recommendation in a Code of Practice issued under the Health and Safety at Work Act.⁹⁵ This latter provision primarily covers orders to close down or improve dangerous or unhealthy working places. Further rights deal with the contract of employment, including the requirement of an itemized pay statement,⁹⁶ longer periods of notice before dismissal,⁹⁷ a specification of the worker's

88. *Id.* § 61.

89. *Id.* §§ 34-52.

90. *Id.* §§ 36-38.

91. *Id.* §§ 48-50.

92. *Id.* § 34(2).

93. *Id.* §§ 63-66.

94. *Id.* §§ 29-33.

95. 1974 c. 37.

96. Employment Protection Act §§ 81-84.

97. *Id.*, sched. 16, pt. II, ¶ 2, amending Contracts of Employment Act 1972, c. 53, § 1(b), (e).

job title,⁹⁸ an itemization of the disciplinary rules applicable to employees (or a reference to a document which specifies such rules),⁹⁹ and a statement of the procedures for appeal against disciplinary actions.¹⁰⁰ Finally, there are a considerable number of minor and consequential changes to existing legislation.¹⁰¹

In total, the Act is a formidable piece of legislation, and one which is likely to produce significant changes in British industrial relations practice. Not all of it, however, is immediately applicable. Administrative reasons such as the potential caseload of industrial tribunals and the preparation of Codes of Practice will result in phased introduction of some sections, while some of the more costly provisions, such as guaranteed pay and maternity pay, will not be introduced at least until 1977 for economic reasons. Nevertheless, the Act must be seen not only in its narrow industrial relations sense, but also as part of the Government's wider economic and social policy. The Minister introducing the bill in Parliament stressed this fact when he called it "the clearest possible evidence of the Government's commitment to the social contract, which in our view remains the only realistic policy for containing inflation."¹⁰²

III

INDUSTRIAL DEMOCRACY

The third major piece of industrial relations legislation in the Labor Government's program is that dealing with the difficult issue of industrial democracy. In 1973 the Trade Union Congress, after a long period of disinterest in the subject, became converted to the idea of worker representation on the boards of directors of industrial organizations,¹⁰³ and this was duly incorporated into Labor Party policy.¹⁰⁴ Al-

98. Employment Protection Act, sched. 16, pt. II, ¶ 4(b), *amending* Contracts of Employment Act 1972, c. 53, § 4(1).

99. Employment Protection Act, sched. 16, pt. II, ¶ 5(b), *amending* Contracts of Employment Act 1972, c. 53, § 4(2).

100. Employment Protection Act, sched. 16, pt. II, ¶ 5(b), *amending* Contracts of Employment Act 1972, c. 53, § 4(2).

101. Employment Protection Act, sched. 16.

102. HANSARD (Parliamentary Debates), April 28, 1975, at cols. 46-47.

103. TUC GENERAL COUNCIL, INDUSTRIAL DEMOCRACY, INTERIM REPORT BY THE TUC GENERAL COUNCIL (1973). This was followed by a somewhat refined version, TUC GENERAL COUNCIL, INDUSTRIAL DEMOCRACY (1974).

104. The most recent Labor Party statement on the topic is LABOR PARTY, THE COMMUNITY AND THE COMPANY: REFORM OF COMPANY LAW (Green Paper, 1974). The only point at which there was a significant divergence from the TUC policy was in the responsibilities of worker-directors, in which the Labor Green Paper argued that worker-directors could not be completely free to pursue the interests of the workers alone, as the TUC had

though there has been a great deal of discussion since then, there has been little advance in clarity of conception or purpose, with even the labor movement far from united. As a result the Government itself has shown no signs of wanting to take rapid action. Pressure from its own backbenchers through the unexpected progress of a private member's bill,¹⁰⁵ however, has precipitated the usual standby of uncertain or dilatory governments, a committee of inquiry.¹⁰⁶ Legislation has thus been deferred until the 1976-77 session, and some difficulties in obtaining membership for the committee may have put even that target in jeopardy.

It is likely that legislation will be passed, although the precise content and form is difficult to predict. Industrial democracy, "employee participation," or "workers' control," as it is variously known, has been part of the policy of all three main political parties, but outside the extremes of the political spectrum there is little certainty as to how to translate a desirable concept into practice, and it is still too early to assume that board representation will become the main mode of workers' representation. The committee of inquiry has relatively little latitude; its function is merely to decide how to set up a system of boardroom representation rather than address the question of whether this is the best approach. Indeed, it was the problem of restricted terms of reference which led to problems of membership for the committee.¹⁰⁷ Even this narrow aspect of the topic, however, involves a host of problems, *e.g.*, whether there should be a one—or two-tier board of directors, what proportion of worker-directors should there be, whether worker-directors should be elected or even nominated through union channels or by the workers directly, how a balance should be achieved between the different unions in an enterprise, what responsibilities the worker-directors should have, how difficulties of confidentiality can be overcome, what should happen with respect to non-industrial and public organizations, for

suggested. There had been an examination of the issue in REPORT OF THE LABOR PARTY WORKING PARTY ON INDUSTRIAL DEMOCRACY (1967), but this had no immediate consequences.

