

# ILO and the tripartite system

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First published in

*International Conciliation – Carnegie Endowment for International Peace*

No. 523, May 1959

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## **ILO AND THE TRIPARTITE SYSTEM, by J. T. Shotwell**

The International Labour Organisation, created at the Paris Peace Conference of 1919, is the first international institution in history participated in by workers, employers, and governments to deal with the problems that are most real to most people the world over, the problems that have to do with the day's work. Its name belies its nature, for it represents all interests, not merely those of labor. It might perhaps be more accurately termed an International Organization for Social justice. There is a hint of this broader conception in the Preamble to the ILO Constitution in the statement that universal peace "can be established only if it is based upon social justice." It must be confessed, however, that when we wrote those words into the text, we were not thinking of their far reach but of a formula which would enable us to tie our institution into the structure of that new world order which the League of Nations symbolized.

The idea of the British members of the Commission on International Labour Legislation of the Paris Peace Conference was that, instead of concentrating attention upon any specific social reforms, there should be an annually recurring international labor conference and an international technical staff, which could keep pace with the demands and needs of a changing world. But if it was to do more than pass pious resolutions, in short, if it was to take the lead in actual reforms, it must do so by dealing directly with governments, and that meant creating something that would not be merely an international labor union. It would have to have representation from employers and governments, to represent the whole social structure of the nation.

Such were the conditions that the British founders of ILO met by the novel device of tripartite representation, discussed in this issue of International Conciliation. Admittedly it is a challenging conception, difficult to apply; but the difficulties inherent in each nation under the free economy system have not proved insuperable, as shown by the record of ILO achievement in the number of ratified conventions, a field where almost nothing existed before. A wholly different set of problems arises from the membership of Communist governments, where the tripartite system of representation does not apply, at least not as originally envisaged.

But again, the ultimate test of the work of ILO is the extent of its impact even across ideological frontiers. The strength of this impact lies in the ability of ILO to change its focus and direction in a manner responsive to the changing demands of world society. Emphasis on legal standard-setting is decreasing, and technical assistance to newly industrializing countries is growing. To moderate the disruptive influence of accelerating change, ILO is helping these countries to create patterns of social as well as of economic development. In many fields, ILO's attack upon the underlying causes of friction contributes to the more orderly conduct of international affairs. Thus its efforts to eliminate substandard labor conditions, to increase worker productivity, and to raise consumer purchasing power lessen the need for protective tariffs and import quotas; and this, in turn, is a step toward the more rational flow of international trade.

In the achievement of such goals, the partnership of labor, industry, and government has been and can still be a significant factor. It is clearly in the interest of the United States and other countries across the world that capital as well as labor should continue to strive for the success of this non-revolutionary institution in its efforts to achieve social justice.

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May 1959\*

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\* In the printed edition, J. T. Shotwell's foreword came before the table of content.

## Origins of the Tripartite System

IT BEGAN IN A little restaurant in Soho one evening in December 1916. David Lloyd George had just succeeded H. H. Asquith and, to consolidate his position, was seeking the collaboration of the labor movement. Several posts in the government were offered to labor, and Thomas Jones, Lloyd George's Principal Private Secretary, was asked to study procedures for creating a Ministry of Labour. Thomas Jones knew a young labor expert in the Board of Trade whose reputation had not yet extended beyond the limits of the British civil service but whose influence was markedly to affect the operation of the International Labour Organisation (ILO) for more than thirty years – Edward J. Phelan. Jones and Phelan dined together in Soho and out of their conversation was born a project—the genesis of ILO.

Some might take issue with this statement, for in history there are no sharply defined beginnings or endings. As early as 1818, Robert Owen, a British cotton manufacturer, sent a memorandum to the Powers at the Aix-la-Chapelle Congress, stressing the benefit to all classes of society of a reform in working conditions. By way of illustration, he pointed to the success he had achieved in his New Lanark plant in Scotland as an enlightened employer. But Owen, "although a pioneer in urging social legislation," never developed his ideas sufficiently for them "to be regarded as the real origins of the movement of today. He never proposed that States should find themselves by conventions possessing legal force."<sup>1</sup>

Twenty years after the Aix-la-Chapelle Congress, the French liberal, Jérôme Blanqui, proposed in his *Cours d'économie industrielle* that labor reforms be "adopted simultaneously by all industrial nations which compete in the foreign market."<sup>2</sup> Here can be seen the prefiguration of the clauses on the harmonization of social legislation which, in 1958, characterized the Rome Treaty establishing the six-nation European Economic Community.

The Swiss like to remember that a year before the French Revolution of 1789, Jacques M. Necker, Genevese banker and French Finance Minister, pointed out that any benefits derived from the exploitation of labor were purely transitory. In his work, *De l'importance des opinions religieuses*, he declared that the country which first abolished the day of rest would gain a temporary advantage, but as soon as "all the sovereigns followed this example, the old relationships which today determine the respective advantages of the various trading nations would not be altered."

### **World War I and the October Revolution**

It was not until the first World War that labor itself came to grips with the problem of obtaining international labor legislation. The spearheads of this movement were the

<sup>1</sup> James T. Shotwell, ed., *The Origins of the International Labor Organization* (New York, Columbia University Press, 1934), vol. i, p. 3.

<sup>2</sup> Cited in *ibid.*, p. 4.

International Federation of Trade Unions and the Socialist International. The former, a product of the nineteenth century trade-union movement, was imbued with the "philosophy of direct action by employers and employees without interference from the state." The latter was a "union of the labor groups who were interested in securing for labor political as well as economic power through the socialization of the state."<sup>3</sup>

From 1914 on, "conventions and congresses of every shade and variety of labor opinion clamored for a just peace and for a recognition in the peace treaty of the rights of labor."<sup>4</sup> The Workers' Conference in Leeds in July 1916 asked that the peace treaties put the people beyond "the attacks of international capitalistic competition."<sup>5</sup> By the time the Paris Peace Conference convened, the urgency of these demands had been heightened. The Bolshevik revolution had been carried through to a victorious conclusion and was threatening the established order all over Europe. Unrest and strikes marked the end of hostilities in many European countries, including those like Switzerland and the Netherlands which had not been shaken by the war. The working classes began to believe that the years, if not the weeks, of capitalism were numbered.

Given this situation, which was threatening more or less all over the world, there could be no question of giving labor representatives merely a consultative and preparatory role in the projected organization for international labor legislation. Today one reads the preamble of the ILO Constitution with an indifferent eye. But when Clemenceau had to mobilize 30,000 men to hold the streets of Paris in the middle of the Peace Conference, the admonition was taken seriously that "conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled."<sup>6</sup>

Great Britain, anxious to give satisfaction to the labor movement and also to dam the revolutionary tide, proposed an international labor organization. There was to be a permanent administration which would hold periodic conferences. Delegations would consist of representatives of employers and labor, side by side with government delegates and with the same standing. The non-governmental delegates were to be chosen in agreement with the most representative organizations of employers and labor.

This proposal was officially submitted to the Peace Conference by G. N. Barnes, the labor representative in Lloyd George's coalition government. Mr. Barnes stressed that it had been accepted by the parliamentary committee of the Trade Union Congress. Moreover, the United States delegate who presided over the Commission on International Labour Legislation, charged by the Peace Conference with studying this project, was the president of the American Federation of Labor, (AFL), Samuel Gompers. The official façade, designed to make fair recompense for the war effort of the workers, was thus "labor."

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3 Ibid., p. 57.

4 Ibid.

5 Ibid., vol. ii, p. 23.

6 Constitution of the International Labour Organisation, Preamble.

But the question remains, who, behind die official façade, were the real authors? In studying the origins of any international instrument, this is the heart of a problem that will always confront historians.

### ***Origins of the Concept***

Where did tripartitism come from? Oddly enough, this question was still being asked forty years after the event. In 1955, the ILO Committee on Freedom of Employers' and Workers' Organisations, called the McNair Committee, admitted that it was not aware of any official exposition of the principles underlying the tripartite structure of the I.L.O. It is, however, clear that one object successfully achieved by the tripartite structure has been to ensure that the International Labour Organisation, unlike most, if not all, other international organisations, should not be one in which governments and governments alone have a voice. Anyone who is familiar with the events lying behind the Labour Part of the Peace Treaties concluded at the end of the First World War must be aware that there was a strong desire on the part of Labour in many countries that its voice should be heard in international discussions upon industrial conditions. In order to ensure a just equilibrium, it was necessary that the employers should likewise be represented."<sup>7</sup>

Despite the "strong desire" of workers to be heard, they were far from envisaging a tripartite collaboration of workers, employers, and governments. When Léon Jouhaux, Secretary of the Confédération Générale du Travail (CGT), declared in a memorandum to the Workers' Conference at Leeds that "labor, like capital, internationalises itself more and more,"<sup>8</sup> he had no desire, when it came to the inclusion of labor clauses in the Peace Treaty, to see employers acting as a counterweight to the "tremendous moral authority" that, according to the demands of the AFL, an international labor organization ought to have.

