

The role of Trade Unions in the contemporary society and economy

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Abstract

Since the early 1980s the role of trade unions in the contemporary society and economy is gradually becoming less significant as a result of the obstructive legislative developments. The Trade Union and Labour Relations (Consolidation) Act 1992 and more recently the Trade Union Act 2016 had an adverse impact on the ability of trade unions to engage in collective bargaining and to organise industrial actions. As a result of the restrictive government legislation towards the two fundamental functions of trade unions, their key objective to protect the rights and interests of workers is becoming more difficult to fulfil. In fact, the popularity of trade unions is in a constant decline as shown by the noteworthy reduction in their membership since the late 1970s. This is happening because less people, especially individuals who belong to the new generation, are now aware of the benefits of strong union power due to the legal barriers that unions face. The argument in this paper is that trade unions can still have an active role in the contemporary society and economy as long as the law does not act as a hurdle to their activities. Indeed, the proper function of trade unions is an essential prerequisite for the fair treatment of discriminated groups at the workplace including women and ethnic minority groups. In parallel, the active role of trade unions in industrialised economies such as Germany and Sweden demonstrate that the belief that they are hindering competitiveness in developed economies is merely a fallacy.

Introduction

Following a period of discontent in the 1970s which involved a lot of strike actions, the Conservative party which came to power in 1979 attempted to restrict trade union power. The neo-liberal policies aimed to re-regulate the labour market in order to boost competitiveness and develop an enterprise culture. As a result, the interventionist Conservative government attempted to restrict the political influence of trade unions and eliminate the solidarity amongst union members through the introduction of the Trade Union and Labour Relations (Consolidation) Act 1992.¹ Consequently, the new Conservative government introduced further limitations under the Trade Union Act 2016² which effectively restricted the prospects of trade unions to organise industrial actions. Although international legislation facilitates the forming of trade unions and enables people to easily join them, the UK legislation limits rather than grants powers to trade unions. In effect, the restrictive government legislation led to a significant fall in the trade union membership since the 1970s as the trade unions were no longer able to collectively bargain with the employers in order to protect the rights of workers. In this paper, it will be noted that there is an abundance of benefits associated with the function of trade unions for the workers and the society in general. However, the anti-union legislation does not permit trade unions to reach their full potential and become more relevant in the contemporary world of work.

¹ Trade Union and Labour Relations (Consolidation) Act 1992, subsequently referred to as TULRCA.

² Trade Union Act 2016, subsequently referred to as TUA.

Reasons for the decline in the trade union membership

The intrusive government legislation towards trade unions from the beginning of the 1980s is directly responsible for the fall in trade union membership. As shown by the statistics, the current amount of trade union members is 6.2 million union members in comparison to the 13 million members in 1979³. The illegalization of closed shops since 1990 which required all the workers in a workplace to join a trade union, gave rise to the 'free rider' problem which means that collective agreements benefit all of the workers at the workplace even if they are not union members. Therefore, workers do not have a strong incentive to join a trade union when they benefit from its activities anyway. In addition, the financial and social transformations during this period are also an important reason for the decline. Industries such as coal, steel and car manufacturing which were heavily unionized are no longer popular today and the majority of the workers nowadays belong to the hard to unionize service sector⁴. Indeed, this is demonstrated by the fact that union members comprise 52.7% of workers in the public sector as opposed to only 13.4% in the private sector⁵. In more recent times, the lack of good quality jobs due to the cuts on the public sector workforce and the rise of the gig economy had a severe impact on union membership⁶. The loss of many jobs in the public sector is revealed by the 'statistically significant' reduction of 209,000 union members in the public sector since 2015⁷. Therefore, the government through its neo-liberal economic policies and the anti-union legislation

³ A.C.L Davies, *Employment Law* (Pearson 2015) 385.

⁴ Jeremy Waddington, 'Trade Union Membership in Britain, 1980-1987: Unemployment and Reconstructing' (1992) 30 BJIR 287.