105. The Industrial Democracy Bill, sponsored by Giles Radice, M.P., reached its Committee Stage and was only withdrawn on the promise of Government action.

106. The committee is to be chaired by Sir Alan Bullock of Oxford University. Mr. Peter Shore, the responsible Minister, has asked for a report by the end of 1976. The TUC would have preferred legislation based on its own document, and would only agree to the inquiry if its terms of reference were tightly constrained.

107. The terms read in part: "Accepting the need for a radical extension of industrial democracy in the control of companies by means of representation of boards of directors, and by accepting the essential role trade union organisations in this process, to consider how such an extension can best be achieved . . ." Quoted from the Financial Times, Aug. 7, 1975, at 14, cols. 5-6.

what size of unit the system should be introduced and how should this be achieved, and so on. It may be best to put these into perspective by briefly reviewing both the British and European contexts.

A. COMMON MARKET DEVELOPMENTS

Perhaps the most influential recent development in this area has been Britain's entry into the European Economic Community (EEC) in 1973. For some time before British entry, the EEC had been moving towards a more cohesive policy on company law. The Draft Statute on European Companies¹⁰⁸ proposed a scheme of employee participation for "Euro-companies," *i.e.* those multinational companies which wish to register on the basis of a supra-national company law to avoid operating under several different sets of national company laws. It is a complex document, but in essence it proposes a two-tier board system with one-third worker representation on the supervisory board, and also makes provision for a European works council. The key aspect of the Draft Statute is that companies may voluntarily choose whether or not to register; of course, there may be pressure from unions and employees to do so. Still more significant for the future is a second document, a Green Paper issued by the Commission of the European Community in November 1975,¹⁰⁹ stemming from the earlier Fifth Directive of 1972.¹¹⁰ The Green Paper is far less detailed than the Draft Statute but, if ultimately adopted, would affect national company law and be mandatory rather than merely voluntary. The various countries of the EEC have been approaching industrial democracy in different ways, and hence it would be virtually impossible to have a single statutory framework. Nevertheless, as an EEC official put it: "If the EEC is to be really meaningful in this field, the rights and legal status of a worker in Naples must be similar to those of a worker in Edinburgh—though that doesn't mean to say they must necessarily be exactly the same."¹¹¹ Although the Euro-

108. Proposed Statute for the European Company, tit. 5, submitted by the Commission of the European Economic Community to the Council of Ministers, June 30, 1970, reprinted in *EUROPEAN COMPANY LAW TEXTS* 33-44 (C. Schmitthoff ed. 1974). A version of the statute together with commentaries can be found in P. SANDERS, *EUROPEAN STOCK CORPORATION: TEXT OF DRAFT STATUTE WITH COMMENTARY* (1969); for the most recent amended text, see *EUROPEAN INDUSTRIAL RELATIONS REPORT* No. 7, July 1974.

109. COMMISSION OF THE EUROPEAN COMMUNITIES, *EMPLOYEE PARTICIPATION AND COMPANY STRUCTURE IN THE EUROPEAN COMMUNITY* (CCH 1976).

110. Fifth Draft Directive, submitted by the Commission of the European Economic Community to the Council of Ministers, Oct. 9, 1972, 15 E.E.C. J.O. 131/49 (1972), reprinted in 1 CCH COMM. MKT. REP. ¶ 1401 (1974); *EUROPEAN COMPANY LAW TEXTS* 113-33 (C. Schmitthoff ed. 1974).

111. Incomes Data Service Int'l Report No. 13, Nov. 1975, at 3.

pean framework will undoubtedly be influential, there will be pressure in Britain to diverge from general trends in Europe in at least the key areas of bargaining at plant level and the role of works councils.

