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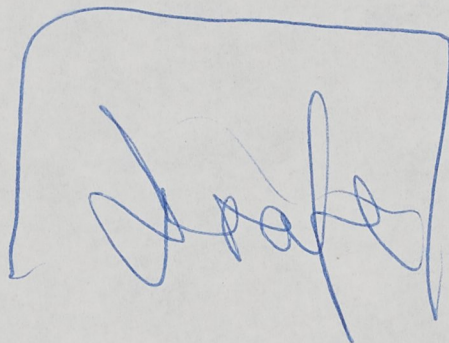
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THE ROLE OF TRADE UNIONS IN A DEMOCRATIC SOCIETY

(Keynote address by Professor Bob Hepple)

The year 1990 has been likened to 1789, 1848 , 1945 and other years in which great flames of democracy were lit in many parts of the world. I saw a small chink of that light in February when the restrictions which have silenced me in the country of my birth for nearly 27 years were lifted. I am grateful to you for allowing me to make my first public utterance at this conference on a subject of such great importance to the future of South Africa.

It is fitting that on this occasion I should pay tribute to those with whom I had the privilege to work in the South African Congress of Trade Unions and the labour movement before I left in 1963. Some sacrificed their lives , like Lawrence

Ndzanga, Caleb Mayekiso and Vuyusile Mini; some died in exile never again to see their native land, like Moses Mabhida ,Alex Hepple and Eli Weinberg; others languished for long years in prison, like Wilton Mkwayi and Billy Nair. One cannot speak of the role of trade unions in a democracy without remembering that outstanding trade unionists such as these believed fervently that without a democratic society trade unions would at best be hamstrung and at worst the subject of endless repression.

I also wish to express my profound admiration to those in this audience and beyond who - as managers, trade unionists, and lawyers - have helped in the development of collective bargaining in recent years. As Clyde Summers said in the keynote address at your conference last year, collective bargaining "provides a process for bringing a measure of democracy to industrial life by giving workers a voice in decisions which vitally affect them." I would add that this example of democracy in industrial life is one which could be emulated in the political sphere, as different interest groups negotiate and settle their differences by peaceful means.

Trade unions and democratic rights

This brings me to the subject of my address. Democracy means participation. It is ,above all, not merely the sense of being ruled by law, but also of being able to shape the law by which one is ruled. It is not surprising that trade unions past and present have a crucial role in the fight for democracy all over

the world, because they consist mainly of those with relatively few rights in society. Their particular contribution has been to extend the concept of democracy from political rights - such as the rights to vote, to speak freely, to assemble and to associate - to social and economic rights. Some would argue that the "right " to work, or the "right" to a decent wage, are not "rights" at all, certainly not in the classic 18th century sense of universal and individual "Rights of Man". They would say that these so-called social "rights" are broad aspirations which can be achieved in a democratic society only by complex and changing social strategies. This presents one of the paradoxes of the trade union role in a democracy. More than any other force the trade unions have helped to unlock the individualist, political-legal straitjacket which confined democratic rights to those found in the American Bill of Rights or the French Declaration . Witness, for example the United Nations Economic and Social Covenant, the Conventions of the ILO, and the European Community's Charter of Fundamental Social Rights of Workers (adopted in December 1989 by 11 of the 12 Member States). The latter proclaims as "pillars of the EEC" "rights" such as those of free movement, the freedom to choose and engage in an occupation and to be fairly remunerated, the right to improved living conditions, the right to social and health protection, the right to vocational training, as well as the "instrumental" rights which workers need to achieve these substantive rights, namely the right to freedom of association and collective bargaining and the right of workers to information and participation .

The paradox is that at the same time as broadening the scope of democracy by demanding "rights" of this kind, it is the trade unions which have demonstrated the limitations of the "individual human rights" approach to politics in a democracy. They have generally maintained that ,although social rights may be included in Bills of Rights and similar declarations, these rights can only become operational in a society so constructed to make them possible. When one reads the famous fifth chapter of Tom Paine's Rights of Man , one is struck by the fact that he does not argue for economic and social rights, but for policies of taxing the rich to create a fund for paying the poor, the unemployed and the elderly as well as for the cost of education. Without such policies, social "rights" are bound to be ineffective.

