THE TRADITION OF VOLUNTARISM*

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IN reply to the legal probings by Lord Donovan, Sidney Greene, General Secretary of the National Union of Railwaymen, said, 'I would be much happier, with great respect to you, my Lord, if we didn't have anything to do with the law at all'. Asked about the Government's role in collective bargaining Feather said, 'We don't think there should be a third party in collective bargaining. Collective bargaining is between employers and trade unions.' Greene asked Donovan, 'Why do you want to raise all these problems when we've got enough problems as it is?'[1]

In so far as one can speak of any common ideology shaping or reinforcing the attitudes of British trade unions to the state, it is not socialism or the class struggle but a devotion to what is called the voluntary system or, sometimes, *free* collective bargaining. Whatever this may mean—and I shall be arguing that its meaning is very far from precise—there can be no doubt that this ideology is also an established tradition with a considerable force. In recent years both Labour and Conservative Governments have had to learn so obvious a lesson. For the first it was the rock on which *In Place of Strife* foundered or, more exactly, a hasty attempt to curry public favour by introducing emergency legislation which would have included token measures to control strikes.[2] For the second it turned the confidently passed Industrial Relations Act into a grave and manifest political miscalculation and blunder within a year of its being on the statute book. Nothing seems able to produce such a united front of resistance in a trade union movement, normally subject to all kinds of rivalries and divisions, than an affront to its tradition of voluntarism.

But how does one describe its contents and implications? The question is not easily answered. Like all traditions it embodies for the group con-

* At the time of his death Allan Flanders was Reader in Industrial Relations at the University of Warwick. For some months he had been working on a book about the relations between trade unions and the state. The work was not sufficiently advanced to be published as it stands, or to be completed by his colleagues, but this article, which was written as a draft chapter, is complete and stands on its own.

[1] Peter Jenkins, *The Battle of Downing Street*, Charles Knight, London, 1970, p. 54.

[2] Even the key proposal giving the Government powers to impose a 'conciliation pause' in unconstitutional disputes was 'token' in that there would have been great reluctance to use it, and its main purpose was to allay public fears of government inaction. It evoked so strong a trade union reaction partly because it was regarded as the 'thin edge of the wedge' and partly owing to the circumstances surrounding the introduction of emergency legislation. A vivid account of these circumstances has been given by Jenkins, *op. cit.*, Chapter 5. He claims that, although 'they developed an obsessive determination to force legislation through Parliament and the penal clauses became strongly identified with them personally', 'neither Harold Wilson nor Barbara Castle were prime movers'. The policy 'was not determined at their wilful dictates but by the collective decision of a weak government struggling to restore its authority at the end of a long run of bad judgement and bad luck' (p. 94).

cerned 'the lessons of its corporate, social experience'[3] and we shall have to turn to history to find our main clues for an answer. Even so a few introductory points need to be made. It has rightly been said that in 'its original conception, the unifying theme of voluntarism was that workers could best achieve their goals by relying on their own voluntary associations'.[4] This did not apply to trade unions alone but included co-operatives and friendly societies and, in its stress on the virtues of independence and self-reliance, was part of the nineteenth-century outlook of self-help and *laissez faire*. It involved a total distrust of state intervention. 'We rely on our own organisations' meant 'we want no help from governments', not merely 'we do not want them to interfere in our affairs'. In its pure form this was only the ideology of a self-centred craft unionism displayed at its most extreme by the American Federation of Labor under Samuel Gompers. It included opposition to all state measures of social insurance, including unemployment benefit, as well as to any legislation dealing with wages and hours of work.

It need hardly be said that the British tradition of voluntarism does not go this far. A contemporary left-wing trade union M.P., who believes that any 'undermining of the voluntary system' is 'a step towards the Corporate State' and the 'very opposite of the socialism that the trade unions . . . have always stood for' then goes on to explain: 'The movement has not been against legislation that helps the trade unions in their struggle for better conditions. Indeed they press for such legislation. But it has always rejected legislation designed to hinder those struggles.'[5] Although sometimes identified with 'keeping the law out of industrial relations', the voluntary tradition of today cannot possibly be equated with a distrust of all legislation, and whether legislation is thought to be a help or a hindrance to trade unions admits of a very wide range of opinion. Is, for example, legislation giving workers protection against unfair dismissal a help to the trade unions in their struggles? It is almost certain now that, whatever happens to the Industrial Relations Act, the majority of trade unions will want to see some such legal protection and will seek to strengthen rather than weaken the existing provisions. Yet as late as the early 1960s, when the T.U.C. conducted an enquiry among its affiliated unions on their attitude to legislation against wrongful dismissal, unions with a combined membership of 4·6 million out of the total of five million taking the trouble to reply said they preferred to do without it.[6] The balance of the mixture of voluntary and legislative action which trade unions have favoured has changed over the years and has differed from union to union, but the tradition of voluntarism in this country has never excluded a positive attitude towards some kinds of labour legislation.

[3] Allan Flanders, *Management and Unions*, Faber and Faber, London, 1970, p. 279.
[4] Michael Rogin, 'Voluntarism: The Political Foundation of an Anti-political doctrine', *Industrial and Labour Relations Review*, July 1962, pp. 521–2.
[5] Eric Heffer, *The Class Struggle in Parliament*, Gollancz, London, 1973, p. 49.
[6] 'Protecting Workers against Unjustified Dismissal', *The Times*, 15 March 1965.

