

# UNTYING WORKERS' HANDS:



TRADE UNIONS AND THE 1990 INDUSTRIAL RELATIONS ACT



THE WORKERS' PARTY



# INTRODUCTION

This proposal by the Workers' Party is located within the Party's understanding of trade unions and their role and struggles. Recent decades have witnessed a major assault against the trade union movement and the rights of workers, and indeed against the very idea of trade unionism. However, trade unions remain mass organisations, and they potentially offer both a site of resistance to attacks on the working class, and a vehicle for raising class consciousness and for progressive interventions in political life. Trade unions also present a forum for protecting and advancing the interests of the working class, both in individual workplaces and at a broader societal level.

In this context and bearing in mind the current constraints referred to in this document, both within the trade union movement and society at large, while the ambition for repeal of the 1990 Industrial Relations Act may appear attractive, current conditions could render this a hostage to fortune. Accordingly, the Workers' Party proposes an immediate campaign to amend the current legislation. This is a modest interim step while retaining the objective of a comprehensive Trade Union Rights and Freedoms Bill which will replace the current legislation on industrial relations and secure better protection for organised labour and the defence of its political freedoms.

# CONTENTS

## **Section 1:**

General historical introduction to trade unions and the law – Combination Acts – Conspiracy and Protection of Property Act 1875 and the Trade Disputes Act 1906 – Background to the Industrial Relations Act 1990.

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## **Section 2:**

An outline of the Industrial Relations Act 1990 – subsections dealing with Immunities – Primary and secondary picketing – Balloting Provisions – Injunctions – Commentary on these provisions.

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## **Section 3:**

The 1990 Act in operation – Review of Nolan Transport case in the High Court and unions’ reactions to that Judgement – G and T Crampton v BATU - Supreme Court decision in Nolan Transport – aftermath of same – UCD conference of 2010 on 1990 Act reviewed - subsequent developments – Aer Lingus v SIPTU 2014 and Bus strike of 2015.

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## **Section 4:**

What is to be done – Repeal or amendment – various courses of actions considered and recommendations on how to proceed - List of Amendments.

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## *Untying Workers' Hands:*

# TRADE UNIONS AND THE 1990 INDUSTRIAL RELATIONS ACT

Dr. Daryl D'Art

*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 of the community, but where class issues are involved, it is impossible to pretend that the courts command the same degree of general confidence.*

Winston Churchill 1911 in the House of Commons (Kahn-Freund, 1959).

## **Section 1**

### ***Trade Unions and the Law - A Brief History***

Traditionally trade unions have viewed the law as oppressive mainly because of the difficulties they had in securing legal toleration during the nineteenth century. From the beginning the common law courts found legal wrongs at every turn in industrial action, with an ingenuity that must have surprised even the litigants<sup>1</sup>. The hostility of the judiciary can partly be explained by class prejudice. It was probably compounded by the dominant ideology of laissez faire individualism which by its nature is hostile to collectivism<sup>2</sup>. Furthermore, there was the underlying common law assumption that employers and workers meet in the labour market as individual and equal contracting parties in the buying and selling of labour. This view of the contract of employment has been described as that "indispensable figment of the legal mind"<sup>3</sup>.

As a result, throughout the nineteenth century unions were confronted by an unrelenting hostility not only from employers and the propertied classes in general but also from the judiciary<sup>4</sup>. Indeed, as Kerr (1978) observes, the characteristic feature of the British and Irish trade union movements has been the constant struggle against judicial interference with union activities, especially in relation to industrial action. It has been claimed that the common law system cannot conceive of the protection of collective interests. It is essentially a charter developed to suit the needs and perspectives of a nineteenth century traders' society. As such it would not accept the use of collective workers' power<sup>5</sup>. This experience encouraged a suspicion of the law by workers, summarised by the observation that "most workers want nothing more of the law than that it should leave them alone"<sup>6</sup>. A study of the development of labour law in nine European countries noted that judicial interpretations of broadly similar laws went beyond liberal expectations and severely restricted even the peaceful activities of strikers<sup>7</sup>. Lawyers and judges, it has been suggested, are no longer hostile to trade unions<sup>8</sup>. Yet evidence from

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1 Redmond, 1994.

2 Deakin and Morris, 2005.

3 Kahn-Freund, 1977.

4 Saville, 1988.

5 Von Prondzynski and McCarthy, 1986.

6 Wedderburn, 1971.

7 Hepple, 1986.

8 Redmond, 1994.

Britain, the US and Ireland suggests the contrary and demonstrates a forceful revival of employer and judicial hostility since the 1980s<sup>9</sup>. Indeed, recent judgements from the European Court of Justice in the Laval and Viking cases have been characterised as a significant legal threat to the right to strike<sup>10</sup>.

### ***The Combination Acts***

The Combination Act 1800 was aimed at discouraging the spread of trade unions among wage-workers. It endorsed and extended the existing law by declaring all trade unions to be criminal conspiracies. The eventual repeal of the Combination Acts in 1824/25 lifted the legal ban on trade unions. However, the activities of unions continued to be closely circumscribed by the common law principles of criminal conspiracy and actions in restraint of trade. While it may have been legal to form associations or trade unions, any trade dispute involving strike action was very likely to contravene one or other of these principles.

### ***Conspiracy and Protection of Property Act 1875***

With the passage of the Conspiracy and Protection of Property Act, the menace of criminal conspiracy was, apparently, finally eliminated. The law provided that where industrial action was taken in contemplation or furtherance of a trade dispute there would be no criminal liability for conspiracy. Put simply, the act of workers combining to influence the employer would no longer be a criminal offence. Unions were delighted with this outcome and the general secretary of the Trade Union Congress announced that "the work of emancipation was now full and complete"<sup>11</sup>. In his enthusiasm, he had forgotten the judiciary and the role it might play.

### ***Taff Vale Judgement 1901***

Towards the end of the 19th century the judges began outflanking the 1875 Act by developing the tort (civil wrong) of conspiracy and by expanding the tort of inducement of breach of contract to apply in labour disputes<sup>12</sup>. This opened the possibility that actions such as strikes inducing workers to break their contracts with the employer would be open to civil damages. In short, any organisers of and participants in a strike ran the risk of having to pay financial compensation to the employer. Union apprehensions regarding these developments were confirmed by the Taff Vale judgement.

At a small railway company in South Wales, the Amalgamated Society of Railway Servants (ASRS) struck in defence of a sacked member who had the temerity to present a collective wage claim. The Taff Vale Company took an action for damages and the judges found in favour of the employer. In a significant new departure, the judges declared that an employer who was injured by industrial action was not restricted to suing his striking workers or union officials (none of which were likely to have much money) but could seek damages from the union itself. After appeals up to the House of Lords it was concluded that trade unions were liable for financial damage to employers caused by strike action. The union was ordered to pay the Railway Company 23,000 pounds in damages plus legal costs of 12,000 pounds. In today's value, this would amount to over a million pounds.

The judgement made strike action virtually impossible as every strike caused damage to someone or some financial loss to employers. If it did not, then it had no possible chance of success. The Taff Vale judgement provided employers with a method of breaking a union just as effective as putting its members in jail. The entire right to strike conceded by the legislation of 1875 was virtually abrogated by this one decision of the courts. Union survival as an effective force depended on its reversal. A combination of political and trade union action succeeded in reversing the decision with the passage of the Trade Disputes Act 1906.

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9 D'Art and Turner, 2002.

10 Hepple, 2010.

11 Pelling, 1969, 76. See also Collins, H. (1982) *Marxism and Law* p 41 Oxford University Press

12 Hepple and O'Higgins, 1976.



### ***The Trade Disputes Act 1906***

The Trade Disputes Act, it has been said, gave everything the unions asked for. It specified that any action against a trade union in respect of any tortious act (a civil wrong giving rise to claims for damages) alleged to have been committed by or on behalf of a trade union shall not be entertained by any court. Furthermore, it made peaceful picketing legal. The tort of inducing a breach of employment contracts or interference with business in trade disputes was excluded. Unions were granted legality and a measure of protection to union funds. In short, the Act restored the 'Golden Formula' of 1875 with the addition of a clause on civil liability. Unions were provided with so called 'immunities' that anything done in a trade dispute (provided it was not illegal in itself) would be free of criminal and civil liability. The Trade Disputes Act 1906 remained in operation in Ireland until its repeal with the passage of the Industrial Relations Act 1990.