In order to find the authors of this concept, it is high time to return to the little Soho restaurant. When Thomas Jones consulted Edward J. Phelan about creating a Ministry of Labour, a chain of events was set in motion that was to have far-reaching consequences. Mr. Phelan was convinced that the minister of a newly created department would have no influence in the Cabinet unless he could have recourse to a research and documentation service which would make it possible for him to suggest carefully thought out concrete proposals. The new ministry therefore included a research division directed by Sir John Hope Simpson. He reported to the Assistant Secretary of the Ministry, Mr. Harold B. Butler, who was later to be Deputy Director and then Director of the ILO Office. The chief of the division had two assistants, one for home questions and the other, Mr. Phelan, for foreign questions.

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<sup>7</sup> *Report of the Committee on the Extent of the Freedom of Employers' and Workers' Organisations*, International Labour Office Doc. 131/7/8, para. 9. (Governing Body. 131st Sess., 6-10 Mar. 1956, Agenda item 7; reproduced in the International Labour Office *Official Bulletin*, vol. xxxix, No. 9.

<sup>8</sup> Reproduced in Shotwell, op. cit., vol. ii, p. 19.

This core of civil servants had at its disposal the experience already acquired by the Home Office and by the Board of Trade in the realm of industrial production. The Board of Trade was particularly concerned with the problem of work stoppages and, in order to sustain the war effort' had created joint councils of employers and workers within industries that had not been unionized and where salaries were especially low. It was upon this experience that Mr. Phelan drew when he drafted his first proposal for ILO.

Thus it was not the trade unions, nor was it the Ministers of Foreign Affairs, who believed that "in order to ensure a just equilibrium, it was necessary that the employers should likewise be represented." Even less was it the employers, who were indifferent if not openly hostile to the principle of international labor legislation. The concept was that of a great civil servant, and that is why it is not clearly manifest in the official reports. True, the idea was in the air and was making progress in circles concerned with social questions. In England, even Sophy Sanger wrote in the August 1917 number of the periodical, *World's Labour Laws*:

What we want is a permanent International Council of Labour Legislation representative of employers and workers as well as of government departments, with power to draw up international regulations and to devise means of supervising their observance in the different countries concerned.<sup>9</sup>

But it was thanks to Mr. Phelan that tripartitism in ILO saw the light of day in Part XIII of the Versailles Treaty. For the next forty years, the practical common sense and genius for compromise of British administration buttressed tripartitism through all the stresses and strains of its existence.

For some years working class circles remained suspicious of the tripartite formula. If Léon Jouhaux, for example, nevertheless rallied to it, this was because he saw in the international legislation a means of introducing socialist ideas into countries and territories where the working classes were not yet organized and could not themselves assert their demands. If in time he became one of the most faithful pillars of the Organisation, if during the Fascist period he went so far as to invoke the solidarity of employers' and workers' groups, whose common destiny was menaced by government infiltration, it can be said, without betraying his memory, that he always considered the presence of employers in ILO as an obstacle to the progress of social legislation. And if, on the personal level, he finally acquired at moments the conspiratorial wink that is exchanged between adversaries who have met too long in parliamentary routine, as a labor leader he could easily have done without the presence and the vote of the employers. Faithful to the end to his report to the Leeds Conference, he believed that ILO should devote itself to the emancipation of the working class.

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<sup>9</sup> A. M. Allen, *Sophy Sanger; A Pioneer in Internationalism* (Glasgow, The University Press, 1958), p. 111.



## ***A Revolutionary Diplomacy***

Without seeking to revolutionize society, the British civil servants who drafted the charter of ILO were nonetheless determined, for constructive purposes, to overturn a certain number of traditions. The immediate antecedents of ILO between the end of the nineteenth century and the beginning of the first World War had been either intergovernmental conferences or congresses of individuals with no official character, chosen primarily for their social sense and technical competence. The two labor conventions adopted before 1914 – one on prohibition of the use of white phosphorous in the manufacture of matches, and one on night work by women – were ratified by only a small number of countries, most of which had already adopted the recommended measures.

The organization responsible for these conventions, the International Association for Labour Legislation, had a tendency (wrote Sir Malcolm Delevingne, a member of the British delegation to the Peace Conference) to dissipate its energies over too vast an area. The great majority of delegates were intellectuals, politicians, professors, doctors, lawyers, social workers. The reports were prepared by individuals with a particular axe to grind and tended to treat only one aspect of problems. The inevitable consequence was that the memoranda and recommendations published by the Association had no influence with governments, concluded Sir Malcolm Delevingne.<sup>10</sup>

To avoid these pitfalls, and to make "the ILO Office and its director depositaries of that compulsive influence engendered by concern for the public welfare, possession of expert knowledge, and discipline of objectivity,"<sup>11</sup> the British proposed not only a tripartite structure and a permanent organization but a new approach to international convention-making. If the ILO Conference were merely to draft texts for submission to a plenipotentiary conference for the normal procedure of ratification, it would be reduced to the rank of a drafting committee, but if it were to act as a supranational parliament, it would come into head-on collision with the sovereignty of member states in the field of legislation. Hence Mr. Phelan's memorandum provided that it be "incumbent on all the Governments of the States belonging to the League [of Nations] to lay any decision arrived at by a two-thirds majority before their national Parliament for consideration."<sup>12</sup> Thus a time-honored diplomatic tradition was upset, a tradition that treaties had to be adopted by unanimous vote, signed by plenipotentiaries, and ratified by sovereigns with, where appropriate, the advice and consent of parliaments.

It was traditionally assumed that, for a "convention" to be ratified, at least two signatures had to be appended to the text. Without signatures, it was said, there was no contractual engagement... The authors of Part XIII [of the Versailles Treaty] were reproached with having introduced a procedure for adherence in a void... Beguiled by this argument which appeared strictly logical, the French Government, therefore, declared that it could only ratify a signed convention, and proposed to

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<sup>10</sup> Shotwell, op. cit., vol. i, p. 50.

<sup>11</sup> Georges Scelle, *L'Organisation Internationale du Travail et le B.I.T.*

<sup>12</sup> Shotwell, op. cit., vol. ii, p. 122.



Sir Eric Drummond [Secretary-General of the League of Nations] that a protocol be opened prior to the acts of ratification.<sup>13</sup>

The reply that the new system had been instituted partly to avoid complications and delays and partly because conventions were to be voted upon by employer and worker delegates as well as governments did little to allay French alarm. However, luckily for ILO, when the time came to examine the text that was to become its fundamental charter, the Powers were at sword's point on all the basic problems of the Peace Treaty. Preoccupied with this political impasse, the plenipotentiaries unanimously accepted as a whole the proposal of the Commission on International Labour Legislation.

The question still arises today as to whether all the consequences of the decision to use this system had been carefully weighed. In any case, it is a common phenomenon that, once created, international organizations develop a life of their own and acquire individual characteristics, often very different and generally more far-reaching than had been anticipated by the founding governments.

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13 Scelle, *op. cit.*, pp. 179-180.

## Tripartitism in Operation

TRIPARTITISM IN ILO was predicated on two assumptions: first, that labor and management interests were independent both of each other and of government—a reflection of the existing situation in Western, capitalistic, industrialized countries; and second, that governments, which have the ultimate responsibility for enforcing labor legislation, should not be outnumbered by the non-governmental groups.

The first assumption has been called into question because of the growing participation of the state in the direction of the economy. This was evident when, in 1955, the McNair Committee gave its attention to "Freedom of Employers' and Workers' Organisations."

It was the second, however, that was the primary issue at stake in the early days of ILO. To protect the position of governments, it was finally decided that the ratio of government representation to that of employers and workers should be two-one-one. Thus the Conference was to be composed of four-member delegations from each state: two for the government, one each for employers and workers. In the Governing Body, the same proportions were to obtain: twelve government delegates, six employer and six worker delegates.

This seemingly prudent formula, however, did not protect governments from unpleasant surprises, as was evident at the first ILO Conference held in Washington in the autumn of 1919. As the Conference was unable to reach agreement on a Director, this decision was left in the hands of the Governing Body, which met at the end of the Conference. It was generally agreed that the choice lay between Arthur Fontaine, General Secretary to the Commission on International Labour Legislation, and Harold Butler, who had been made Secretary-General of the Conference pending the election of a Director. Officially neither of these men were candidates, but no other names had been mentioned. At the meeting of the Governing Body, Arthur Fontaine, elected as acting chairman, proposed that at the next session an acting director of the Office be elected. But Léon Jouhaux protested: the workers were getting impatient. Why the loss of time? Why an acting director? Let him be named immediately and finally.

