

WHITHER BRITISH LABOUR LAW CRISIS, WHAT CRISIS? - AN HISTORICAL PERSPECTIVE ON THE JURIDIFICATION OF BRITISH INDUSTRIAL RELATIONS

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Introduction

This paper is largely historical in that it reflects on the reasons why the British system of industrial relations was transformed from a system rooted in voluntarism or legal abstentionism to one which became increasingly juridified from the 1960s onwards.

Juridification should be understood as a combination of judicial intervention in the arena of industrial conflict and the enactment of substantial legislation in areas previously left to employment contracts between employers and their employees and to non-legally enforceable collective agreements between employers and trade unions.¹ The reason for using this historical methodology is that it enables us to gain insights into how we got to where we are today.

The paper also involves critical reflection on Kahn Freund's conception of collective *laissez-faire*. Other critiques of Kahn Freund's concept of collective *laissez-faire* have focused on its underestimation of the role that the state played in British industrial relations for much of the twentieth century.² This paper contributes to these critiques by arguing that the concept of

¹ For analyses of the juridification of the British system of industrial relations see Clark, J, 'The Juridification of Industrial Relations: A Review Article' (1985) 14(2) Ind LJ 69; Simitis, S, 'Juridification of Industrial Relations' pp 122-136 in Teubner, G, (ed), *Juridification of Social Spheres* (Berlin and New York: De Gruyter, 1987).

² See, as examples, Howell, C, *Trade Unions and the State* (New Jersey: Princeton University Press, 2005); Ewing, K, 'The State and Industrial Relations: Collective Laissez-Faire Revisited' (1998) 5 *Historical Studies in*

collective *laissez-faire* failed fully to take into account the role that judges have played in the British system of industrial relations. Judges have been able to use the common law to intervene in or disengage from involvement with industrial relations in line with the needs of employers and the state to foster responsible trade unionism whilst simultaneously seeking to restrain trade union militancy. To substantiate this contention, this paper will focus on the language used by judges, in the past and in more recent times, in judgments concerned with regulating the organisation of industrial action.

Analysis of these judgments reveals conceptual and philosophical links between past and present judicial perceptions of trade unionism. These judgments both reflect the concerns of employers and the state and influence the way in which trade unions and their actions are generally perceived. Judicial language provides the ideological basis for seeing trade unions and their members as: abusing power; imposing tyranny; violating the freedom of the individual, conspiring to injure or use unlawful means; and, generally intimidating, obstructing and interfering with those who fail to be otherwise coerced by them. In Britain, juridification on the part of the judges has been accompanied and implemented by what can be characterised as a process of judicial mystification of industrial relations.

The other main contention of the paper is that, whilst labour law may currently be in a state of flux, this does not amount to a crisis with respect to its future. Whatever the deregulatory

Industrial Relations 1; Dukes, R, 'Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the the Role of Labour Law' (2008) 35 JLS 341. Paul Davies and Mark Freedland both accept the characterisation of the traditional system as voluntarist and document invaluable insights into how the state provided non-legal forms of support for that system – see Davies, P, & Freedland, M, *Labour Legislation and Public Policy* (Oxford: Clarendon, 1993).

preferences and instincts of the current government, it is not possible for governments to turn back the clock by creating a new form of *laissez-faire* which eliminates employment rights – be they individual or collective – from the workplace. This is partly because the juridification of workplace conflict must remain the State’s preferred mechanism for the resolution of employment disputes; and partly because, in contrast with the past, European law provides an important constraint on a government’s ability to deregulate the employment relation.

The Origins of the Strategy of Collective *Laissez-Faire*

In his seminal work, *History and Heritage*, Alan Fox identifies two conflicting philosophies with respect to trade unionism - ‘atomistic individualism’ and ‘instrumental collectivism’ - located in different sections of capital, government and those concerned with the administration of the state. The latter philosophy understands how trade unions can contribute to the efficient functioning of the economic system so that those in power “while still using perceived self-interest as their criterion of judgement and action find it expedient to concert with others on those issues where collective action yields better results.”³ Atomistic individualism, on the other hand, perceives trade unionism as an inherent threat to individual liberty, which, at the very least, must be subject to substantial legal regulation.

It is contended that these conflicting philosophies underlie the different strategies that have been used by governments and the state to produce a system of industrial relations that promotes a “responsible” trade unionism which prioritises the needs of the economy over fighting to further or defend the interests of trade union members. Related to this in the late 1960s and the 1970s was the development of strategies representing soft and hard forms of corporatism.

³ Fox, A, *History and Heritage* (London: Allen and Unwin,1985) at p 192.

For much of the nineteenth century the state's approach to trade unions as reflected in the Combination and Master and Servants Acts and in judicial decisions interpreting these Acts was rooted in atomistic individualism. This approach is encapsulated by Sir William Erle in his Memorandum to the Royal Commission on Trade Unions. He stated:

‘As to combination, each person has a right to choose whether he will labour or not, and also to choose the terms on which he will consent to labour, if labour be his choice... They cannot create any mutual obligation having the legal effect of binding each other not to work or not to employ unless on terms allowed by the combination... A person can neither alienate for a time his freedom to dispose of his own labour or his own capital according to his own will, nor alienate such freedom generally and make himself a slave; it follows that he cannot transfer it to the governing body of a union.’⁴

However, it was the findings of this Royal Commission that heralded the move away from atomistic individualism to instrumental collectivism. The minority and majority reports of the Commission differ in their recommendations for legal reform but both reports reveal recognition of the positive role that trade unions could play from the state's perspective by fostering peaceful and orderly industrial relations. Through the consequent Trade Union Act 1871 and the Conspiracy and Protection of Property Act 1875 trade unions were given a legal status, and immunity from the criminal law was conferred on industrial action which was in contemplation or furtherance of a lawful trade dispute. Not all sections of the state and

⁴ Quoted in Hedges, R, and Winterbottom, A, *The Legal History of Trade Unions*. (London: Longmans , 1930) at p 52.

certainly not the judiciary were convinced of the new approach and the judgments of the 1890s and 1900s dissected below represent a last ditch stand in this period by the proponents of atomistic individualism.

A firm consensus in favour of instrumental collectivism was represented by the Trade Disputes Act 1906, which conferred immunity on the tortious liabilities that the judges had imposed during the 1890s, and the subsequent judicial disengagement from involvement in industrial relations. As documented by a number of writers such as Ewing, Howell, Dukes and Davies & Freedland⁵, this was a period in which the dominant strategy of the state and many employers was to engage in initiatives designed to support the establishment of collective bargaining procedures, and to promote conciliation and arbitration as the norm for resolving industrial disputes. It was also a period in which many trade union leaders were co-opted onto bodies established to promote and maintain social stability.

This co-operation between employers, trade union leaders and the state was designed to enable trade unions, in the words of Walter Citrine:

‘actively [to] participate in a concerted effort to raise industry to its highest efficiency by developing the most scientific methods of production, eliminating waste and harmful restrictions, removing causes of friction and avoidable conflict, and promoting the largest possible output so as to provide a rising standard of life and continuously improving conditions of employment.’⁶

⁵ *Supra* n 2.

⁶ Quoted in Fox, *supra* n 3 at p 327.

Not all sections of the trade union movement were convinced that this strategy would operate to secure the interests of their members and preferred a more militant approach. Thus, this was also a period in which more coercive legal instruments were put in place to combat trade union militancy. This included the banning of strikes in both world wars, the Emergency Powers Act 1920, and, in the aftermath of the General Strike, the Trade Disputes and Trade Unions Act 1927.

Moreover, the judicial disengagement was initially cautious, but it culminated in the decision in *Crofter*⁷ in which the Law Lords redrew the boundary of liability to such an extent that the tort of conspiracy to injure, established in *Quinn v Leatham*⁸, was effectively removed from the realm of industrial conflict. This decision also revealed a change in the language of the judges so that Lord Wright was able to proclaim: ‘The right of workmen to strike is an essential element in the principle of collective bargaining.’⁹ This constituted a significant demystification in the language of the common law as it had been developed in the 1890s and early 1900s. However, it is interesting to note that a residual hostility to trade unions on the part of some judges can still be detected. Though Viscount Maugham was to find for the

⁷ *Crofter Hand Woven Harris Tweed v Veitch* [1942] AC 435. The judicial disengagement from industrial relations was a slow process which initially was developed through cases concerned with commercial competition. However, the common law was refined and the boundaries of liability were narrowed through these cases so that in *Crofter* the Law Lords had no difficulty in restricting *Quinn* to its facts and refusing to find the union leadership liable. For analysis of the *Crofter* case and its relationship with voluntarism see Brodie, D, ‘The Scottish Case – *Crofter Hand Woven Harris Tweed v Veitch*’, pp 129-144 in Ewing, K., (ed) *The Right to Strike: From the Trade Disputes Act 1906 to a Trade Union Freedom Bill 2006* (Liverpool: Institute of Employment Rights, 2006).