The problem is that in pursuit of social policies of this kind conflicts develop between individual democratic rights and the policies which unions judge to be necessary to make social rights a reality. For example, article 11(1) of the European Convention on Human Rights and Fundamental Freedoms guarantees "the right [of everyone] to freedom of association with others, including the right to form and join trade unions for the protection of his interests." A majority of judges of the European Court of Human Rights ruled in 1981 (in a case where three British railwaymen challenged a closed shop) that this individual right implies a freedom of "choice" of union .Plainly that makes sense in pluralist systems, like France,Italy, the Netherlands and Spain, where unions are divided by political and

religious affiliations. The constitutions of these countries recognise that one cannot force a Catholic worker to belong to a socialist union or vice versa. The position is different in other countries , such as Canada, the United States, Britain and Sweden, where unions are not divided on ideological lines and their influence in the labour market has for long involved a variety of closed shop arrangements. In these countries the judicial task of reconciling the social policy of supporting collective bargaining by averting inter-union competition with the individual's democratic right to choose has aroused passions. The most most stringent rules on the matter are probably those of the German DGB: "Competition is eliminated between unions organised within the DGB." Members may be transferred to other unions against their will. In the United States, "agency shops" (where the dissentients can pay subscriptions to the union or to a charity) are allowed so as to prevent "free riders" from taking the benefits of union bargaining without membership. One might also note the other side of the "free rider" argument. In some countries, like Germany and France, the Minister has the power to "extend" a collective agreement to enterprises or sectors where employers or workers are not parties to the agreement. Although some of these employers or even workers may object that this means that they are having conditions thrust upon them, no one suggests that this is a violation of their rights of association or dissociation. It would be sterile legalism to determine questions about the appropriate legal supports for collective bargaining simply on the basis of an absolute individual right to belong to the union of his choice, or not to

belong to any union. Each industrial relations system has to be viewed as a whole in order to ensure the proper balance between collective interests and individual freedoms.

Another example of the potential conflict between individual democratic rights and the social policies espoused by unions revolves around property rights. For example, article 14(1) of the Bonn Basic Law states: "Property and the right of inheritance are guaranteed. Their content and limits shall be determined by the laws." A similar (although somewhat differently worded) guarantee of private property is to be found in chap.3,art.16(1) of the recent constitution of Namibia. In Germany, numerous corporations and employers'associations complained that the Co-Determination Act 1976 ,which provides for equal representation of employees and shareholders on the supervisory boards of companies, violated the property rights of shareholders. Additionally, they argued that co-determination violated the right (under art.9) of trades,professions and occupations to form associations . In what has been described as a "disciplined exercise of judicial self-restraint" the Constitutional Court rejected the complaints, but it did so only on the basis that the 1976 Act did not confer absolute equality of participation on workers and shareholders (still less domination by workers). The court noted that in the event of a fift-fifty deadlock between workers and shareholders, the chairman of the board who is usually a representative of the shareholders, may cast the deciding vote. The court left open the question whether absolute parity would be unconstitutional. The Court was persuaded that

"co-determination is a legitimate political means of safeguarding the market economy." The case raises the larger question of how far the state may go in regulating the economy as a whole in the interests of workers, where this conflicts with the rights of property owners. In the obverse case, where the state reduces the social "rights" of workers - by wage cuts or a reduction in living standards - no constitutional protection is likely to be found. Their defence lies in collective action through trade unions.

The lesson which I draw is that Bills of Rights are not the end, but only the beginning of the concept of democracy for trade unions. Unions are bound to remain ambivalent towards the way in which the legal process is used to secure individual rights. On the one hand, they will press for the broadest interpretation of those political and civil rights which are essential to trade unionism, such as freedom of association and the right to withhold labour, but on the other hand they are likely to view with suspicion other entrenched rights, such as those to private property or to dissociate, when these appear to threaten trade union policies.