⁵ Department for Business, Energy & Industrial Strategy, *Trade Union Membership 2016 Statistical Bulletin* (National Statistics 2017) 6.

⁶ Alexandra Topping, 'Union membership has plunged to an all-time low, says DBEIS' (*The Guardian*, 1 June 2017) <<https://www.theguardian.com/politics/2017/jun/01/union-membership-has-plunged-to-an-all-time-low-says-ons>> accessed 10 December 2017.

⁷ Department for Business (n 5), 5.

which will be explained next, constitutes the main reason for the decline in the trade union membership.

Legislation regarding discrimination of union members at work

The right of freedom of association under article 11 of the European Convention on Human Rights (ECHR) denotes a fundamental human right to form and join a trade union. Nevertheless, the UK legislation offers adequate protection only to membership and does not effectively protect workers from being discriminated when they are taking part in union activities. TULRCA attempts to offer protection from discrimination to union members during employment. Section 145A prohibits the inducement of workers with regards to their union membership and activities and section 146 prevents workers from facing detriment because of their union membership. Although both provisions offer protection to the workers' participation in trade union activities, their impact is narrowed by section 145(A) under the phrase 'at an appropriate time'. This restriction effectively means that union members are not allowed to participate in a strike or consult their union representative because these actions happen during their working time and without the employer's approval⁸. This comes in contrast to the cases of *Wilson v UK*⁹ and *Demir and Baykara v Turkey*¹⁰ which embraced a dynamic understanding of article 11. These cases highlighted that union membership should be accompanied by an involvement in the union's activities in the form of strikes and collective bargaining and only under exceptional circumstances an interference can be justified. The European Court of Human Rights (ECtHR) held that the UK government, under article 11, has a positive obligation not only to protect union

⁸ TULRCA (n 1) s 146(1)(b), s 146(2).

⁹ [2002] 35 EHRR 20.

¹⁰ [2009] 48 EHRR 54.

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membership, but also to make sure that union members are not prohibited from calling for support from their unions when dealing with their employers.

Moreover, blacklists are another threat of discriminatory conduct towards union members which remains unresolved. Blacklists contain names of union members and union activists which can be used by employers in order to avoid hiring union related individuals. A blacklist was disclosed in the construction industry by the Information Commissioner's Office in 2008 which included the names of more than 3000 workers who were unable to find work for a long period of time¹¹. As a result, the government initiated protection against blacklists under the Employment Relations Act 1999 (Blacklists) Regulations 2010. However, despite of the reverse burden of proof under regulation 5(3) which obliges the defendant to prove that no blacklist was used, employers very rarely confess that they actually discriminated¹². In addition, Bogg supports that sections 146(2A) and 145A(4) are very individualistic, because it is up to the affected individuals to make a claim against the employer and unions are not permitted to bring proceedings on their own¹³. Additionally, remedies under sections 146 and 145A of TULRCA are only available to individuals and unions may only intervene when the individuals request to represent or accompany them in a disciplinary hearing¹⁴. Therefore, the UK legislation ensures that there is an individual enforcement of rights and prohibits trade unions to undertake the initiative to represent their workers. The intentions behind the government's legislations are going to be explored next.

¹¹ A.C.L Davies (n 3), 424.

¹² *Miller v Intervene Industrial Services Ltd* [2013] ICR 445.

¹³ Alan L Bogg, 'Employment Relations Act 2004: Another False Down for Collectivism?' (2005) 34 ILJ 75.

¹⁴ A.C.L Davies (n 3), 428.

