



Novitz, T. A. (2016). UK regulation of strike ballots and notices – Moving beyond ‘democracy’? *Australian Journal of Labour Law*, 29, 226-242.

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## UK regulation of strike ballots and notices – Moving beyond ‘democracy’?

Tonia Novitz \*

### Introduction

From the 1980s onwards, the rhetoric of ‘democracy’ was used to justify industrial relations reform in the United Kingdom (UK), including the incremental addition of balloting and notice requirements for industrial action.<sup>1</sup> The most recent *Trade Union Act 2016* (UK) (‘TUA’) is remarkable, not only for more extensive balloting and notice requirements that aim substantially to reduce industrial action,<sup>2</sup> but also a shift to a more obviously economic justificatory orientation. This blatant shift from principle to pragmatism can be linked to various financial concerns. One example is the Government’s appreciation of the potential economic shocks that could follow the ‘Brexit’ referendum as to whether Britain should remain in or leave the European Union (EU), which led to some concessions made to the UK trade union movement so as not to alienate an ally for the ‘remain campaign’.<sup>3</sup> Another, examined more fully below, is the determination to reduce the budget deficit following the financial crisis.<sup>4</sup> Additionally, and more worryingly, there is evidence that the TUA reforms follow a narrow economic neo-liberal agenda, planned some time before election of the Conservative Government, which aims to silence trade union protest in the UK.

This article begins by explaining the current UK legal regime regarding strike ballots and notices, noting the ways in which the TUA has modified the relevant rules. The democratic justifications given for introduction of this statutory matrix of balloting requirements in the 1980s and subsequent amendments in the 1990s are then considered. Finally, the eclipse of ‘democratic’ by ‘economic’ reasons for the TUA reforms is examined, alongside the future trajectory of legislative regulation of balloting and notice for industrial action in the UK.

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\* Professor of Labour Law, University of Bristol Law School e-mail: [tonia.novitz@bristol.ac.uk](mailto:tonia.novitz@bristol.ac.uk). This is a revised version of a paper presented at the ‘Comparative Strike Ballots workshop’ hosted by the Labour Law and Relations Group at Sydney Law School in August 2015 and another presentation given at the British Universities Industrial Relations (BUIRA) conference on ‘The Trade Union Bill: Implications for Industrial Relations’ held in Manchester, UK, in November 2015. I am grateful for comments from participants at both events, my colleague at Bristol, Michael Ford QC, the anonymous referee and the editors. All errors and omission are my own.

<sup>1</sup> S McCrystal and T Novitz, ‘“Democratic” Preconditions for Strike Action: A Comparative Study of Australian and UK Labour Legislation’ (2012) 28(2) *International Journal of Comparative Labour Law and Industrial Relations* 115 at 135-8.

<sup>2</sup> Alongside other measures, including scope for change to union political funds, union facility time in the public sector, collection of public sector trade union dues, the role of the Certification Officer and picketing practices. See M Ford and T Novitz, ‘An Absence of Fairness... Restrictions on Industrial Action and Protest in the Trade Union Bill 2015’ (2015) 44(4) *Industrial Law Journal* (ILJ) 522 at 523-4. At the time of writing, the TUA has royal assent, but the schedule for commencement of various provisions has not been announced. Many measures contemplated require secondary legislation and will be introduced incrementally.

<sup>3</sup> See financial warnings from the Bank of England and the International Monetary Fund: <http://www.ft.com/cms/s/0/ad066f38-008f-11e6-ac98-3c15a1aa2e62.html#axzz48XZ52eQc>. Regarding speculations that the (even) harsher provisions initially contemplated were abandoned due to cooperation from the Trades Union Congress (TUC) in promoting the case that the UK should stay in the EU, see <http://www.theguardian.com/commentisfree/2016/apr/28/david-cameron-unions-brexit-trade-union-bill-brendan-barber>. However, for reasons elaborated on below, this is likely to be a temporary ceasefire.

<sup>4</sup> For example, an intention to reduce public spending by £12 billion in order to reduce the budgetary deficit. Discussed below at text accompanying n 81 below et seq.