⁸ *Infra* n 39.

⁹ *Supra* n 7 at p 463.

trade union defendants he nevertheless stated: ‘... the power of trade union officials in the circumstances which exist in the Island [Lewis] is so great that the business and the means of business of everyone who resides there are at the mercy of the trade union officials. If they should be so disposed...a tyranny of the most serious character might follow.’¹⁰

The 1960s and the 1970s

The post-war period was the heyday of collective *laissez-faire* but, it is argued, it never crystallised into a tradition – it was always a strategy based on a philosophy of instrumental collectivism for co-opting trade unions into the running of the economic system. The price for this was the creation of the statutory immunities and the judicial disengagement from industrial relations. However, as the events of the 1960s and 1970s were to show, this disengagement was temporary as the judges were waiting in the wings and were to demonstrate that their attitudes to the unions remained consistent with judicial attitudes of the nineteenth and early twentieth centuries. This is exemplified by the decision of the Law Lords in *Rookes v Barnard*, which, as discussed below, characterised a threat to organise industrial action through inducing breaches of employment contracts as an economic form of tortious intimidation.

The decision in *Rookes* was overruled by the Trade Disputes Act 1965 which extended immunity to cover threats to break or induce a breach of contract. The political significance of this Act was that it was passed in return for an agreement by the TUC for the setting up of the Donovan Commission. At the time, the Report of this Commission was regarded as the embodiment and indeed consolidation of collective *laissez-faire*, but it is the contention of this paper that the Donovan Report contained and presaged tensions between soft and hard

¹⁰ *Supra* n 7 at p 448.

corporatist strategies for containing and undermining workplace militancy. These tensions were reflected by the rather more coercive stance of the Wilson Government's proposals in the *'In Place of Strife'* white paper, and by the Industrial Relations Act 1971 which was enacted by the Heath Government. Whilst the majority of the Donovan Commission were largely against coercive legal intervention it is interesting to note that they did recommend the removal of statutory immunity from the organisers of unofficial industrial action – a step that was not even taken by the Conservative governments of the 1980s and 1990s, though legislation passed in 1993 does impose statutory liability on trade unions for industrial action organised at workplace level by shop stewards and the like.¹¹

As Crouch has explained¹², corporatism comes in a variety of forms but a consistent feature of it is the restoration of authority – be it the authority of the state, the authority of the employer over its employees, the authority of the trade union over its members or a combination of all of these examples. The central problem (from the state's perspective) with which the Donovan Commission was tasked in resolving was the growth of an informal system of industrial relations rooted in the power of shop stewards to organise unofficial industrial action at workplace level without the support of, and often contrary to the wishes of, their union leaderships. Unjust disciplinary and dismissal practices by employers were perceived as one of the major causes of workplace militancy. Therefore, one of the priorities for the Commission was to re-establish the authority of the state over employer disciplinary practices. This it did and to an extent still does though the creation of unfair dismissal rights.

¹¹ This was done by the Trade Union Reform and Employment Rights Act 1993 and the relevant law is contained in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) ss 20 & 21.

¹² See Crouch, C, *Class Conflict and the Industrial Relations Crisis* (Harlow: Heinemann, 1977) for his analysis of corporatism.

The recommendation by the Donovan Commission for the creation of the statutory right not to be unfairly dismissed is the one long term consequence of the Donovan Report, although it did also recommend the establishment of a Commission on Industrial Relations which was ultimately to be set up in the rather different form of ACAS. At the time, the rationale for unfair dismissal law was not so much employment protection as relocating disputes over discipline and dismissal away from resolution through direct action to resolution in a state sponsored forum – the industrial tribunal. State authority was imposed on employers as they were to be penalised through new remedies if they unfairly dismissed employees. However, employer authority was also to be reinforced through enabling them to dismiss fairly provided they followed proper procedures prior to reaching a decision to dismiss, and did not dismiss in an arbitrary manner or for no good cause.¹³

Unfair dismissal law can be regarded as the beginnings of a process of incorporating shop stewards, or workplace representatives as they are generally called today, back into the official structures of their unions. The Social Contract between the TUC and the 1974 Labour

¹³ The procedures for resolving disciplinary and grievance issues have been contained in a number of ACAS Codes - essentially this has resulted in the juridification of workplace disputes. For further critical analysis see Collins, H., 'Capitalist Discipline and Corporatist Law Part 1' (1982) 11 Ind LJ 78; 'Capitalist Discipline and Corporatist Law Part 2', p 170. As Collins explains, a good example of how unfair dismissal law reinforces employer authority is through enabling employers fairly to dismiss employees who hold out against accepting unilateral changes to their contracts of employment. It could be argued that it is preferable for disputes over dismissal to be resolved by an employment tribunal rather than by disruptive industrial action. However, in the 1960s such action was often short-lived, and from the perspective of the dismissed employee often successful in terms of securing his reinstatement. There is no guarantee that an employee will win in a tribunal and, even if he or she does, reinstatement is a rare outcome.

government was the key mechanism through which this was achieved and this ‘Contract’ also had the effect of incorporating union leaderships into policing the Labour government’s policies of wage restraint. Part of the Social Contract was the creation of a number of new statutory rights at work including provisions for paid time off rights for workplace union representatives carrying out trade union duties and encouraging employers to provide these employees with facilities to undertake their union work during working hours. A novel collective right was the introduction of a statutory procedure whereby a trade union could secure recognition by an employer who declined to recognise a union on a voluntary basis. Recognised unions were also given the statutory right to seek the disclosure of information from employers for the purposes of collective bargaining. These new rights combined with experiments in industrial democracy, such as the participation committees set up in British Leyland, resulted in shop stewards losing touch with the concerns of rank and file members and increasingly more concerned with ensuring that official union policies were complied with. The militancy of the shop stewards movement was one of the main causes of the neutering of the Industrial Relations Act. Arguably, the weakening of this movement through the soft corporatism, or what Crouch called ‘bargained corporatism’¹⁴, of the Social Contract is one reason why the anti-union legislation of the 1980s was to succeed where the Industrial Relations Act had failed.

It is not possible in this paper to document let alone fully analyse all of these developments.

¹⁵ The purpose of referring to them is to argue that, although today employment lawyers and

¹⁴ *Supra* n 12.

¹⁵ The consequences of the Social Contract and the experiments in industrial democracy for workplace union organisation are discussed in Crouch, *supra* n 12, and Elliot, J, *Conflict or Co-operation? The Growth in Industrial Democracy* (London: Kogan Page, 1978).

indeed trade unionists are right to stress the value of statutory individual employment rights, it is important to remember that their origins lie not so much in providing the basis for workplace justice as in restoration of state, employer and trade union authority over militant workplace organisation. For this reason, although individual employment rights were weakened by both the Thatcher and Major Governments and are being weakened again by the current Coalition Government, it would be ultimately contrary to the interests of both the state and employers to return to the days in which these rights did not exist. If this is felt to be too strong an assessment then it would certainly be a gamble to assume it would be possible to abolish these rights in their entirety without generating substantial industrial unrest.

Historically, it is important to remember that, although the Social Contract succeeded to a significant extent in incorporating shop stewards into official union structures, it ultimately failed as a mechanism for long term wage restraint. Rank and file militancy resulted in the Winter of Discontent, the election of Margaret Thatcher's Government in 1979 and the enactment of a number of legislative provisions which did and do place significant restrictions on rights to strike.

The nature of judicial mystification

This paper has sought to demonstrate how the development and growth in individual employment rights was an important part of a process of juridifying industrial relations in the context of a strategy of soft corporatism. The primary causes of this juridification were, on the one hand, concern that contract law was unable to regulate inequality of bargaining power between employers and employees and thus protect workers from unfair treatment at the workplace, and, on the other, concern on the part of employers and the state that informal workplace union organisation was out of control. Legal intervention was seen as the solution.