The government delegates were not expecting this outburst. Léon Jouhaux was followed—unforeseen paradox by Louis Guérin, the delegate of the French employers, who was not afraid of taking an independent position and who wanted to block Mr. Butler's candidacy (the League of Nations already had an Englishman, Sir Eric Drummond, as Secretary-General). Mr. Guérin proposed an adjournment of the meeting so that the groups might consult separately and together. In his memoirs, Mr. Phelan noted that these last words escaped the attention of the government delegates. But not for long. When the meeting resumed, Léon Jouhaux announced that the employers' and workers' groups had agreed that the Governing Body should immediately elect a chairman and a Director. Vainly the British government delegate, Sir Malcolm Delevingne, protested that some of the delegations had been named in a provisional capacity only and were not in a position to make binding commitments. By fourteen

votes to five, the Governing Body decided to name a chairman. Mr. Jouhaux then insisted that the nomination be final and not provisional. By twelve votes to nine, the Governing Body supported him. In the election Arthur Fontaine received seventeen votes, Sir Malcolm Delevingne three, and Baron Mayor des Planches (Italy) one. Mr. Fontaine was to continue as chairman of the Governing Body for ten years, but at the same time he was put out of the running for the administration of the Office.

This was only an introduction. just as what was happening was starting to dawn on the governments, Mr. Jouhaux demanded the immediate election of a Director. The British government delegate tried to gain time; this was a crucial decision, there was no time to consider it, there was no candidate:

"If you have no candidate, we have," interrupted Mr. Guérin. "Myself and other Government delegates are only provisionally appointed... We have no authority to vote," objected Sir Malcolm. "Sir Delevingne [sic] voted just now for a permanent Chairman," thundered Jouhaux; "if he has authority to vote for a permanent Chairman how can he have no authority to vote for a Director?"<sup>14</sup>

By eleven votes to nine, the Governing Body decided to elect a permanent Director. The British and two other government delegates announced that they would not vote. When the ballots were opened, nine bore the name of Albert Thomas, a member of the French Socialist Party, three of Harold Butler, while six were blank. True, negotiations still had to take place to confirm the nomination of the first Director of the Office and to have him elected by the unanimous vote, if possible, of the Governing Body. But the tour de force had succeeded. It demonstrated that the independence of employer and worker representatives was not a fiction and that throughout the history of ILO it would contribute to the unique character of the Organisation.

### ***The "Most Representative" Organizations***

At this point we may well ask, Who are these non-governmental delegates whose decisions can force the hands of governments? According to Article 3(5) of the ILO Constitution,

the Members undertake to nominate non-Government delegates and advisers chosen in agreement with the industrial organisations, if such organisations exist, which are most representative of employers or workpeople, as the case may be, in their respective countries."

Simple and logical in principle, this provision has created many problems of interpretation in its implementation.

It is fair to say that ILO was created to satisfy the demands of organized labor. Within this framework, it was understood that if the worker delegates are to represent the workers as a whole, they must in fact be chosen by workers' organizations. The trade

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<sup>14</sup> E. J. Phelan, *Yes and Albert Thomas* (London, Cresset Press Ltd., 1936), p. 16.

union representatives who participated in the drafting of the Constitution sought thereby to encourage the growth of trade unions and to foster their development. The workers' delegation to the Conference, wrote Ernest Mahaim, "was conceived of as a stimulus to the organizational effort." He added that a trade union itself

is almost always considered as the official spokesman of the whole group of which it is only a part. Members of the same occupation, once they are "self-conscious and organized," represent all workers *everywhere where freedom of association exists*.<sup>15</sup>

The first problem in implementing this principle arose in 1919 when the Japanese delegate asked, in the Commission on International Labour Legislation, what should be done "in countries where no national organisations of employers or workers existed?"<sup>16</sup> In Japan at that time, the labor unions embraced only 30,000 out of 4,000,000 workers. The Tokyo government therefore decided to undertake an expensive and complicated procedure of elections in three stages (by industries, provinces, and nationally), which resulted in the nomination of three candidates among whom the government made its choice. As the evidence of good faith appeared to be adequate, the credentials of worker delegates were validated, but the Conference notified Japan that this electoral procedure, although regular, did not conform to the Constitution and would have to be modified in the future.

The argument against a delegate elected by unorganized workers is that he is all too likely to be the instrument, consciously or unconsciously, of unknown forces which may have determined the election-sometimes against the interests of the working classes. If there is reliance upon workers' organizations, it is because they constitute the only element with power and experience in collective bargaining. Nevertheless, the result is that the "organized, enlightened and self-conscious" element exercises the role of an enlightened oligarchy that does not totally respect equalitarian principles of universal suffrage. The right to speak on behalf of the workers is in a way qualified by the degree of social consciousness of the proposed representative.

This is a perfectly defensible thesis, but the consequence is that if social consciousness has to be considered, it is not proven that the largest professional organization is necessarily the best qualified. This is precisely why the Permanent Court of International Justice, when interpreting the intentions of the authors of the ILO Constitution, was of the opinion that, in speaking of the "most representative" organizations, this meant that a number of organizations should be permitted to designate a delegate, sometimes giving preference to the largest organization. Georges Scelle has proposed an ingenious criterion:

The most representative organization in a given country is that which best takes into account the dominant trends in the thinking of the workers in that country and

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<sup>15</sup> Ernest Mahaim, *L'Organisation permanente du Travail* (Paris, Librairie Hachette, 1925), p. 54. Italics added.

<sup>16</sup> Shotwell, *op. cit.*, vol. ii, p. 158.

at the time the designation is made. The concept may vary with the country and with the time but it is susceptible of a general definition.<sup>17</sup>

Even if it is susceptible of a general definition, the subjective and arbitrary character of any determination of competence not based on numbers becomes manifestly clear. The frailty of this definition was evident after the second World War when Léon Jouhaux was first designated as an ILO delegate by the CGT, the largest organization in France, with the support of the Christian Trade Unions and the Confédération Générale des Cadres, then by a smaller union he had himself led out of the CGT. It might well be argued that the "dominant trends in the thinking of the workers" in France had meanwhile awakened to the threat to trade unionism presented by the Communist Party in setting up cells within the CGT. But those who followed "Operation Jouhaux" could not question the fact that it was the act of an enlightened minority and that the "dominant" trends sometimes referred to the "ruling" groups rather than "the strongest numerically." The French government, responsible for the Jouhaux appointment, explained ingeniously that it was only the CGT that had been unable to reach agreement with the other unions. As of 1953, moreover, there was an understanding between Force Ouvrière and the Christian Trade Unions on an annual rotation, each in turn designating the labor representative.

In the United States, the choice of worker delegates was initially much easier, as there was only one trade union organization—the AFL. However, in 1937 the Congress of Industrial Organizations (CIO) came into being and demanded representation on the workers' delegation. This posed a number of problems, and the situation was generally unsatisfactory until the merger of the AFL and CIO in 1955. Until that time, efforts were made to alternate between the two organizations, as was often done in Canada, or to include a CIO representative as an advisor to the AFL delegate.

As for the problem of selecting a "representative" employer, in most countries this was relatively simple. There was generally a federation of employers, in name, if not always in substance. This organization nominated the employer at the request of the government. In many cases these national federations belonged to the International Federation of Employers and formed a fairly tight, homogeneous group. In the United States, however, the situation was more complicated. There were two employer organizations—the National Association of Manufacturers and the Chamber of Commerce of the United States. From 1934, when the United States joined ILO, to 1946, the United States Secretary of Labor received nominations of individual employers personally acceptable to the Chamber of Commerce. In 1946, the selection procedure changed and the two organizations jointly nominated their candidates.

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<sup>17</sup> Scelle, *op. cit.*, p. 150.

## Early Chinks in Tripartitism

THE WEST AND its concepts dominated the ILO at its inception. The first draft proposal for the composition of the Governing Body gave permanent seats to France, Great Britain, Italy, Japan, and the United States, the other seven government seats to be elected by the Conference. A proposal made during the preparatory work is worth noting: one delegation from each of the "great powers" – France, Great Britain, Italy, Japan, and the United States; one from the Scandinavian countries; one from southeastern Europe; one from the rest of Europe; one from Latin America; and one from Asia; with the Director having the right to designate two additional members. Europe would thus have been guaranteed fifty per cent of the government seats and possibly more, because of the European influence of the Director.

Further homogeneity of outlook was evident in the fact that, during the early days of ILO, it was fairly easy to find a common approach among the differing elements of the labor movement. Although the AFL, for example, was more strongly opposed than its European counterparts to the imposition of legislation on the regulation of working conditions, at least it had in common with British and French labor the desire to block any governmental meddling in its own affairs. It was inconceivable to both groups for the interests of the working classes to be represented in good faith in any other way.