We are immediately on surer ground when we interpret the tradition in the British context as implying not so much a distrust of legislation as a distrust of courts of law. It is when legislation has the effect, or appears likely to have the effect, of bringing unions and their members into the courts that it meets with almost universal disapproval and the tradition asserts its full force. This is exactly what one would expect given the unions' history and their accumulated lessons of experience. As we know, a central theme of their political history has been that of turning to the legislature to redress disabilities imposed on them by the judiciary. They have had little cause to look on the courts as their friend and more than a few times they have undoubtedly appeared to be their enemy. In 1920 Lord Justice Scrutton frankly admitted some of the reasons for the courts' bias:

> The habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish. This is one of the great difficulties at present with Labour. Labour says 'Where are your impartial Judges? They all move in the same circle as the employers, and they 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.[7]

Earlier in 1911 the then Mr Winston Churchill had told the House of Commons:

> 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 invoved, 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.[8]

The truth in these remarks has not faded with the passing of the years but it is not just suspicion of class bias which has made British unions reluctant to allow the courts to get involved in their affairs. After all, their preference for the voluntary settlement of any industrial disputes is shared by most employers, as has been demonstrated once again by the employers' general disinclination to make use of those provisions of the Industrial Relations Act which were meant to be to their advantage by making

[7] Quoted by K. W. Wedderburn, *The Worker and the Law*, Pelican Original, 2nd edition, 1971, p. 26.

[8] Included by W. Milne-Bailey in *Trade Union Documents*, Bell, London, 1929.

unions discipline their stewards. When the Conservative Government in 1963, by passing the Contracts of Employment Act, made the first, *minor* breach in the 'policy of legal non-intervention'[9] this was as much against the wishes of the British Employers' Confederation as the T.U.C.'s. Moreover in the same year the same Government was still entering a 'solemn solitary dissent' from an I.L.O. recommendation, accepted by an overwhelming majority of other countries, that a national policy should be formulated and pursued aiming at a maximum forty hour week, because this was 'not consistent with the methods by which conditions of employment are normally determined in the United Kingdom'.[10]

So, while trade unions may have had their own additional reasons for wanting to keep clear of the courts, this aspect of voluntarism is also part of a general *British* cultural heritage in industrial relations. One can also argue that it is a very valuable heritage which should never have been placed at risk, but that is not my present concern.[11] The task is to decide what else the ideology of voluntarism implies for trade unions, and how far this is based on fact or fiction.

Having looked at one aspect of voluntarism which has a solid foundation on historical fact we may next with advantage try to uncover some of the fictions. Perhaps the greatest of these which regularly appears as an undercurrent in popular trade union histories is the notion that unions have, as it were, lifted themselves into their present position of power and influence by their own unaided efforts in overcoming employer resistance and hostile social forces. Actually their strikes and struggles are but one part of the story, and not always the most important. Recognition by employers, expressed in a readiness to negotiate agreements with them, has been decisive for growth in the membership of trade unions, and employers have recognized unions not simply because they had to yield to superior power but to advance their own interests.[12] Two different employer interests have predominated in bringing about union recognition. In some industries with competitive product markets employers have been interested in the assistance which trade unions could offer them in market control, at the very least in 'taking wages out of competition'.[13] In other, mainly large-scale, industries on the other hand the main motive has been to secure union assistance in managerial control, in making and upholding

[9] For the sake of brevity one is forced to resort to this somewhat misleading phrase. Previously public policy had been not to intervene without the prior, joint agreement of the T.U.C. and the central employers' association. There were, of course, the traditionally accepted fields of legal intervention such as those entered by the Factory and Truck Acts and similar legislation.

[10] Andrew Shonfield, *Modern Capitalism*, Oxford University Press, London, 1965, p. 112.

[11] A short statement on 'the value of the voluntary principle' can be found in Allan Flanders, *op. cit.*, pp. 173–8.

[12] Although powerful trade unions may be able to put employers under severe pressure through their control of labour supply, their resources are always in the last resort inferior to the resources which employers could mobilize for a fight to the finish. Plants can be closed and investments written off while fortunes remain intact, but men are risking their very livelihood in a sustained strike.

[13] This was important for the early growth of collective bargaining in industries like building, printing, cotton and coal in this country.

rules to regulate work and wages for the sake of gaining employee consent and co-operation and avoiding costly strikes.[14]

Moreover it is not only employers, through their attitudes and organization, which have helped to promote union growth. Governments too have played their part, not least by the impact they have had on employer attitudes and organization. The two great periods of membership growth in British union history have been 1910–20 (though this one was followed by a sharp decline), and 1933–48. Government action in two world wars and in the immediate post-war years, if administrative more than legislative, can be shown to be causally linked with much of this growth.[15]

All this is not to say that trade unions get their members without making any effort to organize them, or regardless of their achievements, or without sometimes being involved in strikes for recognition. That would be nonsense. It is also true that Governments have acted partly because they were particularly concerned to gain trade union goodwill in time of war. But the crude notion that British unions have dispensed with any external assistance in obtaining their growth is greatly at odds with the facts.

Another closely related point arises out of the question of whether British trade unions, in accordance with their voluntarist tradition, have been firmly opposed to any legal support for collective bargaining. On this it must be said that if rejection of legal support has been a principle then the unions have applied Bismarck's belief about the state to themselves. They have acted on the assumption that no union 'has the right to sacrifice its opportunities to its principles'.[16] On notable occasions important trade unions have favoured the legal enforcement both of their procedural and of their substantive agreements. The railway unions were very much in favour of including the industry's wage negotiation and disputes procedure in the Railways Act, 1921, and the procedure was not finally converted into a voluntary agreement until 1935. Given the pre-war resistance of most of the companies to full recognition of the unions, they felt more secure in having their agreements supported by law. In 1934 the cotton unions helped to promote the Cotton Manufacturing Industry (Temporary Provisions) Act which enabled the Minister of Labour to make wages provisions of the relevant agreements compulsory at law, following enquiry into their representative character on joint application from the two sides. A previous Board of Enquiry had reported that the weaving section of the industry faced the possible collapse of collective bargaining. This statute had to be renewed from year to year but was not revoked until 1957.