This took the form of giving legal rights and remedies to individual employees and trade union activists which contradicted contract law and, in so doing, removed some of the causes of workplace industrial conflict. As Foster has explained: ‘Juridification...at a simple level, it merely reproduces the traditional idea of private and public realms, with private areas increasingly being subject to public or judicial control, a move from voluntarism to legalism. But it offers also a more complex version which stresses the interaction as legal norms are used to reorder the power relations within the social arena.’¹⁶

The failure of the Social Contract constituted a failure by strategies based on soft corporatism comprehensively to reorder power relations in favour of the employers and the state. This resulted in renewed judicial intervention in industrial relations. As documented below, the senior judges collectively attacked the immunities as privileges to break the law which ‘stuck in their Lordships’ gorges’ and gave advice to the incoming Thatcher government as to how best to restrict the immunities. The Government heeded this advice and also adopted a strategy of making incremental restrictions on rights to strike rather than adopting the ‘big bang’ approach of the Heath Government.

To understand the role of the judges it is necessary to reflect on history and the process that this paper characterises as judicial mystification. One of the problems with the concept of collective *laissez-faire* is that it reflects the relationship between the law and industrial relations in the post World War II period and perceives the judicial intervention at the end of

¹⁶ Foster, K, ‘Developments in Sporting Law’ in Allison, L (ed), *The Changing Politics of Sport* (Manchester: Manchester UP, 1993) at p 108. Foster was writing about the juridification of sports law but his explanation equally applies to employment law. Indeed, over the past 20 years sports law has increasingly become juridified in ways which are comparable to employment law, albeit for different reasons which largely arise from the commodification of professional sport.

the nineteenth century and the beginning of the twentieth century as of historical rather than ongoing significance. In fact, the techniques of judicial mystification have provided a very flexible mechanism for judges to intervene in or withdraw from involvement in industrial relations as the judges have thought appropriate. It is the nature of this process which this paper will now address.

The notion of judicial mystification is inspired by writers who perceive language as ideology reflecting the interests of hegemonic groups and bodies in society such as those represented by employers and the state. Language can generate and reinforce socially constructed realities which are rendered normative by the media in particular, and ultimately become part of ‘common wisdom’.¹⁷ The term mystification is used because the weight of British history underpinned by judicial language has had a permanently distorting effect on popular understanding of the reasons why trade unions exist and on how industrial action should be perceived in a democratic society. The entry on mystification, contained in the Oxford English Dictionary, is also pertinent to this idea of mystification. The entry defines mystification as to “make obscure or mysterious: lawyers who mystify the legal system so that laymen find it unintelligible”.¹⁸

Use of the common law to regulate trade union behaviour may not have rendered the law unintelligible, but it has certainly rendered it unduly complex and misleading in a way that has distorted and obscured reality. Most fundamentally, it has generated images and

¹⁷ It is way beyond the scope and purpose of this paper to seek to evaluate the competing discourses of a Marxist based structuralism and post-modern deconstructionism but Roland Barthes is a particular influence on the author – see Barthes, R, *Mythologies* as translated by Lavers, A, (London: Paladin, 1972). Also see Berger, P, & Luckmann, T, *The Social Construction of Reality* (New York: Anchor Books, 1967).

¹⁸ Soanes, C, & Stevenson, A, (eds) *Oxford Dictionary of English* (Oxford: Oxford University Press, 2005).

perceptions of industrial action as illegitimate and unreasonable. Such perceptions are not generally replicated in other democratic countries where it is recognised that trade unions exist to further and defend the interests of their members in their relations with employers and the state, and that trade union actions may even have benefits for sections of society beyond the ranks of their own members. It is similarly recognised that trade unions may need legitimately to engage in industrial action to secure their objectives, and thus rights to strike should be perceived as democratic and human rights.

It is argued that this is an accurate reflection of the realities of industrial relations, and that, most importantly, is an approach which accords with international and European law as contained in the Conventions and Reports of the International Labour Organisation and in the jurisprudence of the European Court of Justice (now the Court of Justice of the European Union) and the European Court of Human Rights. The Reports of the ILO have repeatedly castigated British legislation as violating international law because, as examples, all forms of sympathetic industrial action are prohibited as are strikes organised for the purpose of social protest.¹⁹ Whilst the European Court of Justice has subordinated rights to strike to rights to establish a business and provide services, it has nevertheless recognised that rights to strike are fundamental rights.²⁰ In relatively recent judgments the European Court of Human Rights

¹⁹ The relevant reports of the ILO are documented in Ewing, K, *Britain and the ILO* (London: Institute of Employment Rights, 1994).

²⁰ See *ITWF v Viking Line (ABP) and Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*. For an analysis of *Viking* and *Laval*, see Davies, A.C.L, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ' (2008) 37(2) Ind LJ 126. Although the Treaty on the Functioning of the European Union gives legal force to the Charter of Fundamental Rights, it remains the case that the EU has no legislative powers regarding rights to strike.

has declared that rights to strike are an essential part of the rights of association guaranteed by Article 11 of the European Convention.²¹

British law, on the other hand, based as it is in judicial perceptions of trade unionism, reflects an alternative mystifying reality that shrouds trade unions and rights to strike in a veil of illegality. These perceptions originate in nineteenth century case law but this law continues to exert an influence on modern day judges and, ultimately, public perceptions of trade unionism. Judicial discourse has as its starting point the perspective that trade unions are illegitimate even tyrannical organisations that must be heavily regulated by the law to prevent abuse of power. This discourse obscures the true power relations that exist between capital and labour, and the historical fact that trade unions were formed by working class people to give them some ability to defend themselves from the power of capital. However, these power relations did not, and do not, exist in anything approaching a state of equilibrium.²²

The traditions of the common law are relevant to this discourse in that they provide both the mechanism and the philosophical basis for judicial intervention in industrial relations. This is because judges, through a combination of class instinct and training, define trade unions and

²¹ *Demir v Turkey* [2009] IRLR 766; *Enerji Yapi-Yol Sen v Turkey* (Application No. 68959/01), ECtHR. For analysis of the potential conflict between the ECJ (CJEU) & ECtHR, see Ewing, K, & Hendy, J, 'The Legal Accountability of the ECJ: The ILO, the Social Charter and the ECHR', chapter seven in Ewing, K, & Hendy, J, (eds) *The New Spectre Haunting Europe – The ECJ, Trade Union Rights, and the British Government* (Liverpool: Institute of Employment Rights, 2009); and 'The Dramatic Implications of Demir and Baykara' (2010) 39(1) Ind LJ 2.

²² Arguably, the General Strike of 1926 and the Miners' strike of 1984-5 represent two events during the last 100 years where workers sought to exercise their collective power in a militant and determined manner but both strikes were ultimately crushed by the full weight of the state.

industrial action on the basis of rules developed around property rights and relations between individuals of relatively equal standing.²³ Moreover, as Atleson has analysed, judges often operate on the basis of hidden but deeply held assumptions. Referring to the typical judicial view of 'wildcat' strikes he argues: 'it is quite conceivable that common legal condemnation of such behaviour is based on certain, often unstated, assumptions about the expected behaviour of employees, inherent obligations of employees to their employers, and the perceived needs of the economy.'²⁴ Indeed, judges internalise a philosophy which stresses that freedom equates with a society based on the right of the individual to own property, and to dispose of his or her capital or labour as he or she sees fit. In short, this is a philosophy that perceives societies based on market economies as constituting the natural way for the managing of human affairs. Where groups, such as trade unions, are perceived in acting in ways that jeopardise this society it is, therefore, hardly surprising if judges share concerns regarding trade union behaviour and are aware of and open to suggestions both from fellow judges and other powerful groups in society, such as the media and employers' associations, as to how the law should be developed and applied to deal with this problem.

The common law can be regarded as constituting the infrastructure of the process of judicial mystification. In choosing to apply the common law to restrain trade union behaviour, judges use language which is of the utmost ideological significance. This judicial language

²³ For analysis of the impact of class and training on judicial behaviour see Griffith, J.A.G, *The Politics of the Judiciary* (London: Fontana, 1977); Labour Research, December 2002; Lord Wedderburn, *The Worker and the Law* (London: Sweet & Maxwell, 1986). Also see Lord Denning, *The Discipline of the Law* (London: Butterworths, 1979) at pp 175-194 for Lord Denning's own revealing account of his views on trade unions and the statutory immunities.

²⁴ Atleson, J, *Values and Assumptions in American Labour Law* (Massachusetts: The University of Massachusetts Press, 1983) at p 3.

constitutes the superstructure of mystification as, semiotically, it depicts trade unions, their members and their activities in the worst possible light, and distorts the reasons why industrial action is taken. Moreover, judicial language and attitudes are replicated in political discourse and percolate into and substantially affect public consciousness through the ways in which industrial disputes are reported in the mass media.²⁵ British judges have constructed an alternative social reality to how trade unionists perceive their actions, and indeed to the norms of European and international law. Thus, it is argued that in Britain we have a judicial mystification of the realities of industrial relations, which has assisted ideological offensives against trade unions by employers, media and the state and has contributed both to the creation of and justification of legal restrictions on rights to strike.