Even in 1919, however, the preponderant influence of the West, particularly Western Europe, was not accepted without protest. On 28 November of that year, the employer delegate of the Union of South Africa, M. W. Gemmill, wrote to Harold Butler, then Secretary-General of the Washington International Labour Conference, to complain that the six employer members of the Governing Body had been chosen from within Europe. Mr. Gemmill went on to point out that, of the total twenty-four members of the Governing Body, twenty were European. India also protested, and this led to an amendment of the Treaty to give better representation to the non-European countries. The amendment provided that, of the then sixteen government representatives (now twenty), eight (now ten) should be representatives of members of "chief industrial importance,"<sup>18</sup> and of the same sixteen, six should be non-European. Any question concerning this was to be decided by the Council of the League of Nations. Two of the employers' and workers' representatives were also to be non-Europeans.

However, the extent of the evolution that has taken place since then can be measured in one simple phrase. In *The International Labour Organisation: The First Decade*, published for ILO in 1931 with a preface by Albert Thomas, it is said:

This survey would not be complete if it failed to mention Afghanistan in Asia and certain small States and territories in Europe which are still outside the Organisation. In the case of Afghanistan, there is no reason to expect any early

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<sup>18</sup> Standing Orders of the International Labour Conference, Article 49.

application for membership but its absence cannot be said to be of great importance for the progress of international labour legislation.<sup>19</sup>

Afghanistan joined the organization three years later, and subsequently there have been some thirty additional members, most of them from Africa and Asia. Even more significant is the fact that the brutal frankness used by the ILO in 1931 would be unthinkable today. Asia, which has managed to expunge from the international vocabulary such descriptions of it as "backward" or even "underdeveloped" and which considers itself "in the process of development," has acquired, along with respect, a greater voice in the councils of the world than could be imagined in 1919 or even in 1931.

### ***Fascist Corporations***

It was from Europe, however, that the first challenge came to the formula for worker representation prescribed by the authors of the Constitution. Fascism having come to power in Italy in 1923, a worker delegate chosen by the Corporations that made up the Confederation of National Trade Union Organizations was named. This nomination was contested by the workers' group at the Conference on the ground that the Corporations were composed jointly of workers and employers, and that, said Léon Jouhaux, "if the Italian thesis were accepted, this would be a recognition of the right of employers to one and a half representatives and only one-half for the workers."<sup>20</sup> The Italian government gave assurances that the Corporations were composed exclusively of workers, and the credentials of the corporatist delegate were accepted by 63 votes to 17. The following year, the workers' group based their objection on the fact that the Corporations could not be the most representative, since the participation of members was not voluntary. Nevertheless, the Conference again approved the credentials of the corporatist delegate, this time by 55 to 32.

By 1926, the question of the most representative organization was no longer at issue: the Fascist Corporations enjoyed a total trade union monopoly. There still remained, however, the question of collaboration. In principle, each group – workers, employers, governments – nominated independently its delegates to the Committees of the Conference. The workers' group refused to appoint a corporatist delegate as a representative of labor, so the employers' group proposed that the Selection Committee, which directed the work of the Conference, should have the power to complete the membership of the delegations proposed by the groups. Mr. Jouhaux protested that "if the Conference were called upon to intervene in the appointment of members of

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<sup>19</sup> *The International Labour Organisation: The First Decade*, with preface by Albert Thomas (London, G. Allen for the International Labour Office, 1-31), p. 46.

<sup>20</sup> Alexandre Berenstein, *Les Organisations ouvrières* (doctoral dissertation, University of Geneva Faculty of Law, 1936), pp. 82 ff.



Committees.... it could not do so without infringing the autonomy of the groups." The representative of the employers' group, Mr. Oersted, replied that

the autonomy of the groups was subordinate to the supreme authority of the Conference. It was the latter which should elect the Committees, as was shown not only by the Standing Orders of the Conference, but by Article 403 of the Treaty of Peace. Even if the Conference had not up to the present availed itself of the right, it always retained the power to do so.<sup>21</sup>

Thirty years later, faced with the prospect of having the Conference impose a Soviet employers' delegate upon the Committees, the free employers were to regret that through opportunism they had dealt the first blow to the autonomy of the groups. This autonomy, on the other hand, remained intact in the Governing Body, where Mr. d'Aragona, representative of the trade unions that had been dissolved by the Fascists, continued to sit in the same room with the representatives of the Italian government, which did not dare refuse him a visa to go to Geneva.

In 1933 the credentials of the German workers' delegate were contested but, as the National Socialist Government itself withdrew its delegation, the Conference was not obliged to take any action. Then in 1934 came the participation of the USSR.

### ***The Socialist State***

The precedent established in connection with the Fascist Corporations and its implications for eventual USSR participation were already under discussion in 1932. Léon Jouhaux, recalling that the autonomy of the groups was linked to the defense of the general principle of liberty, issued this prophetic warning: "Today [the employers' group] is not the victim but tomorrow it may be"; he added that if the USSR joined the Organisation, "the employers' group will refuse to accept these persons as representatives of employers." In a somewhat elliptical retort, Mr. Oersted replied that if the Soviet government one day joined the Organisation and sent an employer representative, "I would say that ... we should be prepared to appoint him to Committees."<sup>22</sup>

At the time, the possibility of USSR participation still seemed remote. Early hopes for this had been dashed when the Soviet Commissariat for Labour had published an article stating that "all attempts at collaboration with the International Labour Office must be stopped once for all." The justification for this had been that "any form of collaboration, even in the scientific sphere, between Soviet institutions and international institutions" involved "divorcing science from politics and separating the study of facts from analysis in the light of Marxist doctrines ... the only true science."<sup>23</sup>

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<sup>21</sup> *Governing Body, Minutes*, 30th Sess., Jan. 1926, p. 19.

<sup>22</sup> *International Labour Conference, Record of Proceedings*, 16th Sess., 1932, pp. 57, 59.

<sup>23</sup> *The International Labour Organisation: The First Decade*, op. cit., p. 46.

However, the USSR joined the League of Nations in 1934 and sent its first delegate to the International Labour Conference in 1935. At the twenty-first session, in 1936, the Peoples' Commissariat for Foreign Affairs announced the nomination of a delegate from the People's Commissariat of Water Transport, Mr. Kaoulin. The employers' group, while accepting a decision to place Iiim in its ranks, pointed out that it was "not perfectly satisfied about the validity" of the credentials of such delegates and asked the Governing Body to "consider the constitutional objections" which it believed existed.<sup>24</sup>

### ***Independence of Employers and Workers***

These developments opened the door to a debate that is still going on and it has ramifications far beyond the question of the USSR. In 1930 Georges Scelle had posed two fundamental questions, one legal, and the other involving the meaning of the tripartite structure. On the first point he said:

In practical terms the conflict appears to be insoluble, as long as there is no classification of the question of whether Part XIII of the Peace Treaty imposes certain concepts of trade unionism upon the member states, involving the separation of state and trade unionism. It seems to us undeniable that this was the general concept of 1919 and of the Commission on International Legislation, hence of the Treaty.

In regard to the tripartite concept, he declared that "States which do not conform cannot force on the Conference four delegates who are merely government delegates in disguise, without destroying the equilibrium of the institution." As a solution he proposed that the representation of states where trade union autonomy no longer exists be reduced to only two government delegates.<sup>25</sup>

The Office, which had undertaken a study of the constitutional question at the request of the Governing Body, came to rather different conclusions. No provision, said the Office, required that the employer be a private individual. When the state is the employer, "there seems to be no question that ... it is the State which should appoint the employer for whose collaboration the Constitution of the International Labour Organisation has formally provided."<sup>26</sup> And, added Director Harold Butler in pursuing his argument still further, according to the dictionary the term employer means someone who employs people, Whatever the social organization of a country, he said, the interests of the "work-giver" and the "work-taker" can never be identical. Moreover, all employers have a common characteristic, that is to say, they provide employment while guaranteeing remuneration in exchange:

This was the essential element in an employer. It was therefore dangerous to make distinctions between workers according to their method of organisation or their political convictions. The right course was to hold strictly to the terms of the

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<sup>24</sup> *International Labour Conference, Record of Proceedings*, 21st Sess., 1936, Appendix 1, p. 192.

<sup>25</sup> Scelle, *Op. Cit.*, pp. 154-155.

<sup>26</sup> *Governing Body, Minutes*, 78th Sess., 4-6 Feb. 1937, p. 163.

