

ENGLISH LABOR LAW — THE 1984 TRADE UNION IMMUNITIES ACT AND ITS EFFECT ON UNIONS' LEGAL STATUS

I. INTRODUCTION

On July 26, 1984, the United Kingdom enacted the Trade Union Act, placing new restrictions on trade union autonomy.¹ The Act requires unions to adopt prescribed internal procedures designed to enhance trade union "democracy."² Failure by a union to institute these provisions results in the loss of immunity from civil and criminal liability.³

The Trade Union Act requires the election of all voting members of a union's executive council by secret ballot every five years.⁴ Furthermore, the Act makes ratification by postal or secret ballots a prerequisite to the commencement of any form of industrial action.⁵ Only union members, however, may bring suit to enforce provisions of the Act.⁶

This Act further restricts the use of union dues for "political purposes";⁷ specifically, the general membership must endorse the existence of any political fund via secret ballot every ten years.⁸ Only

¹ Trade Union Act, 1984, ch. 49. The Act was the third in a series of laws designed to address the problems of work stoppages. On the average, England loses 440 work days per 1000 employees annually. This figure compares to 30 lost work days per 1000 employees annually in Germany and 170 lost work days per 1000 employees annually in France. *Industrial Relations Europe*, July 1985 at 2, col. 2.

² *DEMOCRACY IN TRADE UNIONS*, CMD. 8778 (1983), para. 56.

³ Trade Union Act, 1984, ch. 49.

⁴ *Id.*

⁵ *Id.* Such proposals are not new to debates on English labor law. In fact, in 1980 the government rejected a back-bench effort to include these proposals in the 1980 Employment Act. Interestingly, the government endorsed these provisions only three years later. *TRADE UNION IMMUNITIES*, CMD. 9128 (1983), para. 246. *See also* 983 Parl. Deb., H.C. (5th ser.) 227 (1980).

⁶ Trade Union Act, 1984, ch. 49. This provision of the Act seriously limits its effectiveness. Rather than forcing unions to comply with its guidelines, the Act merely requires a union to evaluate the loyalty of its rank-and-file. The Act places a heavy burden on workers by requiring them to institute lawsuits to trigger the statute.

⁷ *Id.*

⁸ *Id.*

money emanating from the fund may be used to further the union's political objectives.⁹ By establishing these procedural guidelines, the Conservative Government hopes to increase union "democracy" by making ruling councils more responsive to the rank-and-file membership.¹⁰ *Trade Union Act, 1984*.

The Trade Union Act renews a debate concerning the scope of government regulation over trade unions, a controversy ingrained in English labor law.¹¹ The degree of permissible statutory intrusion depends on government's view of the legal status of trade unions as either "voluntary," "quasi-corporate," or fully "incorporate."¹² If government regards unions as incorporated, it may justify the regulation of the union's infrastructure and the union's external activities.¹³ Conversely, if government sees union membership as voluntary, it can only justify restrictions on external "illegal" activity that members as individuals cannot legally perform.¹⁴ Finally, treatment of unions as quasi-corporate justifies regulation of both "legal" external activity that members as individuals can participate in legally and "illegal" activity.¹⁵

II. LEGAL BACKGROUND

The House of Lords first addressed the controversy of a union's legal status in *Taff Vale Railway v. Amalgamated Society of Railway*

⁹ The strict controls placed on trade union political funds stand in stark contrast to the minimal standards imposed on corporations. The 1967 Companies Act requires directors to disclose the amount of donations and the identity of the recipients in their annual reports. The Companies Act, 1967, § 19.

¹⁰ DEMOCRACY IN TRADE UNIONS, *supra* note 2.

¹¹ R. KIDNER, *TRADE UNION LAW* 4-6 (1983). See also O. KAHN-FREUND, *LABOUR AND THE LAW* (1983); J. CRONIN & R. CRIME, *LABOUR LAW* (1970).

¹² See R. Kidner, *Trade Union Democracy: Election of Trade Union Officers*, 13 *INDUS. L.J.* 193 (1984). Kidner uses the term "incorporate" to denote a mandatory association, or one of compelled membership. Kidner describes a "quasi-corporate" association as "nebulus," since it maintains characteristics of both voluntary and corporate associations. See also O. KAHN-FREUND, *supra* note 11, at 236-70. Kahn-Freund defines a voluntary union organization as one in which workers are free to choose to associate or disassociate.