These are exceptional cases but it must be appreciated as well that the

[14] Obvious examples are railways, iron and steel, chemicals and oil refining.

[15] The proposition has been documented for white-collar employment in George Sayers Bain, *The Growth of White-Collar Unionism*, Clarendon Press, Oxford, 1970, Chapter IX.

[16] Quoted by Nora Beloff, *Transit of Britain*, William Collins, London, 1973, p. 231.

unions have found a partial substitute for the legal support of collective agreements in other devices. The first of these is the Fair Wages Clause in national government and local authority contracts and in some legislation providing industries with public subsidies.[17] This began to bite from 1909 onwards. Much later, derived from the experience with the 1940 wartime Order 1305 and its successor Order 1376 there came to be incorporated in permanent legislation in 1959 a procedure which enables trade unions to obtain a compulsory arbitration award to compel any reluctant employer to observe their wage agreements.[18] It is noteworthy, of course, in all these cases in which the power of the state has been used to lend support to collective bargaining that the forms chosen have generally avoided the unions becoming entangled in legal process.

The history of the debate even over the direct legal enforcement of agreements has a chequered pattern rather than a consistent theme. The short-lived national Industrial Council 1911–13, which included a most representative, if moderate, body of trade union leaders, came out in favour of the principle but no notice was taken of the recommendation.[19] The Whitley Committee envisaged that 'it may be desirable at some later stage for the state to give the sanction of law to agreements' made by its proposed Joint Industrial Councils, provided the initiative came from the J.I.C.[20]

Subsequently the movement for permissive legislation on these lines gained sufficient ground, including strong support from some trade union leaders, to bring about the passing of a private member's bill by 236 votes to 16 under the first minority Labour Government. Only the accident of dissolution prevented it from becoming law. A citadel of opposition was the Ministry of Labour itself which 'throughout persisted in seeing the request for *permissive* legislation as one for the "imposition of compulsory powers"'.[21] Successive Conservative Ministers were happy enough to accept this point of view but even the Labour Minister in 1929–31 took the official line and insisted that there could be no half-way house between a trade board and a wholly voluntary system of negotiation. The T.U.C. now supported permissive legislation,[22] and the Minister of Labour in the National Government of 1932, no doubt with his tongue in his cheek, suggested that legislation might be introduced when the National Confederation of Employers' Organisations had also been persuaded to give its support.[23]

[17] For its present provisions see Wedderburn, *op. cit.*, pp. 204–7.

[18] Under the so-called 'claims' procedure of Section 8 of the Terms and Conditions of Employment Act, 1959. For details and earlier history see Wedderburn, *op. cit.*, pp. 199–204.

[19] For the terms of their recommendation see Roger Charles, S. J., *The Development of Industrial Relations in Britain, 1911–1939*, Hutchinson, London, 1973, p. 69.

[20] *Ibid.*, p. 106.

[21] *Ibid.*, p. 211.

[22] In 1925 Congress resolved in favour of giving national agreements freely entered into by J.I.C.s or similar bodies the same validity as trade board agreements when the parties involved requested it.

[23] Charles, *op. cit.*, p. 212.

Union attitudes to the use of law for regulating hours, as well as physical conditions of work, also indicate that there has been no consistent rejection of regulative legislation. Naturally at times or in areas of industrial weakness there has been the greatest readiness to resort to the method of legal enactment, either because collective bargaining was unavailable or else because its results were unacceptable.

The fact that since 1924, under Rule 2 of its Constitution, the T.U.C. has included among its objects a *legal* maximum working week and a *legal* minimum wage for each industry or occupation may have no practical significance for its present policy, since it is not actively pursuing either of these universal objectives. But their preservation, apart from being a sign of inertia, indicates that they are not taken to be 'detrimental to the interests of the trade union movement or contrary to the declared principles and policy of Congress'.[24]

The conclusion that might easily be drawn from these various aspects of the British unions' readiness to turn to legislation or other forms of external assistance, when the reasons for seeking it appeared strong enough, is that they are, first and foremost, opportunistic bodies with no underlying values or principles to guide them. We set out from a different assumption and anyone with an understanding of trade unions intuitively knows that while they do not articulate their values they are none the less real. The fact that they are adaptive and change their methods according to their circumstances implies no more than that they are not the victims of doctrine and dogma.

The great social triumph and vindication of voluntarism in British industrial relations came during the Second World War and this helps to throw more light on the tradition's underlying values. The First World War had had almost the reverse effect, ending as it did in a cumbersome system of state regulation, and few of the inter-war years had made its advantages seem an unqualified blessing. But voluntarism did work amazingly well and more or less to everyone's satisfaction after 1940, so much so that, for some years when the war was over and throughout the fifties, it became almost an unchallengeable article of faith. This was due in no small measure to the powerful presence of Ernest Bevin as Minister of Labour in the wartime Coalition Government. His biographer has written about 'the philosophy which lay behind his actions at the Ministry'.