Constitution, which simply referred to employers and workpeople without making any further distinction. All those who provided employment for remuneration were employers, and their interests did not coincide with those of the persons whom they employed.<sup>27</sup>

Mr. Butler also pointed out, reasoning in the pragmatic civil service tradition that had shaped ILO, that a living organization must adapt itself to a changing world:

In this connection, the character of the International Labour Organisation, which is referred to as "permanent" by the Treaties, must be borne in mind. This term shows that its activities are required to adapt themselves to all possible forms of life of the nations, and cannot be hedged round with rigid and abstract formulae. The fact that the particular social organisation of a State brings a new element into the working of the Conference does not in itself run counter to any principle of the Constitution.<sup>28</sup>

The employers' group, however, continued to resist the liberal interpretation of the Office and by 1937 they had consolidated their position and were asking for an advisory opinion from the Permanent Court of International Justice:

Inasmuch as the Employers' Group at the Twenty-third Session of the International Labour Conference (1937) is of the unanimous opinion that in point of fact the Constitution of the Union of Soviet Socialist Republics does not recognize private property, and does not recognize the status of employer within the meaning [of,] and in the spirit in which this term may have been adopted to the exclusion of any other concept in the Peace Treaty, Article 389, was the nomination of Mr. Nicolas Andreev, non-Government Delegate, as Employers, representative at the Twenty-third Session made in conformity with the provisions laid down in Article 389 of the Peace Treaty?<sup>29</sup>

This proposal was remitted for study, first to the Governing Body and then to the Standing Orders Committee. The latter rejected it and proposed instead that the Office prepare a report on the implications of new and unforeseen economic systems on the tripartite structure. A brief study was prepared by the Office but no further action was taken by the Conference, and shortly thereafter the whole question became, for the time being, academic. In December 1939, the USSR was expelled from the League of Nations for its invasion of Finland and after that it ceased to be a member of ILO.

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27 Ibid., 79th Sess., May 1937, pp. 39, 40.

28 Ibid., 78th Sess., Feb. 1937, p. 163.

29 *International Labour Conference, Record of Proceedings*, 23rd Sess., June 1937, p. 551.

## Adjusting to the Post-War World

WORLD WAR II brought profound changes in the structure of national and international society. Because total war demanded the total mobilization of the means of production, the state was led to intervene more and more, distributing raw materials on the basis of established priorities, providing investment capital, arbitrating labor disputes, or even settling them by fiat—in short, managing and planning like a super-employer.

In addition to the practical exigencies of the war, other factors contributed to modifying the old pre-war society. One of these was the concept of the welfare state, which was gathering increasing momentum; another was the internal evolution of capitalism, with the employer less and less the owner of his own capital. Ownership of capital was more and more anonymous, diffused through the inorganic mass of stockholders; power was quite naturally becoming delegated to a salaried management. Thus the employer was no longer defending a family or personal patrimony but rather his reputation as a good administrator. Finally, a factor that was to loom ever larger was the emergence of new states in Africa and Asia with concepts and social structures very different from those of the old Western capitalist countries.

When the ILO Conference met in Philadelphia in 1944 and drew up the Declaration of Philadelphia, the first vague stirrings of this new ferment were manifest.

The Conference affirms that the principles set forth in this Declaration are fully applicable to all peoples everywhere and that, while the manner of their application must be determined with due regard to the stage of social and economic development reached by each people, their progressive application to peoples who are still dependent, as well as to those who have already achieved self-government, is a matter of concern to the whole civilized world.

However, the agreement produced no fundamental change in the philosophy or organization of tripartitism. The USSR remained aloof despite a cordial invitation, and the emergence of the new states had not yet begun. Thus the Declaration stressed "the effective recognition of the right of collective bargaining" and referred to the

continuous and concerned international effort in which the representatives of workers and employers, enjoying equal status with those of Governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.<sup>30</sup>

On 3 November 1945, the twenty-seventh session of the Conference in Paris created a "Conference Delegation on Constitutional Questions" with a broad mandate covering all unresolved questions relating to the Constitution and the constitutional practices of

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<sup>30</sup> Constitution of the International Labour Organisation, Annex, Declaration concerning the Aims and Purposes of the ... Organisation, Articles V, III (c), 1 (d).

ILO. The objective was to profit from the dissolution of the League of Nations (with which ILO had shared a common budget), to permit association with the United Nations and particularly with its economic and social institutions, and finally to facilitate the adherence of the USSR by taking into account the special problems that the tripartite structure of the Organisation posed for it.

The Delegation, itself tripartite, was presided over by Mr. (later Sir) Guildhaume Myrrdin-Evans, Under-Secretary in the British Labour Ministry, a civil servant in the best and fullest sense of the term. The Paris Conference had transmitted to the Delegation two proposals designed to modify the basis of tripartite representation in order to facilitate the participation of employees in state-controlled industries or occupations.

### ***Latin American Proposal***

One of these was put forward by the Latin American workers' delegates. Arguing that the world had changed since 1919, when social legislation was in its infancy and relations between employers and workers were based on direct negotiations, the workers' delegates declared that now

the State formulates and administers the social policy of the country.... As regards the form of economic production, side by side with private undertakings, the State in various ways and by different methods has become a producer or director of undertakings .... the number of nationalized undertakings ... is multiplying .... Finally, the world of today is not based, as in 1918, on a universal economic system; a Union of Socialist Republics now exists, covering one-sixth of the world, which has abolished the system of private property and has given new characteristics and a new content to the State, and new forms to the relations between workers, undertakings, and the Government.<sup>31</sup>

And the Latin American workers, boldly drawing conclusions based on the new state of affairs thus described, proposed that classical tripartitism be replaced by the following formula: two government delegates, one of whom, where appropriate, would represent nationalized enterprises; one delegate from private proprietary enterprises; and two workers' delegates, one representing the "National central trade union organisation," the other nominated by the same organization but belonging, where appropriate, to a state enterprise. In countries where private enterprise no longer existed there would be two government delegates, one employer delegate from the state enterprises, two labor union delegates.

In its report,<sup>32</sup> the Conference Delegation for Constitutional Questions did not indicate the circumstances in which this proposal disappeared from its agenda. But it is obvious

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<sup>31</sup> *International Labour Conference, Record of Proceedings*, 27th Sess., Nov. 1945, p. 448.

<sup>32</sup> *Report of the Conference Delegation on Constitutional Questions on the Work of its First Session*, 21 Jan.-15 Feb. 1946 (Montreal, International Labour Office, 1946).

to everyone that reduction of the number of employers representing private enterprise to a one-to-four ratio would have meant the end of their cooperation.

### ***Franco-Belgian Proposal***

The second proposal,<sup>33</sup> to which much more time was devoted by the Delegation, was submitted by the Belgian government delegate, Professor Fernand Dehousse, and supported by the French government delegate, Mr. Henri Hauck. This provided for two government delegates, two employer delegates, and two worker delegates. Where appropriate, one of the two employer delegates (or both where there was no private enterprise) would represent the "controlled sector of the national economy." As for the worker delegates, one of the two was to be "chosen from the relevant organisation other than the most representative organisation."

The authors of the amendment, both of whom were Socialists, declared that their proposal "was not based on ideological considerations, but simply on the desire to reflect the actual position." They added this warning:

If the Delegation refused to recommend a change in the basis of representation in the International Labour Organisation, it would give some of its detractors an excuse for alleging that the Organisation was turning its back on the realities of the modern world and was wedded to a liberal economy and the economic and social forces of the capitalist system. The solidarity of the Big Five was the only basis on which the peace of the world could be maintained, and the I.L.O. must adapt itself to the changed circumstances in order to secure Big Five solidarity in support of its activities.

But the two-two-two formula of the Franco-Belgian amendment, however ingenious in theory, met with the opposition of the majority even in each group. The governments pointed out that if the world of 1945 differed substantially from that of 1919, the world of 1960 might be even more different from that of 1945. They were thus of the opinion that "the fundamental considerations of long-term policy" prescribing that governments be represented in the Conference and the Governing Body in the proportion of two government representatives to one each for employers and labor "remain unaffected by any of the developments which have occurred or are likely to occur." They did not need to count on their fingers to be aware that the new formula put them in the minority vis-à-vis the nongovernmental delegates. And they warned the authors of the proposal that "the weight of Government influence in the Conference would then be regarded with less respect by national parliaments and would be less widely rather than more widely applied."

The same held for the vote on the budget. In short, "any change in the proportionate strength of the three groups would cut at the roots of governmental responsibility in regard to both legislation and finance." This point of view had also been advanced by

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<sup>33</sup> See *ibid.*, pp. 82-88.

Mr. Phelan in the Director's annual message to the twenty-seventh session of the Conference. In order to remain effective, he said, the legislative activity of the Conference must rely on the machinery of diplomatic negotiation in which governments should retain a primordial interest.