## 1. The current legal position regarding pre-requisites for lawful industrial action

There is no positive entitlement to strike under UK common law. Instead, those employees who participate in strikes are usually viewed as being in breach of their contract of employment,<sup>5</sup> while those who organise or participate in industrial action can consequently be liable in tort under common law.<sup>6</sup> This highly vulnerable position is partially ameliorated by various statutory protections for employees and trade unions. The key statutory reference point is the *Trade Union and Labour Relations (Consolidation) Act 1992* (UK) ('TULRCA'), as amended by, amongst other measures, the TUA.

TULRCA recognises scope for civil liability where a trade union has 'authorised' or 'endorsed' the action in question, or at least has not repudiated the actions of its members,<sup>7</sup> subject to a 'cap' on compensation and scope for statutory immunity.<sup>8</sup> Provision is also made for some protection from dismissal for participants, but this is subject to authorisation or endorsement of the action by the trade union whose members are engaged in the dispute and so is contingent on the potential exposure of the trade union to civil liability.<sup>9</sup> Lockouts are regulated only to the extent that the period of automatic protection from dismissal (for industrial action called by a trade union and protected from civil liability) can be extended to take account of such action by the employer.<sup>10</sup> The unreasonable refusal of an employer to take procedural steps to resolve the dispute may also lead to an extension of this period.<sup>11</sup>

A lawful trade dispute, where the trade union has followed correct procedures regarding balloting and notice, can be regarded as exempt from the economic torts of inducement of breach of contract, interference with contract, conspiracy and intimidation.<sup>12</sup> A lawful trade dispute must be 'a dispute between workers and their employer which relates wholly or mainly to one or more' of a list of matters set out in the statute.<sup>13</sup> These concern various work-related subjects, such as terms and conditions of employment and termination. This formulation (alongside a second explicit statutory exclusion) precludes any secondary action in support of a dispute between other workers and their employer.<sup>14</sup> The statutory wording also places 'political disputes' outside the scope of statutory immunity from tort.<sup>15</sup> Industrial action must not relate to the terms and conditions that will apply to future employees or indeed future employers, having implications for action taken regarding the sale of businesses

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<sup>5</sup> *Wilkins v Cantrell and Cochrane (GB) Ltd* [1978] IRLR 483; *Solihull Metropolitan Borough v NUT* [1885] IRLR 211.

<sup>6</sup> *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] AC 426. See H Carty, 'Intentional Violation of Economic Interests: The Limits of Common Law Liability' (1988) 104 *Law Quarterly Review* 250; and S Deakin and J Randall, 'Rethinking the Economic Torts (2009) 72(4) *Modern Law Review* (MLR) 519.

<sup>7</sup> TULRCA ss 20-21.

<sup>8</sup> TULRCA s 22; although this cap may not extend to liability under EU law; see also TULRCA s 219.

<sup>9</sup> There is no need to establish statutory immunity in tort to claim selective dismissal under TULRCA s 238, but such immunity is required for the general protection of a striker from unfair dismissal for a limited period (set by statute currently at 12 weeks). See TULRCA s 238A. See *McCrystal and Novitz*, above n 1 at 136 and 142-44.

<sup>10</sup> See TULRCA s 238A(7C).

<sup>11</sup> TULRCA s 238A(5)(c).

<sup>12</sup> TULRCA s 219.

<sup>13</sup> TULRCA s 244(1).

<sup>14</sup> See not only TULRCA s 244 but also s 224 and *Dimbleby v. NUJ* [1984] IRLR 161 (HL).

<sup>15</sup> See TULRCA s 244(1) and *Mercury Communications Ltd v Scott-Garner* [1983] IRLR 494.

or restructuring of public or corporate enterprises.<sup>16</sup> It is therefore not the workers who collectively decide what they consider relevant to their interests; rather this is dictated by statute and determined by the courts that interpret the statute.

There are also detailed balloting and notice provisions, which are elaborated upon in a Code of Practice.<sup>17</sup> Previously a bare majority of those voting had to endorse their union's industrial action in a ballot, but since the adoption of the TUA there will be a further requirement regarding turnout. At least '50% of those who were entitled to vote in the ballot' have to do so for the ballot to be valid.<sup>18</sup> In respect of ballots in 'important public services', the TUA has introduced provision for a further balloting requirement whereby at least 40% of those entitled to vote in the ballot must have given their approval (in addition to the 50% turnout threshold and the requirement of a majority of those voting supporting the action).<sup>19</sup> Regulations will specify to which 'important public services' this rule applies. At the time of writing the draft Regulations published indicate that the following categories of services will be covered by this additional requirement: (a) health services; (b) education of those aged under 17; (c) fire services; (d) transport services; and (e) border security.<sup>20</sup>