### ***Industrial Relations Act 1990: The Background***

In Ireland during the 1960s, the perceived problem of industrial order became a significant issue of public policy. In 1965 the Government proposed to introduce a Trade Union Bill which included a requirement for a secret ballot in the event of strike action. Strong resistance from trade unions and the failure of the Electricity Special Provision Act forced the abandonment of increased legal intervention in industrial relations. However, during the 1970s employers and policy makers complained of rising strike levels and the dissatisfaction of these groups focussed on the 1906 Act. Employers argued that the Act protected unofficial strikes, strikes in breach of collective agreements or strikes by a minority of workers. Furthermore, a member of the judiciary claimed that the 1906 Act had many 'imperfections'. These concerns led to the establishment of a Commission of Inquiry on Industrial Relations. In their submission to the Commission employers pointed to the lack of legal regulation in collective industrial relations particularly regarding trade disputes. When the Commission reported, it was especially critical of the 1906 Act, claiming a failure of existing voluntary arrangements. At an early stage in the Commission deliberations the trade unions withdrew so no action was taken on its eventual recommendations<sup>13</sup>. Yet despite a long-standing union attachment to and defence of the 1906 Act it was repealed within the decade.

Several factors may have contributed to this outcome. The early 1980s saw the beginning of a sustained attack on trade unions and collectivism<sup>14</sup>. In Britain, successive Conservative governments enacted a raft of legislation all designed to systematically weaken the power of unions and workers in relation to employers<sup>15</sup>. In Ireland, a new political party, the Progressive Democrats, adopted and espoused the neo-liberal policies of the British Conservative party. One objective of these policies was the eradication, or at the very least the marginalisation, of trade unions. In this increasingly hostile climate a fear developed among Irish trade unions that the 1906 Act might be found unconstitutional. Consequently, the Irish Congress of Trade Unions argued that a negotiated agreement with employers and government would act as a bulwark against the neo-liberal policies of deregulation, privatisation and union marginalisation<sup>16</sup>. The result was a Partnership agreement between employers, unions and government. Beginning in 1987 it was to last for nearly quarter of a century.

One of the first fruits of the partnership process was proposals to change the law on trade disputes. However, change was not to be imposed on the union movement but would be subject to prior consultation with all the parties involved. Published in 1988, the proposals (subsequently to become the 1990 Act) suggested a lessening of the immunities for trade unions and their members, requirements in relation to the conduct

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13 Wallace 2010

14 D'Art 2002

15 Crouch 1991

16 D'Art and Turner 2011

of secret ballots, the provision of notice for industrial action and the limitation of immunities in individual disputes. These were to be balanced by restriction on employers seeking injunctions in trade disputes<sup>17</sup>. Compared with the opposition to the Trade Union bill of 1965, reaction from the union movement was muted. Yet some critics saw the Bill as promoting more intervention from the courts and imposing new restrictions on trade unions and their members<sup>18</sup>. Nonetheless the proposals became law as the Industrial Relations Act 1990. One final factor that may have contributed to the relative passivity of the union leadership was the reassuring figure of the Minister of Labour, Bertie Ahern, former trade union official, the working man's friend, ultimate fixer and self-declared socialist. Surely, he would see us alright. As Bertie declared on steering the Bill through the house:

*This is not the UK here. We don't have any of the 'loolahs' which they had over there in the 70s. People were going on strike at the drop of a hat; the situation was ridiculous. We certainly don't have that here; our trade union leadership is very responsible and we don't need to take power away from them. In fact, what I am trying to do is to place the power in the hands of the leadership so that individual workplaces will not suffer because one or two people are abusing their powers as shop stewards ---- I believe in the right to strike --- That's why I am only changing the 1906 Act to cover areas which have either been abused or could cause problems in the future.<sup>19</sup>*




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17 Wallace 2010

18 Rabbitte and Gilmore 1990

19 Fennell and Lynch 1993



## Section 2

### **Industrial Relations Act 1990: Outline and Commentary**

*In general, the basket of measures contained in the 1990 Act has been very helpful to employers.*<sup>20</sup>

*The Industrial Relation Act 1990 --- is a decisive intervention on the side of the employer --- and is intended to remove much of the bargaining power which workers have in an already uneven relationship with employers.*<sup>21</sup>

The Industrial Relations Act, 1990 came into operation on 18<sup>th</sup> July 1990. Its purpose was to make better provision for promoting harmonious relations between workers and employers and to amend the industrial relations and trade union legislation. Its overall aim was to maintain a stable and orderly industrial relations climate<sup>22</sup>. The Act repeals in its entirety the Trade Disputes Act 1906 but re-enacted its main provisions with some significant amendments. According to Kerr (2010), the 1990 Act involves the most far-reaching changes in Irish labour law. Others claimed it represented a major inroad into the idea of trade union autonomy and reflected a growing trend of intervention both legislatively and judicially in the organisation of a trade union's internal affairs<sup>23</sup>.

### **Definitions in the Act**

**Employer** – “A person for whom one or more workers work or have worked or normally work or seek to work, having previously worked for that person.”

**Worker** – “Any person who is or was employed whether or not in the employment of the employer with whom a trade dispute arises, but does not include a member of the Defence Forces or of the Garda Síochána.”

According to Meenan (1994) this is a very loose definition of worker and will be open to wide interpretation. The Irish Congress of Trade Unions (ICTU) were concerned about cases in the past where the Courts held that self-employed workers or those working on a “contract for service” are not employed and therefore not afforded the protection of the Act. Congress argues that the term ‘employed’ should cover any person who provides services to another regardless of the nature of the contract under which they are employed<sup>24</sup>. However, this will be a matter for the Courts to determine.

**Trade Dispute** - ‘any dispute between employers and workers which is connected with the employment, or non-employment, or the terms or conditions of or affecting the employment, of any person’.

### **(A) Immunities**

The legislation does not give a positive right to strike but trade union members, union officials and trade unions themselves who take industrial action in furtherance or contemplation of a trade dispute have immunity or protection under the legislation. In short, they cannot be sued for taking part in such action<sup>25</sup>. A difficulty with immunity is that it sounds like a privilege rather than an entitlement and may have implications for the way in which Judges construe immunities<sup>26</sup>. However, the availability or protection of these so called ‘immunities’ are surrounded by several restrictions or qualifications. It has been pointed out that any limiting

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20 Bertie Ahern 2010

21 Rabbitte and Gilmore 1990

22 Department of Labour 1991

23 Fennell and Lynch 1993, Wilkinson 1991

24 ICTU 1990

25 Meenan 1994

26 Davies 2004

of the immunities in the former Trade Disputes Act 1906 allows for the importation of individualist common law concepts, which have the potential to be inimical to the collective values of trade unions<sup>27</sup>.

First, immunities only apply to an 'authorised' trade union. This means one registered under the 1941 Act and consequently holding a negotiation licence from the minister. Employer unions are exempt from the application of sections 14 to 17 of the Act<sup>28</sup>.

Secondly, a union must conduct a secret ballot of all the workers involved and give one week's notice to the employer before any action is taken. The balloting provisions are outlined below. Congress claims that the immunities conferred by the Act are not conditional on the union conducting a secret ballot<sup>29</sup>. Fennel and Lynch (1993) make the same point. Alternatively, Meenan (1994) insists immunity will be withdrawn if the balloting and notice procedures have not been complied with. Indeed, even actions short of a strike, such as go-slows or bans on overtime, seem to require a ballot. Despite this claim it seems immunities are not conditional on the union conducting a secret ballot. Nevertheless, in the absence of a ballot, or if found to be invalid, then the provisions of section 19 regarding injunctions will not apply. Yet as will be seen below even where a union meets all the balloting requirements injunctions can still be granted.

Thirdly, immunities will not apply to industrial action taken where the outcome of the ballot is against such action.

Fourthly, a workers' 'sit-in' or occupations of the employer's premises will not be protected by the Act.

Fifthly, immunities will not be available in worker versus worker disputes. Immunities are available in disputes concerning an individual worker but only after agreed procedures (in a collective agreement or custom and practice) are first exhausted. This latter provision strikes at the *raison d'être* of effective collectivism, namely an 'injury to one is an injury to all'. Say, for instance, an employee is attempting to organise a section of the workforce and is sacked on a trumped-up charge - a not improbable occurrence<sup>30</sup> - any action in the worker's defence would have to wait on the exhaustion of procedures. This would involve seeking a ruling from the Rights Commissioner or the Workplace Relations Commission (WRC). Yet this could take months with no certainty of reinstatement<sup>31</sup>. The organising drive would be effectively neutralised. A case in point is the recent one-day strike in Dunne's Stores. In the aftermath one participant in the strike, despite an exemplary employment record, was selected for dismissal. Consequently, his only recourse is to the Rights Commissioner or WRC. Now given the circumstances surrounding the case the outcome will probably favour the worker. Nevertheless, the benefit will likely be a severely qualified one. Generally, the Rights Commissioner or WRC award a plaintiff monetary compensation and only on rare occasions do they order reinstatement in the job. It is an open question whether worker success in this matter enhances their employability with future potential employers. In short, the weight of disadvantage falls on the shoulders of individual claimants<sup>32</sup>. Yet the uncertainty surrounding collective action in individual cases has ramifications for union utility and effectiveness in protecting their members. If employers can dismiss with impunity individual union members participating in industrial action, the case in Dunnes Stores example, it can only weaken the propensity of the union and its members to take any action at all.