¹³ As Kahn-Freund notes, it is the voluntariness of union membership that keeps unions democratic. O. KAHN-FREUND, *supra* note 11, at 270-74. Absent this restraint on union leadership activity, the insulation generally provided to leadership would isolate it from the general membership. To retain "democratic" stature, the unions must then adopt internal mechanisms to insure accountability of the leadership to the rank-and-file. Democracy within trade unions is necessary because of their unique role within society. See R. KIDNER, *supra* note 11, at 4-7.

¹⁴ See *supra* note 13; see also O. KAHN-FREUND, *supra* note 11, at 270-74. External activity consists of strikes, secondary picketing, work slow-downs, etc.

¹⁵ Legal activity includes contributions to political funds, which individuals can do freely but only within certain guidelines. *Trade Union Act, 1984*, ch. 49.

Servants.¹⁶ In holding trade unions civilly liable for acts of members, the House of Lords granted legal status to trade unions.¹⁷ The judiciary failed, however, to define the exact boundary of this newfound legal status, refusing to label it either incorporate or quasi-incorporate.¹⁸ Nevertheless, the court clearly rejected the posture of unions as voluntary organizations.

In *Osborne v. Amalgamated Society of Railway Servants*,¹⁹ however, the court took a further step toward adopting the "incorporate" or the "quasi-incorporate" approach.²⁰ The plaintiff in *Osborne* sought to prevent his union from contributing to political parties, theorizing that a trade union is not a voluntary organization.²¹ Consequently, the plaintiff believed it a "monstrous injustice [to compel] men who have been forced into the union" to support financially its political activities.²² In finding for the plaintiff, the court implicitly adopted his view that trade unions are nonvoluntary.²³

The resulting outcry from these decisions forced legislators into the controversy.²⁴ The government's first response limited union liability for the acts of union members "committed by or on behalf of union members."²⁵ In effect, this Act provided trade unions with

¹⁶ *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426.

¹⁷ R. KIDNER, *supra* note 11, at 4. "The decision in *Taff Vale Railway Company v. Amalgamated Society of Railway Servants* that [unions] could be sued in their own name, and damages obtained out of their funds destroyed [the] effective immunity" afforded trade unions status as "unicorporated associations." R. RIDEOUT, *PRINCIPLES OF LABOUR LAW* 311 (1979).

¹⁸ C. DRAKE, *LABOUR LAW* 213 (1981). Only Lord Brompton was willing to assign a quasi-corporate status to unions in *Taff. Id.*; see *Taff Vale Railway Co.*, [1901] A.C. 426.

¹⁹ [1901] C.H. 163.

²⁰ J. RIDDALL, *THE LAW OF INDUSTRIAL RELATIONS* 49 (1981).

²¹ W. OSBORNE, *MY CASE* 39 (1910); see also J. RIDDALL, *supra* note 20, at 49-50.

²² J. RIDDALL, *supra* note 20, at 49-50.

²³ See *Osborne v. Amalgamated Society of Railway Servants*, [1909] A.C. 195, 195-96. L.J. Farwell's opinion inherently suggests that union membership is not voluntary: "It is also necessary for his freedom that he shall not have been coerced into supporting by money or otherwise the candidate whom he wishes to oppose." *Id.* at 195.

²⁴

Member after member rose from different parts of the House to explain that they had pledged themselves to vote for the complete immunity which trade unions were suppose to have been granted . . . and the most powerful Government hitherto known was constrained . . . to pass the Trade Disputes Act of 1906.