Trade unions and politics

The point is that in order to make the social rights of citizenship a reality, trade unions are deeply locked into the politics of democratic societies. The extent of that involvement varies greatly. One may contrast, for example, the role of the

Solidarity trade union in the coalition government of the emerging Polish democracy, with the American unions which are notable for their lack of direct involvement in politics - though even there the unions provide an important source of support for the Democratic Party especially in the north-eastern states. The different degrees of political involvement stem from the historical circumstances in which trade unions and political parties developed in these countries. In Poland, the absence of opportunities for any genuine political opposition to the regime, and the supine nature of the "official" trade unions and works councils, meant that Solidarity was from its inception concerned not only with typical trade union issues but also became predominantly a political force and the natural successor to the unpopular Polish United Workers' Party. Now that Solidarity's political wing, the Citizens Parliamentary Club (OKP), is itself becoming increasingly unpopular and riven with splits as it deregulates and privatises the economy, it is hardly surprising that the "official" workplace unions are taking on a new lease of life as an independent opposition to the coalition government's policies.

This is an important point. If trade unions are to retain credibility with their own members, and with workers generally, they have to remain an independent force. It is a truism that trade unions are not substitutes for political parties. Workers do not join them because they share the same political outlook - although at times they may be united as to the achievement of a particular political objective. Workers join trade unions to

get an improvement in working and living conditions by collective action. It is only where genuine political parties are suppressed, that trade unions have to operate as a disguised political opposition. Once political parties are free to operate, trade unions can concentrate on their primary objectives of securing better wages and greater control for workers over the labour process.

It would, however, be grossly misleading to suggest that there is some kind of sharp dividing line, in modern democracies between the "economic" and the "political" spheres of activity. Any such division is false for at least three reasons. First, the direct and indirect involvement in the working of the economy of all modern governments, even those who espouse the most neo-liberal policies, renders it impossible to draw lines between the realms of "state" and "society". The history of all labour law systems in Europe shows that as disenfranchised groups acquire political rights, they expect the state to attend to social issues, and they claim social rights of citizenship. The political parties and the state, to retain the support of the working-class electorate, have to assume some responsibility for matters which are the direct concern of trade unions. A second reason why the distinction between "economic" and "political" is false, is that trade unions themselves have been developing social interests which go well beyond the sphere of wages and job control, such as environmental and community issues. I shall return later to this expansion of the trade union role which I see as a necessary response to the restructuring of the economy

and the labour market. A third reason for rejecting the distinction is the growing internationalisation of the relations of production. The shift of capital to areas of the world where labour is cheap is resulting in the industrialisation of the "third world" (and the de-industrialisation of some advanced capitalist countries like Britain). The growth in the global power of multinational corporations has been matched by a loss of control over national economies by governments and a weakening of national trade union action. As national governments seek to retain some measure of control over their economies and trade unions resort to international solidarity action, political issues are bound to be high on the agenda.

The legal systems of most democratic societies have not yet caught up with the growing convergence of economic and political issues. This can be illustrated by the law on so-called "political" strikes. The very word "political" is, of course, ambiguous and dangerous as a guide to the analysis of the legality of a strike. As a British judge once said: "It is all too easy for someone to talk of a strike as being a "political strike" when what that person really means is that the object of the strike is something of which he as an individual subjectively disapproves".¹ In Britain, the test of legality is whether or not the action is "in contemplation or furtherance of a trade dispute". A trade dispute can exist only between workers and their own employer. So if the dispute is with the Government there is no immunity from civil action. Moreover, the dispute

¹ Sherard v AUEW [1973] ICR 421, at 435 per Roskill LJ.

with the employer must (since a legislative amendment in 1982) "relate mainly" to those workers' conditions of employment. Before 1982, the dispute simply had to be "connected with" their employment terms in order to enjoy immunity. The more restrictive wording introduced in 1982 has made it easier for employers to obtain interlocutory "labour" injunctions where the issues appear to be "political", such as a union campaign against privatisation. So in 1983 where a union took action against employers after the Government privatised the telecommunications industry, the Court of Appeal decided that the dispute was not "mainly" about fears of redundancy in the newly privatised industry, but was part of the union's campaign "against the political decisions to liberalise the industry and privatise British Telecom."² It is perhaps ironic that this restrictive approach to collective action has occurred in a country where unions have never claimed a right to take "political" strike action, a failure regarded by some as their major weakness. Indeed, the unions have acquiesced (since 1913) in stringent controls (reinforced in 1984) over their expenditure on "political" objects (which must come from a separate fund from which individual members may contract-out).