There is no requirement, as there is in Australia, that a trade union seek permission to hold a ballot. All that is necessary is that notice of the ballot is given to the employer at least seven days before it is held and a sample voting paper is sent to the employer more than three days beforehand.<sup>21</sup> On the other hand, the State will not bear the costs of the ballot; these must be met by the union itself. Where the number of those to be balloted exceeds 50 the ballot has to be overseen by an independent suitably qualified scrutineer and this process of managing and reporting on the ballot can be costly.<sup>22</sup>

There must be sufficient information on the notice of ballot to tell the employer the categories of employee and potential workplaces affected as well as the numbers involved. This information 'must be as accurate as is reasonably practicable in the light of the information in the possession of the union at the time'.<sup>23</sup> There are also detailed provisions setting out what is to be placed on the voting paper itself (which must include a 'health warning' regarding the potential for dismissal) as well as the option for the action to be a strike or 'short of a strike'.<sup>24</sup> Following reforms introduced by the TUA, the voting paper must specify further 'the type or types of industrial action... either in the question itself or elsewhere on the ballot paper' as well as 'the period or periods within which the industrial action or, as the case may

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<sup>16</sup> *University College London Hospital NHS Trust v Unison* [1999] IRLR 31 (Court of Appeal); found not to be in violation of Article 11 of the European Convention on Human Rights (ECHR) by the European Court of Human Rights (ECtHR) in *Unison v UK* [2002] IRLR 497.

<sup>17</sup> See TULRCA 1992 s 226 – 234A; and the Code of Practice on Industrial Action Ballots and Notice to Employers available at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/245421/05-1462-code-of-practice-industrial-action-ballots-and-notice.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/245421/05-1462-code-of-practice-industrial-action-ballots-and-notice.pdf).

<sup>18</sup> TUA s 2 amending TULRCA s 226.

<sup>19</sup> TUA s 3 amending TULRCA s 226.

<sup>20</sup> TUA s 3 inserting after s 226A *inter alia* s 226(2E). See also the Government response to the consultation on ballot thresholds in important public services, January 2016, Annex B, 'Skeleton regulations' available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/493880/bis-16-15-consultation-on-ballot-thresholds-in-important-public-services-government-response.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/493880/bis-16-15-consultation-on-ballot-thresholds-in-important-public-services-government-response.pdf).

<sup>21</sup> TULRCA s 226A.

<sup>22</sup> TULRCA s 226B.

<sup>23</sup> TULRCA s 226A(2D). Although note that the names of employees need not be disclosed under s.226(2G).

<sup>24</sup> TULRCA s 229.

be, each type of industrial action is expected to take place'.<sup>25</sup> It is unclear to what extent, if at all, the union may depart from what is set out subsequently, for example, in the context of negotiations aimed at averting action. Additionally, since 2016, the ballot paper 'must include a reasonably detailed indication of the matter or matters in issue in the trade dispute to which the proposed industrial action relates'.<sup>26</sup> This suggests that sufficient information must be given to those voting to enable them and the employer to ascertain whether this is a lawful trade dispute. If there are doubts, the employer may, for example, wish to seek injunctive relief to prevent the action from taking place; indeed the vague words 'reasonably detailed' almost invite litigation to avert a strike.<sup>27</sup>

An industrial action ballot must be 'secret' and, for the time being, take place by post.<sup>28</sup> The legislation is framed around each individual's discrete choice rather than collective deliberative processes.<sup>29</sup> There is little scope to rally support for voting in the workplace, so as to secure large numbers of returns. Rather, this is a discrete atomised process, in which each individual is responsible for their own return of the voting paper by mail. There is to be an independent review commissioned regarding introduction of electronic balloting, which unions hope would enhance turnout.<sup>30</sup> However, the Secretary of State is not obliged to accept the results of any such review, but merely to publish the response laid before Parliament. A potential pilot scheme is envisaged in the event of a favourable response.<sup>31</sup>