From the point of view of the workers, the idea of increasing their representation in order that minority organizations might be represented evoked not the slightest enthusiasm. It was considered "calculated to place a premium on labour disunity throughout the world." (This was, it should be remembered, before the Free Trade Unions had separated from the Communist-dominated World Federation of Trade Unions.) To put a premium on minority trade union movements by means of representation in the Conference would tend to encourage such movements. "This would be a great disservice to both labour and the community." The workers' group, moreover, feared lest the international forum of the Conference would thus serve as a platform for airing domestic quarrels and "impair the unity of the Workers' group, thereby both weakening its voting strength in the Conference and increasing the difficulty of negotiating compromise solutions of controversial questions."

For the employers' group, the arithmetical problem was a little more complicated. At first sight, the two-two-two rule would give them a larger proportion of delegates than the two-one-one rule. But this did not obtain from the point of view of the representatives of private enterprise. Indeed, the latter considered that when there was only one seat, it belonged to them by right, and that the nationalized enterprises in countries with mixed economies should be represented "either among the advisers to Government delegates or, with the concurrence of the most representative organization of employers in the country concerned, among the advisers to the Employers' delegate." If one realizes that almost every country in the world has public services, managed by the state, which could have demanded an employer's seat under the two-two-two rule, it is obvious that the representation of private enterprise would have been reduced to a minority without influence, which would not have been in proportion to its real responsibility in world economy.

To avoid this eventuality, the employers' group undertook a major revision of its doctrinal position, facilitated to a certain extent by the at least superficial atmosphere of trust that had been created between the USSR and its Western allies by the fraternity of arms. Moreover, at the time only the candidature of the USSR was envisaged. It was not foreseen that the Soviet Union would draw within its orbit all of Eastern Europe or that the young independent states of Africa and Asia would be closer in their economic structures to socialism than to capitalism. The employers' group, therefore, unanimously concluded that

if the U.S.S.R. resumed membership [in] the Organisation, and the Employers' representatives shared the general desire that it should do so, it would naturally appoint as Employers' delegate a representative of the socialised management of the U.S.S.R.



The Delegation itself was "unanimous in desiring the active participation in the International Labour Organisation as Members of States with all types of economic and social structure." It also referred to the declaration of the Paris Conference that "the doors of membership in the Organisation are wide open to all of the United Nations and that a cordial greeting awaits those members of the United Nations which are not at present members of I.L.O." The red carpet of welcome could not have been rolled out more warmly.

### **Other Efforts**

The next effort to reform the tripartite structure came indirectly from the USSR. Although it had not yet rejoined ILO in the summer of 1948, it introduced a resolution in the United Nations Economic and Social Council recommending that the workers' representation in ILO be augmented by twenty-five to fifty per cent. This proposal was defeated, but the following year a similar proposal was introduced, with no greater success, at the ILO Conference by Czechoslovakia. In support of this proposal the Bulgarian delegate declared:

It is time to ask ourselves whether employer representatives, having interests opposed to those of the workers, can contribute to the realisation of social progress at all, or whether they do not rather direct their efforts in the opposite sense.... Vain will be the hopes of the I.L.O. in the future if it does not proceed to its reorganisation and if it is not composed solely of men sincerely concerned with social progress.<sup>34</sup>

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<sup>34</sup> *International Labour Conference, Record of Proceedings, 32nd Sess., 1949, p. 36.*

## Tripartitism and the World Today

DESPITE SUCH MOVES, the tripartite issue led a relatively uneventful life until 1954, when the USSR rejoined the Organisation. The employers' group, which since 1953 had challenged the credentials of the Czech employers, now challenged the credentials of the Soviet employers and refused to put them on the technical committees. On this occasion the employers spoke in the name of the autonomy of the groups but-as thirty years earlier, in the case of the workers' delegate from the Fascist Corporations-the Conference overrode the protest and approved a compromise solution of its Selection Committee, appointing the Communist employers as associate members in the Committees, that is, without the right to vote, although of course, they retained full voting rights in the Conference.

In the Credentials Committee there was manifestly a desire "not to upset the apple cart." The majority report, presented by Mr. Oksnes of Norway on behalf of the government and worker delegates, noted that

the Committee *unanimously* accepted that the Employers' delegates and advisers in question were directly or otherwise connected with individual undertakings in their respective States. The Committee *unanimously* accepted also that, as such, they perform those executive and managerial functions and responsibilities which correspond to those normally exercised by Employers in other economic systems.

"Hence, the unresolved question," said Mr. Oksnes, is "whether, under the Constitution of the I.L.O., a government with a nationalised economy is entitled to nominate Employers' delegates and advisers."<sup>35</sup>

This text represented the largest possible common measure of agreement. There is reason to believe that it did not emerge of its own accord. Something that the Committee could agree upon unanimously must have been weighed, tested, and negotiated by professional mediators. It should also be noted that what was unanimous was the acknowledgment of the incontrovertible fact that Soviet managers ran their businesses.

The question of whether state socialism should be recognized remained an open one for the employers' group. In 1954, the United States employers' delegate, who distinguished himself even within his own group by his intransigence, made it known that if the Soviet employers' delegates were to remain in the Organisation, he would recommend that his government not send any more employers' delegates to the Conference. The United States government delegate let it be understood in a press conference that the United States was considering a constitutional amendment that would exclude from employer delegations individuals who were in fact answerable to their governments.

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<sup>35</sup> *International Labour'Conference, Record of Proceedings, 37th Sess., 1954, p. 320. Italics added.*

But before the issue came to this point, the Organisation set in motion study machinery designed to clarify the basic premises of the situation and also, it must be admitted, to gain time in the hope that in one way or another people would become accustomed to co-existence, that the sharp edges would be blunted, and that ILO would be able to go on with its work, if not as before, at least with relative serenity.

### ***The McNair Committee inquiry***

At the 127th session of the Governing Body in Rome in November 1954, the workers' group, presided over by Sir Alfred Roberts of the United Kingdom, proposed that the Governing Body establish a tripartite committee to examine Article 3, paragraph 5, of the Constitution, which provides for the appointment of workers' and employers' representatives, and to make proposals for amendments that would "ensure that Workers' and Employers' representatives could only be appointed after nomination by organisations of workers and employers which are free and independent of their governments."<sup>36</sup> The employers' group supported this proposal, but strong opposition arose in the government group. Out of the negotiations came, at the next session of the Governing Body (March 1955), a compromise. The Governing Body reaffirmed the tripartite principle of the Organisation but recognised at the same time that

problems of the application of this principle arise owing to the fact that the relationships between governments on the one hand and employers' and workers' organisations on the other hand vary from country to country.

Having thus expressed its skepticism regarding the possibility of applying a single yardstick, the Governing Body forebore to put forward amendments which would assure the freedom and independence of non-governmental organisations. Instead it asked the Director-General of the Office to "arrange for the preparation of a report ... regarding the extent of the freedom of employers' and workers' organisations from government domination or control" in each of the member states.<sup>37</sup> To this end the Director-General on 31 May 1955 established a Committee of Independent Experts, composed of Sir Arnold McNair-later Lord McNair-former president of the International Court of justice, who presided; Mr. Pedro de Alba, former president of the Senate of Mexico; and judge A. R. Cornelius of the Federal Court of Pakistan.

The McNair Committee having the matter in hand, no one raised the question of the Communist nongovernmental delegates at the June 1955 Conference. However, as in 1954, the employers' group refused to appoint Communist employers' delegates to the Committees and, as in 1954, the Selection Committee, approved by the Conference, appointed them as associate members.

In March 1956, the McNair Committee submitted its report to the Governing Body-four volumes totalling 2,400 pages of which 1,900 were devoted to describing the particular

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<sup>36</sup> *Governing Body, Minutes, 127th Sess.*, Nov. 1954, p. 125 (Appendix XXI).

<sup>37</sup> *Ibid.*, 128th Sess., Mar. 1955, p. 58.

situation in member countries. This had not been achieved without difficulty. The Committee had sent a fourteen-page questionnaire to governments, clearly stipulating that it would not "proceed to form any conclusions, either interim or final, until they have had full opportunity to place before the Committee all the information which they may regard as relevant."<sup>38</sup> When, two months later, forty-three governments had not replied, the Committee then prepared its monographs on the basis of the available documents for each of the seventy member countries, describing the existing situation in regard to employers' and workers' organizations and those elements of law and practice which seemed pertinent to it. The monographs were sent to governments, and comments were requested by letter and by telegram. In the end, only five countries (Bolivia, Byelorussia, Libya, the Ukraine, Venezuela) remained totally mute. Fifty-five countries, including the USSR, had made comments or corrections that were taken into account.

### ***A Single Yardstick?***

As might be expected, the general conclusions stemming from the report corroborated the initial skepticism of the Governing Body.