B. BRITISH DEVELOPMENTS

The British tradition of labor relations has principally been based on shop steward-dominated workplace bargaining while the European tradition, by contrast, has favored works councils.¹¹² The Trade Unions Congress has unequivocally declared itself opposed to the latter approach, arguing that:

An attempt to introduce a general system of works councils in British industry would lead to one of two things. Either they would duplicate existing structures at plant level, in which Works Councils would clearly be superfluous; or they would displace and supercede existing trade union arrangements; this latter approach would be even more unacceptable to the trade union movement.¹¹³

The TUC firmly believes that the major way to extend collective control of the workers over their work situation "will continue to be through the strengthening of trade union organization, and the widening of the scope of collective bargaining."¹¹⁴ Beyond the official TUC approach, there are three separate views in opposition to board-level worker representation which are held by different members of the labor movement: the far left of the union movement believes that the policy would involve an unacceptable compromise with capitalist institutions, the more traditional unionists believe that proposed forms of representation will blur the conflict relationship within collective bargaining, and all sides entertain a more general worry that the new structure would find the unions unprepared to provide adequate servicing in terms of personnel, research, and organization.

British management, for its part, shows little enthusiasm for any of the proposals, particularly dislikes a 50-50 system of board representation. It would, however, be prepared to accept a system of employee participation based on consultation, and would contemplate works councils provided these were not solely dominated by unions.¹¹⁵ Some individual companies, on the other hand, have either advanced or have

112. The British tradition has also been followed, to some extent, in Italy and Ireland.

113. INDUSTRIAL DEMOCRACY, *supra* note 103, at 40.

114. *Id.* at 27.

115. See CONFEDERATION OF BRITISH INDUSTRIES, THE RESPONSIBILITIES OF THE BRITISH PUBLIC COMPANY (1973) and CITY COMPANY LAW COMMITTEE, EMPLOYEE PARTICIPATION (1975).

been forced into more liberal positions. British Leyland,¹¹⁶ Harland and Wolff,¹¹⁷ Ferranti, Alfred Herbert, and Chrysler have all proposed structures giving some representational rights beyond collective bargaining, although all their proposals fall well short of equal boardroom representation. It is noteworthy that these companies are all ones which have sought governmental financial assistance. The Government has sought to sponsor industrial democracy not only by means of outside direct legislative imposition, but also indirectly. Thus the Industry Act¹¹⁸ and the Scottish and Welsh Development Agency Acts¹¹⁹ state that one of the objectives for the agencies they create is that of "promoting industrial democracy," although no guidance is given as to how this should be done. Forthcoming legislation, such as the Bill to nationalize the shipbuilding and aircraft industries, is likely to contain the same objective.

In general, therefore, industrial democracy remains a fuzzy concept; while it probably will be implemented initially through a system of boardroom representation this will not be the end of the debate, and in the longer term it is likely to develop in ways which are not yet evident.

IV

OTHER LEGISLATION

Besides the three statutory plans discussed above, there are several other Acts and bills of a secondary significance in the development of industrial relations which, although not part of the central planks of Labor's industrial relations program, are still of considerable importance in their own right. Several of these measures represent a significant advance into areas of industrial life hitherto subject to little statutory regulation. Moreover, even if this legislation is less concerned with the ideological aspects of industrial relations, and even if some of it had partial origins in European influence or in proposals of the Conservative Government, the final contents and administrative form of the various Acts bear a distinct stamp of labor movement influence.

A. HEALTH AND SAFETY

The Health and Safety at Work Act¹²⁰ contains provisions which

116. See *Financial Times*, Oct. 29, 1975, at 18, cols. 3-8.

117. See NORTHERN IRELAND DEP'T OF MANPOWER SERVICES, *INDUSTRIAL DEMOCRACY: A DISCUSSION PAPER ON WORKER PARTICIPATION IN HARLAND AND WOLFF* (1975).

118. 1975, c. 68.

119. 1975, chs. ____.

120. 1974, c. 37.

largely were inherited from the previous Conservative Government's bill.¹²¹ Previous British legislation in this field had been a morass of statutes and regulations, and a special committee had recommended a comprehensive updating measure.¹²² The Act provides such an update, and also extends statutory safety protections to some five million workers previously outside the orbit of any legislation and gives protection to non-employees on industrial premises.

The Act is essentially an enabling measure since the new Health and Safety Commission, the main administrative agency, will make recommendations to the Secretary of State on the issuance of new regulations which, over time, will extend, revise or replace the existing legislation.¹²³ These regulations will cover a wide range of safety, health, welfare, and environmental matters at the workplace; one area in which regulation may be particularly important is that of formulating licensing provisions for work activities involving especially dangerous processes or materials. Beyond the regulations, two other types of obligations are imposed on employers: codes of practice for practical guidance, which the Commission will issue,¹²⁴ and general statutory duties laid down for employers concerning obligations to their employees and the general public, breach of which is an offence.¹²⁵ As a counterpart to these, there is also a statement of the general duties of employees at work.¹²⁶