The intentions of the Conservative government behind the anti-union legislation

First, the Conservative government under TULRCA attempted to make trade unions more democratic by enforcing them to ballot the union members before undertaking industrial actions¹⁵ and enabled union members to challenge the activities of their unions¹⁶. Moreover, people were given the freedom to choose if they want to join a union and they were not obliged to participate in the activities of the union¹⁷. The non-compulsory union membership is compatible with the decisions of the ECtHR¹⁸, but it seems that the government's intention was to give more freedoms to the union members in order to challenge the trade union's activities. Indeed, it was up to the individuals to decide whether or not to join a strike as it was made illegal for the unions to dismiss or penalize union members who did not wish to join a strike. However, it seems unreasonable to give an option to not follow the trade union rules when people freely decide to join it.

Second, the Conservative government attempted to deteriorate the solidarity between unions and union members. For instance, it is now illegal for workers to undertake secondary action to defend the interests of workers in other workplaces¹⁹. The definition of 'trade dispute' under section 244(1) imposes limitations on the right to strike as disputes should only concern workers and employers of the same enterprise, meaning that secondary action is not acceptable. Secondary action was addressed in *RMT v United Kingdom*²⁰, where the ECtHR classified it as an 'accessory' freedom as opposed to a 'core' freedom under article 11(1) ECHR. Hence,

¹⁵ TULRCA (n 1), s 226.

¹⁶ *ibid* S 230.

¹⁷ *ibid* S 65(2)(a).

¹⁸ *Sorensen v Denmark* [2008] 46 EHRR 29.

¹⁹ TULRCA (n 1), s 244(1).

²⁰ *National Union of Rail, Maritime and Transport Workers v United Kingdom* [2014] ECHR 366.

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the total ban on secondary action was considered to be justifiable under Article 11(2) which confers a wide margin of appreciation to the UK government. The ban on secondary action means that workers are not allowed to go on strike to protest for other workers who encounter a dispute with their employer in another workplace. Ewing and Bogg criticize the ECtHR for construing very narrowly the common law on collective action and highlight that the political pressures influenced the ruling of the Court²¹.

On the contrary, the disputes of Grunwick and Gate Gourmet illustrated that workers in different workplaces are still bound by the principle of solidarity and that the illegality of secondary picketing should be reconsidered. In effect, the disputes demonstrated the difficulty in organizing industrial actions and the lack of protection for workers from dismissal when they undertake informal industrial actions. Moreover, employers still use tactics like outsourcing where they replace the current personnel with other staff who are willing to work for less money²². Considering that four decades separate the two disputes, we can observe the continuity of poor working conditions and the outrageous treatment of women in different workplaces. Indeed, women view trade unions as a shield of protection for their rights at work and this explains why they comprise the majority of trade union members as they represent 54.5% of the total union members²³. The important role of trade unions in protecting workers who are exposed to illegal treatment at work was illustrated in *R (Unison) v Lord Chancellor*²⁴. Unison brought a claim challenging the introduction of employment tribunal fees by the government and the Supreme Court rendered them illegal under constitutional law

²¹ Alan Bogg and K.D. Ewing, 'The Implications of the RMT Case' (2014) 43 ILJ 238.

²² 'The Gate Gourmet Dispute' (*Striking Women*) <<http://www.striking-women.org/module/striking-out/gate-gourmet-dispute>> accessed 11 December 2017.

²³ Department for Business (n 5).

²⁴ [2017] UKSC 51.

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because they prevent access to justice. In effect, the ruling facilitated the bringing of proceedings by workers since many of them were prevented from bringing a claim because of the expensive tribunal fees. Unison's legal action has a major significance for female workers and other disadvantaged groups as the tribunal fees were more expensive for claims regarding racial and sexual discrimination as well as for unfair dismissal²⁵.