The Committee submitted a majority report signed by Lord McNair and Mr. de Alba, and a minority report signed by Judge Cornelius. Both merit examination. The majority report declared:

It is obviously a serious matter when a government can place obstacles in the way of the formation of an organisation of workers and employers. If it has the power to suspend or dissolve an organisation or to cancel its registration (where registration is essential to its effective functioning) without previous application to a court of law, it is in possession of a dangerous instrument of "domination and control." It can terminate the existence of the organisation, it can deprive the members of their rights, and, incidentally, it can threaten the officers of the organisation with the loss of their livelihood. The power of suspension or dissolution or cancellation of registration without previous application to a court of law appears to exist in at least 20 countries, in varying degrees, and it appears from an examination of the proceedings of the Governing Body Committee on Freedom of Association that abuses of this power have in fact occurred.<sup>39</sup>

The report then went on to point out that "there has been a marked and accelerating swing in favour of the increased participation of governments in the economic activities of their countries." It was thus "inevitable" that government participation in the economic field should increase the influence of governments, "whether that increase finds expression in laws and practices or whether it is of a less tangible kind." The majority recognized, however, that standards for good administration exist in socialized as well as in non-socialized enterprises, and was convinced that

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<sup>38</sup> *Report of the Committee on the Extent of the Freedom of Employers' and Workers' Organisations*, op. cit., Appendix 1, pp. 4-5.

<sup>39</sup> *Report of the Committee...*, op. cit., para. 337.

in most countries every effort is made to ensure that those responsible for the direction and management of public enterprises shall be held strictly accountable for the efficient management of the industry entrusted to them, and that in the course of their work they are confronted with many of the same problems which occupy the attention of employers and managers in private industry.<sup>40</sup>

Basing its conclusions on this factual situation, the majority believed that the contribution of employers and workers in the ILO had probably changed in character: in the beginning, they had ensured the protection of their respective material interests and at the same time made available their experience as regards industrial management and the well-being of their employees. Lord McNair and Mr. de Alba thought that the initial purpose of this separate representation had acquired a larger meaning, and that it was now also a question of the combined interests of these two elements in the realm of productivity and in the functioning or technical competence of industrial management. They suggested that in this light the contribution of employers and workers had a less negative character and tended to do more than merely protect the interests of capital and labor.

The McNair Committee majority noted that there was no employers' organization in the USSR and that according to the statutes of the labor unions the latter "conduct all their activities under the guidance of the Communist Party of the Soviet Union, the organising and directing force of Soviet society." As regards the employers, the majority was of the opinion that administrative personnel had

extensive powers and discretions and responsibilities and that a great deal is left to their independent judgment within the limits of the over-all economic plan, so that it is evident that by reason of their experience they are capable of making a distinctive contribution to the work of the Organisation.<sup>41</sup>

In summary, what the McNair Committee majority was saying was that (1) a literal and legalistic interpretation of the Constitution would be tantamount to excluding a third of the members of the Organisation where trade union freedom was not guaranteed; (2) the economic evolution of the world had deprived representatives of private industry of their exclusive title as defenders of the employer's point of view; (3) this evolution had markedly increased the similarity in the nature of the functions performed, regardless of the structure of the enterprise; and (4) Communist employers, by virtue of their technical duties, have a special contribution to make to ILO. The Committee, however, left open the question of whether the Communist employers would have the political freedom to make this contribution or whether they would merely be the docile instruments of the policy of their government.

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40 Ibid., paras. 338, 340.

41 Ibid., paras. 350, 353.

In his minority report, judge Cornelius stressed that very different criteria had to be used if the objective was to measure, under various circumstances, the amount of domination or control exercised by governments over professional associations. Citing the example of the Middle East, he recalled that

countries are found whose governments are at present engaged in bringing organisations of workers and employers into existence, both by education in trade union practice as well as by legislation. A degree of governmental influence is to be inferred which these organisations are probably powerless to resist. Yet it has to be conceded that it is an influence of a parental character, and the presumption of benevolence must be made in its favour.

He added:

In more than one country, organisations have been formed under the aegis of the governments themselves. This may be necessitated by the "trade union movement" being in a nascent state of development, but it must obviously be long before a body so created can become capable of functioning in complete independence of the government.<sup>42</sup>

Thus to the factual skepticism of his two colleagues, which he shared, judge Cornelius added skepticism as to principle. Not only did freedom of association not exist in its pure state, except in a limited number of countries, but it was not at all certain that it corresponded to the development needs of certain countries. With the growing number and political importance of the underdeveloped countries of Africa and Asia, their point of view had assumed an importance that would have been unimaginable in 1919.

### ***Reaction to Findings***

Needless to say, the employers' group received the McNair Committee report coldly, since, while maintaining the principles of trade union freedom and of the tripartite structure of ILO, it in fact gave priority to the universality of the Organisation and strengthened the arguments of the partisans of an evolutionary interpretation of the Constitution. The employers' group continued to refuse to appoint Communist employers to the Committees of the Conference.

The Western employers at the European Regional Conference in 1955 had already walked out of the Committees in which Eastern employers had been seated over their objection that a true employer had to be independent of government to merit this designation. In 1956, as before, the ILO Conference approved the credentials of the Soviet employers on the principle of *res judicata* and appointed them associate members in the Committees. The debate lasted two days; over forty speakers asked for the floor. In the name of their different economic structure, the Russians demanded the right to sit in the three groups. The employers from private industry refused to consider what they deemed a violation of the Constitution. Sir Richard Snedden, the employers'

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<sup>42</sup> Ibid., Note by Mr. Justice Cornelius.

delegate from the United Kingdom, said "it may well be that ultimately the only real solution is for the free countries to withdraw from the present set-up and to establish an I.L.O. of their own."<sup>43</sup>

But many government and workers' delegates feared, above all, any cleavage in the Organisation – the former because of their desire not to aggravate the international situation, the latter because they were engrossed in maintaining contact with the growing trade union movement in the new countries and were thus prepared to abandon a narrow and legalistic interpretation of the Constitution.

Professor Robert Ago, the Italian government delegate and former chairman of the Governing Body, conclusively proved that it would be impossible to amend the Constitution in the direction suggested by the employers' group, that is, by explicitly requiring that non-governmental delegates be designated by organizations that were independent of their governments: if this principle were to be applied strictly, a good third of the members of the Organisation would fail the test. In order to take effect, a constitutional amendment required ratification by two-thirds of the members. No one had ever seen a state ratify something directed at its exclusion.

### ***Effect of the Hungarian Crisis***

Actually, in November 1956, the Governing Body rejected by 29 to 11 the constitutional amendment submitted by the employers' group. But meanwhile a new development had intervened that was to interject into the debate an exceptionally powerful wave of emotional tension: the uprising of the Hungarian workers, the publication of their demands, and their crushing by the return in force to Budapest of the Red Army. By 36 to 2 (USSR and Egypt-this was also at the time of Suez), with 2 abstentions (Burma and India), the Governing Body in November 1956 approved a resolution expressing its solidarity with the Hungarian workers who were struggling for their fundamental freedoms. And when the time came to discuss the McNair Committee findings on trade union freedom in the USSR, the Swiss workers' delegate, Mr. Jean Möri, pointed out that

under the constitution and rules of the Soviet trade unions mentioned by the U.S.S.R. Government the Congress of Trade Unions of the U.S.S.R. was convened once every four years, but the Workers could not help noticing that in spite of this no Congress of Russian trade unions had been held for 17 years.

He added that "it was to be hoped that this regulation would be applied in future."<sup>44</sup>

The reaction to the Hungarian crisis was reinforced at the June 1957 Conference by the Report of the United Nations Special Committee on the Problem of Hungary, which declared: "Having taken over Hungary by armed intervention, the Soviet authorities

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<sup>43</sup> *International Labour Conference, Record of Proceedings*, 39th Sess., 1956, p. 134.

<sup>44</sup> *Governing Body, Minutes*, 133rd Sess., 20-24 Nov. 1956, p. 51.



were compelled ... to administer a country whose popularly supported Government they had overthrown."<sup>45</sup>

This time the entire Hungarian delegation was almost unseated. By a simple majority (94 to 88, with 52 abstentions), the Conference upheld the challenge to the credentials of the Hungarian government delegates, but to invalidate them would have required a two-thirds vote. That this was not obtained was primarily because most of the governments thought this decision should first be taken by the United Nations. But the credentials of the Hungarian non-governmental delegates, about which the United Nations could have nothing to say, were rejected by an overwhelming vote: those of the employers by 141 to 7, with 35 abstentions; those of the workers by 141 to 5, with 20 abstentions. Thirty-four governments, and all the workers' representatives from the two Americas, Western Europe, Scandinavia, and Asia had voted for rejection.