> When Bevin talked about 'voluntaryism' (his own word for it) he meant something more than the traditional trade-union opposition to industrial conscription. He started with the question: how could a country with the democratic institutions of Britain hope to match the degree of organisation already achieved in Germany? Not, Bevin answered himself,

[24] This is the wording of Rule 13 giving the grounds that would justify the General Council investigating the conduct of any affiliated organization and possibly suspending them from membership. Only Congress has the power to expel. One must assume that the Constitution is not self-contradictory.

by discarding its own traditions and trying to copy the totalitarian methods it was fighting against: this was the mistake of those who wanted to treat the whole nation in wartime as if it were an army and organise it on military lines. The right way was to stick to the basic principle of democracy, government by consent, and rely on the willingness of people in an emergency to make greater sacrifices willingly than they could be dragooned into making by compulsion. This, he believed, could be more effective than dictatorship, provided that besides appealing to people, you took practical steps to remove the obstacles which inhibited or impaired consent . . .

Bevin had too much experience of organising men to suppose that the country would get through the war without having to apply some degree of compulsion to labour . . . 'Voluntaryism' did not rule this out, did not mean that the Government had to rely solely on appeals for volunteers; what it did mean was that, instead of starting with a full-blown system of industrial conscription, you began from the opposite end, demonstrating to people that it was not only necessary but fairer to employ compulsory powers and keeping their use to a minimum. When the time came Bevin proved that he was quite prepared to issue orders if he thought this necessary: but when he did, it is not playing with words to say that it was upon a basis of consent, and that consent was more willingly given because he had plainly exhausted the possibilities of purely voluntary methods first.[25]

Voluntarism's greatest wartime achievements were in wages policy and the handling of industrial disputes. Already in 1929 the Treasury had prepared a memorandum on 'The Course of Prices in a Great War' which advocated direct state control of wages as a necessary part of an anti-inflation programme if war should come.[26] This was still their departmental attitude on the Lord President's Committee in the lengthy series of discussions on the subject which took place in 1940–1. Bevin, as a leading member of the Committee and of the Cabinet, resisted this view and his policy, strongly supported within his own Ministry, prevailed. It has been described as 'a combination of faith and works—faith in the moderating influence of the trade unions and action to control the cost of living'. The latter included, apart from rationing, price controls, food subsidies and utility clothing, the acceptance of a cost of living index which became more and more a statistical fiction. 'If prices could be stabilised, Bevin argued, it would be possible to keep wage rates steady as well, since it was the rising cost of living which, far more than anything else, had been the chief stimulus to wage claims in the first eighteen months of the war.'[27] But it was the remarkable experiment in compulsory arbitration under Order 1305 which served as the cornerstone of the policy for wages.

Shortly after he had taken office in the crisis atmosphere of 1940

[25] Alan Bullock, *The Life and Times of Ernest Bevin, Vol. II: Minister of Labour 1940–1945*, Heinemann, London, 1967, pp. 44–6.

[26] W. K. Hancock and M. M. Gowing, *British War Economy, History of the Second World War*, H.M.S.O., London, 1949, pp. 47–8.

[27] Bullock, *op. cit.*, p. 87.

Bevin asked his newly created Joint Consultative Committee of employer and union representatives to devise a method to remove wages from the field of controversy for a few months and put forward two suggestions for discussion: that the Government treat all industries uniformly and review the stabilized wage structure at four-monthly intervals, or that compulsory arbitration or some other independent element be introduced into wage negotiations. The T.U.C. representatives were opposed to the first proposal and, although the employers were more divided in their attitudes, a joint statement was agreed which was gladly accepted by Bevin and became the basis of Order 1305. This, far from being a provisional measure, set the course in industrial relations for the duration of the war and for the years of post-war reconstruction up to its repeal in 1951. The National Arbitration Tribunal, established under the Order, was not used extensively. When a dispute was reported to the Minister the attempt was first made to settle it by voluntary methods and only when these failed was it submitted for a legally binding arbitration award. Of the 4,510 cases reported over the decade or so that the Order was in force, only 2,092 were referred to the N.A.T. There is no comparative figure for the total number of voluntary settlements arrived at throughout this period, although obviously they were vastly in excess. Even the number of official conciliation settlements was considerably greater every year. However, in the ten year period 1941–50 there were also more than 17,000 industrial disputes leading to stoppages of work in the United Kingdom. Why in view of these figures is it justified to refer to Order 1305 as a triumph for voluntarism?

In the first place the effect of the Order was greatly to strengthen voluntary collective bargaining, not to weaken it, as provisions for compulsory arbitration were liable to do. It did so in more ways than one. Apart from the priority accorded to voluntary settlements already mentioned, the Order compelled employers to observe 'recognized' terms and conditions of employment which meant those fixed by collective agreements, so that the non-federated employer, who previously had refused to recognize unions, could be compelled by an arbitration award to fall into line. The use of this power lay for all practical purposes within the discretion of the unions so that the long-standing problem of legal enforceability of collective agreements was solved in a manner that raised no union doubts. When in 1946 the T.U.C. by a fairly large majority rejected a resolution calling for the immediate repeal of Order 1305, a leading official of the National Union of General and Municipal Workers told the delegates:

> I feel that quite a number of unions affiliated to this Congress were very thankful to have the opportunity of compelling reluctant employers to go before the Tribunal—those employers who generally refuse to meet the unions and discuss and negotiate anything which may be put forward . . . I

> suggest that prior to the inauguration of the National Arbitration Tribunal there was really a gap in the machinery for ultimate negotiation and settlement . . . The Tribunal was brought in during the war to compel people who would not be reasonable enough to negotiate to face up to the question in the light of publicity, fact and reason before a body which would give a decision after hearing the case. Are we going to throw that away? Are we going to throw something away which can be the absolute final court after every other bit of machinery has been exhausted?[28]