Third, the legislative reforms sought to limit the political power of unions. For the unions to involve in political activities, they had to upkeep a separate fund for political campaigns and they were prohibited from spending money on political campaigns unless the members agreed to this through a resolution²⁶, and re-approve it every ten years.²⁷ The mentality behind these legislations was that the union members were not as politically radical as the leaders of the trade unions and that their views were not compatible. Indeed, some right wing politicians argue that trade unions have a negative impact on politics in the UK because they exert undue influence upon the Labour party due to the party's funding support by trade unions²⁸. Nonetheless, it appears that the link between unions and the Labour party has been weakened due to the introduction of reforms by Ed Miliband which reduced the affiliation between union members and the Labour party²⁹. Moreover, 4,777,168 union members contributed to the political fund of their unions in 2017, as opposed to only 622,286 who did not and the total revenue for the political fund reached the enormous

²⁵ 'UNISON legal victory sees employment tribunal fees scrapped' (*UNISON*, 26 July 2017) <<https://www.unison.org.uk/news/article/2017/07/tribunal-fees-victory/>> accessed 14 December 2017.

²⁶ TULRCA (n 1), s 71(1)(b)(i).

²⁷ *ibid* s 73(3).

²⁸ A.C.L Davies (n 3), 389.

²⁹ Press Association, 'Labour backs extensive reforms over links with trade unions', (*The Guardian*, 1 march 2014) <<https://www.theguardian.com/politics/2014/mar/01/labour-ed-miliband-reforms-links-trade-unions>> accessed 13 December 2017.

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total of £24.54 million³⁰. Therefore, the statistics show that union members have similar political views to their leaders and that they want their unions to promote political campaigns in order to persuade the government to introduce legislation that defends the interests of workers.

Indeed, the government's measures contradict Ewing's perspective that trade unions have a governmental function and that they operate as the political representatives of workers to promote regulatory legislation that will protect the rights of the workers³¹. Trade unions through their political activities have the potential to improve employment law as well as to promote housing and social security benefits³². By engaging in public administration trade unions can, to some extent, become 'the administrative agent of the state.'³³ In effect, trade unions can develop government policy in the areas of health insurance and education as well as accomplishing financial objectives by regulating wage inflation to fulfil the government's economic plans³⁴. For example, the government recently asked the trade unions to initiate discussions with employer organizations in order to implement EU directives regarding agency work³⁵. Additionally, since trade unions operate like political actors, they encourage more people to get involved in national politics by taking part in the union's campaigns which can ultimately deal with the low levels of turnouts at elections.³⁶ However, Ewing clarifies that the political function of trade unions is ever changing because unions have to conform to the government's program and interests³⁷. This system is characterized as a 'new supply side trade unionism'³⁸ where the role of trade

³⁰ Certification Officer, *Annual Report of the Certification Officer 2016-2017* (2017) ch 7.

³¹ KD Ewing, 'The Function of Trade Unions' (2005) 34 ILJ 1.

³² A.C.L Davies (n 3), 387.

³³ G.D.H Cole, *Organised Labour* (George Allen & Unwin 1924) 146.

³⁴ KD Ewing (n 31).

³⁵ A.C.L Davies (n 3), 387.

³⁶ *ibid* 389.

³⁷ KD Ewing (n 31).

³⁸ *ibid*.

unions is determined by the government. Since the 1970s the regulatory and governmental influence of the unions has been narrowed down and its major role nowadays is restricted to encouraging the government to introduce beneficial employment laws³⁹. Therefore, the restrictive government legislation does not enable trade unions to successfully deliver their political function and the same applies in the case of collective bargaining.

Importance of collective bargaining for the workers and the society

The fundamental function of trade unions is the representation of workers' interests, most commonly through collective bargaining. Collective bargaining is a process by which trade unions represent workers by negotiating with their employers in order to reach a collective agreement that will determine the terms and conditions of their employment⁴⁰. The benefits of collective bargaining are not limited to the protection of collective bargaining as they lead to progress in the wider social and political spectrum. First, collective bargaining is an efficient way in dealing with the unequal bargaining power between the employers and the workers. Indeed, it is hard for employers to ignore the demands of a large group of workers and especially under the threat of industrial actions if their requests are not satisfied. In this way, the workers feel that they are well represented at the workplace and that their rights are not easily abused. Additionally, there are economic advantages related to collective bargaining as union members have a wage premium of 13.7% as of 2016 and their average earnings per hour were £15.07 as opposed to £13.25 for non-union members⁴¹. Nevertheless, classical liberal economists such as Hayek argue that trade unions have a negative

³⁹ A.C.L Davies (n 3), 387.