Finally, even if all the above conditions are complied with and the balloting requirements fulfilled, it cannot be assumed that any subsequent action taken 'in contemplation or furtherance of a trade dispute' will have the protection of the Act. A trade dispute is defined above.

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27 Wallace 2002

28 Kerr 2015

29 ICTU 1990

30 D'Art and Turner 2013

31 Rabbitte and Gilmore 1990

32 O'Connor 2010



There are several issues which do not come within the above definition and, therefore, would not qualify as a valid trade dispute and so forfeit the protection of the Act. These are: attempts to enforce a closed shop agreement, demarcation disputes or strikes or industrial action connected with purely political issues. This latter provision would appear to rule out the tax marches that took place during the 1980s. Industrial action or strike against an employer stocking certain goods would not be a valid dispute<sup>33</sup>. Under this provision, actions such as those taken by the Dunnes Stores workers blacking South African produce would be of doubtful validity. The claim by Congress (1990) that industrial action to secure union recognition would constitute a valid trade dispute appeared questionable in the light of the High Court judgement in Nolan Transport. The Supreme Court, however, confirmed a recognition dispute as a valid trade dispute.

In the case of disputes concerning 'non-employment' this situation could arise where a contractor is replaced by another contractor who refuses to take on all the employees of the previous contractor. It has been suggested that workers demanding the displaced employees be employed by the new contractor would constitute a valid trade dispute<sup>34</sup>. Yet in the Judge Roy Beans case which centred on action by the workers to oblige the new contractor to employ them, the court found against the strikers and granted an injunction<sup>35</sup>. This came up again in the case of Roundabout Ltd. v Beirne concerning the owners of a public house who became involved in a dispute with some of their employees concerning redundancy payments. In the middle of the dispute, the owners closed the pub and set up a new company, Roundabout Ltd. The union continued to picket the premises and the company sought an injunction arguing there was no dispute between the company and employees and that furthermore the company was not an employer. When the case came to court, the judge held that the central question at issue was: did a trade dispute exist against the new company. The judge agreed that there was substance in the suggestion that the new company was formed to get rid of the trade dispute and dispense with the employment of union staff. The formation of the new company, he continued, was a subterfuge designed to end the trade dispute. Despite these sympathetic noises, the judge concluded that the new company was a separate legal entity and thus there was no dispute within the meaning of the Act<sup>36</sup>.

Workers might be convinced they are involved in a trade dispute, but if that conviction is challenged, then it will be for the judiciary to decide if a trade dispute exists. This will depend on the willingness of the judiciary to take an expansive view of what constitutes a trade dispute<sup>37</sup>. There is little evidence of a development in that direction. As one judge remarked 'the ingenuity of Counsel in finding some nice distinction to demonstrate that the dispute is not a protected trade dispute seems to be of inexhaustible resource'<sup>38</sup>. Overall the effect of the 1990 Act has been to considerably narrow the definition of what constitutes a trade dispute<sup>39</sup>.

### ***Primary and Secondary Picketing***

Primary Picketing - The Act provides that it shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union in contemplation or furtherance of a trade dispute to attend at, or where that is not practicable, at the approaches to a place where their employer works or carries on a business, if they attend for peacefully obtaining or communicating information or of peacefully persuading any person to work or abstain from working.

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33 ICTU 1990

34 ICTU 1990

35 Meenan 1994 – However when the injunction came to a full hearing the employer has to concede that the Transfer of Undertaking Regulation did apply and substantial compensation was paid by employer. Nevertheless, the strike had been defeated by the injunction.

36 Fennell and Lynch 1993

37 Fennell and Lynch 1993

38 Kerr 2010

39 Fennell and Lynch 1993

Apparently, primary or secondary picketing cannot take place without meeting the balloting requirements. Employees or unions in breach of this requirement will not have the benefit of the immunities conferred by the Act. Assuming compliance with these requirements, employees or unions can only picket their employer but not at the premises of associated companies. What of the situation of workers who are employed by one company but work at the premises of another? For instance, in the catering and cleaning industries the employer may be located in a head office but the workers are employed in various locations. Must picketing be confined to the head office or can the workers picket at the various sites where they work? It will be for the courts to determine where 'it is practicable' to picket<sup>40</sup>. Though the High Court has definitively confirmed that picketing cannot lawfully be engaged in at a place where the employer had worked or carried on business at least a week previously<sup>41</sup>.

Another potential difficulty is the provision that employees must picket at the premises where the employer carries on business or if that is not practicable, 'at the approaches to the premises'. Picketing of shopping centres can raise problems. Such complexes are usually owned by financial institutions or investment companies. Employers who have shops or factories in the complex are their tenants. Staff picketing a shop within the centre can be seen as trespassing, while picketing outside the shopping centre can be seen as affecting other traders. A resolution of this difficulty would depend on the willingness of the centre's owners to give permission to picket the premises in question<sup>42</sup>. This situation arose in the recent Tesco strike.

Secondary Picketing - Generally under the 1990 Act all secondary picketing is unlawful. This is a very restrictive provision<sup>43</sup>. The ban on secondary action under UK law has been condemned by the ILO<sup>44</sup>. Yet in circumstances where a second employer is directly assisting your employer to frustrate the industrial action then it will be lawful to picket the premises of the second employer – secondary picketing. The onus of proof will be on those who wish to engage in secondary picketing. They will have to establish to the satisfaction of the court that another employer has 'directly assisted' their employer to frustrate the strike. This is likely to prove very difficult. Also, the balloting provisions are of particular importance on secondary picketing. Not only will the issue be balloted on by the employees in the primary dispute, but union members in the secondary employment will have to ballot. The wording of the Act on secondary picketing and the balloting provisions will undoubtedly provide ample scope for litigation and judicial interpretation<sup>45</sup>. Depriving workers of the right to take secondary action is to deprive them of an element of their strength; 'to make them enter the economic struggle with one hand tied'. Irish judges have tended to be unduly restrictive of workers engaging in secondary picketing. The 1990 Act has made it impossible<sup>46</sup>.

### ***(B) Secret Ballots***

Section 14 of the Act requires that the rule book of every trade union must contain the following provisions. No strike or other industrial action can take place without a secret ballot. All members whom it is reasonable for the union to believe are likely to be involved in the industrial action must be given a fair opportunity of voting. Furthermore, the union must take reasonable steps to ensure that every member entitled to vote can

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40 Meenan 1994 – It has been suggested that picketing can take place without a ballot but given that the act stipulates that a unions rule book must contain a provision that no strike or industrial action can take place without a secret ballot this seems very unlikely – see ICTU IR Act 1990 and Meehan p.179

41 Kerr 2010

42 Meenan 1994

43 ICTU 1991

44 Davies 2004, 229., ILO 2003

45 Meenan 1994

46 Rabbitte and Gilmore 1990



do so without interference from the union or any of its members, officials or employees. The governing body of the union shall not call, organise or participate in industrial action without a majority of votes in favour. Before engaging in any industrial action or strike the union must give the employer concerned at least one week's notice. Yet irrespective of a majority result the union executive will have the final decision to proceed with or suspend the contemplated action. A minority vote in favour of industrial action cannot be supported by the union executive unless there is more than one union involved and the aggregate ballot amounts to a majority. Where a majority vote favours supportive action for another union this must be sanctioned by Congress. No ballot is necessary to approve the settlement of a dispute and a return to work.

On completion of the ballot the union must make known to members who were entitled to vote the following:

- The number of ballot papers issued
- The number of votes cast
- The number of votes in favour of proposal
- The number of votes against the proposal and
- The number of spoilt votes



**Enforcement of rules for secret ballots** – All trade unions with negotiation licences must forward a copy of their rules incorporating the secret ballot requirements to the Registrar of Friendly Societies. Where the Registrar is satisfied, after due investigation, that it is the policy or practice of the union to ignore the ballot rule, an instruction can be issued obliging compliance. If the instruction is ignored, the union's negotiation licence can be revoked. In that event the union would forfeit all immunities contained in the Act.

**Commentary** – At the 1991 Annual Conference of the Irish Congress of Trade Unions, some delegates were critical of the balloting requirements of 1990 Act. They were answered by the Assistant General Secretary. He reminded them that the majority of Irish unions have always required a secret ballot before undertaking a strike or industrial action. Furthermore, he continued, it would be unwise for conference to denounce a provision which intended to ensure that workers have the democratic right to decide for themselves whether they wish to endure the hardship that is inevitably associated with going on strike. Finally, he concluded with a seemingly unanswerable rhetorical flourish. How, he asked, given that Congress was 'dedicated to maintaining and expanding democracy' could they publicly declare that Congress was 'opposed to democracy' within its own organisations<sup>47</sup>.