But this judicious use of compulsion to extend the voluntary system had been accompanied by a general prohibition on strikes and lockouts. One of the main purposes of the Order was to preserve industrial peace while the nation was at war. Did it fail in this? Success is a relative question. Most of the disputes leading to stoppages of work were local and of short duration. A telling comparison is between the annual average of working days lost during the two world wars: 2·0 millions for 1940–5 was less than half of 4·2 millions for 1915–18. This was moreover roughly the normal level of total days lost over the pre- and post-war years in the absence of any national strikes. One could well look on such an amount of a friction as a necessary safety valve. The Coalition Government appear to have taken such a view by giving up any attempt to prosecute strikers, after looking rather silly in the famous Betteshanger Colliery case.[29] During all the war years there were 109 cases of prosecution of workpeople, involving 6,281 individuals, and two of employers for taking part in illegal stoppages of work. Peace was preserved not by punishment but by the improved machinery for settling disputes and the support given by the unions at all levels to the war effort.

Having found this wartime measure to have been of value, most trade unions were content to keep it in force over the difficult years of transition from war to peace. The legal restrictions on the right to strike which it nominally imposed were unprecedented in peacetime. They were only acceptable to the unions because they were temporary, and also because they were not enforced. Significantly, as soon as the attempt was made in 1950 to prosecute strikers under the Order—some leaders of a gas strike in north London—consent for its continuation was withdrawn. The courts were being used to punish strikers in violation of the traditions of the movement. Even then the unions were loath to sacrifice machinery that they had used to good purpose and there followed that quite unique experiment in industrial relations, the Industrial Disputes Order, Order 1376. This combined the earlier machinery and procedures (though somewhat modified) with an absence of any restrictions on stoppages of work. The Donovan Committee called it unilateral arbitration, that is arbitration

[28] Trades Union Congress, *78th Annual Report*, 1946, pp. 369–70.

[29] The Secretary for Mines, although himself a former miners' leader, decided on prosecution against the advice of the Ministry of Labour, but he obtained prior Cabinet backing. For details see *Royal Commission on Trade Unions and Employers' Associations, 1965–1968*, Report, Cmnd. 3623, H.M.S.O., London, 1968, Appendix 6, pp. 340–1.

available at the request of only one party, but with binding awards. The employers eventually argued that in practice awards were binding only on them because, although they were forced to pay the terms of any award that went in the unions' favour, they could not prevent the unions from re-opening negotiations or threatening to strike when dissatisfied with an award. It was in fact on the employers' insistence that the Government hastily withdrew Order 1376 and the Industrial Disputes Tribunal ceased to exist after February 1959.

With these experiences in mind we may return to the question of the values embodied in the British union tradition of voluntarism. They certainly do not involve a categorical rejection of compulsion or legislation when the case for either is regarded as proven. On the other hand that case has to be a strong one supported by experience, and there is a decided preference for voluntary solutions. But there is more to it than that. The passage quoted on Bevin's 'philosophy' expresses the tried and tested convictions of an astute and highly successful trade union leader. No one else could have brought such convictions into the political leadership of the nation in the handling of its 'labour problems' in a time of extreme crisis and made them work. The reasons are not hard to find. They lie in the nature of his job when a man fills it with distinction.

Trade union leaders must lead or they are a failure. By and large they cannot get their way by commands, orders or coercion. They are not without power and have to be ready to use it on occasions. If they are any good, they certainly have a strong personal influence on policy decision. Only a very naïve view of democracy sees it as incompatible with strong leadership. But there are few unions in which successful leadership does not make very exacting demands in terms of the exercise of persuasion and the gaining of consent. The House of Commons is a debating club by comparison and facing an election every several years is very different from having constantly to cope with dissatisfied groups and the political processes of collective bargaining which revolve around the making of acceptable agreements. Naturally trade union leaders come to trust and to value the requisite skills for finding the workable compromise; they are better at it than people who have spent most of their lives telling other people what to do.

So the values of voluntarism bring us back to the theme of democracy —as trade unions interpret it. They want to order their own affairs according to their own preferences with as little outside interference as possible. This applies at all levels of trade union organization, to union affairs within a plant in their relations with district or higher union authorities, as well as to national unions and their relations with the state. Self-government is the essence and a concern for it can hardly be treated as of ephemeral or trivial value.

In the nature of things this concern cannot be expressed in absolute terms. The extent to which external aid, including legislation, is sought

depends on the need for it, and trade unions try to assess how much they will be losing or gaining control over what they take to be their own affairs. When their affairs are brought into a court of law it is particularly evident that they are being dealt with in a manner and on grounds that are totally alien to the working of trade unions.

We see then that there are deeper values involved in the British union tradition of voluntarism and that it would be quite wrong to assume that the unions' attitudes to legislation and government intervention are governed only by opportunistic reasons. We might rather ask whether their attitudes are realistic and adaptable enough. Traditions do, after a time, become inflexible and a substitute for thought, and trade unions over the post-war years, in company with many other British institutions, have been remarkably slow in recognizing where their views on the role of government in industrial relation were due for revision, if only the better to advance their own interests. The very success of voluntarism, as conceived during and immediately after the war, produced a mood of complacency which remained almost intact until the second half of the sixties. In spite of incessant activity on wage claims caused by the inflationary spiral the trade unions were in a state of stagnation so far as policy innovation was concerned. There are two basic questions about this policy innovation which need to be asked. The first relates to what is outmoded in the voluntary tradition and the second to how this is likely to be changed?