⁴⁰ *ibid* 436.

⁴¹ Department for Business (n 5).

impact on the economy⁴². By encouraging employers to raise the salaries, trade unions extract 'rents' which are excessive payments that pass the required market rate of the business⁴³. Therefore, unionised businesses become less competitive than non-unionised businesses because they have to cover more labour costs and start hiring less workers. However, trade unionists support that the extra costs from the rise in salaries can be covered through a reduction in the employer's profits. Indeed, in developed economies, such as the one of Germany, collective agreements are legally enforceable, which disapproves the criticisms of classical liberal economists.

Second, Freeman and Medoff developed the 'voice' argument which demonstrates that when workers have an active participation in the workplace they tend to be loyal towards their employers⁴⁴. Thus, employers benefit too as the workers will be more productive and they will need to spend less on recruiting and training new personnel. This condemns the criticisms that trade unions represent an out of date adversarial approach of the industrial relations between employers and employees⁴⁵. Third, collective bargaining is fruitful for the government as it constitutes a cost-effective method of dealing with social conflicts. It is costly for the government to introduce regulations to resolve workplace issues and government intervention might lead to government failure if it promotes 'one size fits all' solutions on different enterprise and industries.⁴⁶ Despite the fact that collective bargaining possesses plenty of benefits, the UK legislation is restrictive when it comes to the recognition of trade unions.

⁴² FA Hayek, *The Constitution of Liberty* (University of Chicago Press 1960) ch 18.

⁴³ A.C.L Davies (n 3), 390.

⁴⁴ Richard B Freeman and James L Medoff, *What Do Unions Do?* (Basic Books 1984) ch 6.

⁴⁵ A.C.L Davies (n 3), 390.

⁴⁶ *ibid* 389.

The process of obtaining recognition for collective bargaining

Trade unions should first obtain recognition by the employers for collective bargaining either voluntarily, or by statute. Through voluntary recognition trade unions attempt to persuade the employer to engage in collective bargaining, which can be done by warning them of an industrial action. As a result, trade unions need to secure the support of workers in order to show to the employer that they are popular amongst the workforce. Nonetheless, it is very hard for trade unions to attain voluntary recognition because its success is determined by two areas of law which are impertinent towards trade unions. The first is the right to strike⁴⁷ and the second is the protection of union members from being discriminated by their employers. If trade unions manage to secure voluntary recognition and reach an agreement with the employer, it will be equivalent to a collective agreement under section 178 TULRCA. This means that under section 179 TULRCA the agreement will not be enforceable in law unless it is written and provides a clear statement that it aims to be treated as legally enforceable. Therefore, trade unions do not have the right to bring proceedings to court if the employers break the agreement.

Alternatively, trade unions may seek to achieve recognition through Schedule A1 of TULRCA when the employers remain unwilling to engage in collective bargaining. Statutory recognition may require the employer to discuss with unions once a year issues related to payment, hours and holidays⁴⁸. However, there are many limitations towards invoking the statutory process. Indeed, there must be more than 21 workers in a workplace in order for the union to invoke a statutory recognition and this effectively prohibits access to 30% of the total amount of workers⁴⁹. Paragraph 35

⁴⁷ TULRCA (n 1), s 179.

⁴⁸ *ibid* Sch A1 para 31(3).

⁴⁹ Bob Simpson, 'Trade Union Recognition and the Law, a New Approach- Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992' (2000) 29 ILJ 193.