The process of judicial mystification

The origins of judicial mystification can be rooted in a number of judgments interpreting the Combination Act 1825 and designating trade unions as organisations in restraint of trade.²⁶ However, the case of *Temperton v Russell* in 1893²⁷ is the starting point for the development of the common law as it remains to this day. The decision in this case applied the decision in *Lumley v Gye*²⁸ that to injure a person's business by inducing a third party to act in breach of contract constituted a tort. It can be argued that the judges had no choice other than to apply *Lumley* to find the trade union officials to be liable. However, as the history of the tort of conspiracy to injure demonstrates (see below), judges have a substantial freedom of

²⁵ For example, the role of the media in fermenting anti-union feeling during the 'Winter of Discontent' is analysed in Hay, C, 'Narrating Crisis: The Discursive Construction of the 'Winter of Discontent.' (1996) 30(2) *Sociology* 253.

²⁶ See, for example, *Hornby v Close* [1867] LR 2 QB 153.

²⁷ [1893] 1 QB 715.

²⁸ [1843-60] ALL ER Rep 208.

manoeuvre in expanding or restricting the boundaries of legal liability. In 1893 it was by no means certain that the officials had acted unlawfully. For example, the notable jurist Sir Frederick Pollock believed that such action was lawful, providing there was no 'coercion' or 'intimidation' of workers who were being asked to break their contracts of employment. Thus, the judges could have declined to have applied *Lumley* on this basis. The judges could also have noted that the repeal of the Master and Servant Acts along with the immunity provided by s.3 of the 1875 Act was intended to legalise industrial action. Whilst, of course, these legislative reforms conferred immunity from the criminal and not the civil law it is contended that it would have been quite possible, at the time, for the judges to conclude that it was not appropriate to extend the law of tort to the use of industrial action in furtherance of a lawful trade dispute. However, the court did precisely the opposite, and, in so doing, significantly undermined the purposes of the 1875 reforms.

This decision was soon followed by others in which industrial action was depicted as 'malicious interference'²⁹ or involved the use of unlawful means. The concept of unlawful means (or illegal means) has been and is at the root of judicial perceptions of industrial action and constitutes the basis for establishing legal liability. Its use demonstrates how a legal concept developed in contexts outside the world of industrial relations is imported by judges into that world to impose legal liability on trade union actions. The earliest case in which the concept appears to have been used was in 1602 where it was held that it constituted illegal means to deprive a quarry proprietor of his trade by threatening his customers with

²⁹ This term first appears to be used to establish liability in *Trollope & Sons v The London Building Trades Federation* (1895) 72 LT 342.

mayhem.³⁰ The phrase was also used to describe firing cannon at inhabitants of Cameroon³¹, and disturbing wild fowl by firing a gun³².

However, since the nineteenth century the concept has become commonplace in case law concerning the use of industrial action. This has been so with respect to picketing, threats to organise industrial action and, of particular significance, the organisation of sympathetic industrial action. According to the common law these trade union activities are inherently acts of illegality. Even though typically this has led to the creation of tortious rather than criminal liability, this vital legal distinction is often lost when it comes to the media reporting of industrial disputes and thus to popular understanding of the law. For example, it is commonly assumed today that it is illegal to participate in any industrial action that has not been sanctioned by a prior secret ballot, or that ‘secondary’ and/or mass picketing is inherently illegal. Moreover, these misunderstandings, compounded as they are by a conflation of tortious and criminal liability, extend even to trade union activists.³³

³⁰ *Garret v Taylor* (1620) 2 Roll Rep 162.

³¹ *Tarleton v M’Gauley* (1793) 1 Peake 270.

³² *Keeble v Hickeringill* (1707) 11 East 574.

³³ See Welch, R, ‘The Behavioural Impact on Trade Unionists of the Trade Union Legislation of the 1980s’ (1993) 24 *Industrial Relations Journal* 236. Trade unionists will typically regard such behaviour as justified, but nevertheless often feel constrained to obey the law. Note participation in a strike where there has been no ballot is not illegal, though it is of course a breach of contract. However, there are no special penalties until and if the strike is repudiated by the workers’ trade union in which case unfair dismissal rights cease to apply. Picketing, secondary or otherwise, does not automatically involve the commission of a tort, let alone a crime. Moreover, any form of picketing, if properly conducted, is in accordance with the rights of assembly granted by Article 11 of the European Convention on Human Rights.

It is not part of the argument that judges all think and act in the same way or that in particular periods of history there is a judicial conspiracy to ‘get the unions’. In the 1960’s, in the aftermath of the decision of the Law Lords in *Rookes v Barnard*, which is discussed below, there was significant concern expressed by senior members of the judiciary that the decision could undermine the right to strike. Most notably, given his anti-union decisions in the late 1960s and 1970s, Lord Denning cautioned judges against re-entering the arena of industrial relations. In his judgments in the cases of *Stratford v Lindley*³⁴ and *Morgan v Fry*³⁵, Lord Denning spoke in terms of the need to recognise the right to strike. In the latter case he warned: ‘If the arguments submitted to us in this case were right, it would mean that the decision in *Rookes v Barnard* had reversed the whole of the labour law in this country as it had been understood for sixty years. It should be confined to cover the case when there is a pledge not to strike.’³⁶

In the 1970s, the House of Lords overruled a series of the decisions by the Court of Appeal which sought restrictively to interpret the statutory immunities as they had been enacted by the 1974 Labour Government. Recent decisions on how statutory provisions on strike procedures should be interpreted reveal divided opinions on the part of our contemporary judiciary.³⁷ Similarly, judicial decisions in the 1890s were not consistently anti-union. In *Allen v Flood*³⁸, the majority of the Law Lords resisted Lord Halsbury’s attempt to persuade them that a union official was committing and malicious interference with trade by informing

³⁴ [1964] 2 ALL ER 209.

³⁵ [1968] 2 QB 710.

³⁶ *Ibid* at p 730.

³⁷ *Infra* n 72.

³⁸ [1898] AC 1.

the employer that his workers would strike if he did not agree to refuse to employ the plaintiffs.

However, Lord Halsbury was to get his way three years later in *Quinn v Leatham*.³⁹ The 1875 immunities covered liability for criminal conspiracy. In *Quinn*, the Law Lords established that conspiracy to injure constituted a tort as well as a crime, and the effect of this judgment was to render virtually all forms of industrial action unlawful, even where no breaches of contract were involved. The judgments in *Quinn* provide a paradigm of the process of judicial mystification. New common law liability is identified in order to restrain trade unionists from taking industrial action; as explicitly articulated by Lord Lindley in his judgment, it is ‘discovered’ that pre-existing statutory immunities do not cover this new form of liability⁴⁰; the imposition of liability is expressed in hyperbolic language that ideologically and fundamentally distorts the nature of trade union behaviour.

Thus, Lord Brampton characterised the threatened industrial action as ‘...a conspiracy formed by a number of unscrupulous enemies acting under an illegal compact, together and separately...Such a conspiracy is a powerful and dangerous engine...employed by the

³⁹[1901] AC 495.

⁴⁰ It was also Lord Lindley who, in *Lyons v Wilkins* [1896] 1 Ch 811, restrictively interpreted s.7 of the Conspiracy and Protection of Property Act 1875 by pointing out that immunity from the offence of watching and besetting was limited to workers peacefully communicating information and did not extend to workers seeking peacefully to persuade other workers not to work. His general view of the 1875 immunities is encapsulated by his dictum that: ‘... The foundation of strikes is dictation. A strike is an attempt to dictate to the employer...Parliament has not yet conferred upon trade unions the power to coerce people and to prevent them from working for whomsoever they like upon any terms they like...’, at pp 822-823.

defendants for the perpetration of organised and ruinous oppression.’⁴¹ Such language may be appropriate when judges are dealing with organised crime. The ideological connotations of using such words in the world of industrial relations are clear.