By the 1958 Conference, the United Nations General Assembly had adopted the Report of its Special Committee on Hungary and had failed to approve the credentials of the Hungarian delegate.<sup>46</sup> Moreover, the execution of Imre Nagy and General Pál Maléter had just been announced. To avoid the precedent – dangerous for a specialized agency – of a rejection of credentials on political grounds, Sir Guildhaume Myrddin-Evans sought to have the Conference express its indignation in a special resolution. But this exceptional procedure would have had to be adopted unanimously by the officers of the Conference, and this was obviously impossible because one of the vice-presidents was a Romanian. All that could be done was to reject the Hungarian credentials. This was done by 142 to 48, with 29 abstentions, for the government delegates, and 146 to 48, with 23 abstentions, for the employers' and workers' delegates. This was the first time in the history of international organization that the credentials of government delegates had been rejected.

### ***The Ago Committee***

In 1957 the Soviet employers had again been accorded associate membership in the Conference Committees. They lost it in 1958 as a result of a stiffening in the Soviet attitude: angered by rejection of a Polish government proposal to give the Communist employers full membership in the Committees, the Communists joined with the Western employers to reject by 97 to 63, with 53 abstentions, the traditional compromise of the Western governments—that of associate membership.

This situation pleased the Western employers, who thus obtained what they wanted, but it was obvious that the Soviet Union was not going to accept such discrimination without protest. As Mr. Arutiunian had declared in the Governing Body,

<sup>45</sup> *United Nations General Assembly, Official Records*: 11th Sess., 1957, Suppl. No. 18, p. 11.

<sup>46</sup> General Assembly Res. 1133 (XI) endorsing the Report was passed (60 to 10, with 10 abstentions) on 14 Sept. 1957. On 10 Dec. 1957 the Twelfth Assembly accepted (77 to 1) the report of its Credentials Committee containing a United States motion "that the Committee take no decision regarding the credentials submitted on behalf of the representatives of Hungary," United Nations Doc. A/3773, 9 Dec. 1957; a similar motion had been adopted at the Assembly's eleventh session.

Newton's law that action and reaction were equal and opposite applied to the reactions which would follow from attempts to prejudice the rights of the Socialist countries in respect of the organisation of the I.L.O.'s work... The Soviet Union had come into the I.L.O. in a spirit of co-operation, but its rights must be respected; if they were not, the Soviet representatives would defend their rights and in so doing they might have to make public criticism of the working methods of the Organisation.<sup>47</sup>

In order to provide the basis for a *modus vivendi*, the Office had submitted to the October 1957 session of the Governing Body a report concerning

- a) the Setting up of Continuing Fact-Finding Machinery to establish the Facts in relation to Freedom of Association;
- b) Improvement of the Practical Methods of Working of the International Labour Conference.<sup>48</sup>

The two parts of this report were discussed again at the March 1958 session. In regard to freedom of association, the debate revealed that governments were generally not inclined to submit to a rigorous examination of their behavior in this area. The Office withdrew its proposal to create an independent mechanism and, with relief, the Governing Body approved a resolution providing that the present Committee on Freedom of Association should hold "a special meeting to consider the improvement of its procedure."<sup>49</sup>

As far as the working methods of the Conference were concerned, the Governing Body had agreed in principle in October 1957 to set up a tripartite committee to study the adaptation of Conference procedure to the existing situation. The following spring the members of the Committee were appointed: Professor Roberto Ago, Italian government delegate, as Chairman, without the right to vote; government group, H. A. Majid (Pakistan), Raúl G. Migone (Argentina), and Sir Guildhaume Myrddin-Evans (United Kingdom); employers' group, C. G. Parker (United States), P. Waline (France), and N. H. Tata (India); workers' group, E. Nielson (Denmark), A. Sanchez Madariaga (Mexico), and J. Möri (Switzerland).

A working document for the Committee was prepared by the Director-General, providing the Committee with

a complete catalogue of all the proposals that had been made, which meant practically all the possible proposals. The Governing Body was aware in advance of the advantages that some saw in the adoption of some proposals and the disadvantages that the same proposals would imply in the view of others. Above all

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47 International Labour Office Doc. G.B.138/P.V.8, p. VIII/13. (Governing Body, 138th Sess., Draft Minutes of the 8th sitting, 15 Mar. 1958, Agenda item 23.)

48 International Labour Office Doc. G.B.137/3/1, 29 Oct.-1 Nov. 1957.

49 International Labour Office Doc. G.B.138/P.V.3, p. III/11 (Governing Body, 138th Sess., Draft Minutes of the 32 sitting, 12 Mar. 1958, Agenda item 2.)

the Governing Body was now in a position to appraise the difficulties in the way of formal submission of any single one of the proposals in question.<sup>50</sup>

The concepts were too divergent for the Committee to arrive at a unanimous conclusion. The majority, composed of the government and workers' members of the Ago Committee, were concerned with the need "to remove this source of acrimony from the proceedings of the Conference and thereby enable the Conference to concentrate more fully upon the practical work of the Organisation."<sup>51</sup> The employers' group, on the contrary, was primarily interested in safeguarding its autonomy.

The new procedure as devised by the Ago Committee, which is to be placed before the June 1959 Conference, provides that "every delegate making application to his Group for membership of a committee shall be placed on the list of members of that Committee."<sup>52</sup> The groups then recommended that the Conference decide how many members of each group shall have the right to vote and which members shall form the "voting section" of the group. If a delegate deems that he has been wronged by not being included in the voting section, he may have recourse to the Conference.

Heretofore an appeal has gone first to the Selection Committee and was then debated in plenary session. Henceforth, "the Conference shall without debate transmit the appeal to a Board selected from a panel of independent persons who have been previously appointed by the Conference." There will be no appeal from a decision of the Committee and the Conference will give effect to it without debate. Under the appeal procedure, "in no case shall more than two delegates be added to the voting section of any one committee."<sup>53</sup> Thus an Areopagus has been created with a composition reminiscent, for example, of the former judges of the Hague Court, where the authority of the Hague Conference was delegated to professors of international law to make the final determination of the voting members in the technical committees.

As might be expected, this solution has not been accepted without protest by the free employers. Having denied the right of the Conference to impose Communist partners on them in the Committees, they also denied that this right should be delegated to a kind of arbitral tribunal.

On the Communist side, the Soviet delegate on the Governing Body said that, in limiting to two the number of delegates who could be added to the voting section of each Committee, the Ago Committee was in principle far removed from the principles of the Constitution. However, he declared, he was prepared to accept this proposal on an experimental basis for the June 1959 Conference. The USSR has nothing to lose by the experiment because up to now the Conference has granted the Soviet employers only one additional member, with no voting rights in each technical Committee.

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50 International Labour Office Doc. G.B.137/P.V.6, p. VI/7. (Governing Body, 137th Sess., Draft Minutes of the 6th sitting, 31 Oct. 1957, Agenda item 3.)

51 International Labour Office Doc. G.B.141/2/9, 10-13 Mar. 1959, p. 4.

52 Ibid.

53 Ibid., p. 5.

The creation of the independent committee proposed by the Ago Committee is a purely procedural solution and it resolves none of the problems posed by the Organisation's tripartite structure vis-A-vis the economic, social, and political evolution of the world. Its principal merit is to allow the Organisation to gain time in order to see whether, in connection with its permanent objectives and its work methods, certain readjustments cannot be made and new interpretations given to tripartitism.

In the report to the June 1959 Conference, Director-General David A. Morse points out that, although the objectives of ILO remain constant, it has undergone two major transformations since its inception – one in the composition and character of its membership, the other in the tasks that engage it. The great diversity today in social, economic, cultural, and political conditions in the member countries calls, he said, for "a full understanding of and respect for these differences." This understanding "begins with a recognition of differences, not a will to uniformity."<sup>54</sup> In regard to the tasks, the fixing of international standards was initially the major preoccupation, and it was with this end in mind that the tripartite structure had been devised—not only that standards might reflect the needs, preoccupations, and realities of the three partners in the economy, but also that implementation might be made possible through the indispensable cooperation of these partners. Now the focus has shifted, in large part because of preoccupation with the needs of the underdeveloped countries and also because of the system of international cooperation in economic and social matters that has grown up around the United Nations. "Technical assistance and operations have become a major part of the I.L.O.'s programme. Educational and promotional action is of growing importance." The challenge to ILO today, says the Director-General, is "to work effectively within this diversity of conditions and ideas for the attainment of the universally acknowledged objectives for which the Organisation continues to stand."<sup>55</sup>

Whether or not tripartitism still has a contribution to make in enabling the Organisation "to work effectively" on its future tasks, and whether new interpretations can be given to this form of collaboration are the questions that face ILO as it enters its fifth decade.

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54 International Labour Conference, 43rd Sess., 1959: Report I (Part 1), p. 5.

55 Ibid., pp. 1, 6.