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of Schedule A1 provides another obstacle as unions which are already recognized for the bargaining unit are not allowed to seek for the statutory recognition procedure. Therefore, employers have the opportunity to recognize a union which is less demanding and disallow better representative unions from seeking recognition. Indeed, this problem was addressed in the *Boots*⁵⁰ case. There the High Court ruled that unions can invoke Part VI of Schedule A1 to derecognize the incumbent union because for these purposes the meaning of collective bargaining must be interpreted as 'negotiations over any matters which the parties have agreed should be the subject of collective bargaining'⁵¹. Nevertheless, the procedure is still complicated for the unions because when an incumbent union exists they are not allowed to act independently and they should convince workers to make an application to the Central Arbitration Committee (CAC) in order to derecognize that union⁵².

Furthermore, the recognition process appears to be complicated and time consuming. Indeed, if the employer rejects the proposed bargaining unit, this will lead to more procedural steps as the CAC might be called to decide the bargaining unit which might not be the one initially proposed by the union. As Simpson illustrates, employers do not have an obligation to carry out negotiations in good faith and are only obliged to 'meet and talk' and can easily avoid any meaningful discussions relating to bargaining with the unions⁵³. Adding to it, the CAC will have to evaluate the application by scrutinizing similar matters to the ones already checked during the 'admissibility' stage which is unreasonably time consuming.⁵⁴ According to Bogg, the recognition process does not offer adequate protection when the employer is not

⁵⁰ *R (Boots Management Services Ltd) v Central Arbitration Committee* [2014] EWHC 2930 (Admin).

⁵¹ *ibid.*

⁵² A.C.L Davies (n 3), 441.

⁵³ Bob Simpson (n 49), 215.

⁵⁴ *ibid* 205.

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cooperative⁵⁵. Initially, the government introduced the 'unfair practice' provision to deal with the critics of TUC by modifying Schedule A1 in the Employment Relations Act 2004. As shown in paragraph 27A (2) the provision attempts to prevent the employers from using tactics that will discourage workers from voting for recognition. Nonetheless, the provision is only operative after the CAC orders a ballot. Hence, employers might follow dishonest strategies to encourage workers to oppose the initial approach of the union. Consequently, unions might fail to obtain the requirement of achieving a majority support or 10% membership in the bargaining unit in favour of recognition⁵⁶.

In addition, Bogg is critical of paragraph 27B (4) because the CAC has to identify how the voting intentions of the workers had been affected by the employer's strategies⁵⁷. This acts as an additional burden for the unions who invoke the unfair practices provision because it is very hard to establish the particular requirement. As a consequence, very few claims had been successful because the CAC is very hesitant when applying the unfair practice provision⁵⁸. Indeed, the prerequisite for a majority support as well as 40% of workers in the bargaining unit, prohibits unions with strong but not exceptional support to achieve recognition. Hence, Gall argues that the main problem of the statutory recognition procedure is that only unions with widespread support amongst the workers can be recognized⁵⁹. Indeed, Gall highlights that in recent times statutory recognition appears to be the sole option for unions to be recognized. This means that it has been very difficult for unions to negotiate the rights

⁵⁵ Alan Bogg, 'The Mouse that Never Roared: Unfair Practices and Union Recognition' (2009) 38 ILJ 390.

⁵⁶ *ibid* 392.

⁵⁷ *ibid* 442.

⁵⁸ *ibid* 390.

⁵⁹ Gregor Gall, 'Union Recognition in Britain: the End of Legally Induced Voluntarism' (2012) 41 ILJ 422.

of workers⁶⁰. The procedure of statutory recognition does not take into consideration that support for trade unions has been reduced and that it is very difficult for unions to fulfil the high requirements in terms of support. Also, unrecognized trade unions find it very hard to encourage workers to join them because there are many workers who did not experience strong union support and remain unaware of its benefits⁶¹. As a result, the process of obtaining recognition for trade unions is very hard, meaning that they are not able to negotiate with the employers in order to preserve the interests of the workers. In fact, there is a similar restrictive legislation in the case of organising industrial actions.