In answering the first question I would like to draw on the thinking of the man who, among the most distinguished academic lawyers, has probably shown most understanding and appreciation of voluntarism in British industrial relations, Professor Otto Kahn Freund. In a notable lecture on 'Trade Unions, the Law and Society'[30] he poses the central dilemma that is rarely brought out so clearly:

> In a sense the position of trade unions in society today is paradoxical. They are private, voluntary and autonomous organisations, but they discharge indispensable public functions. Some of these have been conferred upon them by legislation or administrative practice, through membership in innumerable governmental institutions, committees, tribunals, and through rights of consultation throughout the legal system. But some public functions have been assumed by them through their own practice.[31]

He instances 'closed shop' practices, leading to control of the labour market, as public functions assumed by union practices but his argument has a wider application. The whole of the institution of collective bargaining could, on the same logic, rightly be regarded as a public function. The fact that sectional or, if you will, private interests clash in the 'bargaining

[30] The Gaitskell Memorial Lecture of 1970 at the University of Nottingham. Reproduced in *The Modern Law Review*, Vol. 33, No. 3, May 1970, pp. 241–67.
[31] *Ibid.*, p. 243.

process' (i.e. in the settlement of disputes) should not obscure the social necessity for agreements on a body of rules to regulate employment relations. It is possible to describe collective agreements (as has been done) as 'agreed industrial by-laws'.[32] If it is suggested that they are only the equivalent of *private* law, then it must also be admitted that some form of regulation is indispensable in modern society, which for good reasons prefers collective bargaining to state regulation on many subjects. The case for legal or government support of collective bargaining rests on arguments of this sort.

But this is, of course, only one side of the paradox or the dilemma. On the other side the social value of the institution of collective bargaining, indeed of trade unionism itself, lies in its important contribution to representative self-government in the political and social framework. And that contribution *may* be imperilled if the state, in the name of the public interest, seriously restricts the automony and therefore the independence of the trade unions. As always the path of wisdom lies in finding the golden mean between mistaken extremes. It is wrong to expect trade unions to abandon their primary responsibility to look after the interests of their own members and transform themselves into instruments for the execution of government policy. But it is equally wrong for trade unions to act as if they had no other responsibilities in present-day society and were under no obligation to consider the wider social impact of their conduct. What has become increasingly outmoded in voluntarism is the notion that each trade union should enjoy an unqualified autonomy or that collective bargaining can continue to be free in the sense that it acknowledges no higher principle than *laissez-faire*.

But we must also be careful not to throw the baby out with the bathwater and here another part of Kahn-Freund's argument is relevant. He has important things to say about what the law can hope to achieve in the realm of industrial relations, a subject on which a great deal of nonsense has been talked. First, what it decidedly cannot achieve:

> The law is likely to be a failure whenever it seeks to counteract habits of action or of inaction adopted by large numbers of men and women in pursuance of established social custom, norms of conduct or ethical or religious convictions . . . In a country in which statutes are deliberately couched in an esoteric language invented by lawyers for the use of lawyers it is difficult to rely on the educative role of legislation. Most legislation operates not by the lesson it teaches or the sermon it preaches but by the promise of rewards or the threat of deprivations attached to its observance or breach, that is, by the expectation of its enforcement. Legal norms have their social effect through legal sanctions, and sanctions cannot be applied to counteract the spontaneous conduct of amorphous masses.[33]

[32] In the prefatory note to the *Report on Collective Agreements between Employers and Workpeople in Great Britain and Northern Ireland, Vol. I*, H.M.S.O., London, 1934. No further volumes were ever published.

[33] Kahn-Freund, *op. cit.*, p. 241.

Applied to our present subject, these are the grounds for suggesting that the tradition of voluntarism cannot be legislated *against*. This is not to say that legislation can play no part in changing it; only that legal sanctions are not in themselves an effective means of changing popular conduct which is motivated by deep-seated convictions. The conduct of organizations is another matter and this may more easily be regulated by law. It is a 'sociological commonplace', Kahn-Freund suggests, that the 'scope of the law grows as organisation in society supplants spontaneity'.[34] There are, however, other reservations which have particular application to trade unions and on these he cites the earthy but eloquent similes of a famous Harvard law teacher, Professor Zechariah Chafee.

> He analysed the attitude of the courts here and in the United States, and . . . tried to formulate the policies which lie behind these attitudes. One of these is what he called the 'living tree' policy, another is the 'dismal swamp' policy. This means that the court, if it is well advised, will recognise that autonomous bodies such as trade unions develop their own customs, norms, institutions, mores, and that these must be allowed to grow like a tree without being stunted by the law. And often, to change the simile, these mores and norms—think of union rule books—are so involved and obscure, intractable and inaccessible, that an outsider, such as a judge, who seeks to penetrate them, will soon lose his foothold in a 'dismal swamp'. The trade unions are entitled to claim, especially in this country, that their norms and institutions express a 'sub-culture' and that the courts have in the past shown their inability to understand it.[35]

These are two powerful arguments supporting legal non-intervention in union affairs but there is a third, the 'hot potato' argument. Problems relating to the control and regulation of the labour market are policy and power problems to be decided by the appropriate authorities (government, unions and employers in their various relations) and not by 'a court which is ignorant of these things and has no access to relevant facts'. Otherwise there is a danger of it becoming an instrument 'in a power struggle made up to look like a fight for human rights and civil liberties.'[36]

None of these arguments, let it be stressed, totally rules out the use of law for the regulation of the conduct of trade unions, and Kahn-Freund proposes a cautious extension in the legal protection of individual members' rights to prevent marginal abuses of power. But it is clear that the law is a very inadequate, dangerous and dubious means for trying to modify any established modes of conduct of trade unions, not to speak of their members in the workplace where it is likely to have little or no force whatsoever. Yet the voluntary tradition will have to be modified, and public policy, even legislation, is likely to have a hand in the matter. The question is basically our second one of how traditions are changed.