J. RIDDALL, *supra* note 20, at 49.

²⁵ *Id.*; see also Trade Disputes Act, 1906.

immunities or privileges unavailable to voluntary organizations, incorporated associations, or individuals, recognizing legislatively the quasi-corporate status suggested in *Taff*.²⁶

The initial Act also removed restrictions on unions' abilities to maintain political funds, but permitted a union member to limit his dues to non-political funds.²⁷ These provisions suggest that the legislature "compromise[d] between two democratic necessities. . . ."²⁸ Thus, while moving unions toward autonomy and voluntary legal status, the Act recognized the unique nature of union membership.²⁹ The legislature recognized unions' legal status as quasi-corporate, but was unsure what degree of intrusion was permissible and where quasi-corporate status fell in respect to voluntary and incorporate status.³⁰

From 1913 until 1956, statutory and case law clearly held that "registered trade unions [were] not a simple incorporated association" like a "tea club" or "philatelic society."³¹ In *Bonsor v. Musicians' Union*,³² the court clarified unions' status.³³ The plaintiff sought to hold his union liable for wrongfully discharging him from its ranks. Prior to enactment of the Trade Union Act of 1913, the court dismissed a similar suit in *Kelly v. National Society of Operative Printer's Assistants*,³⁴ where it viewed trade unions as voluntary organizations.³⁵ Seeking to reverse *Kelly*, the plaintiff in *Bonsor* argued that "[a] registered trade union is a legal entity, though not a cor-

²⁶ The 1906 Act provided immunity for organizations' industrial actions. Prior to the Act the common law clearly held such acts violative of statutory law. *See, e.g.,* *Lyons v. Wilkins*, [1896] C.H. 811; *Lyons v. Wilkins* [1899] C.H. 255. *But see* CITRINE, *TRADE UNION LAW* 558-62 (3d ed.); *see also* *Hubbard v. Pitt*, 1975 Indus. Cas. R. 308, 317 (Lord Denning, dissenting). Further, the Act did not restrict the manner in which unions chose to use industrial action or to exempt individual members from a "coerced" participation.

²⁷ Trade Union Act, 1913.

²⁸ *Id.* § 3.

²⁹ O. KAHN-FREUND, *supra* note 11, at 247.

³⁰ *See id.* at 247, 274. While Kahn-Freund argues that the statute favors union autonomy, the Act still restricts union activity by preventing the union from compelling members to contribute money for a political fund. The statute seeks to protect the minority because of the special status unions maintain in society. *See* R. KIDNER, *supra* note 11, at 4-5.

³¹ C. DRAKE, *supra* note 18, at 213; *see* Trade Disputes and Trade Unions Act, 1927; Trade Disputes and Trade Unions Act, 1946; *see also* *Barker v. Allanson*, [1937] 1 K.B. 463. *See generally* J. RIDDALL, *supra* note 20, at 53-56.

³² [1956] A.C. 104.

³³ *Id.*; *see also* C. DRAKE, *supra* note 18, at 213.

³⁴ [1915] 31 TLR 632.

³⁵ *Id.*

poration. It is a quasi-corporation."³⁶ Overruling *Kelly*, the court accepted the plaintiff's argument that unions are quasi-corporate, expressly rejecting the defendant's contention that unions lacked legal entity status and should be considered voluntary.³⁷ This decision firmly established trade unions' quasi-corporate status.³⁸

This quasi-corporate status remained unchallenged until 1968. Then, in an effort to combat economic stagnation, the Labour Government appointed the Donovan Commission.³⁹ Among a variety of suggestions regarding the restructuring of worker-employer-union relationships, the Commission recommended that unions be assigned corporate legal status.⁴⁰ The Labour Government failed, however, in implementing the Commission's recommendations, and general discontent with the freedoms afforded trade unions restored the conservatives to power and brought a new approach to trade unions.⁴¹

In 1971 the Conservative Government passed the Industrial Relations Act,⁴² which addressed the "disorderly condition of industrial relations."⁴³ The Act expressly provided for a change in legal status by directing that "[a] registered trade union becomes a full incorporated body upon registration."⁴⁴ The Act also created a cause of action in workers fired for failing to join a union.⁴⁵ In effect, the

³⁶ *Bonsor*, [1956] 1 A.C. at 110.

³⁷ *Id.* at 107. The defendant contended that unions are not of themselves legal entities; rather, that they are only associations of legal entities or individuals. Consequently the defendant claimed that unions cannot independently enter contracts or other legal relationships. *Id.*

³⁸ C. DRAKE, *supra* note 18, at 213; *see also* R. KIDNER, *supra* note 11, at 4 (arguing that *Bonsor* pushes union status closer to total incorporation).

