THE RIGHT TO STRIKE IN A FREE SOCIETY

8 Wilfred Street, London SW1E 6PL
Telephone : 01-828 1176

This paper has been prepared by Sir Leonard Neal and Lionel Bloch, of the Trade Union Reform Group of the Centre for Policy Studies.

ISBN No: 0 - 905880 - 46 - 3

C O N T E N T S

THE "RIGHT TO STRIKE" IN A FREE SOCIETY

INTRODUCTION

The right of employees to withdraw their labour in an organised fashion was achieved slowly and, it must be admitted, sometimes painfully during the nineteenth century and in the first years of this century. The background was one in which employees individually worked at great economic disadvantages vis-à-vis the employer and one in which some employers were willing to exploit their advantage.

Two things need to be said at this point. Firstly, that not all employers behaved badly. From Francis Place in the 1830's through the great Quaker and Nonconformist houses, many employers behaved with great enlightenment and concern for those whom they employed and, also, for the communities in which they lived.

The second point on which we need to be reminded, is that Conservative and Liberal governments throughout this period, displayed a willingness to grant political and constitutional rights to the representatives of organised labour and to labour itself, that was in advance of its times and reflects great credit on those political parties. It began even as Sir Robert Peel's Government introduced the first bill introducing factory hours.

An additional element in this development also has to be noted. British society throughout those years was largely fragmented and isolated. Thus, without the existence of a fully used transport system and the dubious advantages of present instant information (by a network of press, radio and television) communications were highly localised and independent. They had to be. But since that age of compliant governments, and complacent employers, British society has changed out of all recognition. Now we are a totally interdependent society. No community, no industry and no public service lives to itself alone. We are all dependent on one another. More importantly we are now so utterly reliant on some services that, without them, convenience, security, health and even life itself can be disastrously affected if any are disrupted or withdrawn from the community.

At the beginning of last century, even the rich did not have main drainage and few families enjoyed a piped water supply. Houses were small and separated and a fire in one need not have burned down the others. Illumination was mainly by gas light or candle.

It is in these conditions that we developed our attitudes to the "right to strike" - a right that has regressed from a basic right that is inseparable from the fundamentals of a free society, to a right that must not now be diminished by the exercise of other rights eg, the right to work and even the right to live ("yes, it is true that some people may die because of our members' action but that may be the price that has to be paid.") Thus, in a changed situation we have elevated the "right to strike", conceived in quite different circumstances, into an absolute right regardless of the consequences to individuals, to the public at large and to the wellbeing of the country. In a world where people may die by the withdrawal of labour from electricity, water and fire stations; where health is endangered by similar "industrial action" in hospitals and main drainage systems, we have made the "right to strike" superior to all other rights.

It cannot be wrong therefore to insist that this power now needs to be re-examined, not to attack democracy but to defend it.

Although the problem is complex and difficult solutions must be found that restore balance. Just as the employers' power had to be restrained in years past for the benefit of the trade unions now the union's power has to be restrained for the benefit of the people. In particular, solutions have to be found in two vital areas. In "essential services" and in the need to preserve the integrity of "procedural agreements".

1 ESSENTIAL SERVICES

Definition and Legislative Background

The Conservative Party's 1979 Election Manifesto foreshadowed a reduction of the excessive powers enjoyed by trade unions in this country.

So far, the government's step by step strategy has not dealt directly with the question of strikes in essential services but the recent water workers strike has illustrated that there are always reasons for curtailing a withdrawal of labour that would be incompatible with the maintenance of civilised society.

As we observed in "Liberties and Liabilities - A Case for Trade Union Reform", November 1980, the right to strike is a basic freedom, but when its exercise can result in suffering, or even death, we do not believe that it is a right that it should be regarded as superior to all others.

The first problem that has to be considered is the definition of essential services. This is not a new question, although it requires constant review because of the increasing inter-dependence of society, made more extreme wherever monopoly powers exist.