The central aim of this legislation was to create an essentially self-regulatory system for the adoption and observation of safety and health standards in light of the investigating committee's discovery that people had seen responsibility as lying too much on the law and the inspectors and too little on themselves. Although there is an expected reduction in the role of criminal prosecutions, the inspectorate has widespread powers to issue improvements and prohibition notices to remedy any viola-

121. A Conservative bill was presented to Parliament in January 1974, only to be rapidly overtaken by the General Election the following month. This bill, in turn, had been based on COMMITTEE ON SAFETY AND HEALTH AT WORK, REPORT OF THE COMMITTEE (ROBENS COMMITTEE), CMND. NO. 5034 (1972), which had been appointed by the previous Labor administration. That Labor Government had introduced a bill itself, but the 1970 General Election intervened.

122. See REPORT OF THE COMMITTEE, *supra* note 121.

123. Health and Safety at Work Act 1974, c. 37, §§ 10-14. Enforcement of the requirements for industrial premises is carried out by the Health and Safety Executive, a three-member board which takes over functions of former Government inspectorates in several industries. *Id.* §§ 10, 18. Local authorities are responsible for enforcement on non-industrial premises. *Id.* § 18(2)-(5).

124. *Id.* § 16. These codes will not have direct legal enforceability but will be taken into account in legal proceedings. *Id.* § 17.

125. *Id.* §§ 2-6.

126. *Id.* § 7.

tion of statutory requirements, and can also prohibit any dangerous activities.¹²⁷ Employers have the right to appeal to industrial tribunals.¹²⁸

The Act's major departure from the committee recommendations and the Conservatives' earlier bill concerns the involvement and role of trade unions. In the past there has been some consultation through established management-worker safety committees, but the basic responsibility for work place health and safety has been solely a management one.¹²⁹ The investigating committee, although making some commitment to the need for joint consultative machinery, saw no legitimate scope for bargaining or negotiation over safety and health matters due to a strong identity of interest between the parties. Under the new Act the Secretary of State can make regulations providing for the appointment of workers' safety representatives with whom the employer is required to consult about arrangements. Safety committees are to be established if requested by worker safety representatives.¹³⁰ While the actual functions and powers of the committees and representatives are at the present very much open-ended, it is certain that the regulations when issued will further strengthen the role of the unions.¹³¹ Already the Employment Protection Act has amended the Health and Safety Act to give unions the sole right to appoint safety representatives.¹³²

The comprehensive, enabling nature of this legislation means that there are few areas outside the achievement reach of regulations or codes under the Act. However, experience under the United States' Occupational Safety and Health Act¹³³ and earlier safety legislation in Britain indicates the overwhelming importance of the actual administrative processes, and in particular the degree to which economic or production considerations will be allowed to water down safety standards.

127. *Id.* §§ 21-22.

128. *Id.* § 24(2).

129. *Cartwright v. G.K.N. Sankey, Ltd.*, 12 Knight's Ind. Rep. 453 (Q.B. 1972). See also Atherley, Booth & Kelly, *Workers' Involvement in Occupational Health and Safety in Britain*, 111 INT'L LAB. REV. 469 (1975).

130. Health and Safety at Work Act 1974, c. 37, § 2(5), (7).

131. Thus, the Trade Union Congress has confidently suggested guidelines for the safety representatives, TRADE UNION CONGRESS, HEALTH AND SAFETY AT WORK: A TUC GUIDE 11 (1975), including facilities to carry out inspections of the work area at least every three months or in the event of a notifiable accident or dangerous occurrence, to inspect any documents relevant to health and safety, and to sign an inspection register to be set up by the employer.

132. Employment Protection Act, *supra* note 34, § 116.

133. 84 Stat. 1590 (codified in scattered sections of 5, 15, 18, 29, 42, 49 U.S.C.). See Wood, *An Assessment of Three Years of OSHA: Labor View*, PROCEEDINGS OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 43 (1974).

B. SEX DISCRIMINATION

As a complement to the coverage of the contractual terms and conditions of employment by the 1970 Equal Pay Act,¹³⁴ which has been in full effect since December 29, 1975, Labor took up the lead of the previous Government¹³⁵ and passed the Sex Discrimination Act¹³⁶ outlawing sex discrimination in the remaining areas of the employment relationship as well as in such areas as training, education, housing, and the providing of goods and services to the public.