³⁹ J. RIDDALL, *supra* note 20, at 58.

⁴⁰ C. DRAKE, *supra* note 18, at 213.

⁴¹ WEEKES, MELLISH, DICKENS, & LLOYD, *INDUSTRIAL RELATIONS AND THE LIMITS OF LAW* (1955). After the Donovan Commission's report, the Labour Government issued a white paper, "In Place of Strife," which sought to implement much of the Commission's recommendations. Strong Trade Union Council (TUC) opposition, however, forced the Labour Government to withdraw the recommendations and adopt a more conciliatory position. *Id.* at 1-4. Nonetheless the TUC's victory was shortlived. *See infra* notes 42-46 and accompanying text.

⁴² Industrial Relations Act, 1971. The Act amended many of the provisions of the pre-1970 legislation and took a more active role in limiting trade union activities. C. DRAKE, *supra* note 18, at 2.

⁴³ J. RIDDALL, *supra* note 20, at 60. The legislation emanated from a Conservative Party paper entitled "Fair Deal at Work." The paper contained most of the suggestions from the Labour Government's white paper "In Place of Strife." *Id.*; *see supra* note 41.

⁴⁴ Industrial Relations Act, 1971, § 74.

⁴⁵ J. RIDDALL, *supra* note 20, at 60. This portion of the Act seems paradoxical

Act subjected trade unions to unprecedented levels of legislative intrusion.⁴⁶

Trade unions' corporate legal status was shortlived. In 1974, the Labour party regained control of Parliament and reinstated unions' quasi-corporate status.⁴⁷ The Trade Union and Labour Relations Act, 1974⁴⁸ specifically prohibited the treatment of unions as corporate organizations, conferring upon them "quasi-corporate attributes."⁴⁹ In essence, the Act restored the legal status of trade unions to the pre-1971 status quo.⁵⁰ This status quo remained unchallenged until the Trade Union Act, 1984.⁵¹

III. COMMENT

While on its face the 1984 Trade Union Act leaves untouched unions' quasi-corporate status as found within the 1974 Act, the 1984 Act in effect restores union status to the corporate level by regulating trade unions' infrastructure.⁵² In attempting to justify this regulation, the government contends that a lack of democracy within trade unions necessitated statutory intervention.⁵³

since it seeks to restore unions to the status of voluntary associations while treating them as incorporate organizations.

⁴⁶ Previous legislation dealt with liability for industrial actions, while case law limited union liability to industrial action and "wrongful dismissals." See *Bonsor*, [1956] 1 A.C. 104. Here the 1971 Act created liability arising out of the employer-union relationship regarding closed shop agreements and constituted the first intrusion into "collective" agreements of this type. See O. KAHN-FREUND, *supra* note 11, at 248.

⁴⁷ C. DRAKE, *supra* note 18, at 213; R. KIDNER, *supra* note 11, at 4; J. RIDDALL, *supra* note 20, at 63; see also Trade Union and Labour Relations Act, 1974.

⁴⁸ Trade Union and Labor Relations Act, 1974.

⁴⁹ C. DRAKE, *supra* note 18, at 213.

⁵⁰ *Id.*

⁵¹ See O. KAHN-FREUND, *supra* note 11, at 270-90; see also R. KIDNER, *supra* note 11, at 4-6. In 1980 a back-bench attempt was made to assign corporate status to trade unions. However, the Thatcher government refused to disturb the status quo, at least temporarily. See R. Kidner, *supra* note 12.

⁵² See *supra* notes 1-9 and accompanying text.

⁵³ R. KIDNER, *supra* note 51, at 193-94. The government stated that the high incidence of industrial conflict resulted from militant officials who received authorization for industrial action in "rowdy open air meetings which were a travesty of Democracy." J. Hutton, *Solving the Strike Problem: Part II of the Trade Union Act 1984*, 13 *INDUS. L.J.* 212; see also Trade Union Immunities, *CMD.* 8128, para. 247 (1983).