In fact, laws prohibiting such strikes go back over 100 years. The Conspiracy and Protection of Property Act of 1875, Section 4, made it a criminal offence for any person to break a contract of service if he was employed in a gas or water undertaking, and if he knew that the probable consequences would be to deprive the consumer wholly or to a large extent, of water or gas. The Act provided for penalties up to three months imprisonment and of fines. Of course, this Section did not apply to workers who terminated their employment by giving proper notice. Nor is it suggested that the right of one individual to end a contract of employment by observing and fulfilling agreed procedures should be curtailed, although, of course, concerted action on the part of large numbers of employees might be subject to the laws of conspiracy.

The Electricity Supply Act 1919 extended the provisions of this Section to electricity workers. In fact only one prosecution and that of gas workers is recorded in 1950. Section 4 of the 1875 Act was repealed by the Industrial Relations Act 1971, but this Act did contain a number of balancing provisions in substitution for Section 4. When the Labour government repealed the 1971 Act, nothing was left to make up for the safeguards of Section 4, except the general terms of Section 5 of the 1875 Act, which have been forgotten or overlooked.

What is often forgotten, is that Section 5 of the Conspiracy and Protection of Property Act 1875, which also deals with strikes and essential services, is still in force. Under this Section, the person who has reasonable cause to believe that the breaking of his contract of service could endanger human life or cause serious bodily injury is liable to a fine or a term of imprisonment. The range of this Section is extremely wide and Citrine's Trade Union Laws (1967) suggests that it applies to drivers, signalmen, pilots, surgeons, hospital staff, sewerage workers.

There are also provisions which could be invoked in respect of essential services, by bringing Section 5 up-to-date, and increasing the upper limits of the fine that can be levied under the Section. The more serious penalties providing for imprisonment could be left unchanged but special remedies should be introduced providing for severe punishment in the event of death or serious injury being caused by the deliberate withdrawal of an essential service. This should be treated as a criminal conspiracy to cause death or grevious bodily harm.

The advantage of dealing with the problem in this way, would be tactical: Section 5 has a very respectable pedigree and has not been repealed by successive Labour administrations. On the other hand, to press into service this kind of legislation, has certain drawbacks. Thus:-

a) The very width of its provisions could well make it applicable to services or industries which, in the eyes of the public, do not merit the special distinction of being treated as an essential service.

b) It could introduce a serious element of uncertainty if it were relied upon to become the principal means of curtailing strikes in essential services, because these are not defined by the Section and the Section does not distinguish between services that are essential and those that are not:

c) Its age would be used as an argument against the Section, because, there will always be those who would question the wisdom of regulating the most sensitive of services and industries of this country on the strength of the Victorian Act of Parliament. But it must be said that Trade Union leader's objections are only to those aspects of nineteenth century legislation which impose some clear and even modest limitations upon their activities. They clearly do not object to other Victorian Acts that suit their purpose.

The Drawbacks of "Pragmatism"

The question then arises why this Section has practically never been used to prevent strikes in essential services. The answer is that for a very long time its financial penalties have been utterly inadequate and the provisions for imprisonment have been considered by timorous employers as "too blunt an instrument" or "too provocative".

Successive employers have preferred to rely on their workforces' "sense of responsibility" and above all by the expedient of meeting unreasonable wage claims regardless of their consequences.

On this situation we offer two comments:

i) It is true that in some cases, workers in essential services like ambulance drivers and firemen have sometimes ignored a strike to deal humanely with an emergency. The question we have to consider is for how long can modern society's dependence on essential services be left to the arbitrary and unpredictable decency of strikers?

And can for instance, unskilled hospital workers really be left to determine what is and is not a matter of urgency?

ii) It is equally true, that had employers in an essential service asked the Attorney General to act under Section 5 - and had he agreed to do so - that would have been seized on to exacerbate and prolong the dispute, thus incurring larger immediate losses and subjecting the public to greater risks and inconvenience. Hence, the short-sighted preference for capitulation made palatable by the fig-leaves provided by conciliation services, committees of enquiry etc.