It is also important to appreciate that *Quinn* and other relevant judgments did not take place in a vacuum but interconnected with and reflected a general anti-union offensive by sections of capital and the media. In the 1890s the National Free Labour Association was formed by William Collinson in response to the perceived threat of militancy associated with the ‘new unionism’. Using the language of the judges he declared that it was: ‘the right possessed by every man to pursue his Trade or Employment without dictation, molestation, or obstruction.’⁴² The NFLA was to play a prominent role in organising strike-breaking labour during the Taff Vale dispute. Following the decision in *Lyons v Wilkins* (1896), which restrictively interpreted the picketing immunity provided by the 1875 Act, a W J Shaxby produced a book called *The Case Against Picketing*. This was published by the Employers’ Parliamentary Council, and its purpose was to provide advice on how use the decision to act against pickets. In an editorial of 29 July 1898, *The Times* demanded: ‘Unions should cease to be extra-legal in character...the time has come...for placing upon the unions a proper amount of corporate responsibility for illegal acts, which inflict injury upon employers or upon non-unionists.’ The Law Lords were happy to oblige several years later by following this advice in the *Taff Vale* decision.⁴³

⁴¹ *Supra* n 39 at p 531.

⁴² Quoted by Saville, J, ‘Trade Unions and Free Labour: The Background to the Taff Vale Decision’ in Briggs, A, and Saville, J, (eds) *Essays in Labour History 1886-1923* (London: Macmillan, 1971) at p 318.

⁴³ *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426. For analysis of the events leading up to *Taff Vale* and the Trade Disputes Act see Lockwood, G, ‘Taff Vale and the Trade Disputes Act 1906’, chapter 2 and Saville, J, ‘The Trade Disputes Act of 1906’, chapter 4 in Ewing K., *supra* n 7.

This convergence between judicial decisions and a wider political assault on legislation designed to provide rights to strike was effectively to be repeated in the late 1970s, when the collapse of the Social Contract ushered in a new period of judicial and political interventionism. The Grunwick strike, which was one of the most important and bitter industrial disputes in the latter part of the 1970s, can be regarded as the pivotal moment when there was a coordinated ideological offensive against the unions which is reminiscent of the 1890s.

The dispute arose after workers on strike were dismissed and then joined a union, APEX, to secure reinstatement and union recognition. From a trade union perspective, the dispute revealed deficiencies both in the law protecting strikers from dismissal and in employment protection rights designed to enable workers to join a union and seek its recognition. From the perspective of many employers and the media the essence of the dispute was resistance by the Managing Director of Grunwick, George Ward, to a bullying and over-powerful trade union movement. This was particularly the case after days of action in the form of mass picketing were organised in solidarity with the sacked workers.⁴⁴

In the words of John Gorst, the local Conservative MP:

‘...the government allow trade union leaders immunity to traduce their opponents during a trade dispute... With governments such as this, for how much longer will the ordinary citizen be able to exercise against trade unions even those diminished legal

⁴⁴ Full accounts of the Grunwick strike, written from rather different perspectives, are provided by Rogaly, J, *Grunwick* (London: Penguin, 1977); and Ward, G, *Fort Grunwick* (London: Maurice Temple Smith Ltd, 1977).

rights that he still possesses? ...The indictment against the government is that they have played in this whole affair a very sorry role...they have been...ever-willing to see a small business man's undoubted legal rights trampled under force while his loyal workers have been coerced by fear. If Grunwicks are beaten, it will be a sorry day for liberty under the law.'⁴⁵

These views were echoed by other Conservative Backbenchers in the House of Commons. For example Ronald Bell warned: 'The coercive combinations of the trade unions have almost destroyed industry in this country, wrecked our productivity and corroded the constitution. Gang warfare has taken over and challenges not only the rule of law, but democracy itself.'⁴⁶

It is easy to see how language of this sort approximates very closely to that used by the likes of Shaxby and Collinson in the 1890s, and how such comments, when repeated in printed and broadcasted news, impact on public consciousness.

It is interesting to note in passing that whilst Lord Denning was not called upon in his capacity as a judge to rule on the picketing that took place during the Grunwick dispute he nevertheless found it appropriate to make a political intervention. His sentiments were revealed at a public meeting when he proclaimed: 'The mobs are out. The police are being subjected to violence. Intimidation and violence are contrary to the law of the land. It should be condemned by every responsible citizen.'⁴⁷ In his judicial capacity, Lord Denning made a direct contribution to the changes to picketing law which were implemented by the

⁴⁵ HC Debs, cols 603-604, 30 June 1977.

⁴⁶ HC Debs, col 578, 30 June 1977.

⁴⁷ Quoted in Rogaly, *supra* n 44 at p 128.

Employment Act of 1980 when he declared prematurely that: ‘...when strikers choose to picket, not their premises but the premises of innocent third parties not parties to the dispute – it is unlawful. ‘Secondary picketing’ it is called. It is unlawful at common law and is so remote from the dispute that there is no immunity in regard to it.’⁴⁸

Lord Denning’s decision in this case, along with his other decisions of the time, was overturned by the Law Lords. It could be argued that the fact that the Law Lords overruled the Court of Appeal demonstrates that Lord Denning was a maverick whose view of the immunities was not generally shared by the senior judiciary. However, the conflict between Lord Denning and the Law Lords, whilst real at a doctrinal level, did not reflect ideological differences. The true sentiments of their Lordships are revealed by Lord Diplock’s statement that:

‘...the consequences of applying the subjective test...have tended to stick in judicial gorges: so that great damage may be caused to innocent and disinterested third parties in order to obtain for one of the parties to a trade dispute tactical advantages which in the court’s own view are highly speculative and, if obtained, could be no more than minor.’⁴⁹

⁴⁸ *Associated Newspapers Group v Wade* [1979] ICR 669, at p 695. Denning’s statement of the law was premature and incorrect at the time as such picketing was not inherently contrary to the common law in 1979 and even today it is not automatically tortious. However, since 1980, it is the case that if ‘secondary’ pickets commit torts they cannot enjoy statutory immunity. It is uncertain whether Lord Denning originally coined the phrase ‘secondary picketing’, but he certainly popularised it in legal circles and use of the phrase has long been common currency.

⁴⁹ *Express Newspapers v McShane* [1980] ICR 42, at p 57. The statutory immunities (today contained in the Trade Union and Labour Relations (Consolidation) Act 1992 s 219) protect industrial action which is in

The influence of the Law Lords on the content of the initial anti-union laws of the 1980s is revealed by the content of their judgments. Effectively, they advised the new Conservative government on how the law should be changed and the immunities reduced, and this advice was substantially based on Lord Denning's view of the law.⁵⁰ It is clear the government listened. In the words of the Earl of Gowrie, who had the responsibility of steering the 1979 Employment Bill through the House of Lords,

‘The Court of Appeal judgments widely associated with Lord Denning attempted to derive from the wording of the statutes a commonsense and workable doctrine of remoteness where legitimate industrial action was concerned. The Bill gives formal expression to this sensible and acceptable idea. My Lords, the case of *McShane* demanded an immediate legislative response and this is therefore it.’⁵¹

contemplation or furtherance of a trade dispute. The position adopted by the Court of Appeal, under the guidance of Lord Denning, was that ‘in furtherance of a trade dispute’ should be interpreted as imposing an objective test and therefore it was for the courts, not union leaders, to determine whether industrial action really would further a union's cause. The Court decided that sympathy action taken by union members who had no dispute with their own employers injured the business of the latter without materially assisting the workers involved in the primary dispute with their employer, and was therefore beyond the scope of the trade dispute immunity. In *McShane*, the Law Lords reinstated the orthodox position that the correct test was subjective and therefore this aspect of the immunity was satisfied providing a union genuinely believed that sympathy action would help their members win their dispute. However, as is demonstrated by the quotation from Lord Diplock, the Law Lords did agree with Lord Denning as to what the law should be.

⁵⁰ Also see Wedderburn, *supra* n 23, pp 20-21 and pp 568-570.

⁵¹ HL Debs, col 746, 16 May 1980. As well as the judgments in *McShane*, the same process can be seen at work in *Duport Steels Ltd v Sirs* [1980] ICR 161. In this case the Law Lords lifted the injunctions, restraining sympathetic action in the support of the steelworkers' strike, which had been granted by the Court of Appeal.

Judicial perceptions of pro-union legislative reforms

The central mystification of industrial action, generated by judges, is the way in which the statutory immunities are depicted. Most British labour lawyers regard the system of immunities as creating rights to strike in a negative form. Judges, however, when they deem it appropriate, characterise the immunities as creating privileges to break the law. Such perceptions are typically accompanied either by the creation of new common law liabilities to circumvent existing immunities and/or restrictive interpretation of the statutory provisions. This is a major facet of distorting what should be seen as human rights, guaranteed by international law, through invoking images of law-breaking.