Such a justification implicitly supposes that unions are corporate entities.⁵⁴ Traditionally, "internal" trade union democracy⁵⁵ was not viewed as a necessary restraint on trade union officials since "a [union is] always and inevitably threatened by disruption because it is a fighting body which may be attacked" by external forces.⁵⁶ These external forces allow discontented members to form competing organizations and secede from the union.⁵⁷ This "mortal threat of secession" requires union leaders to remain responsive to the changing political posture of the general membership.⁵⁸

The traditional approach assumes, however, that union membership is voluntary, or at least quasi-voluntary, with individuals retaining the right to move freely in and out of the union organization.⁵⁹ In other words, the presumed quasi-corporate status provided to trade unions made internal regulation unnecessary. The government's position, as reflected in the 1984 Trade Union Act, assumes that trade unions are corporate entities, not voluntary associations. This approach more accurately reflects present labor relations.

Trade union membership is no longer voluntary. The nature of employer-union relations compels trade union membership. Employers and the union generally negotiate collective agreements that guarantee a "closed shop" workplace.⁶⁰ This closed shop agreement makes union membership a prerequisite to employment and severely inhibits secession.⁶¹

⁵⁴ Corporate entities in this context are organizations with compelled membership. See R. Kidner, *supra* note 12.

⁵⁵ "Internal" democracy simply refers to the internal mechanisms of the trade union (e.g., the manner of electing officials and the process of ratifying strikes).

⁵⁶ "External forces" refers to the union system itself (e.g., the ability of members to secede and refuse to join the rank-and-file). Specifically, external forces are forces beyond the control of unions which act as constraints on their autonomy with respect to the rank-and-file. O. KAHN-FREUND, *supra* note 11, at 273-74.

⁵⁷ *Id.*

⁵⁸ See generally *id.* at 270-90.

⁵⁹ See *id.*; see also R. KIDNER, *supra* note 11; C. DRAKE, *supra* note 18.

⁶⁰ A closed shop is "a situation in which employees come to realize that a particular job is only to be obtained and retained if they become and remain members of one of a specified number of trade unions." W. MCCARTHY, *THE CLOSED SHOP IN BRITAIN* 3 (1964). In the United States a different method of unionization is employed. Unions are chosen through "certification" by the workers; therefore, no preexisting agreement is present. The only role played by the management/employer is the ratification of the election results. COX, BOX & GORMAN, *LABOR LAW* 262 (1981).

⁶¹ See O. KAHN-FREUND, *supra* note 11 at 236-70.

Absent the "mortal threat" of secession, union leaders arguably become isolated from the rank-and-file.⁶² This combination of compelled membership and leader isolation places at risk rank-and-file members' inherent rights regarding important work-related decisions.⁶³ The creation of internal "democratic" mechanisms seeks to protect these rights.⁶⁴

Assuming that the government correctly assessed the nature of current labor practices, an argument remains as to whether its chosen course properly addresses the problem by attempting to protect union members' inherent rights through these "democratic" guarantees. Critics assert that the ideal of trade union democracy is unattainable because of the lack of parties within the union structure.⁶⁵ "As we in our present world understand 'democracy' it presupposes parties. This means that there must inside the body politic, be groups representing different interests and ideals. . . ."⁶⁶ Further, the potential for secession arguably implies that parties cannot exist in unions.⁶⁷ The existence of parties would result in constant splintering into factional trade unions after each election.⁶⁸

Initially, these arguments incorrectly assume that "parties" within a union can splinter to form their own unions. As noted, closed shop agreements prevent the free flow of non-union labor.⁶⁹ By splintering off from the recognized union, insurgent members lose their jobs and, consequently, the base needed to establish a competing union.⁷⁰

⁶² *Id.*

⁶³ These inherent rights include the right to ratify a strike, to determine the acceptability of employment contracts, and to determine the interests sought during negotiation. The test of union democracy is whether the union enhances the interests of its members. L. ALLEN, *POWER IN TRADE UNIONS* 56 (1954). To enhance members' interests effectively, union officials must be able to identify the interests of union members. *Id.* Such an identification process necessarily assumes that union leaders are not isolated. *See id.*

⁶⁴ *See* Kidner, *supra* note 12, at 193-94; *see also* Trade Union Act, 1984. *See generally* Democracy in Trade Unions, CMD. 8778 (1983).

⁶⁵ O. KAHN-FREUND, *supra* note 11, at 273-74.