Provisions of the Act outlawing discrimination in employment on sex and marriage grounds were drafted to reflect many of the negative lessons of the 1968 Race Relations Act.¹³⁷ In particular, proof of unlawful discrimination does not, as in the Race Relations Act, rest solely on motive, *i.e.* on the presence of actual or inferred intention to discriminate. Rather, the definition approximates the United States approach¹³⁸ of looking at the effects: any employment condition or requirement which in practice can be fulfilled by only a significantly smaller number of women than men constitutes unlawful discrimination. An important issue here for the future will undoubtedly be the impact of past discrimination patterns on the present ability of females to meet various employment conditions and standards. As in the United States, this raises the awkward issue of whether "reverse discrimination" is necessary to overcome the effects of past discriminatory practices.

Although a small number of exceptions are specified where sex constitutes a genuine occupational qualification,¹³⁹ the Act makes it explicit that cost advantages to the employers, even where they could be demonstrated statistically due to factors such as differential turnover or absen-

134. 1970, c. 41. For statements of progress on the phasing in of this legislation, see OFFICE OF MANPOWER ECONOMICS, *EQUAL PAY: FIRST REPORT ON THE IMPLEMENTATION OF THE EQUAL PAY ACT, 1970* (1972), and *Further Progress Towards Equal Pay*, 83 DEP'T EMPLOYMENT GAZETTE 747 (1975).

135. As with health and safety, the Conservative Government had intended legislation in the field of sex discrimination, only to have it overtaken by the February 1974 General Election. For details of the Conservative Consultative Document, see INDUSTRIAL RELATIONS REVIEW AND REPORT No. 65 at 3-7 (1973).

136. 1975, c. 65.

137. 1968, c. 71. This was made explicit in HOME DEPARTMENT, *EQUALITY FOR WOMEN*, CMND. No. 5724 (White Paper, 1974).

138. Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1970), the Circuit Courts of Appeal have held that a *prima facie* case of discrimination may be made on the basis of statistics showing the severely disproportionate number of minorities employed in comparison with the number residing in the area. See *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421, 426 (8th Cir. 1970).

139. These provisions are similar to the "bona fide occupational qualification" provisions in Title VII. 42 U.S.C. § 2000e-2(e) (1970).

teeism rates between the sexes, are unacceptable as a justification for discrimination. Also unacceptable for exemption is discrimination exposing an employee to adverse working conditions, although this may be in conflict with the section of the Act which retains the protective clauses for females under the 1961 Factories Act and associated legislation. Again looking at the American record, it is clear that a decision must be made between protection and equality of opportunity and treatment.¹⁴⁰

The real novelty and strength of the Act lies in its machinery for enforcement, which differs from the Conservative Government's proposals. After attempts at conciliation, the complainant may seek legal redress through the industrial tribunals, although he or she bears the burden of proving discrimination. This procedure is linked with the strategic functions of the newly created Equal Opportunities Commission, which is the primary agent of change in this field. At the same time, the Commission is not to be hamstrung, as was the Equal Employment Opportunities Commission in the United States before 1972,¹⁴¹ because of a lack of statutory powers to compel enforcement: the failure of an employer to comply with a nondiscrimination notice issued by the Commission can lead to a Commission injunction against the employer in a County Court.

C. RACIAL DISCRIMINATION

In the White Paper on Equality for Women¹⁴² the Government stated its intention to harmonize the powers and procedures for dealing with racial and sex discrimination. Subsequently the Home Office published a White Paper on racial discrimination,¹⁴³ the provisions of which it hopes will be law by October 1976. Aiming to tighten the loopholes and ambiguities revealed in the operation of the 1968 Race Relations Act, the Act would provide for a widened definition of unlawful discrimination concentrating on effects rather than motive, the establishment of a new body—the Race Relations Commission—to replace the Race Relations Board and the Community Relations Commission, and would grant the right to obtain legal redress in industrial tribunals as in the sex discrimination legislation. Firms obtaining Government contracts

140. See Munts & Rice, *Women Workers: Protection or Equality*, 24 *IND. & LAB. REL. REV.* 3 (1970).

141. See Gunther, *Special Complaint Procedures Concerning Discrimination in Employment*, 104 *INT'L LAB. REV.* 351, 354-55 (1971).

142. See note 137 *supra*.

143. HOME OFFICE, *RACIAL DISCRIMINATION*, CMND. No. 6234 (White Paper, 1975).

would also have to supply to the Department of Employment information about their employment policies and practices.¹⁴⁴