The trouble with this so-called "practical" approach is that the cumulative effect has been disastrous. Each concession offered to avoid or to end a strike creates a powerful precedent for further and ever increasing demands. The resulting momentum has crippled Britain's post-war economy. We have now almost reached a situation where any trade union leader in an essential service can pressurise the community and obtain excessive wage rises by a negotiating technique which consists of asking for 50% more than the maximum he hopes to get. This will usually be met by the employer making a "final" offer of roughly a third of the increase demanded and eventually, often after much argument, and some ruthless industrial action a "half-way" award will be made or a "give and take" compromise reached, by granting to those who were ready to use their industrial "clout", precisely what they hoped to get to start with.

Employees in essential services, have so often exceeded their "final" offers, that nobody takes them for more than bargaining gimmicks.

The Case for Reform

For these reasons, we would recommend that the Government should deal with the problem boldly by way of a consolidated statute that could adapt the essential provisions of the legislation on the subject from 1875 up to the Industrial Relations Act 1971.

Such an Act should first of all specifically prohibit strikes in the ambulance service, the fire brigade, hospital nurses and all medical staff, gas, water, electricity, nuclear power and sewerage services.

The first part of such an Act should deal specifically with the prohibitions. The second part should deal with the machinery for settling disputes, and set out particularly detailed provisions for compulsory arbitration, and also provide the framework for a general procedural agreement. There will always be room, within such a general framework to work out ad hoc arrangements adapted to the needs of any particular service or industry. This part of the proposed Act should also set out the penalties for infringing its provisions - including substantial fines and imprisonment. The fines should be applicable both to trade-union funds and to individuals. The Act will have to define carefully the liabilities of trade union leaders in "official actions" and ring-leaders in unofficial industrial action.

The third part of such an Act should deal with the rewards that would have to be awarded to those who would lose their right to strike.

Inevitably the list of essential services included in such legislation must have a degree of arbitrariness about it, but, whatever is arbitrary can be remedied by introducing an element of flexibility. We must bear in mind that in these days of industrial inter-dependence, workers in auxiliary services which generally speaking could not be considered an essential service, could, by withdrawing their labour, completely paralyse an essential one. This could give those working in the essential services the de facto ability to withold their labour without exposing themselves to the provisions of the new legislation. That kind of abuse could be largely avoided by giving the Secretary of State for Employment, or some appropriate parliamentary commissions, the additional enabling power to:

a) Declare any auxiliary service or industry (without whose labour or support an essential service cannot function), to be subject to the same restriction as the essential services already specifically designated as such in the Act.
b) Extend the prohibition against strikes to groups of key workers in any essential service as herein defined.

This last extension is extremely important in these days of advanced technology, when a handful of skilled and specialist operators could bring an entire industry or service to a complete standstill, by withdrawing their labour. Such people should not be allowed to hold entire communities or even the nation to ransom.

The Do-Nothing School

These proposals are often opposed for a number of reasons that merit brief mention:

Thus, in the Green Paper on Trade Union Immunities, presented by the Secretary of State for Employment in January 1981, (paragraph 323) it is argued that "most people would accept that action which puts lives at risk or imperils national security, constitutes an emergency".

The Green Paper goes on to recognise that essential supplies and services to the sick have been disrupted in the past, but, "in general, workers do not go on strike or if they do so, ensure that essential services are maintained".

Whilst this has been fortunately true in some cases, there have been outstanding exceptions in these last few years, particularly during the hospital porters strike, which have been sufficiently grave to remove any complacency, and more seriously, they have shown us that much worse could happen in the future. "The bad drives out the good" in this area, even more than in others.

The question therefore arises, whether one has to wait for a serious crisis with all its dire consequences, or take preventive action when there is no major crisis, that requires emergency legislation.

In our submission, prevention is better than cure.

Now is the time to pass restrictive legislation in a period of relative social calm, rather than at a time of heightened turbulence.

Against this view, we are often told, mainly by extremist trade union leaders, that any attempt to introduce legislation to curb the "right to strike" will be socially divisive and bring about confrontation with untold consequences. The Green Paper of 1981 seems to endorse this view (paragraph 320) when it states; "the major objection to such proposal is that . . . it places in the hands of the executive a considerable power to restrict strikes and undermines basic liberties in a way which many would regard as unacceptable." Is this perhaps the reason why the new Green Paper "Democracy in Trade Unions" (January 1983) has absolutely nothing to say on the question of limiting the right of strikes in essential services?