⁶⁶ *Id.* at 272.

⁶⁷ *Id.* at 273-76.

⁶⁸ *Id.*

⁶⁹ *See supra* note 60 and accompanying text.

⁷⁰ Examining the situation from the employer's perspective, an employer would not want a competing union since it could be both confusing and time consuming. Different unions require separate agreements, resulting in two sets of negotiations. Also, perceived friction between the competing unions may persuade an employer to release a militant union member rather than retain him and his splintered organization.

The reality of existing employer-union practices therefore requires competing parties to remain within the union organization.

Further, the suggestion that "parties" are necessary for the existence of democracy seems erroneous. Parties are simply the conglomeration of individuals with similar viewpoints. Democracy does not require formalized parties; rather, democracy implies the tolerance of factions opposed to incumbent officers.⁷¹ The survival of factions limits leaders' isolation and requires responsiveness to membership demands.⁷²

Democratic procedures protect factional interests by providing a forum for their existence. Elections present an opportunity for factional groups to express their philosophies, by allowing both leadership and opposition a vehicle for evaluating changes in membership interest. The net result is a more responsive system since the process creates a method for determining rank-and-file interests.

Democracy, then, protects membership rights through increased responsiveness. The question remains, however, whether the 1984 Trade Union Act effectively achieves trade union democracy. Taken by itself, Part I of the 1984 Act seeks to establish democracy by outlining election guidelines.⁷³ These procedures require the free election by all voting members of the executive councils every five years.⁷⁴

Despite its initial appearance, however, the Act goes beyond mere implementation of democratic guidelines. The Act intrudes into the internal affairs of unions, in direct contravention of International Labour Organization (I.L.O.) standards. Convention No. 87 of the I.L.O. directs governments to afford unions "the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administrations and activities and to formulate their programmes."⁷⁵ The 1984 Trade Union Act limits these forms of trade union autonomy by establishing guidelines for union elections, effectively rewriting most union constitutions.⁷⁶ While the Act may solve the problem of trade union democracy, it creates a

⁷¹ Martin, *Union Democracy: An Explanatory Framework*, 2 Soc. 205 (1968).

⁷² *Id.*

⁷³ See *supra* notes 1-9 and accompanying text.

⁷⁴ *Id.*

⁷⁵ *Survey by Committee of Experts on Freedom of Association and Collective Bargaining*, I.L.O. Geneva, 1983, paras. 149-74. See R. Kidner, *supra* note 12, at 195.

⁷⁶ *Supra* notes 1-9 and accompanying text. The provisions regarding union elections affected by the 1984 Act are generally found within a union's constitution. Thus, to impose restrictions different than those presently in force effectively rewrites the union's constitution. See R. Kidner, *supra* note 12, at 193-94.

new problem by improperly limiting trade union autonomy.

To attack the problem of trade union democracy within the parameters created by the I.L.O. convention, the government must regulate union activity through external controls. For instance, the government should require the recertification of unions by the rank-and-file instead of regulating internal elections.⁷⁷ The recertification process would create a forum for factional interest groups and provide union leaders with a mechanism to assess these factional views.⁷⁸ Further, the recertification process insures that union leadership will remain responsive to the wishes of its membership because of the threat of expulsion.⁷⁹ Thus, the recertification process and its "mortal threat" of expulsion provide the government a method of guaranteeing union democracy within I.L.O. guidelines.

While this procedure creates democracy within trade unions, governments must remain cognizant of an individual or "minority" worker's interest in not joining a union. "No one must be exposed to the dilemma between joining a union he does not want to join, and not obtaining or holding a job he wants to obtain or hold."⁸⁰ Workers have a viable interest in remaining independent of unions since union activity extends beyond the workplace.⁸¹ Requiring individual workers to support these extended activities as a condition of employment offends notions of fairness and democracy.⁸²

⁷⁷ As previously noted, in the United States workers choose the union they wish to join collectively through a process called certification. Recertification amounts to an extension of this principle. Rather than voting for individual union leaders, workers would vote to retain or expell the existing union. This process eliminates control over the internal operations of union elections, but insures that unions will remain responsive to rank-and-file wishes, or face expulsion. Further, by requiring automatic recertification, individual workers no longer bear the burden of enforcing the statute. This result counteracts a serious flaw in the 1984 Act. For more background on the certification/recertification process, see Cox, *supra* note 60, at 262. Regarding the flaw in the 1984 Act, see R. Kidner, *supra* note 12, at 210-11.