A broader approach to political strikes has emerged in Italy, where article 40 of the Constitution guarantees "the right to strike, within the limits of the laws regulating it." For some years, it appeared that only "economic" strikes would be regarded as within this protection. But in a case decided in 1974, arising

² Mercury Communications v Scott-Garner [1984] Ch.37, CA.

from an anti-fascist protest strike, the Constitutional Court held that in addition to the "right to strike" covered by article 40, there was a "liberty" to strike which was free from the criminal law, although not from civil obligations. A further case in 1983 made it clear that the only strikes which may be penalised through the criminal law are those aimed at "subverting the constitutional order" of the State or which hinder or obstruct " the free exercise of the rights and powers through which the sovereignty of the people is expressed." These decisions are the product of the modern Italian culture of political pluralism and a reaction to the provisions of the former fascist penal code which criminalised action to coerce the public authorities. The Italian approach may be useful pointer in other societies emerging from authoritarian regimes .

Trade unions, economic restructuring and deregulation

So far I have assumed that the democratic state is broadly neutral as to the nature of the economic order, and that the legislature, elected by universal suffrage, is free to pursue any economic and social policy which it considers feasible. I have, however, already indicated that there may be certain basic assumptions, possibly enshrined in a Bill of Rights, about the "natural" order of society being one based on private property with a limited right of the State to expropriate only where this is "in the public interest" and subject to payment of adequate compensation. In some countries, such as Germany, economic rights are expressly infused with the notion of a "social market" and

a "social-legal state" (Sozialer Rechtsstaat).

It is in their role towards the economic order of a democratic society that trade unions reveal their central contradiction. Unionism is a natural form of collective worker resistance to the power of capital. Yet this very form of organisation makes it possible to channel conflict into manageable demands on which compromise can be reached through collective bargaining. In C.Wright Mills' well-known words, the unions are "managers of discontent."

This contradictory mixture of roles as both the natural opposition and the natural ally of capital explains the ambiguous attitudes of both right and left to trade unions. On the right they are seen alternately as a source of order and stability in society or as a threat to the workings of the "free market". On the left they are viewed by some as "schools of class war" and by others as a means for groups of workers who are relatively protected from the consequences of labour market competition to advance their sectional interests. Whichever of these analyses one accepts as an historical description of trade unionism, the emerging new international economic order must force a fundamental reassessment.

Let us remind ourselves briefly of the qualitative changes which are taking place. During the first two centuries of the industrial revolution the focus of employment shifted from the farm to the factory. Within the factory, the system pioneered by

Henry Ford was that of mass-produced standardised products with tasks being broken into component parts under the direction of scientific management or Taylorism. Human beings were treated as interchangeable parts of a machine. The result was high turnover of reservoirs of unskilled or semi-skilled cheap labour, low productivity and shopfloor resistance and strikes. In this system, labour control was traditionally exercised through the employer's unmitigated power to hire and fire, reinforced by state policies of discrimination. This corresponded to the common law model of freedom of contract. It is a system, marked by low productivity, which produces constant social crises as workers resist the attempts to keep them unorganised.

Sooner or later it was replaced, to a greater or lesser extent, by systems of power bargaining, in which workers are motivated both by the negotiation of material rewards and by the sense of participation in aspects of their working life. Trade unions and collective bargaining thus became an established part of the democratic systems, first in Britain (from the end of the 19th century) and then elsewhere in Europe (after the First World War) and in the United States from 1935. By the late 1970s the trade union leaderships, particularly in Britain, were coming under sustained attack, from the left for their neo-corporatist "social contracts" with governments to hold down wage demands, and from the New Right for their resistance to lowering real wages which was seen as a major obstacle to making Britain more competitive in world markets.

Forms of collective bargaining also spread to the third world. Where power bargaining by trade unions preceded political independence and democracy , the consequences for the newly independent regimes have been profound. The new governments have had to deal with explosive demands for wages and the redistribution of resources. They have tended to respond to this by establishing forms of state corporatism in which trade unions have been registered and tightly regulated by the state and, where possible, kept under close control by the ruling party.

The central planning systems, established in the Soviet Union in the 1920s and in Eastern Europe after the Second World War, also embraced Fordism and Taylorism . Although early attempts were made to motivate labour by moral example (e.g. the Stakhanovites), this kind of enthusiasm evaporated within ten years. Instead labour came to be controlled through material incentives and state coercion. In this process trade unions were usually seen simply as the "transmission belts" of party and state and lost their role as independent defenders of workers' interests. Morale and productivity were notoriously low.