[34] *Ibid.*, p. 241.
[35] *Ibid.*, pp. 265–6.
[36] *Ibid.*, p. 266.

Fortunately we have a classic comparative case to demonstrate the answer, the change in the traditions of organized labour in the United States.

Prior to 1932 no trade union movement in the world had so deep, extreme and declared a commitment to voluntarism as the American Federation of Labor. Today that no longer holds. On the contrary all labour unions in the United States, including those affiliated with the A.F.L.–C.I.O., have come to accept that all their activities should be governed by an extensive framework of legal rules. Voluntarism, in the sense of opposition on principle to legal support and regulation, is as dead as the dodo. How has this come about? First we must examine the tradition in its American context more closely.

The extent and the character of the American unions' earlier commitment to voluntarism has been the subject of some dispute. What is not in doubt is that the A.F.L. nationally under Samuel Gompers carried it to the lengths of opposing not only any minimum wage laws for men[37] and any legislation for regulating their hours of work but almost the whole gamut of social legislation favoured by most other reformers, such as unemployment and compulsory health insurance and, for a time, even old-age pensions.[38] It has been shown, however, that this does not hold for many of the 'local' state federations of labour which were in closer touch with rank-and-file opinion and more open to other political and ideological influences.[39] These facts provide further supporting evidence for the theory advanced by Rogin in 1962 that voluntarism 'was above all an organization ideology, serving organizational needs'. 'Voluntarism, by ignoring the problems of power in the name of an abstract defense of freedom, legitimized the existing power distribution and attacked the legitimacy of attempts to change it,'[40] including those of his socialist critics who Gompers came to detest. In short, it provided a moral defence for a ruling bureaucracy indifferent to the plight of the unorganized who were treated with disdain. Not the least interesting function of this ideology, according to Rogin, was the ambiguity of its political implications. While the mainly craft unions constituting the A.F.L. at this time were not greatly interested in national (federal) legislation, local unions were concerned with licensing and apprenticeship laws, political pull for obtaining contracts and help in strikes, not to mention a share in graft. By keeping the unions free from party allegiances nationally, voluntarism left the city locals free to form close political alliances with city machines to get their share of patronage.

But ideologies which are traditions acquire a force of their own which

[37] Generally protective legislation was favoured for groups said to be unable to help themselves, and these were mainly women, children and federal employees. But Gompers is on record as opposing a New York State minimum-wage law for women. See Rogin, *op. cit.*, p. 533.

[38] This was changed at the 1929 A.F.L. Convention when Gompers' position was reversed. Irving Bernstein, *The Lean Years*, Houghton Mifflin, Boston, 1960, pp. 484–5.

[39] See Gary M. Fink, 'The Rejection of Voluntarism', *Industrial and Labor Relations Review*, January 1973, pp. 805–19.

[40] Rogin, *op. cit.*, p. 529.

sustains their influence even when they have become dysfunctional in meeting narrow organizational needs. That was the fate of voluntarism as the Great Depression deepened after the Wall Street crash towards the end of 1929.

One has to appreciate the straits to which the unions and their members had been reduced by the end of 1932. Even their nominal membership had dropped below three millions, which represented about one in twenty of the nation's labour force and was exceeded by the number of unemployed by four to five times. Many of the unions were deeply in debt despite drastic cuts in the numbers and pay of their staff. The once powerful miners were in the most desperate position of all for, in the words of one historian, 'the coal industry was in a state of complete demoralization'.[41] How did the A.F.L. respond to this unparallelled crisis?

The essence of the Gompers' tradition had been that 'The state and the trade union could not complement each other; they could only compete'.[42] But where else than to the state could the workers turn for help? 'Certainly not to the trade union, which was itself bordering on collapse.'[43] Yet it was not until its convention in 1932, on 30 November with Roosevelt as President, that the A.F.L. *began* to accept the simple logic of this situation. For the first time it endorsed unemployment insurance. On the same day, however, another resolution was passed with greater enthusiasm which envisaged a *compulsory* thirty-hour week. When the President came to make up his package of promised New Deal measures, he questioned the value of a maximum hour law unless it was accompanied by legislation to maintain wages.[44] Such a departure from voluntarism was still too great for the A.F.L. to accept. It advanced the old argument that minimum wages would soon become maximum wages. As late as 1937 George Meany was still opposing the New York State Governor's request for a minimum wage for men,[45] although in the next year, in order to outmanoeuvre the C.I.O., the A.F.L. supported its own version of the Fair Labor Standards Act, which fixed a low national minimum wage, and before long joined forces with the C.I.O. to defend the Act against attempts to weaken it.[46]

Enough has been said to indicate the blinding effects of ideology in the A.F.L.'s slow and reluctant acceptance of social and labour legislation under the stress of a severe crisis. But the changes in legislation which had the greatest long-term consequences for organized labour in the United States have yet to be mentioned. The new legal framework for collective

[41] Bernstein, *op. cit.*, p. 389. See his Chapter 10 on 'Catastrophe in Coal', pp. 358–90 for the part played by John L. Lewis who had supported Hoover.
[42] *Ibid.*, p. 347.
[43] *Ibid.*, p. 345.
[44] Rayback, *op. cit.*, p. 327.
[45] Joseph C. Goulden, *Meany—The Unchallenged Strong Man of American Labor*, Atheneum, New York, 1972, p. 47.
[46] Walter Galenson, *The CIO Challenge to the AFL—A History of the American Labor Movement, 1935–1941*, Harvard University Press, Cambridge, Mass., 1960, pp. 615–6.

bargaining, that was eventually to extend it to the great majority of manual workers, had two corner-stones, the first being laid before voluntarism began to be abandoned.