Industrial action

Strikes represent the most popular method of industrial action through which workers stop working until a grievance is satisfied or more commonly to encourage employers to engage in collective bargaining. Sometimes employers disregard the collective demands of the workers, thus initiating a strike appears to be a strong form of protest to force the employers to reconsider their conduct. Workers are not paid during strike actions and 'actions short of a strike' where workers remain passive during work. This is because courts tend to consider them as equivalent to strikes and allow employers to not give out payments⁶². Thus, strikes which last for only one day are now the most popular amongst workers who want to initiate a protest. Although in recent times the number of strikes especially in the public sector has increased as a protest towards the austerity of the government, industrial actions were reduced since the 1970s mainly due to the high threshold requirements for industrial actions. Indeed, the

⁶⁰ *ibid* 419.

⁶¹ Ruth Dukes, 'The Statutory Recognition Procedure 1999: no Bias in Favour of Recognition?' (2008) 37 *ILJ* 236.

⁶² A.C.L Davies (n 3), 456.

average working days lost per year between 1973 until 1992 were 7.8 million as opposed to only 615.000 from 1993 until 2012⁶³.

The starting point for industrial actions under the British legislation is that there is not an express right to strike. This comes in contrast to the ruling of the CJEU in the case of *Viking*⁶⁴ which established that trade unions have the right to strike. Instead, strikes are considered to be a breach of contract of employment and lead to liability in tort, unless they are protected by the statutory immunities of section 219 which provides that they must be 'in contemplation or furtherance of a trade dispute'. Trade unions must make sure that the purpose of the strike 'relates wholly or mainly'⁶⁵ to the particular issues recorded in the provision. Indeed, most of the matters listed in the provision are related to collective bargaining. Thus, aims including political purposes such as reforms in government policy and increasing the minimum wage are not permissible. Hence, trade unions should be very cautious when presenting the objectives of the strike. The International Labour Organisation (ILO) has criticized the particular provision because it encourages governments to prevent strikes which aim to satisfy the social and economic welfare of the union members⁶⁶.

As a matter of fact, the introduction of the TUA has introduced new limitations on the undertaking of industrial actions. Indeed, the TUA under section 2 has made it even more difficult for trade unions to organize industrial actions as the minimum ballot turnout is now 50%. An additional threshold applies to 'important public services' under section 3 which requires a minimum support of 40% of the ballot vote for an industrial action. In this way, the government holds trade unions to a higher democratic standard

⁶³ Office of National Statistics, *Labour Disputes – Annual Article, 2013* (July 2014).

⁶⁴ Case C-438/05 *International Transport Workers' Federation and another v Viking Line ABP and another* [2008] IRLR 143.

⁶⁵ TULRCA (n 1), 244.

⁶⁶ A.C.L Davies (n 3), 471.

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that the one it holds itself during elections. According to the government, these measures were introduced to promote fairness and democracy to avoid public disturbances when there is low support for industrial action⁶⁷. Also, section 9 according to which the mandate for industrial action terminates after six months, was introduced to make sure that the support for the industrial action is 'ongoing'⁶⁸. Adding to it, the government argues that the aim is to benefit the consumers by protecting them from industrial actions that will prevent them from access to public services. Indeed, it is the taxpayer citizens who are affected by the strikes and not the government which imposes the strict measures.

Nevertheless, Bogg argues that the new Act reflects an authoritarian version of the Conservative ideology which aims to pacify trade unions and workers in order to promote social order by restricting industrial action⁶⁹. The TUA represents a part of the wider objective of the government to eliminate resistance towards its policies which Bogg characterizes as the process of 'de-democratisation'⁷⁰. According to Bogg, the new measures regarding industrial action in combination with the complex information that the trade unions have to provide in the voting paper and to the members under sections 5 and 6, are constructed to facilitate the ability of employers to seek for injunctions to halt industrial actions when the unions fail to follow the hard to fulfil provisions. As Elias LJ highlighted in *Serco*, the ballot and notice requirements are 'extremely detailed' and the 'balance of convenience test almost always lies in favour of granting the injunction pending trial.'⁷¹ Therefore, most of the times interim

⁶⁷ Department for Business, Innovation and Skills, Trade Union Bill: *Consultation on Ballot Thresholds in Important Public Services* (July 2015) BIS/15/418.