What may explain the apparent cognitive dissonance displayed by delegates critical of the balloting provisions? One can only speculate. It may have been due to the belief that employers, government and the law were not invariably aligned with those of workers<sup>48</sup>. Or indeed the view that the operation of the law was inimical or unsympathetic to worker collectives. If it was the latter it was not without with some general historical justification. In Ireland, a 1966 Trade Union bill proposed that the rules of a trade union require that before the serving of strike notice a secret ballot must be conducted in which a majority of member voted in favour of the action. Massive opposition from the trade union movement forced its abandonment<sup>49</sup>. Yet in the context of the recently negotiated partnership arrangements the articulation of such attitudes must have struck an appallingly anachronistic note. Nonetheless, subsequent events and legal interpretation were to confound the trusting harmonic co-operators of partnership.

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<sup>47</sup> Kerr 1991

<sup>48</sup> D'Art and Turner 1999

<sup>49</sup> Kerr 2015 91

According to Wilkinson (1991) the above balloting provisions represent an unprecedented intrusion into the internal affairs of trade unions. Articles 3 and 8 of ILO Convention 87 allow unions complete autonomy in setting their own internal rules<sup>50</sup>. The necessity for such an intervention is not immediately apparent. Unions have always made extensive use of secret ballots in running their affairs. It seems the origin of the initiative lies with the employers. What they want most is not secret ballots as a precondition for strike action, but no strikes or industrial action at all.<sup>51</sup> Over time this claim has become less far-fetched. Recently an employer's spokesman wondered if the existing balloting provisions were sufficiently robust to prevent a resurgence of industrial action.<sup>52</sup> Formulated over decades, the objectives of the bill, and particularly its balloting provisions, critics claimed, was to delay industrial action of any type for as long as possible, extend the grounds on which injunctions can be obtained and ultimately discourage ballots and therefore strikes and industrial action generally.<sup>53</sup> An examination of the balloting provisions will determine if such claims can be substantiated.

In some industrial disputes, immediate action may be a necessity – timing being of the essence for effectiveness.<sup>54</sup> Formerly, most unions provided for the possibility of an immediate stoppage, for instance, in cases where the health and safety of the workers would be endangered if work were to continue. Section 14 of the Act makes no exceptions and in all dispute situations unions must conduct a secret ballot and give the employer seven days' notice. On this crucial issue of timing, Fennell and Lynch (1993) conclude the advantage is weighted heavily in favour of the employer.

Regarding the actual conduct of the ballot, the legislation lays down a number of specific requirements. The entitlement to vote shall be accorded equally to all members whom it is reasonable at the time of the ballot for the union to believe will be called on to engage in the strike or industrial action. At first sight, this appears as a superfluous provision. In contemplating a strike where members stand to lose pay, maximum participation in the ballot will be of vital interest to both members and union officials. They will hardly need urging from the state to do so. Again, the provision that the union take reasonable steps to ensure every member entitled to vote can do so, without interference from or constraint imposed by the union, its members, officials or employees, and as far as is reasonably possible, that such members shall be given a fair opportunity of voting, is quite a bizarre, desiccated and unreal view of democratic participation either within a union or society at large. In any democratic body people often hold opposing views, debate, argument and attempts to persuade opponents are integral to any democratic process. On the shop floor debate can be vigorous and any attempt to stifle or stultify that process smacks of authoritarianism. Under the above provision a recommendation by a union official to accept or reject a proposal or speeches from the floor in support or rejection could be construed as 'constraint' or 'interference' with the balloting process. All this would be of little account if, as Congress (1990) claimed, an employer cannot challenge the outcome or manner in which the ballot was conducted. This has proved not to be the case.

Given the employer can now challenge the conduct and outcome of a ballot the possibilities for litigation are obviously endless.<sup>55</sup> For instance, the 'entitlement to vote' being extended to all prospective participants. Will members who are sick or on leave render the ballot invalid? Members should be given a fair opportunity to vote as far as is reasonably possible. What a 'fair opportunity' or 'reasonably possible' may mean is open to being queried or challenged in the courts. In circumstances where a member or members who

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50 ILO 1948, Davies 2004

51 Rabbitte and Gilmore 1990

52 McGinty 2010

53 Rabbitte and Gilmore 1990

54 Fennell and Lynch 1993

55 Fennell and Lynch 1993



argue strongly in favour or against a proposal and attempt to persuade others or a union official to make a recommendation, could this be regarded as 'constraint' or 'interference'? Finally, there is the administration, counting and recording of the ballot. There will surely be difficulties in relation to the interpretation of ballot rules with employers claiming that the procedures have not been properly followed and, therefore, the industrial action taken is not covered by immunities.<sup>56</sup>

It is evident from the balloting provision that the legislation is not committed to the ideal of increased trade union democracy. Even if a majority of workers vote in favour of industrial action the legislation empowers the union executive to override or set aside the decision. Conversely, where the ballot result is against industrial action the executive has no discretion in the matter. Regarding the settlement of a dispute and return to work, no ballot is required, secret or otherwise. What the balloting provisions of the legislation do is to place as many obstacles as possible along the road to full industrial action and every step of the way will be overshadowed by the prospect of a legal challenge from the employer. Consequently, the real object of the legislation is the preservation of industrial peace.<sup>5758</sup> Anything that might disturb this objective, such as democratic procedures, processes and their results are to be set at nought. The foregoing largely vindicates the earlier claims made by Rabbitte and Gilmore (1990).

### ***(C) Injunctions***

In Ireland, the power to grant an injunction is possessed by the High Court. An injunction is a judicial order restraining a person or persons from an act or compelling redress to an injured party. The aim of an injunction is to preserve the status quo between the parties between the time of granting of the injunction and a full hearing of the issue in dispute. Usually the granting of a labour injunction to employers has the effect of suspending or postponing industrial action. Kerr (1985) suggests that employers do not see the grant of an injunction as simply a way of maintaining the status quo ante until the trial of the action. Rather it is a simple and relatively inexpensive way of bringing the dispute to a head by depriving the employees of a bargaining counter and allowing the employer to negotiate from a position of strength. As one judge remarked "it is the nature of industrial action that it can be promoted effectively only when it is possible to strike while the iron is hot, once postponed it is unlikely it can be revived".<sup>59</sup> Most labour law disputes do not go to a full hearing where damages are awarded. Usually they are resolved at the injunction stage if an order prohibiting further action is granted.<sup>60</sup>

Beginning in the 1960s there was an apparent increase in the use of injunctions. Unlike their British counterparts, Irish employers were much more willing to resort to injunctions as a way of processing trade disputes.<sup>61</sup> The frequency with which injunctions were sought and granted coupled with the unsatisfactory nature of the proceedings was a source of irritation and frustration to workers and their unions.<sup>62</sup> Particularly galling was the use of ex-parte injunctions. These were injunctions granted where one party to the dispute, usually the employer, sought a temporary injunction without notice of the application to the union. Ex-parte injunctions were often heard outside normal working hours in a judge's home and used as an emergency measure by employers. They were frequently used by employers to lift a picket or postpone a strike where shipments or processes had to be completed immediately. Usually the effect of granting an injunction was to negate the bargaining power of the workers involved.

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56 Fennell and Lynch 1993 also see the GT Crampton dispute below

57 Fennell and Lynch 1993

58 Wilkinson 1991

59 Kerr and Whyte 1985

60 Fennell and Lynch 1993

61 Kerr 1985

62 Kerr 1985

**Injunctions and the 1990 Act** – While the Act was passing through the Dail it was proposed to ban all ex-parte injunctions relating to industrial action. This was rejected by the Minister. Nevertheless, some concession seemed necessary to soften the increased regulation of trade union affairs.<sup>63</sup> Consequently, Section 19 of the Act provided, that once a secret ballot was held and appropriate notice given then no employer could apply for an ex-parte injunction restraining the resulting industrial action. Yet this did not preclude some other third party applying for an ex-parte injunction to restrain the industrial action. Such an application would only be entertained by the court if it decided that the third party had a ‘sufficient interest in the matter’, meaning someone who could argue that they were directly affected by the industrial action. This could conceivably encompass another employer or an aggrieved member of the public.<sup>64</sup>

**Interlocutory Injunctions** – These are injunctions granted or withheld at hearings where both parties, union and employer, are present. Under the Act there are several steps in an injunction hearing. First, the plaintiff or employer will have to establish a prima-facie case for the granting of an interlocutory injunction. A prima-facie case would be one where at first sight or ‘on the face of it’ the evidence presented seems sufficiently strong for the union to be called on to answer it. Secondly, the union will have to establish that there is a fair case to be made that it was acting in contemplation or furtherance of a trade dispute. If the union can establish to the satisfaction of the court that is the case then no injunction will be granted.<sup>65</sup> Of course, this may be easier said than done. As already noted, the 1990 Act has considerably narrowed the definition of what constitutes a trade dispute. Furthermore, all aspects regarding the conduct of the ballot are open to interrogation by the employer. The discovery of any deficiencies will likely render the trade dispute invalid. Finally, if the court is not satisfied with the union’s arguments then it will go on to consider with whom the balance of convenience lies. In weighing the balance of convenience, the Irish courts have invariably repeated the formula that the effect of granting the injunction will be merely to temporarily delay the picketing or industrial action whereas the employer will suffer irreparable loss if the injunction is not granted.<sup>66</sup> However, if due weight is not given to the ‘temporary’ loss of a bargaining counter (the strike or industrial action) then judgement will be inevitably given against the union. The crucial issue of timing in industrial action and the effect of its postponement have been considered above. In proceedings of this kind, a judge remarked, the balance of convenience as to the grant of an interlocutory injunction would appear to be weighted in favour of the employer.<sup>67</sup> Davies and Anderman (1973) claim that the whole notion of the court being able to act to maintain the status quo in labour disputes is fallacious and so the justification for granting interlocutory remedies evaporates.

