

JUDGING THE LABOUR JUDGES IN BRITAIN AND SOUTH AFRICA

It is not good for trade unions that they should be brought in contact with the courts, and it is not good for the courts. The courts hold justly a high and, I think, unequalled prominence in the respect of the world in criminal cases, and in civil cases between man and man, no doubt, they deserve and command the respect and admiration of all classes in the community, but where class issues are involved, it is impossible to pretend that the courts command the same degree of general confidence. On the contrary, they do not, and a very considerable number of our population have been led to the opinion that they are, unconsciously no doubt, biased.

—W.S. Churchill, (1911) 26 House of Commons Debates col. 1022

I: BRITAIN

The notion that British courts of law are biased against the interests of trade unions and their members is a venerable component of trade union tradition. The origin of the belief can be traced back to three features of nineteenth century labour law. The first was the existence of 'master and servant' laws which imported criminal sanctions into the private employment relationship and were applied with vigorous determination by lay magistrates, often middle class employers. The second was the application by the courts of a number of Acts passed after the French Revolution to proscribe trade union organisation. The third was the ingenuity displayed by the courts (in the wake of the liberalisation of the statute law by the Combination Acts of 1824 and 1825, the Trade Union Act of 1871 and the Conspiracy and Protection of Property Act of 1875) in fashioning from the common law a weapon which could be employed to curtail the unions' scope for lawful industrial action.

The two last-mentioned features gave to the union movement two of its legal menhirs, the cases of the Tolpuddle Martyrs and the Taff Vale Railway Company. The Tolpuddle Martyrs were a group of six agricultural labourers from Tolpuddle, Devon, who were convicted, under the Unlawful Oaths Act of 1797, of swearing an oath of allegiance to Robert Owen's Grand National Consolidated Trades Union. For this risible act they were sentenced to seven years' transportation to Australia. A massive protest campaign resulted in the remission of their sentences in 1836 and their repatriation in 1838.

The Taff Vale case concerned an industrial dispute between the Taff Vale Railway Company and the Amalgamated Society of Railway Servants over the alleged victimisation of a trade unionist who had led a wage demand. With feelings running high over the Company's use of scab labour and alleged sabotage by the union, the Company sought an injunction against named union officials and the union itself in order to prevent further picketing of its premises. It was widely believed that the unions' status as unincorporated associations under the Trade Union Act of 1871

rendered them impervious to actions for damages founded in tort. In the High Court, Farwell J held that 'it would require very clear and express words of enactment to induce me to hold that the Legislature had in fact legalised the existence of *such irresponsible bodies with such wide capacity for evil* (emphasis supplied)'. Although Farwell J's finding that union funds were not immune to execution was reversed by the Court of Appeal, it was restored by the House of Lords. The injunction was granted and the Company later successfully sued the union for damages. The case left, in Heuston's words, 'a legacy of suspicion and mistrust . . . to poison relations between the courts and the unions for many years'. It also resulted in the enactment of the Trade Disputes Act of 1906, which granted trade unions immunity for otherwise tortious acts, provided that they were committed 'in furtherance of a trade dispute'.

The law relating to trade union immunity remained in a relatively constant state (save for ad hoc wartime measures) until in 1964 there was another burst of judicial 'creativity' in the case of *Rookes v Barnard*. The facts in that case were as follows. The British Overseas Airways Corporation (BOAC) had an informal closed shop agreement with the AESD, the draftsmen's union. Rookes was employed by BOAC as a draftsman, and was initially a member of the union. He then resigned. Some fellow employees, who were union members, and a third party, a trade union official, informed BOAC that a meeting of union members had called for Rookes's removal from the draftsroom within three days, failing which they would strike. BOAC then lawfully dismissed Rookes, giving him long notice. Rookes then sued the three unionists for damages for conspiracy.

The High Court upheld his claim, and granted him punitive damages of £7 500. The unionists appealed against this decision to the Court of Appeal, which held that they were not liable for damages for conspiracy to injure as their conduct was protected by s1 of the 1906 Trade Disputes Act. The case then went to the House of Lords on appeal. The question for decision was whether there was any merit in Rookes's contention that he had been injured by a 'civil intimidation'. The case law on this topic was both sparse and ancient. In 1793 it had been held that it was such a tort for the captain of a ship to fire his cannon at islanders in canoes in order to deter them from trading with a rival ship. But that was a clear case of intimidation by violence, and the only possible ground of unlawfulness in the Rookes case was the threat to strike. Could there be any analogy?