It is necessary to examine the vague concept of "many" referring to the objections to curbing strikes in essential services. How many are many? Since an overwhelming proportion of voters in 1979, when asked what issues they most preferred the next government to deal with, opted for law and order. It is almost certain that very few would give precedence to the "right to strike" over the "maintenance of essential services". In our view "many" is more correctly to be construed as "minority". But even so, are we expected to subscribe to the view that Parliament should only enact such laws as are likely to enjoy the widest possible consensus?

Once the difficulties of enforcement become the paramount consideration in the legislative process, the rule of the law is at an end. This is why it remains the function of the police to implement the law, even when the efforts of doing so can be rather onerous, just as is the duty of the Judges to punish wrongdoers, regardless of whether their sentences are popular with every section of the population.

The Myth of Consensus

When Society is faced with a clear conflict of interests between the majority of the population on one hand, and a powerful entrenched minority on the other, it is utterly unrealistic to expect that such a minority will join in a general consensus on the very question of curtailing its excessive privileges.

One can either opt for the "one nation" ideal and forego any action that would antagonise a privileged minority, or embark on reforms that will enevitably be described as divisive and forego the quest for general consensus.

Naturally the avoidance of socially divisive legislation and the flight from painful choices are usually hailed as a higher form of political wisdom. Sometimes they are. But, when it comes to dealing with Trade Union immunities, this approach is bound to fail through lack of realism. Another argument often put forward by those who either oppose any restriction of strikes in essential services or those who approve of them but doubt that they can be implemented, is that when all is said and done, one could not really give effect to the ultimate sanction because "you cannot send thousands of trade unionists to jail". They often quote the 1942 strike in the Kent coalmines as an example. At that time, the government decided not to use its powers and compromised.

We have no doubt, that psychologically, this is the central objection to any effective action to outlaw strikes in essential services.

We submit that the objection is misconceived for the following reasons:

First of all, no civilised society can survive unless it is prepared to stand up to a major challenge. In theory, if thousands of people break the law, circumstances could arise where a free society could only survive if those who choose to defy it are confronted with the full rigour of the law.

Secondly, in practice - such a situation is not likely to arise in a politically mature country like the United Kingdom. We have a long tradition of respect for the law. Most trade unionists are decent responsible people who would not be associated with quasi-revolutionary situations. The minority that would and that always uses labour disputes for extreme political ends, may well find themselves at the receiving end of the new legislation. For this we do not have to apologise. Even so, the vision of "thousands" being sent to jail borders on the fantastic. The new legislation, will work on the usual law-enforcement basis. The police have always been very selective in carrying out arrests when faced with large-scale disturbances. Hundreds may riot at a football match but only a few dozen get arrested. First offenders usually get away with a fine and a warning. The power to send people to jail is and will always be held in reserve for the few really serious offenders.

Its main function will be a deterrent one.

Finally a word about those 1942 Kentish coal-miners. When the authorities decided to show forbearance they had to take into account the fact that this country was at the most critical stage of the war and could ill-afford a major upheaval - national unity was essential. Such considerations do not apply today when the paramount consideration is the welfare of the community as a whole. This is now under threat.

It is argued that the Industrial Relations Act of 1971 illustrated the pitfalls of the frontal attack on excessive Trade Union powers. In fact, the 1971 Act had considerable merits and in many instances proved an effective instrument in reducing Trade Union abuses. It also produced many advantages for the unions which they were not slow to exploit notwithstanding the official boycott policy of the TUC.

But no statute, however well drafted, and however timely, can succeed unless the Government has the will to implement it. This was not apparent when the 1971 Act was put to the test in major confrontations. The Act was not unworkable. There is also a claim by some that this country is not prepared to accept the possible social disruption inherent in any policy directed at curbing lawlessness, and thus are in fact saying that Britain is ungovernable.

Once we accept such a premise all discussion about law reform becomes rather academic.