With the passage of the 1990 Act, Congress welcomed the new rules surrounding injunctions. It did acknowledge that the application of rules would be a matter for the courts and only in time would a clear pattern emerge. Nevertheless, Congress believed it “probable that it will be more difficult for employers to obtain injunctions than heretofore”.<sup>68</sup> Critics had a much gloomier prognosis. They argued that the effect of the restrictions in the new Act were such that the much-heralded relief to trade unions in respect of ex-parte injunctions will be significantly diminished in practice.<sup>69</sup> An examination of the 1990 Act in operation may help to settle these contesting claims.

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63 Fennell and Lynch 1993

64 Wilkinson 1991

65 Fennell and Lynch 1993

66 Kerr 1985

67 Kerr 1985

68 ICTU 1990

69 Rabbitte and Gilmore 1990



## Section 3

### ***The Industrial Relations Act 1990 in Operation***

Initially on its enactment the 1990 Act seemed to command a wide measure of acceptance among many union leaders. For this group, an attractive feature of the Act was its apparent strengthening of trade union authority.<sup>70</sup> Also they had the assurances of their legal advisors and politicians that all would be well. Consequently, critics and prophets of doom could be safely ignored. Yet bringing the law into the area of trade disputes inevitably involves the judiciary as final arbiters and interpreters. Compared with its 1906 predecessor, the 1990 Act facilitated increased legal intervention. Such a development, the historical record suggests, would not benefit trade unions or their members. Quite soon unions found themselves entangled in several legal cases. The outcome of these cases clearly demonstrated that judicial interpretation was going to be a key factor in the operation of the 1990 Act.<sup>71</sup> Two cases of note are outlined below.

***The Nolan Transport Case 1993*** – Nolan Transport, a family firm engaged in road haulage, employed 55 drivers. Dissatisfaction with the prevailing wages and conditions prompted some drivers to join SIPTU. The union sought recognition from the company to negotiate on their behalf. Following this communication, a verbal altercation developed between two unionised workers and family members of the management team. As a result, the two union members left the premises believing themselves to have been sacked. After a series of meetings, a ballot was held and a majority voted in favour of industrial action. Strike notice was served and on its expiry (February 11<sup>th</sup>, 1993) a picket placed on the premises.

On the same day Nolan Transport applied to the court seeking injunctive relief and damages against SIPTU, its members and officials.<sup>72</sup> While this was in train the company then sought an interlocutory injunction to restrain picketing. Citing section 19 of the Act, the union argued that the application should be dismissed. However, the judge pointed out that section 19 could only come into force after a secret ballot had been held. Those resisting the injunction must prove to the satisfaction of the court that the balloting requirements had been complied with. In this instance, he was not satisfied there was evidence 'of sufficient weight' to indicate compliance.<sup>73</sup> Consequently, the injunction was granted.

Issues concerning the conduct of the ballot were to figure prominently in November 1994 when the Nolan Transport case came before Justice Barron in the High Court. Barron, J. identified two issues to be determined. First, whether a trade dispute existed. Secondly, was SIPTU entitled to authorise strike action "having regard to the way the secret ballot was conducted and the manner in which those voting actually voted"? Both these questions were answered in the negative.<sup>74</sup> Justice Barron concluded that the workers were not dismissed and therefore there was no trade dispute. The dispute was really an attempt to gain union recognition and this did not constitute a valid trade dispute. Furthermore, he found that the ballot itself was fraudulent. Consequently, he concluded the immunities were not available to either SIPTU or its members.<sup>75</sup> Therefore, he awarded Nolan Transport a sum of £601,000 damages against the union. In addition, an injunction was granted restraining the union from picketing the premises or engaging in industrial action against the company.<sup>76</sup> The union appealed the judgement to the Supreme Court. It was eventually heard in 1998.

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70 O'Connor 2010

71 Wallace et al 2013

72 Kerr 2010

73 Kerr 2010

74 Kerr 2010

75 Wallace et al 2013

76 Meenan 1999

**Union reaction to the High Court Judgement in the Nolan Transport Case** – The decision in the Nolan Transport case became the subject of debate at many union conferences. The debate focused on two key points: (1) the belief that political undertakings, given prior to the introduction of the Act, had not been honoured and (2) the attitude of the judiciary to the unions.<sup>77</sup> At the 1995 ICTU Biennial Delegate Conference it was noted that the courts had interpreted and applied the Act in a manner inconsistent with assurances given to Congress and repeated in the Dáil and Seanad during the passage of the Bill.<sup>78</sup> These were listed as follows.

- (1) Only an aggrieved member of a trade union could mount a legal challenge to the outcome of a secret ballot.
- (2) The availability of the immunities under the Act is not dependent on the holding of a secret ballot.
- (3) A legal action could not be taken against a trade union arising from its activities in contemplation or furtherance of a trade dispute.
- (4) Ex parte interim injunctions would not be granted in trade dispute cases where a ballot had been held and adequate notice served on the employer.
- (5) A change in the name or corporate identity of a company could not render unlawful continued picketing in furtherance of a pre-existing dispute.<sup>79</sup>



These political assurances now proved worthless. Blame was also laid on the judiciary who, it was claimed, in creating and interpreting the law invariably favoured employers.<sup>80</sup> Similar complaints were made by unions after the Taff Vale Judgement of 1901. Yet the union leadership and its legal advisors were in some measure responsible for the situation the union movement found itself in in the wake of the High Court judgement. Unlike similar legislation in Britain, the 1990 Act was not simply an imposition by government fiat. Rather it was the result of a consultative process in which Congress had the potential to exercise some input and influence. There was some debate within the unions and prescient criticisms were made of the proposed legislation both within and outside the Dáil. Furthermore, the historical record of legal intervention in industrial relations should have prompted a stringently critical examination of the proposals rather than reliance on comforting assurances from politicians and lawyers. One can only speculate as to why this was not done or at least not done very effectively. It may have been the euphoria generated by the new partnership arrangements and the belief in some quarters that the old conflicts between capital and labour were about to be transcended.

**G and T Crampton v BATU 1997** - While SIPTU and unions generally awaited the outcome of the Supreme Court appeal another case arose which further demonstrated how the Act was going to be applied. In *G and T Crampton v BATU* (1997) a dispute arose concerning the re-employment of unionised bricklayers with a new sub-contractor. Re-employment was refused by the new contractor, a picket was placed and an injunction sought. The High Court found that a union opposing an interlocutory injunction had to prove compliance with certain requirements. These were firstly that a secret ballot had been held and properly conducted. Secondly, that the outcome was in favour of the action taken and minimum notice given. Assuming these conditions were met then the union had to establish a fair case that it was acting in contemplation or furtherance of a trade dispute. If the Court was satisfied then injunctive relief to the employer would be withheld.<sup>81</sup> In the event the Court concluded that while a ballot had been held it had not been sufficiently inclusive as two

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77 Wallace 2002

78 Wallace 2002

79 Wallace 2002

80 Wallace 2002

81 Wallace et al 2013



workers had not been given a vote. Consequently, the ballot was invalid. The union pointed out that the two individuals involved had automatically ceased to be members because of non-payment of union dues, but to no avail. The injunction was granted. On appeal, the injunction was upheld in the Supreme Court. In this instance, a different problem with the ballot was identified namely, a failure to specify the precise nature of the industrial action it proposed to sanction.