The House of Lords answered this question in the affirmative. Of their reasoning, Lord Wedderburn has observed 'what stands out in the speeches of the Law Lords is their determination to reach this result'. Lord Hodson held that a threat to strike was just as serious as a threat to do

violence, perhaps even more so. Lord Devlin regretted that the decision would cause 'difficulties' for unions, but 'he could not hobble the common law' on that account. The decision certainly did cause difficulties for the unions. There was a rash of actions against trade union members until the Trade Disputes Act of 1965 closed this fresh breach in the dyke built by Parliament in 1906.

The process by which the House of Lords arrived at its seemingly confident decision has only recently been revealed. Paterson reveals that when the first conference of the Lords took place in chambers after the initial hearing in *Rookes v Barnard*, Lord Devlin was in a minority of one (or possibly two) which favoured the appellant (*Rookes*). After additional argument all the Lords found themselves to have been persuaded by the speeches of Lord Devlin and Lord Reid, even Lords Pearce and Evershed, who had originally favoured the respondents. This does not prove a conspiracy, or any irregular conduct, by the Lords, but it does demonstrate the fragility of the laths which support the seemingly flawless plaster of the common law. It also demonstrates the possible effect of a strongly-held opinion on a collective decision.

There are many other cases that one could cite in order to support a contention that the judiciary *is* biased against trade unions in Britain, but this is not the place to do it. I propose to turn instead to another line of enquiry. Does the statistical evidence support the argument that such bias exists? This too is something of a vexed question. Can one infer bias from every decision which is adverse to the interests of trade unions? And which decisions should one categorise as adverse?

O'Higgins and Partington, in their unique study of judicial decisions affecting trade union interests, define an adverse decision as any decision which went contrary to the order sought by the union. Using this criterion they analysed 70 reported cases from the period 1871 to 1966. These cases were all ones in which the cause of action arose out of 'industrial conflict'. They found that of the 70 cases, 50 of which were civil and 20 criminal cases, 42 had been decided in a way which could inhibit freedom of industrial action and 28 in a way likely to extend its scope. Although this indicated that there was a majority of 'anti-union' decisions, the researchers concluded that 'there was less statistical evidence of judicial bias than might *a priori* have been expected'.

This finding, the only one based upon the available statistics in Britain, showed that 60% of the decided cases were against trade union freedom of action. The significance of this finding is somewhat limited, without comparative statistics showing the overall trend in all decided labour cases. But let us assume, for the sake of argument, that we can safely extrapolate from the specific to the general and assume judicial hostility to trade union objectives. How can one explain this assumed antipathy? Among the factors which might explain why British judges are likely to have attitudes which are hostile to trade unions are the following.

Social and class background

Lord Devlin appears to accept that the judges are 'conservative' in their dealings with trade unions, but suggests, it would appear seriously, that this should be tolerated because they are oligarchs of advanced years. His solution to the problem is for the judges to be made aware of the

'perils of maturity' by reading books on that topic, including Griffith's *The Politics of the Judiciary*.

Griffith argues, on the other hand, that the judges belong to a small social elite, functioning to a very large extent within a closed social circuit. The family and educational backgrounds of the judges are remarkably similar, that is upper and upper-middle class and public school followed by an Oxbridge degree. The fact that the judges are appointed from the ranks of the most successful barristers also means that they belong to a wealthy economic group. They tend to be of an average age of about 60. They tend to belong to the same clubs and to engage in the same kinds of social activity.

These statistics are both interesting and useful, but there are dangers inherent in utilising them in a deterministic fashion. One such danger is that one then has some difficulty in explaining the forty percent of cases in which the decision favoured the union party. One would also have some difficulty in explaining why Professor Griffith, whose personal background is very similar to that of the stereotypical judge, does not think like a judge!