These were the Norris-La Guardia Act of 1932 and Section 7(a) of the National Industrial Recovery Act of 1933. One of the main effects of the first piece of legislation was severely to restrict the role of the courts in industrial disputes by issuing injunctions. It also banned the 'yellow-dog contract' (making non-unionism a condition of employment) and generally recognized the rights of labour to organize and bargain collectively. The purpose of the 1933 Act was to aid business recovery by permitting industry to write codes of fair competition. Section 7(a) insisted that every code must provide 'that employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from interference, restraint or coercion . . . in the designation of such representatives'. Employers were not to make their employees join company unions, a form of evasion of the 1932 Act which had spread rapidly.[47]

But Section 7(a) was no more than a starting point. Employers ignored it or claimed exemption and there were no effective means of enforcement. Its immediate importance was symbolic: workers responded to what they saw as an invitation to join or form independent unions under government protection. The greatest gains came first where organization was already well established in coal mining and the clothing industry. Yet by 1935 43 per cent of industry had no union organization, 20 per cent had company unions, 7 per cent had both company and independent, leaving only 30 per cent where workers were represented solely by independent unions.[48] The same year saw the passing of the National Labor Relations (Wagner) Act which, by setting up the National Labor Relations Board, enforcing the unions' right to recognition when they had majority support, and deterring employers from engaging in a range of 'unfair labour practices', gave solid legal support to collective bargaining. The constitutionality of the Act was contested and only upheld by the Supreme Court in April 1937 after Roosevelt had enlarged the membership of the Court in order to secure the result. This most decisive political event in the annals of American labour was actually opposed by a minority of members of the A.F.L. Executive Council.[49] If the decision of the Court had gone the other way one historian doubts whether the new industrial unions in the C.I.O. could have survived the economic recession of 1937–9.[50]

We do not need to take the story much further to bring out the lesson

[47] See Rayback, *op. cit.*, pp. 327–8.
[48] *Ibid.*, pp. 329–30.
[49] On a motion to approve the plan for 'packing' the Supreme Court nine votes were cast in favour and three against, with two abstentions. Galenson, *op. cit.*, p. 617.
[50] *Ibid.*, p. 611.

relevant to the argument of this article. George Meany said to his biographer in defence of his earlier attitudes: 'We were a little afraid of the law getting into the picture, on the theory you start to depend on the law to organize, the first thing you know you'll be controlled by law'.[51] That might be the wisdom of hindsight, but in any case it has proved to be true. American trade unions have continued to gain from government support, especially from the operation of the War Labor Board[52] and, much later, through the changed attitude to the union representation of public employees which began with President Kennedy's Executive Order 10988 in January 1962.[53] Equally they have become subject to various legal controls, a process that started with the Taft-Hartley Act of 1947 and was extended by the Landrum-Griffin Act of 1959 and the Civil Rights Act of 1964, ignoring state legislation and statutes relating to particular industries. While some of this legislation, notably the 1947 Act, met with strong union opposition at the time, there has never been any suggestion from union quarters that they would like to dismantle the general legal system regulating labour relations and return to unbridled voluntarism. Their conversion in this respect has been complete.

If one now asks why this occurred, what destroyed the blinding influence of the old voluntarist ideology, the most important part of the answer must be *favourable experience of legal support.* True, the whole composition of the American labour movement changed after 1932 with the rise of the C.I.O. New unions appeared for whom much of the past A.F.L. tradition was meaningless or anathema. But the old unions also changed their outlook and shared in the growth of membership and collective bargaining. To represent the change as being simply from craft to industrial unionism is mistaken on many counts. For one thing, the old A.F.L. had some strong industrial unions within its ranks, as in coal and clothing; and for another, craft spirit and practice have continued to survive. This has been asserted even in the midst of that most self-conscious of industrial unions, the auto workers.[54] Quite apart from the rise of the C.I.O., the gradual process of reluctant conversion of at least the greater part of the A.F.L. has been described, and always the lever of change was experience: unfavourable experience challenging the old ideas and then favourable experience supporting the new ones. It was favourable to the organizations as such, as it helped to promote their growth, but even more to their members who bargained more successfully and above all conquered a new range

[51] Goulden, *op. cit.*, p. 31.

[52] The Board was composed of 'independents' who were sympathetic to organized labour. Its first major substantive decision was on union security or the 'closed shop'. The solution adopted was the 'maintenance of membership' plan which greatly assisted some unions who had not yet gained a union shop and was much resented by employers. See *ibid.*, p. 96.

[53] This was rather over-praised by Meany as 'the equivalent of a Wagner Act for public employees' (*ibid.*, p. 327) but he was a Kennedy fan. It was more in the way of a first step.

[54] In 1957 their union, U.A.W., had to accept the necessity for separate and largely autonomous bargaining arrangements for the skilled crafts among its members.

of rights for themselves in industry.[55] The conclusion is to be expected. 'The deeply-engraved lessons of past experience can only be erased by the consistent lessons of a different experience. In a world where tradition rules, old traditions can only be conquered by creating new ones.'[56]

[55] The above account has concentrated on changes in legislation because voluntarism is the subject, but the rights were not won without many battles. Most of the days lost through strikes from 1936–41 were over recognition and organization. The picture changes after the war and the proportion declines to a small fraction. See Galenson, *op. cit.*, p. 605.

[56] Flanders, *op. cit.*, p. 288. also for a more theoretical statement of a supporting argument, pp. 278–82.