In 1997 a survey of union officials at Branch Secretary level and higher was carried out. Its object was to gauge these officials' assessment of the impact of the trade disputes provisions of the 1990 Act. Their assessment was strongly negative. A majority believed that the 1990 Act was a mistake and that it needed major amendment or repeal.<sup>82</sup>

### Attitude of Union Officials to the Industrial Relations Act 1990

	No.	%
The 1990 Act was a necessary development in ensuring responsible Trade unionism	1	3
There are minor difficulties with the Act which should be ironed out	5	17
The Act is not perfect but unions should learn to work it properly and Live with it	2	7
The 1990 Act was a mistake which should not have been accepted in its current form and which needs major amendment or repeal	22	73

Source: Wallace and Delaney (1997)

One object of the 1990 Act was to strengthen the power of the trade union and its officials against irresponsible individual members on the shop floor (see above quote from Minister of Labour). Among employers a popular explanation for unofficial strikes is that they are the work of a militant politically motivated minority. A study of unofficial strikes during the late 1980s found no support for this contention.<sup>83</sup> Nevertheless, some union leaders may have seen the 1990 Act as a way of ensuring 'responsible trade unionism' – whatever that might be. Yet if the Act was to be used extensively by employers it seemed more likely to be directed at the trade union itself rather than individual members.

### Groups against whom the Employers threatened the use of the 1990 Act

	No.	%
Ordinary workers	10	44
Unofficial groups	7	30
Shop stewards or union committee members	9	39
Paid union officials	8	35
The trade union itself	13	57

Source: Wallace and Delaney (1997) Totals add to more than 100% due to multi-responses.

82 Wallace 2002

83 Wallace and O'Shea 1987

It should be noted that these surveys were conducted before the final outcome of the Nolan Transport case in the Supreme Court.

***Nolan Transport in the Supreme Court 1998*** – When SIPTU’s appeal was eventually heard in the Supreme Court two issues had to be decided. First, was there a trade dispute? Secondly, was the union entitled to authorise strike action? Regarding the existence of a trade dispute the Court concluded that the employees involved had good grounds for thinking themselves dismissed and therefore a trade dispute existed. Furthermore, the judgement seemed to imply that a strike for union recognition would qualify as a valid trade dispute.<sup>84</sup>

In answering the second question the Court focused on the balloting requirements and embarked on what could be considered a tortuous line of reasoning. Murphy, J. noted that it has often been said that section 14 requires industrial action to be authorised by a ballot but such a statement, he continued, is misleading. Participation by a union or members in industrial action without the authority of a secret ballot would be an internal union matter not a breach of statutory duty. Holding or not holding a secret ballot or the way it was conducted does not in any way impinge on the union immunities provided by the Act. While individuals may lose these immunities when they engage in industrial action in “disregard of or contrary to the outcome of a secret ballot”, unions themselves are not penalised in that way. If a union were to engage in industrial action in disregard of the wishes of its members expressed in a secret ballot it would risk the loss of its negotiation licence but not its immunities. Yet without a negotiation licence the immunities would not be available to a union. As noted earlier none of these strictures apply in cases where the union sets aside a majority vote for industrial action. However, in this case, the judge concluded, that as a trade dispute was found to exist then the immunities applied. Therefore, the judgement of the High Court could not be upheld and the injunction must be discharged.

This was not the end of the matter regarding the balloting provisions. Turning to the provisions of section 19 of the Act, the judge allowed they were not directly material to any matter at issue in present case. Nonetheless, reference was being made to that section to identify “the purpose and proper interpretation of the Act”. Section 19, the judge noted, alters the law in relation to circumstances in which an interlocutory injunction may be granted to restrain a strike or other industrial action. Prior to its enactment it was quite common for employers to apply to the court for an injunction restraining picketing. It was common knowledge, the judge continued, that frequent use of that procedure by employers meant that legitimate methods used by trade unions to advance their interests were effectively neutralised by the way the law operated. Now, section 19 affords important protection to the trade union. However, the judge emphasised that a specific, indeed crucial, requirement must be met before section 19 can come into play - that is, a secret ballot has been held in accordance with the balloting provisions of the Act and the court must be satisfied these have been complied with. Indeed, the onus was on the parties resisting the injunction to show that a secret ballot had been held. Yet, the judge continued, it would hardly be sufficient to establish a stateable case in relation to compliance with the rules. Rather the union must be able to “comfortably demonstrate” compliance. This meant in effect that every step in the balloting procedure and its administration would be open to interrogation by the employer’s council. Under hostile and ingenious scrutiny, the union task in demonstrating total and absolute compliance with the balloting provision would be extremely onerous and far from comfortable. Potential difficulties and pitfalls in union compliance with the balloting provisions to the satisfaction of the court have been outlined above.

A second judge in the case, O’Flaherty J., agreed with his peers that a trade dispute existed and consequently the immunities were available. He went on to characterise the case as a “sorry saga” redolent of an era at the

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84 Wallace 2013



turn of the century. The days of “class struggle”, he opined, should be regarded as long gone. Unfortunately for the learned judge numerous contemporary examples would suggest the class struggle to be in rude good health.<sup>85</sup> However, the judge continued in a reassuring tone possibly designed to smooth the ruffled feathers of indignant union officials and members generally. Unions he asserted are now very powerful bodies with a highly trained professional staff and employers have an obligation to respect them as representing the rights of workers. One lesson to be learned, the judge continued, is that the requirements for a proper secret ballot should always be observed but this was primarily designed to strengthen the role of “union management” against the action of “maverick members”. Reference to union managers and maverick members suggests a peculiarly impoverished understanding of a trade union function and purpose. Trade unions are essentially democratic organisations and as such must be responsive to majority of members’ wishes and that may include so called maverick members. Sometimes, of course, unions may manage discontent but on other occasions they may organise and direct discontent against autocratic and arbitrary management action. Union officials may be at times bureaucrats, organisers or the providers of services to members to whom they are accountable but they are not managers. Contrary to the spirit of the 1990 Act, unions are not an auxiliary arm of the state whose sole purpose is to manage discontent. Finally, O’Flaherty J concluded with the good news that the 1990 act “solidifies and indeed expands the privileged position afforded by the law to trade unions”. A review of developments since the Nolan Transport judgement will help to establish the solidity or otherwise of the supposedly privileged position of trade unions.

***Situation Post Nolan Transport*** – The Supreme Court appeal judgement in the Nolan Transport case was characterised by newspapers of the day as a major victory for SIPTU.<sup>86</sup> Certainly the outcome was greeted with a sigh of relief by trade unions generally.<sup>87</sup> Nevertheless, the strike had been defeated and Nolan Transport remains a non-union company. Yet SIPTU agreed to pay its costs in the action which amounted to a considerable sum. Furthermore, the decision did not prevent the taking of legal action in the future against a trade union arising from its activities in contemplation or furtherance of a trade dispute. Only if the trade union can establish it had a reasonable belief that it was acting in contemplation or furtherance of a trade dispute will this provide a defence against such action.<sup>88</sup> Even under the Trade Disputes Act 1906 the phrase “acting in contemplation or furtherance of a trade dispute” was subject to continuous limitation and refinement by the courts.<sup>89</sup> This process may be given added impetus by the 1990 Act, in which the balloting provisions will be an important factor. During its passage through the Dail the Workers’ Party was of the view that the 1990 Act would invite the intervention of the courts to a greater extent than formerly.<sup>90</sup>

***The Industrial Relations Act 20 years on*** - Twenty years after the passage of the 1990 Act a conference was held at UCD to ascertain whether the measure had achieved its objectives. A variety of views were expressed. The employer’s spokesman believed the Act had worked well over the previous twenty years. However, he wondered if the provisions of the Act were now sufficiently robust to protect those affected by irregular balloting and unofficial action. He cited anecdotal evidence that some employees had been pressured by union colleagues to vote a certain way. The Act should be amended, he suggested, enabling the Labour Court to fine unions in breach of balloting procedures and so save the employer the expense of seeking injunction.<sup>91</sup> The President of SIPTU expressed deep disappointment with the working of the Act

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85 Turner et al 2013, D’Art and Turner 2005

86 IT 11th.May 16<sup>th</sup>, 1998

87 Wallace 2002

88 Wallace 2002

89 von Prondzynski and McCarthy 1984

90 Kerr 2010

91 McGinty 2010

despite it being initially welcomed by many as strengthening trade union authority.<sup>92</sup> The Act, he claimed, has become increasingly an instrument of exclusion by making it virtually impossible to extend practical support or solidarity to vulnerable workers. The prospect held out by section 19 of the Act that once a union complied with section 14 of the Act and conducted a secret ballot, employers would be restrained from seeking ex parte injunctions had not been realised. In support, he cited three occasions in 2009 where the High Court had awarded ex parte injunctions in disputes where SIPTU had fully complied with its obligations under sections 14 and 19 of the Act. The restraints offered by section 19 of the Act, he concluded, had been more honoured in the breach than in the observance.<sup>93</sup>

A view of the Act from a legal perspective noted many issues that still awaited clarification.<sup>94</sup> For instance, the question of who is a 'worker'. The original draft of the Act excluded self-employed people or those on a contract of service from the definition of worker. However, it was deleted as the Minister conceded it would exclude various categories of workers it was not intended to exclude.<sup>95</sup> As Congress pointed out at the time those who contract to provide their own labour or services to another could not be described as anything but a worker.<sup>96</sup> Nevertheless, in two subsequent cases the judge believed that a fair issue arises as to whether a person who is not employed under a contract of service is a 'worker' within the meaning of the Act.<sup>97</sup> However, the most important issue identified by Kerr (2010) was the ballot and the granting or withholding of injunctions. As noted above in the Nolan judgement, the union resisting an injunction must be able to show not only that a ballot has been held but be able to "comfortably demonstrate" that the conduct of the ballot administration etc. was "manifestly correct". The problem is that the standard of proof required to show this is the case is unclear.<sup>98</sup> Consequently, the general trend is that when cases come before the court once the employer raises a 'serious issue' as to whether the picketing was authorised by a secret ballot then the requirements of section 19 are held not to be established. As Kerr (2010) points out, the immunities conferred by the Act are of little value unless they are available at the injunction stage.