When judges wish to attack legislation designed to protect trade unions and their members from common law liability they do so by characterising the common law as the protector of individual liberty and the legislation as an onslaught on freedom. This is exemplified by Farwell LJ's judgment in *Conway v Wade*. Having made references to Magna Carta, the abolition of serfdom and the law as propounded by King Solomon, his view of both the Trade Union Act 1871 and the Trade Disputes Act 1906 is encapsulated in the following words:

‘It was possible for the Courts in former years to defend individual liberty against the aggression of kings and barons, because the defence rested on the law which they

This is in itself led to hysterical newspaper headlines reminiscent of the 1890s and the General Strike. For example, an apocalyptic headline in *The Daily Mail*, 15th February 1980, announced that “ANARCHY HAS WON”. However, in reversing the Court of Appeal's decision, the Law Lords were explicit in calling for the immunities to be narrowed.

administered; it is not possible for the Courts to do so when the Legislature alters the laws as to destroy liberty, for they can only administer the law. The Legislature cannot make evil good, but it can make it not actionable.’⁵²

Such condemnations of pro-union reforms are accompanied by statements which recast negative rights to strike as privileges to break the law. For example, in *Conway v Wade*, Farwell LJ depicted the objective of the unions in overturning *Taff Vale* through the Trade Disputes Act 1906 as obtaining for themselves: ‘the unrestricted capacity for injuring other people by the use of that capacity which they had not, a privilege possessed by no other person or corporation in the realm...the general nature of the Act is in entire contradiction of those doctrines of personal freedom and equality before the law which have hitherto been its main aim and object.’⁵³

This method was essentially employed by Lord Denning, in his judgments in the late 1970s, as the ideological basis for attacks on those provisions in the Trade Union and Labour Relations Act (TULRA) 1974 which sought to implement the objectives of the Trade Disputes Act 1906 by drafting the immunities in as watertight a way as possible. In *BBC v Hearn*, he complained: ‘Parliament has conferred more freedom from restraint on trade

⁵² *Conway v Wade* [1908] 2 KB 844, at pp 854-856. For analysis of this case and the role of Farwell LJ see Ewing, K, *The South Shields Case – Subverting the Trade Disputes Act 1906?*, pp 101-128 in Ewing, K, *supra* n 7.

⁵³ *Ibid* at p 855. Similarly, in *Quinn v Leatham* Lord Brampton declared: ‘the legislature in conferring upon trade unions such privileges as are contained in the Trade Union Acts 1871 and 1876...had not conferred upon any association or any member of it a licence to obstruct or interfere with the freedom of any person in carrying on his business, or bestowing his labour in the way he thinks fit.’ - *supra* n 39 at p 531.

unions than has ever been known to the law before. All legal restraints have been lifted so that they can now do as they will...⁵⁴

In *Express Newspapers Ltd v McShane*, Lord Denning stated:

‘I would also draw attention to the fact that, when Parliament granted immunities to the leaders of trade unions, it did not give them any *rights*. It did not give them a *right* to break the law or to do wrong by inducing people to break contracts. It only gave them immunity if they did... the words of the statute are not to be construed widely so as to give unlimited immunity to law-breakers. They are to be construed with due limitations so as to keep the immunity within reasonable bounds. Otherwise the freedom of ordinary individuals -- to go about their business in peace would be intruded upon beyond all reason.’⁵⁵

Autopoietic law and judicial intervention

It can be argued that when judges apply the common law to new situations they are merely concerned to consider the established elements of liability and whether they apply to the facts of the case before them. Thus, they have no choice in applying the law to industrial disputes if common law principles so require. Moreover, if, in accordance with autopoietic theory, law is seen as an autonomous and closed system it is erroneous to view the language that judges use by reference to how such language is used and understood in other societal contexts.⁵⁶ On

⁵⁴ [1977] ICR 685, at p 690.

⁵⁵ [1979] ICR 210, at p 218.

⁵⁶ Autopoiesis is a term originating from biology meaning self creating or self producing. Applied to law, autopoietic theory invites us to reflect on the extent to which legal systems are self creating and self referential with their own self contained norms and language. For a variety of perspectives on autopoietic law see the

this basis, the concept of unlawful means, for example, is a technical concept which is understood as such by lawyers and it is not the fault, or concern, of lawyers if such language is misunderstood in wider society. However, in focusing on the norms of a legal system, autopoietic theory diverts our attention away from why judges impose legal liability in a concrete situation and why they choose to use particular language in the course of deciding that liability is to be incurred. Autopoietic theory does not account for the extreme forms of language demonstrated in the above quotes where trade unions are depicted as tyrannical organisations who abuse privileges to break the law. Moreover, surely such language is intended for consumption by those outside the ranks of the judiciary and the legal profession.

Conversely, based on the above analysis and evidence, my contention is that the flexibility of the common law is such that judges do have discretion as to if and when they should extend or restrict the boundaries of liability. In particular, they have the freedom to decide on the language they will use in reaching their decisions. *Quinn v Leatham* is one major example of a decision where language is used in an ideological fashion both to identify a new form of legal liability and to justify its imposition by significantly distorting the norms of trade union behaviour and the objectives of statutory immunity. Another example is provided by the decision of the House of Lords in *Rookes v Barnard*,⁵⁷ which also heralded the break with the hitherto post-war consensus in favour of judicial abstentionism.⁵⁸

collection of essays in Tuebner, G, (ed) *Autopoietic law - a new approach to law and society* (Berlin, New York: De Gruyter, 1987).

⁵⁷ [1964] AC 1129. For further analysis of the judgments in this case see Welch, R., 'Judicial Mystification of the Law: *Rookes v Barnard* and the Return of Judicial Intervention', pp 195-218 in Ewing, K., *supra* n 7.

⁵⁸ The industrial relations context within which this decision was given is of significance. It concerned threatened industrial action which, had it taken place, would have been both unconstitutional and unofficial, and both these forms of industrial action were increasingly becoming focal points of concern on the part of state and

The language used by the Law Lords to impose liability was a resurrection of language which strongly echoed the sentiments and prejudices of the judges of the nineteenth and early twentieth centuries, and ushered in a new era of judicial mystification of the nature of trade unionism and industrial action. This is perhaps symbolised by the extent of discussion by counsel as to the nature and scope of 'illegal means' and the invocation of ancient cases such as *Tarleton v M'Gawley*.⁵⁹ In *Rookes*, the Law Lords found the presence of the requisite unlawful means through the tort of intimidation. The Court of Appeal had accepted that one of the major arguments against liability had been that intimidation, as a tort, should be confined to threats to commit acts of violence. All the Law Lords ruled to the contrary by extending the meaning of intimidation to cover threats to break contracts; such threats not being explicitly covered by the immunities in the Trade Disputes Act. As with *Quinn*, the judgments in *Rookes* constitute the perfect exemplar of how the common law can be developed by judges to circumvent pre-existing statutory immunity, and how the language in which new liabilities are cast provides ideological justification for the judges' actions.

This is particularly demonstrated by the judgments of Lords Reid, Hodson and Devlin all of whom compared threats to strike and threats of violence. In the words of the latter:

[there is]: '...nothing to differentiate a threat of a breach of contract from a threat of physical violence or any other illegal threat. The nature of the threat is immaterial ...

employers in the early 1960s. Moreover, the object of the industrial action was to enforce the closed shop. This has always attracted some controversy as an industrial relations institution, and the collectivist philosophy underlying the closed shop conflicts with judicial perceptions of individual liberty. Indeed, aspects of *Rookes v Barnard* are reminiscent of the issues that led to the decision in *Quinn v Leatham*.

⁵⁹ *Supra* n 31.

All that matters to the plaintiff is that, metaphorically speaking, a club has been used. It does not matter to the plaintiff what the club is made of. Whether it is a physical club or an economic club, a tortious club or an otherwise illegal club...'⁶⁰

In cases such as *Quinn* and *Rookes* judges have not merely been engaged in doctrinal analysis and application of the law. Contrary to what may be argued on the basis of autopoietic theories of law, it is contended that *once* judges choose to apply and develop the common law to restrain industrial action, they deliberately use language that castigates and demonises trade union behaviour, and, in so doing, mystify the nature of industrial action and the reasons why it is being taken whilst simultaneously providing ideological justification for the imposition of legal liability. In seeking further to substantiate this contention it is instructive to examine how judges have approached economic torts in cases concerned with commercial activities in comparison with cases concerned with industrial disputes.