D. INDUSTRIAL RECONSTRUCTION

The highly controversial 1975 Industry Act¹⁴⁵ has three main provisions concerning industrial relations. First, it provides for a state industrial holding company, the National Enterprise Board,¹⁴⁶ in which unions will be represented at board level, and which, as already noted,¹⁴⁷ has among its functions that of promoting industrial democracy. Second, the Act provides for a system of voluntary planning agreements as a means of dovetailing Government and enterprise plans and actions in key sectors of the economy. Established through tripartite Government/company/union consultation and discussion, these planning agreements will cover 100-150 major export-oriented companies and will concern matters such as investment, employment, exports, productivity, and product and process development. Unions will not be signatories to the agreements, which are themselves not enforceable at law, and the extent and detail of their functions and involvement in the planning process have been diminished considerably from the original proposals. Even so, there is substantial scope in the consultation process for union influence on company policy. The third relevant facet of the Act is that the Secretary of State is empowered to serve notice on any large company in a key economic sector, whether or not it has signed a planning agreement, requiring the disclosure of information on matters such as employment, company plans for the acquisition and disposal of capital assets, output, productivity, and various other matters. The Secretary can require some or all of this information to be passed on to the relevant trade union representatives, although it may be accompanied with various safeguards. A Committee is to be appointed to hear union and company appeals on disclosure and to advise the Secretary of State on the matter, although the ultimate decision is his alone.

144. This is similar to the provisions of Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65), 42 U.S.C. § 2000e n. (1970) in the United States, and the problems revealed in its operation may serve as a warning to British policy. See United States Commission on Civil Rights, *The Federal Civil Rights Enforcement Effort*, in DAILY LAB. REP. NO. 30, Feb. 13, 1973, at E 1-5.

145. 1975, c. 68. This was originally viewed by industry as the first step in a radical program aiming at extensive Government control of the private sector. However, the replacement of Mr. Benn by Mr. Varley as Secretary of State for Industry resulted in a more moderate sponsorship that helped allay many early fears.

146. Special agencies have been created in separate legislation for Scotland and Wales, *i.e.* the Scottish Development Agency and the Welsh Development Agency, although the National Enterprise Board will have jurisdiction over the whole of Great Britain.

147. See notes 118-19 *supra* and accompanying text.

E. DOCK LABOR

The final area presently earmarked for legislation is that of dock-side employment. An intraunion dispute between the dock and road haulage sections of the Transport and General Workers Union precipitated publication of a Consultative Document in March 1975,¹⁴⁸ and a bill has now been introduced which (1) proposes to extend the present statutory closed shop for dock workers to all significant commercial ports and wharves, and (2) adopts a definition of "port transport work," which limits employment to registered dock workers, covering a five mile corridor from the waterside. This measure is bound to arouse considerable Parliamentary opposition; indeed the Shadow Employment Secretary has already described it as "one of the most damaging measures to be put in front of the Commons for years."¹⁴⁹ There is also little doubt that, if passed, this measure would impinge on TUC rules which are designed to cope with interunion conflicts of jurisdiction.

CONCLUSION

If we assume the enactment of the various bills yet to be passed by Parliament, the scheme of legislation described in this article may well be the most comprehensive reconstruction of industrial relations in such a short space of time anywhere in the world. It also represents the most direct influence of an independent labor movement in any country; even accepting the traditionally strong influence of the unions on the Labor Party, never before has it been given what amounts to a carte blanche to sponsor its own legislation. The measures are almost entirely pro-union or pro-worker, and impose virtually no constraints on either. Indeed, a continuing theme has been the Labor Government's concern, amounting to an obsession, to prevent any conflict between labor and the legal system. Yet there is another side to the story, and one which requires mentioning to give a correct perspective. Much of the legislation was enacted as part of the "social contract,"¹⁵⁰ and this concept

148. *Dockworkers' Scheme—New Proposals*, 83 DEP'T EMPLOYMENT GAZETTE 322 (1975).

149. *POLITICS TODAY*, Dec. 15, 1975, at 96.

150. The social contract originated in the TUC-Labor Party Liaison Committee's joint statement *Economic Policy and the Cost of Living* in February 1973, which emphasized the need for a coherent economic and social strategy to overcome the nation's grave economic problems and to provide the basis for cooperation between the unions and any future Labor Government. As developed over the following year and included in the Labor Party Manifesto for the February 1974 General Election, it committed such a Government to a far-reaching program which included not only the three major industrial relations measures discussed in this paper but also control over prices, the sponsoring of investment, a freeze on housing rents, food subsidies, and much greater spending on social

imposes on the labor movement an obligation to maintain a system of income control. When Labor came to power, the Trade Union Congress, as its part of the social contract, offered to implement the remaining period of Phase III of the Conservative Government's incomes policy.¹⁵¹ This was followed in August 1974 by TUC guidelines for collective bargaining,¹⁵² and when these proved inadequate to keep down the rapidly rising wage spiral, yet another, but much tougher, TUC policy was imposed.¹⁵³ Although this policy is due to last for only a single year, up to August 1976, it is highly likely that a similar policy will replace it in spite of the continuing antagonism of many unions and Labor Party members to any constraints on free collective bargaining. In other words, the TUC, although exercising great power, has been forced into a position of assuming responsibility for moderating the potentially inflationary effects of that power. At the same time, the sanctions which the Government has promised to bring into play if the incomes policy does not work will be directed at employers through the price control system, and not in any way at unions or workers.