In any discussion involving the limitations or restrictions of strikes in essential services, one must always remember the human element. Sometimes, people forget that Trade Unionists are also individual human beings. When we have strikes in hospitals, those who suffer are called "the public". But the public includes Trade Unionists and the media as well as the Government who may occasionally underline this fact with greater vigour. The question should be posed for instance:

How would a coal miner feel, when, on taking his child for an emergency operation to a hospital, he would be told that nothing could be done because the hospital was closed through official or unofficial action? Or, how would he feel if his house caught fire and upon calling the Fire Brigade he would be told that his home had to burn down because his "brethren" in the Fire Brigade were on strike?

Responsibility or Quid Pro Quo?

But these arguments, however compelling, are thought by some to be insufficient to make the restrictions on strikes in essential services palatable. Some argue that a quid pro quo to those who lose the right of striking should be introduced.

There is a powerful argument that no man has the right to use the health or safety of a fellow human being as a bargaining counter for his own or anyone else's benefit, and that there is no morality in seeking a so-called quid pro quo for not doing so.

Others may feel that the removing of this right should be acknowledged by some material recognition. While we do not think this desirable or justified on fundamental moral grounds, it may be that a modest system of linking the pay of workers in non-strike services to the retail price index, would be an appropriate way to offset the cost of the right to strike. Such a system would be automatic and would be infinitely preferable to a system of comparability concessions that have caused so much inflation, aggravation and imbalance in the past. Should such an idea gain ground in governmental circles we strongly suggest that such index-linked increases should only occur when the RPI moves within one year by five points or less and above this level the adjustment should require a special decision of the government laid before Parliament.

Additional advantages above the index-linked increase can be secured by normal negotiations such as shorter working hours, earlier retirement age, longer holidays, higher pensions, calculated on the basis of an unblemished length of service. This system pre-supposes forfeiture of additional pension benefits in case of unathorised withdrawal of labour, thus creating additional incentives for discipline. It goes without saying that none of these additional improvements can be secured by resorting to strike action. Such negotiations should be the subject of procedural arrangements as outlined elsewhere in this paper.

This brings us to the second major objection to these proposals. Namely, that any system of reward, ie, higher salaries, special allowances, or additional pensions rights, or a combination of all three, are bound to have a "knock-on" inflationary effect, but only if employers and the public are again willing to surrender to unreasonable demands and pressures.

Ideally speaking, these rewards should not be merely material. However, it is doubtful whether, in a modern consumer-oriented society, symbols like badges or uniforms or priority in certain non-economic spheres, would carry much weight, although all these additional methods of social recognition and appreciation should be carefully considered. Ultimately, recognition will have to be translated into hard cash.

An approach of this sort will also be more orderly, and its economic consequences will be easier to anticipate. In any event, reasonable safeguards against creating unreasonable, excessive pressures could be built into the rewards system.

It is not the purpose of this paper to suggest in detail the best methods of rewarding and dealing with those who will and have to accept the condition of working in essential services.

Let us not forget that if these services have been spared frequent catastrophic strikes, such "peace" has often been bought at an excessive high price in the form of constant capitulation to unreasonable wage demands, made under threats. Appeasement has been the constant policy in some State industries, which were politically too weak to resist. The exorbitant increase just awarded to the water workers is a case in point.

Foreign Experience

A final note about the way other Western industrial democracies limit the right to strike in essential services. Some of these restrictions have been summed up briefly in the 1981 Green Paper, and certainly deserved detailed study, both in terms of formulation, as well as in their practical applicability.

Such a study however is not likely to provide us with an easily adaptable blueprint, primarily because the United Kingdom has such a different history and tradition of industrial relations.

Basically, in the advanced industrial democracies, a spirit of enlightened self-interest dominates the relations between employers and Trade Unions. Their negotiation machinery runs along smooth lines and their Trade Unions have never felt particularly disadvantaged for not enjoying the range of immunities available to Trade Unions in Britain. This is one of the reasons why we will not find too much explicit legislation outlawing the strikes in essential services in these countries. The emphasis is often on statutory cooling periods, such as provided by the famous Taft Hartley Act in the United States. Others, like certain states of Australia, notably Queensland and Victoria, have special provisions for the declaration of a state of emergency in case of essential services being disrupted or stopped. These and others offer many useful precedents, but at the end of the day we shall have to settle for a sui generis system best suited to protect the vital interests of the British public.