Judicial values and commercial activities

The Law Lords decision in *Mogul Steamships v McGow* provides an exemplar as to how the judges can manipulate the common law so as to avoid impacting on the perceived norms of capitalist competition whilst imposing liability on trade unions when they act in a similar way to a business. The case concerned the legality of collective action by a trading association to protect its members from competition from rival traders. In a judgment that rejected contentions that the association was conspiring to injure the plaintiff, or acting in restraint of trade, Lord Halsbury stated:

⁶⁰ *Supra* n 57 at p 1209.

‘It is impossible to suggest any malicious intention to injure rival traders, except in the sense that in proportion as one withdraws trade that other people might get, you, to that extent, injure a person’s trade when you appropriate the trade to yourself. If such an injury, and the nature of its infliction, is examined and tested, upon principle, and can be truly asserted to be a malicious motive within the meaning of the law that prohibits malicious injury to other people, all competition must be malicious and consequently unlawful, a sufficient *reductio ad absurdum* to dispose of that head of suggested unlawfulness.’⁶¹

This judgment reflects a clear understanding of the realities of commercial competition and of the need for the law to accept those realities (and illustrates the *laissez-faire* attitude of the common law to acts, which under modern statute and European law, would be regarded as anti-competitive). It can be contrasted directly with cases such as *Trollope*⁶² where industrial action was unlawful because it was deemed to constitute malicious interference with another’s trade. If business strategies to secure or maintain competitive advantage are to be viewed as lawful irrespective of their effects on other businesses then why should actions taken by trade unionists to protect their interests be viewed any differently?

How context can determine the choice of language a judge uses is demonstrated by contrasting Lord Diplock’s judgment in *Lonrho Ltd v Shell Petroleum Ltd* with his judgment in *McShane*. With respect to the origin of the tort of conspiracy lying in the power of the combination over the individual, he commented:

⁶¹ *Mogul Steamship Co v McGregor Gow and Co* [1892] AC 25 at p 36.

⁶² *Supra* n 29.

‘But to suggest today that acts done by one street-corner grocer in concert with a second are more oppressive and dangerous to a competitor than the same acts done by a string of supermarkets under a single ownership or that a multinational conglomerate such as Lonrho or oil company such as Shell or B.P. does not exercise greater economic power than any combination of small businesses, is to shut one's eyes to what has been happening in the business and industrial world since the turn of the century and, in particular, since the end of World War II.’⁶³

Here Lord Diplock was clearly recognising how the economic power of an individual corporation may be greater than that possessed by a combination of small traders. In *McShane*, Lord Diplock ignored industrial relations realities when he criticised the NUJ for organising sympathy action which it felt was essential if its members employed by provincial newspapers were to stand any chance of winning their pay dispute.⁶⁴

Most recently, in *OBG Ltd v Allan*⁶⁵, the House of Lords reviewed the economic torts revolving around interference to business and contract as they have developed since the decision in *Torquay Hotel v Cousins*.⁶⁶ The case brings together three appeals from cases arising in the commercial world, and the language used by the Law Lords in examining the law is very sober in tone and generates none of the more lurid images that have been projected by a number of the judgments discussed above. It is of particular interest to this paper that, although the Law Lords did not directly criticise or disapprove the decision in

⁶³ [1982] AC 173 at p 189.

⁶⁴ *Supra* n 49.

⁶⁵ [2008] 1 AC 1.

⁶⁶ [1969] 1 ALL ER 522.

Rookes v Barnard, it can be argued that the decision suggests that threatening to induce a breach of contract should be regarded as an example of the tort of causing loss by unlawful means rather than an economic variant of the tort of intimidation.⁶⁷

Judicial mystification -the legacy

Whilst juridification in the 1970s focused on the creation of individual employment rights, juridification in the 1980s and the 1990s was primarily in the area of collective labour law with the enactment of six statutes⁶⁸ concerned with regulating industrial action and the internal life of trade unions. This was accompanied by judicial innovations in tortious liability in the contexts of economic duress, inducing or procuring breaches of statutory duty and the nature of unlawful means.⁶⁹

⁶⁷ For analyses of *OBG v Allan* see: Deakin, S & Randall J, 'Rethinking the Economic Torts' (2009) 72(4) MLR 519; Simpson, B, 'Economic tort liability in labour disputes: the potential impact of the House of Lords' decision in *OBG v Allan*', (2007) 36(4) Ind LJ 468. The one clear consequence of this decision is the overruling of the position, put forward in *Torquay Hotel* and approved by the House of Lords in *Merkur Island v Laughton* [1983] 2 AC 570, that there is a unified tort consisting of inducing or procuring a breach of contract or interfering with its performance. If a breach of contract is induced or procured a tort is committed irrespective of whether this is achieved by direct or indirect means. Interference with contract, however, as is the case with interference with trade or business, is only tortious if accompanied by the use of unlawful means. It can be noted that, somewhat ironically given that it was in industrial dispute cases that procuring a breach of a commercial contract was found to be tortious, trade unions will not generally benefit from the decision in *OBG*, as torts involving commercial contracts are typically committed in the context of sympathetic (secondary) industrial action from which all immunity has been removed (other than in the context of lawful picketing).

⁶⁸ The Employment Acts 1980, 1982, 1988 & 1990, the Trade Union Act 1984 and the Trade Union Reform and Employment Rights Act 1993.

⁶⁹ Liability for economic duress was imposed in *Universe Tankships v ITWF* [1982] ICR 262 and *Dimskal Shipping Co SA v ITWF* [1992] IRLR 78. The issues of potential tortious liability arising from breaches of

The ongoing legacy of judicial mystification is that the laws enacted by the Thatcher and Major Governments have been largely left in place despite the ILO condemnation of much of them as constituting breaches of international law.⁷⁰ In recent times there have been no new examples of developments in the common law further mystifying industrial action - though the common law does remain in a confused state, the Law Lords decision in *OBG v Allan* notwithstanding.⁷¹ Recent cases have focused primarily on the validity of pre-strike procedures – in particular whether trade unions have given employers requisite information on the identity of workers to be balloted and on the result of ballots that have been completed. Complex statutory provisions contained in Part V of the TULRCA have been interpreted in ways that make it very difficult, logistically, for unions to conduct legally valid ballots. This has been so even where it can be argued the policy objectives of the provisions have been met, in that the ballot result has shown a clear majority in favour of industrial action, and/or in practice employers have received sufficient information to enable them to communicate with their workforces as to why they should reject industrial action, or, where there has been a vote in favour, why they should not participate in it.⁷²

statutory duty and whether acting in breach of contract could constitute unlawful means were discussed by Henry J in his judgment in *Barretts & Baird Ltd v IPCS* [1987] IRLR 3.

⁷⁰ *Supra*, n 19.

⁷¹ *Supra* n 65 - despite the decision of the HL in *OBG v Allan*, the extent of the liabilities referred to in note 69, *supra*, remains unclear. It is uncertain whether and when inducing breaches of or procuring breaches of statutory duty will constitute unlawful means. It remains possible that agreeing to strike could constitute the tort of conspiracy to use unlawful means.

⁷² See *Metrobus v Unite the Union* [2010] ICR 173 and the decision of Cox J in *British Airways Plc v Unite the Union* [2010] IRLR 423. It should be noted that the majority of the Court of Appeal, in a second case arising out of the holding of a fresh ballot by Unite in the same industrial dispute, lifted an injunction that had been granted to BA on the basis that the union had not actively communicated the number of spoilt papers to its members;

Whilst these interpretations are not part of the process of judicial mystification they are the contemporary and long term consequences of it, for they have been facilitated by a public opinion which has been moulded to see industrial action as inherently unlawful rather than as the exercising of legal rights guaranteed by international law. The following dictum by Maurice Kay LJ in *Metrobus* is a reflector of the past and thus a contemporary reminder of why the absence of a legal right to strike is a meaningful issue.

‘In this country, the right to strike has never been much more than a slogan or a legal metaphor. Such a right has not been bestowed by statute. What has happened is that, since the Trade Disputes Act 1906, legislation has provided limited immunities from liability in tort. At times the immunities have been widened, at other times they have been narrowed. Outside the scope of the immunities, the rigour of the common law applies in the form of breach of contract on the part of the strikers and the economic torts as regards the organisers and their union.’⁷³

rather the members had to be pro-active in securing this information for themselves by going on to the union’s website – see *British Airways Plc v Unite the Union* [2010] ICR 1316. In three cases since - *National Union of Rail, Maritime and Transport Workers v Serco Ltd* [2011] ICR 848, *London Underground Ltd v ASLEF* [2012] IRLR 196 and *Balfour Beatty Engineering Services v Unite the Union* [2012] IRLR 452 - judges have refused to grant or have lifted injunctions where the employer argued that statutory strike procedures had not been properly adhered to. This paper has reflected on past divisions within the judiciary as to how the common law should be applied to industrial disputes. It seems that there are differences within the contemporary judiciary as to how statutory provisions should be interpreted – some judges clearly fear that an over restrictive approach will bring the law into disrepute and/or regard such interpretations as unfair to the unions. Indeed, in *Balfour Beatty*, Eady J argued that that strike procedures generate very sensitive policy issues and a balance should be struck between striving for democratic legitimacy and imposing unrealistic burdens on unions and their officers.