What of the future of the legislation? Given the poor record of law in the British industrial relations system, a cynic might be forgiven for doubting its impact, or expecting it to be revised by the next Conservative Government. To expect either eventuality, however, would be an error. First, although there is bound to be a process of digestion as all parties, including the workers themselves, realize and begin to implement their rights and obligations, implementation thereafter will be rapid in unionized plants, and the legislation's impact will strongly be felt. This will come about first as a result of the plant bargaining process, as stewards and their members seek new sources of advantage or as employers try to preempt any such demands, and only secondarily by recourse to law. Further, there is another reason to believe that the legislation will not be a dead letter: the labor movement is increasingly playing a direct executive and policy-making role through council membership of the agencies which now dominate employment policy—the

priorities. For its part, the TUC recognized the need to control inflation by means of income restraint. At this point, however, there was no intention of introducing an incomes policy as such; rather, the TUC undertook that negotiations would be influenced by the constructive policies of the new Government.

151. For a review of this policy, see Hunter, *British Incomes Policy, 1972-1974*, 29 IND. & LAB. REL. REV. 67 (1975).

152. TRADE UNION CONGRESS, *COLLECTIVE BARGAINING AND THE SOCIAL CONTRACT* (1974).

153. TRADE UNION CONGRESS, *THE DEVELOPMENT OF THE SOCIAL CONTRACT* (1975). In essence, this policy gives all workers six pounds per week up to 8,500 pounds per year, and nothing more. The policy suggested in this document was adopted almost verbatim by the Government in *THE ATTACK ON INFLATION*, CMND. NO. 6151 (White Paper 1975).

Health and Safety Commission, the Advisory Conciliation and Arbitration Service, and the Manpower Services Commission—and this will give it a further means of initiating and monitoring developments. The second possibility, repeal by an incoming Conservative Government, is also unlikely. The Conservative approach towards the unions was destroyed by the failure of the Industrial Relations Act and by the two confrontations with the mineworkers.¹⁵⁴ As a result, they have been left without a viable industrial relations policy, and in spite of a move to the right under their new leader, Mrs. Thatcher, the Conservatives have only one path left: a conciliatory one. Indeed, on the passage of the Trade Union and Labour Relations Act in 1974 the Conservative spokesman, James Prior, said that the Act “can now stand as a solid foundation for our law on trade union organization and on the legal framework in collective bargaining. There will be no need for further substantial legislation in these particular areas.”¹⁵⁵ The Conservatives are also committed to the development of employee participation, and in the same speech, Mr. Prior said: “We need to catch up with developments in Europe. We need to develop the new themes of employee participation and employee involvement. We need to find ways of improving the arrangements for redundancy payments. We need to find a new approach to the improvement of the quality of life at work.”¹⁵⁶ To a considerable extent, therefore, the two major parties have similar views on legislative needs.

There are likely to be remaining areas of controversy, however. The question of press freedom remains an embroiled issue. The Conservatives may also try to push for a broad right of the individual to opt out of union membership in a closed shop situation, especially since many unions are currently seeking to extend the closed shop into new areas. Another important issue is the question of state benefits during strikes, which the 1975 Conservative Party Conference pledged itself to reconsider. The matter of state assistance to unions in carrying out postal ballots for elections is a further possible area of future legislation, although it may generate a bipartisan debate, since this issue has numerous sympathizers on the Labor side.¹⁵⁷ Finally, there is the difficult question of picketing. This is the one major area where the TUC and

154. There were two major coal strikes in 1972 and 1974, the first of which forced the Conservatives to introduce an incomes policy and the second of which resulted in the February 1974 election and the fall of the Government. *See* Hunter, *supra* note 151.

155. Address by James Prior, Aug. 9, 1974.

156. *Id.*

157. Former Prime Minister Wilson declared himself in favor of postal ballots. *Chronicle of Industrial Relations*, BRIT. J. INDUS. REL. 408 (Nov. 1975).

the Labor Party diverged in the recent legislation and the Labor Government's proposals in the Employment Protection Bill were not acceptable to the unions.¹⁵⁸ Any further attempt to strengthen the law in favor of the unions would certainly be strongly opposed by the opposition parties.