2 PROCEDURAL AGREEMENTS

Collective bargaining in the United Kingdom rests, inter alia, on two legs, "procedures" whereby the parties (Trade Unions and employers) set forth the arrangements that regulate their relationships and from which the second leg, the "substantive" agreement will develop.

It is not the purpose of this study to make proposals about "substantive" agreements, since these should remain the absolute responsibility of the employers who make them with their Trade Union counterparts.

"Procedures" however raise quite different issues. Collective bargaining, if it is to succeed and be a sensible and civilized method of resolving disputes without the present arbitrament of warfare, then our procedural agreements need to define the stages through which grievances, disputes, changes and claims can all be sensibly discussed and settled: that these stages must terminate (if agreement cannot be reached) by an automatic resort to third party binding arbitration - and that no strike, lock-out or other interruption of work shall take place during the operation of the agreement.

It has to be said that most of our collective agreements contain provisions of this sort and some, even the last requirements of binding arbitration. But if the typical procedure agreement contains provisions such as these, then it has to be acknowledged that the common experience is that they are honoured in the breach more than the observance. It was not always so.

The founders of our unique system of collective bargaining determined that the procedural provisions must be honoured by both sides and not least by the unions. "We are men of honour and our word is bond" was the principle that sustained these men. And because they kept their agreements the world beat out a pathway to our shores to enquire how we managed to operate a successful industrial relations culture without the benefit of legal enforcement.

Unfortunately, the practice of honouring agreements and not breaking them has become a "technical point" in the words of one leader, which must not be allowed to call in question the paramountcy of the current strike. Thus, as Lord Donovan pointed out, the present pattern is that 95% of labour disputes in the United Kingdom are in breach of Labour's own agreements.

It follows that if we are to have a railway system that works; a manufacturing industry that can compete in delivery, price and quality and local government service that is worth the high costs that profligate local authorities levy upon helpless rate payers - then the procedures by which the relationships are regulated between organised labour and the employers in these and other industries and services, must be maintained and followed.

Since honouring agreements has been unfashionable now for more than twenty-five years, enforcement via the law is the only avenue open to us.

This is not a new proposal. It has been canvassed frequently over the years, but it has been resisted on the grounds that a) legal enforcement would not work and b) that labour agreements are too loosely worded for the courts to interpret. The first of these objections relies on the belief that present practices are the best we can hope for, (and they manifestly are not.) Thus there is no hope that they will improve of their own volition while unions can get all the advantages of making agreements and then all the further advantages that follow from breaking them.

The second argument is equally fallacious for it assumes that the common language is unclear while legal language is unambiguous. The reality is that procedural agreements are generally written in clear requirements, that disputes and grievances will be processed through well-defined stages so that failure at any stage leads inevitably to the next and, most important of all, that no strikes, lock-outs or interruptions of work will inhibit adherence to this procedure. No judge or lawyer is needed to interpret these intentions. Any competent and experienced labour practitioner could determine what the parties intended and (in a dispute) which party was in breach of its undertakings. Even if the procedures were not written with this precision, it is only necessary for parliament to publish a standard procedure and then for ACAS to pronounce, either centrally, or locally, whether the actual or standard procedure has been breached and to identify the offending party. To restore order in an inherently disorderly situation it will then be necessary to give ACAS (or some alternative body) the power to award damages against the culpable union or employer.

We are often told that, to punish Trade Union leaders for their breaches of agreements, is to incur the danger of transforming them into martyrs. This argument is no more genuine that that of today's "sick" strikers who defend their own agressions against society by employing that most specious of all political excuses that "you cannot make omelettes without breaking eggs". If society has to choose between the desired martyrdom of a few Trade Union officials and its own actual martyrdom, then society has a duty to preserve itself and its successors.

Price: £1.00