⁶⁸ *ibid.*

⁶⁹ Alan Bogg, 'Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State' (2016) 45 ILJ 300.

⁷⁰ *ibid* 306.

⁷¹ *RMT v Serco* [2011] EWCA Civ 226.

injunctions tend to be granted to the employers who seek to halt an industrial action.⁷² Moreover, Elias LJ emphasised that the right to strike can be interpreted as an extension of article 11 and that immunities should be construed neutrally rather than against the union which is the traditional judicial pattern.

In fact, Dukes goes as far as to argue that the legislative reforms represent an attempt to ban industrial action 'by the back door'⁷³. In effect, it appears that Hayek would also be reluctant to the implementation of TUA because it undermines the rule of law by eliminating effective checks towards the government and by granting arbitrary powers to government officials⁷⁴. The government by adopting these measures and presenting these justifications overlooks that industrial actions constitute an important part of collective bargaining. In many cases it is the union members that encourage the leaders to put pressure on employers in order to deal with issues related to payment and pension rights⁷⁵. Finally, the government fails to provide concrete evidence to justify its measures. For example, there is no evidence that abstainers during the voting process were forced to participate or that they opposed the organization of an industrial action⁷⁶. Furthermore, the government failed to demonstrate how the measures introduced are going to lead to the aspired outcomes. For instance, there is no supportive evidence that the termination of the mandate for industrial action every six months will ensure an ongoing support⁷⁷. In addition, the government attempts to justify the additional requirements for picketing under section 220A in terms of the necessity to 'protect non-striking workers from

⁷² G Gall, 'Research Note: Injunctions as a Legal Weapon in Industrial Disputes in Britain 1995–2005' (2006) 44 BJIR 332.

⁷³ Ruth Dukes and Nicola Kountouris, 'Pre-strike Ballots, Picketing and Protest: Banning Industrial Action by the Back Door?' (2016) 45(3) ILJ 339.

⁷⁴ FA Hayek (n 42), 268.

⁷⁵ Ruth Dukes and Nicola Kountouris (n 73), 350.

⁷⁶ *ibid.*

⁷⁷ *ibid.*

intimidation⁷⁸. However, when the government collected evidence for intimidating conduct, the majority of the responses demonstrated that workers did not encounter intimidation or inducement⁷⁹. Indeed, Novitz and Ford highlight that there is already adequate protection from intimidation under criminal law and that further provisions appear to be unnecessary⁸⁰.

Conclusion

Trade unions can be made relevant in today's world of work if the UK government starts promoting legislation which will enable the unions to effectively protect the rights of workers. The majority of workers and employees are unaware of the importance of strong union power because the government's opposition and ignorance towards unions makes them weak and unable to efficiently serve workers' rights. The current system of individual enforcement of rights and the restrictive legislation in the areas of industrial action and collective bargaining undermine the role of trade unions in the society. The examples of Germany where collective agreements are legally enforceable and Sweden where the majority of workers in the public and private sectors are covered by collective agreements, demonstrate that trade unions can have a significant economic and social role in developed economies. Therefore, it is a misconception that trade unionism is an out of date system of representation and to a large extent it is the treatment of the government that classifies the role and function of trade unions in society.

⁷⁸ Department for Business (n 67), *Consultation on Tackling Intimidation of Non-Striking Workers, Consultation on Tackling Intimidation* (2015) no 3.

⁷⁹ Ruth Dukes and Nicola Kountouris (n 73), 358.

⁸⁰ Michael Ford and Tonia Novitz, 'An Absence of Fairness...Restrictions on Industrial Action and Protest in the Trade Union Bill 2015' (2015) 44 ILJ 544.