An examination of the Act from an industrial relations perspective agreed with much of the foregoing.<sup>99</sup> Apparently the Act had not succeeded in diminishing the courts' presence in the arena of industrial relations. Nor had it disposed of injunctions. They continued to be granted because the employer can interrogate the conduct of the ballot.<sup>100</sup> As already noted, assurances from politicians and legal advisors had led Congress and the unions to believe this would never be the case. Furthermore, the balloting provisions were supposed to strengthen the hand of union officials against unofficial action. Contrary to what was envisaged, cases taken under the Act have tended to constrain official rather than unofficial action.<sup>101</sup> Like the Trojan horse, the balloting provisions and the Act itself have, for the Irish trade union movement, turned out to be one of those gifts from the Greeks.

Finally, one speaker at the UCD conference speculated on the long-term effect of the Act. He recognised the potential difficulties the Act still posed for trade unions. Nevertheless, he believed that post the Supreme Court Nolan judgement controversy over the Act had largely dissipated. The Act he continued has 'bedded-in' and gained acceptance among practitioners.<sup>102</sup> Events were to challenge such an assessment.

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92 O'Connor 2010

93 O'Connor 2010

94 Kerr 2010

95 Kerr 2010

96 ICTU 1990

97 Kerr 2010

98 Kerr 2010

99 Wallace 2010

100 Wallace 2010

101 Wallace 2010

102 Wallace 2010, 2013



**Dublin Airport Authority, Aer Lingus and Ryanair v SIPTU March 2014** – The dispute centred on an outstanding deficit of 780 million in the pension fund of workers at Aer Lingus and the Dublin Airport Authority. Three years of negotiation and visits to the Labour Relations Commission had failed to persuade the companies to adequately address the deficit. Consequently, SIPTU sought a mandate from its members for industrial action. With a majority of the ballot in favour, the union gave the companies fourteen days' notice of its intention to strike for four hours. Their reply was to seek an injunction restraining the union's proposed action.

In court, the employers claimed that if the strike went ahead it would cause irreparable damage, inconvenience to passengers and close the airports and secondly that the action contemplated was not a valid trade dispute within the meaning of the Act. It concerned a pension matter and was not a dispute connected with the employment or non-employment of workers. Thirdly, it was argued that the ballot was defective as it excluded union members who were not members of the pension scheme yet they would be expected to take part in the industrial action. Also, the ballot had included the firemen and airport police who were precluded by their contractual obligations for taking part in industrial action. Damages, the employers concluded, would not be an adequate remedy and the balance of convenience favoured the granting of an injunction.

The judge declared he did not have sufficient information on the pension issue to decide if it constituted a valid trade dispute. He postponed the decision until a full hearing. Turning to the conduct of the ballot he cited the issue of the firemen and police who should not have been called on to vote. Consequently, the legal validity of the ballot was problematic and therefore he granted the injunction. The four-hour stoppage was suspended.

It was a victory for the companies involved but one at least was not yet satisfied. Though the strike had never taken place, Aer Lingus announced its intention to seek damages for "conspiracy" and "unlawful interference" with its business. The company claimed it had incurred significant losses because of the threatened action. It went on to serve legal proceedings on SIPTU and its official seeking "multiple millions". The Minister for Transport described the Aer Lingus action as "unhelpful".<sup>103</sup> In fact, the Aer Lingus action was a throw-back not just to the Nolan Transport dispute but to the situation prevailing just before 1906. A year later Aer Lingus discontinued its action as part of an agreement with the union to resolve the pension crisis.<sup>104</sup>

**Bus Éireann, Dublin Bus and the NBRU/SIPTU May 2015** – This dispute concerned the proposed action by the National Transport Authority to put out to tender 10% of bus routes. If implemented, it would amount to a partial privatisation of the company. The bus workers argued that this would adversely affect their terms and conditions of employment. After unsuccessful negotiations, the members were balloted and a majority were in favour a two-day strike. The stoppage went ahead. In the aftermath of the strike the company wrote to the unions involved claiming their action was illegal. Furthermore, it threatened High Court proceedings for damages. This was dismissed by the unions as an attempt to intimidate their members. Yet the Minister of Transport believed the decision to partially privatise was a question of public policy. He appeared to suggest it was a political strike and therefore would not have the protection of the 1990 Act.<sup>105</sup>

**Conclusion** – As noted above, in the Supreme Court judgement in the Nolan Transport case, Judge O'Flaherty claimed that the 1990 Act "solidifies and indeed expands the privileged position afforded by the law to trade unions". Since that time there is little in the available evidence to support such a claim. Indeed, the contrary seems to be the case. The facility afforded to employers to interrogate every aspect touching the conduct of the ballot has weakened considerably the ability of unions to effectively resist the granting of interlocutory injunctions. Even ex parte injunctions have not been disposed of. Writing in 1991 Kerr noted the ease with which the judiciary granted injunctions. Unless there was a radical change in judicial attitudes and behaviour

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103 IT March 15th 2014

104 IT 15<sup>th</sup> May 2015

105 IT May 2<sup>nd</sup> 2015

regarding injunctions, then he believed, the Act would prove to be “fundamentally flawed”.<sup>106</sup> Since that time there is no sign of change, radical or otherwise, in judicial attitudes to the granting of injunctions.

According to Wilkinson (1991) the primary objective of the Act is the reduction of industrial unrest though limiting the effectiveness of industrial action by workers and trade unions. It seems the ability to take industrial action is being progressively circumscribed. In this regard, the overall operation of the Act has had a chilling effect on union action in defence of workers. A further ominous development is the willingness of employers to sue unions and officials for loss of revenue due to industrial action. As noted earlier, every strike causes damage to someone or some financial loss to employers. If it did not, then it would have no possible chance of success. If, once again, employers could sue unions for financial damages ascribed to strike action, then any form of industrial action would become virtually impossible. It was with this prospect in mind that the Trade Disputes Act 1906 ruled that any such action by employers would not be entertained by any court. Recent threats by employers to sue unions hark back to the situation prevailing before the 1906 Act.

Though inconvenient at times, freedom of association and the right to withdraw labour is integral to any democratic polity. In capitalist democracies unions serve an important function in exercising a check on the overweening power of capital. Indeed, unions perform several socially useful functions. At enterprise level, they provide employees with a collective voice through which they can exercise some influence on decisions affecting their working lives. Thus, unions both express and foster democratic values and culture. In the wider society trade unions act to promote values of social solidarity and provide a check on the socially corrosive effects of atomistic market individualism.



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106 Kerr 1991



## Section 4

### **What is to be done?**

Since the passage of the 1990 Act, the promises of politicians and assurances of legal advisors as to the likely operation of the Act have proved baseless. Contrary to expert opinion at the time, employers can challenge the conduct and outcome of the ballot. Far from enhancing trade union democracy, the balloting provision places many obstacles on the road to industrial action and opens every step of the way to legal challenge by employers. Ex parte injunctions have not been disposed of. Even when all the requirements of Section 19 are met by the union, ex parte injunctions continue to be granted. The expectation that legal action could not be taken against a trade union arising from its activities in contemplation or furtherance of a trade dispute has not been realised. Likewise, the assurance that the transparent subterfuge of changing the company name would not render unlawful continued picketing in furtherance of a pre-existing dispute. It did. The Irish trade union movement has been short-changed. One can only agree with the analysis of Wilkinson (1991) and the predictions of Kerr (1991) that the 1990 Act is fundamentally flawed. There are at least three possible responses to these difficulties with the Act.

### **1. Repeal**

'Repeal the 1990 Act' has the immediate simplicity of an effective political slogan. Given the manifest defects in the Act it appears as the ideal solution. Yet all industrialised nations have some legal framework governing industrial relations. So even if it was repealed it is inevitable that the Act would have to be replaced with some other legislative enactment. The hope would be that this new legislation would produce a more appropriate framework for the regulation of collective industrial action and legitimate the positive role unions play in enterprise and capitalist democracies. This would appear to involve a break with the common law system of immunities. For instance, Deakin and Morris (2005) doubt the effectiveness of any system of immunities, no matter how widely drafted, in protecting even the most basic collective rights of organised labour.