⁷³ *Ibid* at p 209. For an analysis of *Metrobus*, see Dukes, R, ‘The Right to Strike under UK Law: Not Much More than a Slogan’ (2010) 39(1) Ind LJ 82.

Legal restrictions on rights to strike have also led to the undervaluing of the role of collective bargaining, which, it is argued, remains indispensable as a primary mechanism for securing workplace justice and dignity.⁷⁴ This has also been achieved by Human Resource Management (HRM) strategies, which reflect the anti-collectivist philosophy of atomistic individualism, designed to individualise employee relations.⁷⁵ One consequence of this is the emergence of a false dichotomy between collective and individual labour law which suggests they have different roles and concerns. In this context it is worth noting in passing that in many Law Schools only the latter is regarded as worthy of study, or, at least, inclusion on LLB courses.

Trade union membership is, of course, half what it was in 1979. To a significant extent this is because of the major structural change in the labour market, which Margaret Thatcher initiated, of moving away from heavy and manufacturing industries towards promoting employment in the banking, financial and services sector (where trade unions always had relatively low membership levels). Permanent mass unemployment has also been an important factor. The weakness of trade unions in terms of being able to organise industrial

⁷⁴ See Welch, R, 'Into the twenty-first Century - The Continuing Indispensability of Collective Bargaining as a Regulator of the Employment Relation', pp 615-634 in Collins, H., Davies, P. & Rideout, R. (eds.) *The Legal Regulation of the Employment Relation* (London: Kluwer, 2000).

⁷⁵ It can be argued that HRM practices are consistent with atomistic individualism even though this is disguised by modern terminology such as the psychological contract. For an analysis of derecognition and HRM based strategies in the 1990s see Smith, P & Morton, G, 'Union Exclusion and the Decollectivization of Industrial Relations in Contemporary Britain' (1993) 31(1) *British Journal of Industrial Relations* 97; Welch, R & Leighton, P, 'Individualizing Employee Relations: The Myth of the Personal Contract' (1996) 25(5) *Personnel Review* 37.

action, which is both effective and lawful, has meant that many particularly vulnerable workers – such as casual, agency and part-time workers – who objectively have much to gain from joining trade unions fear that they will lose their jobs if they do so. It is not a coincidence that trade unions are largely composed of full-time employees on permanent contracts. Individual employment protection rights are important in this regard as they give employees a sense of job security and therefore the confidence that they can join a union without being victimised as a result. Moreover, trade unions through the advice and representation they can give individual members are able to help employees enforce their legal rights. However, this is not much use to casual and agency workers who do not have these rights in the first place.

With this legacy of substantially weakened collective rights as the backdrop, the current coalition government is now focusing on reducing individual employment rights. It has adopted the ideological position that employment rights can be passed off as red tape. Its most far-reaching change to employment rights to date has been the restriction of unfair dismissal rights. The consequences of increasing the qualifying period to two years are considerable but, of course, this is not a new legal measure. Indeed, the position is not as yet as bad as it was in the 1980/90s when waiver clauses could be incorporated into fixed-term contracts.⁷⁶ It is of particular concern that the government is proposing to introduce tribunal

⁷⁶ However, at the time of writing, more reductions in statutory rights were in the offing. George Osborne, in his speech to the Conservative Party's annual conference, announced that the government was going to give employers the option to replace employment contracts with a new type of employee-owner contract under which employees would be required to give up statutory rights such as unfair dismissal in return for shares in their companies. This proposal may or may not become law and is largely aimed at small companies. It has not been universally welcomed by employers and was given a lukewarm response by the CBI. John Cridland, Director General of the Confederation of British Industry, stated: 'In some of Britain's cutting-edge entrepreneurial

fees – this can only have the effect of deterring individuals from presenting tribunal claims – even where they have a reasonable chance of success. The government has also proposed reducing collective rights to consultation in the context of proposed redundancies or other economic dismissals. It remains to be seen whether EU law will prevent it from doing this. It is highly unlikely that the government will seek direct conflict with the requirements of EU law by taking away maternity rights as some Tory right-wingers have called for. Indeed, the existence of EU social law is a very important barrier to wholesale deregulation of the workplace as a raft of important individual rights are derived from EU law. To a lesser extent this is also the case with the European Convention on Human Rights – at least whilst the Human Rights Act remains in force. It may even be the case that increasing the qualifying period for unfair dismissal rights constitutes indirect sex discrimination contrary to EU law.⁷⁷

Conclusions

The title to this paper paraphrases Jim Callaghan, who was Prime Minister during the Winter of Discontent', by posing the question crisis, what crisis? The answer is that there is a crisis, but it is the economic and financial crisis of global capitalism not a crisis in the ongoing and future importance of employment law. It is not surprising that attacks on employment rights are part of government policies designed to make working people pay for this crisis. The key

companies, the option of share ownership may be attractive to workers, rather than some of their employment rights. But I think this is a niche idea and not relevant to all businesses.' See King, M & Osborne, H, 'George Osborne's "employee rights for shares proposal" draws scepticism,' *The Guardian* 9 October, 2012 at 6.

⁷⁷ *In R v Secretary of State for Employment ex parte Seymour-Smith (No 2)* [2000] ICR 244 the House of Lords accepted a ruling by the ECJ that the two year qualifying period amounted to indirect sex discrimination.

However, the Law Lords decided that this discrimination was justified as it was for the legitimate economic and social objective of encouraging employers to take on more employees. It is open to question whether the indirect sex discrimination involved is still justifiable on this basis today.

role for progressive employment lawyers today is to demonstrate the negative consequences of restricting employment rights whilst continuing to promote the case for more extensive and effective employment rights in the future.

In this regard, one conclusion that can be drawn from this paper is that there are advantages to any pro-union reform being in the form of positive rights replacing statutory immunities. In particular, this would prevent judges, politicians and the media from characterising what are intended to be rights to strike as privileges to break the law. The question can be posed in this way. Is it better to provide rights and then decide what restrictions, if any, it is reasonable and just to impose on them? Or is it better to retain a system where industrial action is inherently defined as law-breaking and then identify the circumstances where this law-breaking should be protected from the imposition of normal legal liabilities? However, irrespective of whether a future British government retains the system of immunities or adopts a system of positive rights, it should be the case that any restrictions on industrial action are in line with the requirements of the ILO and therefore compatible with international law.⁷⁸

⁷⁸ For further arguments on replacing the statutory immunities with positive rights see Welch, R, *supra* note 57; and 'Judges and the Law in British Industrial Relations: Towards A European Right to Strike' (1995) 4(3) *Social & Legal Studies*, 175. On the other hand, Lord Wedderburn has argued that the system of immunities constitutes the provision of rights in a negative form and that any system of rights – positive or negative – is susceptible to judicial restriction and the creation of new liabilities. Wedderburn's view was that the emphasis should not be on the form in which rights are provided, but on the establishment of autonomous labour courts which would be staffed by lawyers experienced in employment law rather than by the traditional judiciary. See Wedderburn, Lord, 'From Here to Autonomy' (1987) 16(1) *Ind LJ* 1.

The second conclusion is that, whilst individual rights are an important mechanism for providing employment protection, the juridification of workplace conflict remains in the interests of employers and the state. Nevertheless, the current dynamic is towards deregulation as part of an austerity programme. Employment lawyers may not be able to stop proposed changes from taking place, but in contributing to the development of arguments as to why they are wrong we may be able to ensure these changes never enjoy popular support. Employment lawyers can also provide practical challenges to legal change where it can be argued that it is in contravention of the requirements of European law.

The relationship between individual and collective rights should be regarded as a symbiotic one. Therefore, in the longer term, the aim should be for a system of positive rights – both individual and collective- as the basis of a regulatory system that provides movement towards a balance between the interests of working people and the interests of employers and the state. The immediate future for employment lawyers, who wish to see an employment law which promotes workplace justice and dignity, is not a rosy one. But, as this paper has sought to demonstrate, there is still much that can and must be done in keeping alive the case for substantial employment law reform in the future.