All these systems of labour control are now in a state of crisis and transformation. An underlying cause is the radical change which is taking place in the productive forces. This is referred to in the United States as "flexible specialisation" or in France as "neo-Fordism". Computer technology is applied to each stage of the production process from design to retailing, all being linked into a single integrated system. The economies

of scale of mass production can now be achieved on much smaller batches of products. We now have flexible machinery producing a variety of products. These can be produced by relatively small groups of sub-contractors or by networks of "outdoor" workers, many of them self-employed or part-time or both. Consequently, there is irresistible pressure for a variety of changes in the form and content of the relations of production, for new contractual arrangements in place of the traditional "contract of service" and for flexibility in working time, the encouragement of part-time and temporary work and so on. There is also overwhelming pressure for decentralisation, for the break-up of large production units and for localised determination of pay and conditions. These pressures are reflected in a variety of political strategies, such as deregulation and privatisation not only in the Western democracies (carried furthest by Mrs Thatcher's Government in Britain), but also in the former "socialist states" of Eastern Europe and the Soviet Union.

The consequences of these new strategies - some of which you will be debating in the South African context - will have profound effects on trade unions, and will demand imaginative responses. Let me mention just a few of these consequences:

1. In the new labour market, economic security will be offered only in return for flexibility. The "Japanese" and Thatcherite solutions are to offer this bargain only to the "core". The Swedish approach has been to extend security to the periphery, for example by

"solidarity" bargaining so as to reduce the differentials between richer and poorer workers, to guarantee the whole population minimum incomes and to embark on extensive training and retraining programmes. Unions and the political parties which they support in democracies have a choice between building a defensive ring around the "core" of unionised workers which they represent, or pursuing broader social policies through legislation and bargaining to secure a floor of rights for all workers.

2. The restructuring of industry can take place either at the expense of workers or be for their benefit. The unions undoubtedly see it as their role to demand that restructuring takes account of social priorities, such as the need for education and training, and for democratic participation in the decisions to introduce new technologies, to rationalise production and make changes in the workforce. One of the key issues in the post-Fordist world is the management of time. Employers seek to introduce new shifts, rostering, weekend work and part-time work, to suit their convenience. Unions are seizing the opportunity to fit working time into the needs of those with family responsibilities and other activities away from work.

3. The effects of production on consumption are also

bound to come to the centre of stage. Deregulation can mean increased risks of environmental pollution and defective products. Privatisation can reduce the access of the poor, the elderly and the sick to benefits such as health ,education and transport services. These issues affect workers as consumers, and so unions are increasingly concerned with them. Trade union politics are no longer confined to working conditions but extend to environmental and community issues as well.

Conclusion

I have tried to show that the role of trade unions in a democracy is complex and many-sided. Trade unions need democracy and democracy needs trade unions. I can do no better , in concluding, than to quote some words written by my father Alex Hepple 36 years ago in a pamphlet called Trade Unions in Travail³ in which he asked the question "Can real trade unions survive in South Africa ?" in the face of the onslaught by the Nationalist Government:

"Trade unions cannot be looked upon simply as organisations to defend their members against capitalist exploitation. In South Africa they must be seen as part of the movement to educate and advance all the peoples to a better life...Trade unions are as

³ Alex Hepple MP, Trade Unions in Travail: the story of the Broederbond-Nationalist Plan to Control South African Trade Unions, Johannesburg, Unity Publications, 1954, pp.87-88.

much a part of the movement towards democracy and freedom as Parliamentary institutions are, and the still older institutions of local self-government. It is not an exaggeration of the historical facts to say that the rise of trade unions coincided with the birth of parliamentary democracy. Organised labour has been the main source of the power which fostered the development of free citizenship and became the mainstay of democratic government. Racial fears may make many white trade union leaders afraid to support that view. Yet it is the true answer to the future of democracy in South Africa. ...Workers should no longer allow themselves to be duped by cunning appeals to racial prejudice and cries of "Communism". They should stand together and help to create trade union unity. If they fail to do that, they will surrender themselves to slavery."