One way to escape the difficulties associated with common law and collectivism, it has been suggested, is to move from immunities to a rights-based system. The concept of 'immunity' it is argued, does not have the same rhetorical force as the term 'right'. It is difficult to deny someone rights without good justification. An immunity on the other hand sounds like a privilege rather than an entitlement. Consequently, this may have implications for the way in which judges construe the immunities. Rights may be construed generously; privileges are construed narrowly.<sup>107</sup> Yet even a positive right, Deakin and Morris (2005), point out is not immune from a creative interpretation by the courts. It may be as vulnerable to circumvention as an immunity in the hands of an adjudicating body attuned more to the individualistic tradition of common law rather than collective values.<sup>108</sup> In Ireland during the 1980s, the then Minister for Labour proposed to introduce a positive right to strike. Though initially welcomed by the ICTU it was eventually rejected due to concern with the extent of the restrictions placed on the right to strike. Little more was heard of a rights-based approach after 1987.<sup>109110</sup> In 1995 the British TUC launched a campaign for a new legal framework that would combine the best traditions of collective bargaining with the new rights under European law.<sup>111</sup> To date it appears the campaign has met with little success. This is hardly surprising given the balance of political

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<sup>107</sup> Davies 2004 228, Syrett 1998

<sup>108</sup> Deaking and Morris 2005, 1986 Doherty, M. 2014 Review Essay Back to the Future of EU Labour Law? *Kings Law Journal* 25 pp 467-475

<sup>109</sup> Wallace 2010

<sup>110</sup> Bonner 1987

<sup>111</sup> Hepple 1995

forces and the ambiguity of the British labour party regarding its relationship with the trade union movement. Even in Europe the political and industrial balance of power has shifted against trade unions.

Labour legislation is always an outcome of conflict between different social groupings and competing ideologies. What any group gets is not just a matter of what they choose or want but what they can force or persuade other groups to let them have. It is the power of opponents of reform which is the decisive factor in the making of labour law.<sup>112</sup> In Ireland, aside from the left wing political parties, the union movement has very few allies in the larger parties or in the print and electronic media. Given these circumstances, the necessary support for repeal might not be forthcoming. Even if it were, the influence wielded by the union movement might not be sufficient to shape the replacement legislation to its satisfaction. Indeed, it might turn out to be more restrictive.

## **2. Leave sleeping dogs lie**

The formidable obstacles to repeal, and even if overcome the uncertain outcomes combine to counsel a policy of leave sleeping dogs lie. Given the circumstances this may seem a sensible and pragmatic strategy. After all the 1990 Act has been on the statute book for over 25 years. By now trade unions and officials have a wealth of practical experience and gained a good understanding of the Act in practice. Consequently, they can continue to pursue and defend their members' interests within the constraints of the Act while avoiding its various pitfalls regarding industrial action. The success of this strategy is contingent on the absence of judicial activism. This cannot be relied on. For instance, in Britain two periods, the early 1900s and the mid-1960s, have been identified as times when judges choose to launch new developments in the common law regarding unions. Revived judicial inventiveness has been ascribed to industrial militancy and concern at so called abuses by trade unions of their economic power (see Deakin and Morris, 2005). In contemporary Ireland, there is a growing demand for wage restoration if not wage increases across the economy. If this were to issue in industrial action or strikes, public sympathy might be in short supply. The recent action by the Luas tram drivers is a case in point. Commentary in the media was hostile and there appeared to be a wilful misunderstanding of the role of union officials and the operation of union democracy. Nonetheless it may have helped shape a hostile public response and create a climate conducive to judicial innovation and inventiveness in dealing with trade disputes. In such a climate, the courts might be willing to entertain the ridiculous threat by management to sue the striking Luas workers for breach of contract. Letting sleeping dogs lie may not be the best policy.

## **3. Amend the Act**

As already noted the 1990 Act has been characterised by academic commentators as fundamentally flawed and likely to progressively circumscribe the effectiveness of industrial action by workers and their unions. Prior to its passage it was described by one union leader as 'the worst dilution of workers' rights in the history of the state'<sup>113</sup>. Repeal appears as an ideal but currently problematic solution. Failing that the amendments set out below may serve to weaken its more repressive elements.

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112 Hepple 1995

113 Cited in Sheehan, M (1991) The Right to strike: a thing of the past? *Making Sense* January/February



### ***The Ballot***

As we have seen a central difficulty with the 1990 Act, from a trade union viewpoint, are the balloting provisions. As already noted, Wilkinson (1991) claims they represent an unprecedented intrusion into the internal affairs of a trade union. Indeed, they are likely at variance with Articles 3 and 8 of ILO Convention 87 which allows unions complete autonomy in setting their own internal rules. At an international level, trade union autonomy is regarded as fundamental to the concept of freedom of association.<sup>114</sup> In line with Convention 87 union autonomy should be restored regarding the conduct and holding of ballots. The Act, as interpreted by the judiciary, facilitates employers interrogating every aspect of the ballot. Consequently, the possibilities for litigation appear endless. The slightest defect, real or asserted, in administering the ballot, counting of votes, numbers or eligibility of those taking part etc. can render the ballot invalid resulting in the granting of an injunction and the neutralisation of industrial action. Prior to the passage of the Act, unions were assured by politicians and legal advisors that this situation would never arise. Consequently, the only remedy in these circumstances is to return to the status quo before the passage of the Act that the conduct of the ballot is purely an internal matter for a trade union. It should never be a matter open to interrogation by the employer or his/ her legal advisors. Far from being a radical demand such an amendment would merely bring the Act into conformity with the requirements of Articles 3 and 8 of the ILO Convention 87.

As we have seen, Section 14 of the Act rules that in all dispute situations unions must conduct a secret ballot and give the employer seven days' notice. There are no exceptions to this rule. This is unduly restrictive and weighs the advantage heavily in favour of the employer. It advantages the unscrupulous employer prepared to take precipitate action without consultation. A recent example would be the Clerys' case. Furthermore, this restriction on union autonomy may again be at variance with the ILO's Convention 87. The Act must be amended to allow for immediate action by trade union in circumstances where the employer takes arbitrary action and without consultation with the union or its members.

### ***Who is a Worker?***

According to the Act it is "any person who is or was employed, whether or not in the employment of the employer with whom a trade dispute arises, but does not include a member of the Defence Forces or the Garda Siochana". As we have seen, the Irish Congress of Trade Unions (ICTU) was not happy with this definition. The so-called immunities granted by the Act would be confined to those working on a contract of service. ICTU was concerned that there had been cases in the past where the courts held that self-employed workers or those working on a "contract for service" are not employed and therefore not afforded the protection of the Act. Congress argues that the term "employed" should cover any person who provides services to another regardless of the nature of the contract under which they are employed (ICTU, 1990). Given the growth in bogus self-employment contracts, the Congress definition of a worker should be adopted regarding strikes or industrial action.

### ***Primary and Secondary Picketing***

Those best placed to establish where the employer carries on business are the employees. Consequently, this decision should be left to the workers involved and not decided by the courts. In the recent Tesco strike some employees were precluded from picketing the stores in dispute and were obliged to picket at the entrances to the industrial estate. This involved hardship for small employers who were not in any way involved in the dispute. Also, the restrictions on secondary picketing must be removed in line with that cardinal principle of trade unionism 'an injury to one is an injury to all'.

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114 Deakin and Morris 2005

### ***Strikes in defence of a single worker***

Even before the enactment of the IR Act 1990, strikes in defence of a single worker were a rarity. Nevertheless, in cases of summary dismissal or victimisation such strikes may be necessary. In such circumstances, the decision should be left to the worker's colleagues and trade union.

### ***Sit-ins and Political Strikes***

Generally, 'sit ins' are a rare occurrence. In very difficult circumstances a sit-in is the only option left to workers. The disgraceful treatment of the Clerys' workers is a case in point. While it may not have won the day, a sit-in would have caused great inconvenience to the employer and might have hurried a resolution. Widespread public support would have been likely. Consequently, it is important that the ban on 'sit-ins' be lifted. As for political strikes, this should only be a matter for the entire trade union movement.

### **Proposed Amendments to the Industrial Relations Act 1990**

Part 2 of Industrial Relations Act 1990 - Trade Union Law - Trade Union Disputes

Section 9 - Application of Provisions of Part 2 - remove subsection (2).

Section 14 - Secret Ballots - complete removal of this section with no substitution as it might interfere with internal trade union governance.

Section 15 - Power to alter rules of Trade Unions - remove sub-section (1).

Section 16 - Enforcement of rule for Secret Ballot - complete removal of this section which is redundant without section 14.

Section 17 - Actions contrary to outcome of Secret Ballot - complete removal of this section.

Section 19 - Restriction of right to injunction - complete removal of this section which is redundant without section 14.



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