⁷⁸ With respect to factional interests and elections, see *supra* notes 71-72, and accompanying text.

⁷⁹ A worker's power to secede amounts to a "mortal threat" to the existence of a trade union by threatening its power base. Extending this argument further, the threat of expulsion, which would dissolve the local union, acts as a similar restraint on union activity. See O. KAHN-FREUND, *supra* note 11, at 274; see also *supra* notes 36-58 and accompanying text.

⁸⁰ O. KAHN-FREUND, *supra* note 11, at 236. See R. KIDNER, *supra* note 11, at 88-103.

⁸¹ See Osborne, [1911] C.H. 540; see also *supra* notes 20-22 and accompanying text.

⁸² Osborne, [1911] C.H. 540; see R. KIDNER, *supra* note 11, at 88-103; see also O. KAHN-FREUND, *supra* note 11, at 234-40.

To protect an individual's right to remain independent, the government must replace "closed" or "union" shop agreements with "agency" shops.⁸³ Such a system protects individual rights while reducing traditional friction between union and "free riders" since it requires all individuals to pay a portion of union dues for the services provided during negotiations.⁸⁴

IV. CONCLUSION

The 1980 Employment Act marked an attempt by the Conservative Government to restrict closed shop agreements, but "stopped short of a direct and outright onslaught upon the practice of the closed shop."⁸⁵ A "direct and outright onslaught" must be instituted to insure individual worker rights. Further, both unions and employers should face sanctions in an effort to dismantle the closed shop system, since employers also tacitly encourage the system.⁸⁶

The 1984 Trade Union Act evidences a concern for trade union democracy and worker rights. In attempting to address these concerns,

⁸³ For a definition of "closed shop" see *supra* note 60. A union shop agreement requires "employees in a given bargaining unit to become members thirty days after being hired." *NLRB v. General Motors Corp.*, 373 U.S. 734, 741 (1963). See generally Cox, *supra* note 60, at 1056-80. An "agency shop" gives a worker two choices once employed:

(a) he can become a member of one of the registered unions with whom an agreement exists;

(b) he may decline such membership but pay the equivalent of union dues to one such union. In that case he can be a member of some other organization of workers if he chooses, or he may remain outside any organization.

R. RIDEOUT, *TRADE UNIONS AND THE LAW* 43 (1973).

⁸⁴ See *Radio Officers' Union v. NLRB*, 347 U.S. 17, 41 (1954) (court "recognized the validity of unions' concern about 'free riders,' — employees who receive the benefits of union representation but are unwilling to contribute their fair share of financial support to such unions — and gave the unions the power to contract to meet that problem").

⁸⁵ O. KAHN-FREUND, *supra* note 11, at 252; see *The Employment Act, 1980*. The Act allows workers to avoid union membership if they "genuinely object on grounds of conscience or other deeply held personal convictions. . . ." O. KAHN-FREUND, *supra* note 11, at 253. In effect, the Act required "conscientious objectors" to make affirmative claims that could result in litigation. Thus while the Act afforded workers an opportunity to reject "compelled" membership, the workers could still be dismissed and would then bear the burden of proving the reasonableness of their objections. Such a costly and time consuming burden limits the effectiveness of the 1980 Act. *Id.* at 252-61.

⁸⁶ *The Employment Act, 1980*; see O. KAHN-FREUND, *supra* note 11, at 252.

⁸⁷ Such a provision would eliminate "tacit" closed shop agreements. The 1982 Employment Act recognized the possibility of tacit employer/union agreements and outlawed dismissals for non-membership of a union as an automatically unfair dismissal. See *Employment Act, 1982*.

the Act assigns trade unions corporate legal status. The result of this determination led the government to institute controls on the manner employed by unions to elect its officials. Such regulation, however, invades the rights of unions according to I.L.O. provisions. By instituting a recertification procedure and eliminating closed shop agreements, the government can address its concerns within I.L.O. standards.

Bret J. Pangborn