An important aspect of the judicial background, which may account for decisions adverse to trade unions, is the fact that very few judges have any experience of formal training in the area of industrial relations. This incomprehension of the dynamics of collective bargaining was noted in an address by Donaldson M.R. in which he appeared to suggest that every industrial dispute could be characterised in terms of 'right' and 'wrong'. Griffith describes these views as 'bewildering in their ingenuousness'. Industrial conflicts, he adds, are not of this kind. 'They can be solved only by compromise and by the exercise of economic and political strength, not by the application of legal principles or guidelines'. Although Devlin criticises Griffith on the grounds that he is advocating a 'might is right' doctrine, Griffith's views accord with those of the great majority of industrial relations experts.

To sum up the relevance of judicial background to this topic, the real issue is one which was raised by Scrutton L.J.:

'Labour says: "Where are your impartial judges? They all move in the same circle as the employers and are all educated and nursed in the same ideas as the employers. How can a labour man or a trade unionist get impartial justice?" It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class.'

The legislative background

Many of the decisions which have been adverse to trade union interests in Britain have been the direct result of legislation, invariably introduced by Conservative governments, intended to bring about that very result. Apart from the direct and inevitable consequences of such legislation, the fact that the government is legislating in that way is bound to influence the judges when deciding hard cases in 'grey' areas.

Another possible explanation is the long tradition of statutes penalising breaches of contract by employees and also proscribing combinations. The spirit of such laws may well have outlived the laws themselves.

Public opinion

Although the judges in Britain do not have constitutional authority to perform the same functions as the United States Supreme Court, that does not mean that they do not feel any obligation to take public policy into account in reaching their decisions. Public policy considerations feature in many judgments in the field of industrial relations law, usually taking the form of a conviction that trade unions which are 'too powerful' are contrary to the public interest.

Eccentricity

One would not wish to attach too much weight to this factor. Yet it does seem that in the cases of at least two British judges, Lord Halsbury and Lord Denning, personal eccentricity played a major role in shaping their decisions. In the latter stages of Lord Denning's tenure as Master of the Rolls, his decisions on trade union issues had become so uniformly hostile that they were almost predictable, as was their reversal by the House of Lords on appeal.

SOUTH AFRICA

When one turns to a consideration of the attitudes of the South African judiciary towards trade unions and their members one ventures into even murkier waters. The number of cases that one has to draw upon is very limited and the South African criminal justice system does not encourage public speculation concerning the weaknesses, deficiencies or personal idiosyncrasies of the judiciary. There is also no local equivalent of the O'Higgins and Partington study.

However, one can venture at least one tentative comment on the available court decisions. The South African judiciary is at least as unfamiliar with industrial relations principles as its British counterpart. Many witnesses before the Wiehahn Commission 'criticised the application of labour law by the general courts' but the Commission did not examine the grounds of criticism because it believed

that there were other, more compelling, arguments for the establishment of a specialist industrial court. Some of these witnesses pointed out that (the) general courts must apply legal principles in their hearings and findings but in most labour cases the sociological, economic, political, psychological and other aspects are as important as the legal aspect'.

In a recent case involving industrial relations issues, including unfair dismissal and retrenchment policy, one of the two judges on the bench expressed relief that the Labour Relations Act did not apply to his 'garden boy'. His brother judge commented that with legislation like the Labour Relations Act on the statute book he was at a loss to understand why anyone needed communism. He also observed that the 'lifo' (last in, first out) retrenchment policy, which pays no heed to merit, 'stuck in his gullet'.

There are probably two explanations for such viewpoints. The first is the general unfamiliarity of the judges with the principles of labour law and industrial relations. Labour law only entered the curriculum of most South African universities in the post-Wiehahn era. The second is our Roman-Dutch legal system's preoccupation with individual, as opposed to collective, rights. This latter factor could explain how the Supreme Court could hold in the *Piet Bosman* case that an unregistered trade union has no *locus standi in judicio*, while the Industrial Court held in the *Precision Tools* case that such a union did have *locus standi* in the Industrial Court. There is a clear conflict of paradigms.

Even without a detailed statistical analysis of the existing labour cases one can assert with confidence that we have a long way to go before we can say of our judiciary, as Miliband has said of that in Britain, 'judges, like governments and capitalist interests themselves, have come to recognise that trade unions, far from constituting a menace to "society", could in fact greatly contribute to its stability and help to limit rather than exacerbate social conflict. . .'. But then would Miliband write that in Thatcherite Britain today?□

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