The European model of regulatory industrial relations will continue to influence British labor policy. It can be argued that this would have occurred even if Britain had not joined the European Economic Community—in fact, the TUC was in favor of taking Britain out of the Common Market in the 1975 referendum—nevertheless, the influence of Europe to date has been important if indirect, and it will grow in the future since European policy created through the various institutions tends to be long-term in nature.¹⁵⁹ The present bases of Community policy are threefold: (1) the European Commission's Social Action Program of 1973,¹⁶⁰ (2) the creation of common features of company law,

158. Although the 1971 Act made only minor substantive changes in the picketing clause of the Trade Disputes Act of 1906, 6 Edw. 7, c. 47, *i.e.*, the 1971 Act does not authorize picketing at a person's residence, there was widespread public concern at mass and occasionally violent picketing. Furthermore, the unions themselves were concerned when picketing law was thrown into a state of some confusion by the common law cases of *Broome v. Director of Public Prosecutions*, [1974] 1 All E.R. 314 (H.L.), and *Kavanagh v. Hiscock*, [1974] 2 All E.R. 177 (Q.B.), giving considerable discretion to the police in evaluating a potential breach of the peace or an obstruction of the highway and making it clear that there is no right to stop a driver against his will. The TUC wanted the explicit right to stop vehicles entering or leaving premises for the purpose of peaceful persuasion, and this was written into the consultative document for the Trade Union & Labor Relations Act in April 1974. After an outcry from employers and the Conservative Party, it was withdrawn before the bill was published, but a further promise was made for its reintroduction in the Employment Protection Bill. When this latter appeared, however, Clause 99 did not meet the demands of the TUC, since it set out rights "falling short of obstruction of the highway." Mr. Foot stated in Parliament his difficulty in reconciling the union viewpoint with that of the police and road haulage employers; this was one of the very few times when Mr. Foot parted company from the TUC. Clause 99, however, did not survive, falling after the failure of a left-wing attempt to allow stopping vehicles. The issue therefore remains alive and may be brought back to prominence by action during a strike.

159. For a general review of European social policy, see M. FOGARTY, *WORK AND INDUSTRIAL RELATIONS IN THE EUROPEAN COMMUNITY* (1975).

160. In the Social Action Program certain features were picked out for short-term implementation, such as programs for migrant workers and handicapped workers, the implementation of equal pay for equal work, the institution of a 40-hour week and four weeks paid annual holidays, the harmonizing of laws on collective dismissals, the extension of the Mines Safety and Health Commission and the creation of a Foundation for the improvement of the environment and living and working conditions. Other elements of the Social Action Program will cover such issues as retraining, sexual equality in the labor market, cooperation between national employment services, the problems of special

including the aspects of industrial democracy already discussed,¹⁶¹ and (3) proposals to handle the special problems caused by multinational companies. In these areas the Community will operate through a framework of objectives. It has no power to impose detailed codes, since cultural conditions vary considerably and in any case any country can use its veto in the Council of Ministers, but it does have strong influence in promoting a general harmonization of standards and the Commission in particular has an important leadership role. Industrial democracy is one area where Britain lags behind European practice, at least in terms of statutory rights, and European influence there has therefore been important. Several of the job protection aspects of the Employment Protection Act were influenced by Community initiatives.¹⁶² On the other hand, several of the other measures described in the paper carry Britain ahead of European practice.¹⁶³

Finally, although the new legislation will have immense effects on the British industrial relations system, it cannot of itself resolve all the problems which have plagued Britain over the past decade and more. Here the plant remains the key. It is unfortunate that the recent emphasis on legislation has tended to deflect attention away from bargaining reform at plant level, which the Donovan Commission and the approach of the American "model" emphasized. Some improvements have been achieved in this area, but much remains to be done if industrial relations in Britain are to develop stability. One thing, however, remains clear: Britain has moved well away from the old concept of state abstention and is becoming much more like other national industrial relations systems in its acceptance of state intervention. The major difference is that it lacks a code of restrictive law, but even this may not be important if, as is likely, there is a series of negotiated or imposed incomes policies stretching well into the future.

groups such as school-leavers and elderly workers, labor market forecasting, a range of social security measures, and aspects of the quality of working life.

161. See section III.A. *supra*.

162. Thus the EEC Council in February 1975 adopted a directive on collective dismissals requiring employer consultation with worker representatives, which influenced the redundancy procedures of the Employment Protection Act. Directive on the approximation of the laws of the Member States relating to collective redundancies, Feb. 17, 1975, 18 E.E.C. J.O. 48/29 (1975).

163. For example, there has been a growing interest in Europe in the British system of shop stewards as a concomitant to the existing plant-level institutions based on works councils. See J. BARBASH, *TRADE UNIONS AND NATIONAL ECONOMIC POLICY* ch. VIII (1972).