Further requirements are imposed regarding notice of the result of the ballot to all those entitled to vote and to the employer.<sup>32</sup> After the TUA, that notice must not only state the number of votes cast, votes in favour, votes against and spoiled ballot papers, but also whether or not the number of votes cast is at least 50% of the number of individuals who were entitled to vote in the ballot and, where important public services are concerned, whether the requisite 40% threshold is met.<sup>33</sup> Then notice must be given to the employer of the industrial action itself, which since the TUA is to be given two weeks prior to its beginning (having been just one week previously).<sup>34</sup> Action normally has to be taken within four weeks of the date of the ballot, although this may be extended by agreement up to eight weeks or in the event of legal proceedings up to twelve weeks.<sup>35</sup> Further, from 2016, the mandate given by a ballot to industrial action will expire six months after the date of the ballot (or up to nine months if the parties so agree), such that a 'fresh ballot' has to take place to authorise industrial action after this time (with the attendant costs this may incur).<sup>36</sup> Again, any failure to comply with notice

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<sup>25</sup> TUA s 5 amending TULRCA, s 229 by inserting (2C) and (2D).

<sup>26</sup> TUA s 5 amending TULRCA s 229 by inserting (2B).

<sup>27</sup> As regards the excessive incidence of injunctive relief in UK courts, see N Countouris and M Freedland, *Injunctions, Cyanamid and the Corrosion of the Right to Strike in the UK*, UCL Working Paper, LRI WP 1/2010, UCL, London 2010; and B Simpson 'The Labour Injunction and Industrial Action Ballots' (2013) 42 *ILJ* 54.

<sup>28</sup> TULRCA s 230.

<sup>29</sup> Cf *McCrystal and Novitz*, above n 1.

<sup>30</sup> See Frances O'Grady, Trades Union Congress (TUC) General Secretary, on electronic balloting at <http://www.bbc.co.uk/news/business-29072893>.

<sup>31</sup> TUA s 4.

<sup>32</sup> TULRCA s 231 and s 231A.

<sup>33</sup> TUA s 6 amending TULRCA s 231.

<sup>34</sup> TUA s 8.

<sup>35</sup> TULRCA ss 233, 234(1)-(6).

<sup>36</sup> TUA s 9 amending TULRCA s 234.

provisions and balloting requirements can lead to an action by the employer for injunctive relief.<sup>37</sup>

In 1999, a ‘New Labour’ government introduced a key qualification to these procedural requirements, namely section 232B, which states that certain ‘small accidental failures’ that do not affect the result of the ballot can be disregarded.<sup>38</sup> This provision still stands. It is limited in that it ostensibly concerns only balloting and not notice provisions. The difficulties entailed in complying with the latter requirement are not accorded any formal statutory recognition.

Nevertheless, it has been established by case law that a *de minimis* rule applies, such that a minor error or omission should not be taken to invalidate the notice when trade unions have done what is reasonable to comply with the statutory requirements.<sup>39</sup> Notably, in a case decided in 2012, *Balfour Beatty*, it was acknowledged that: ‘Very sensitive issues of policy arise in this context as to where the balance should be struck between striving for democratic legitimacy and imposing unrealistic burdens on unions and their officers’.<sup>40</sup> It is not sufficient to be ‘doing one’s incompetent best or ... being lax about taking proper steps to obtain the most up to date information available’,<sup>41</sup> but neither should unreasonably stringent standards be demanded. ‘It cannot be right for a judge to hold that all reasonably practicable steps have not been taken merely because he or she would (as an outsider) have done something different.’<sup>42</sup> The response of the Coalition Conservative-Liberal Democrat government to this judgment was to introduce a legislative requirement for trade unions to conduct a stringent ‘membership audit’ which would inform the ballot notice and its conduct.<sup>43</sup>

In the UK, the ready availability of injunctive relief has become notorious. Where employers think they have a *prima facie* case that the substantive or (more commonly) procedural requirements for statutory immunity were not met, then they can (under *American Cyanamid* principles)<sup>44</sup> seek an injunction on the balance of convenience. Given the likely costs of industrial action to an employer, this ‘balance’ almost invariably would favour the employer. Although TULRCA s 221 provides that injunctive relief should be granted on the basis of the likelihood of the defence succeeding at trial, this approach has been neglected in much of the case law, which has permitted injunctive relief on the basis of very minor delays or inaccuracies in notice.<sup>45</sup> In the Court of Appeal joined cases, *RMT v SERCO* and *ASLEF v London & Birmingham Railway Ltd*,<sup>46</sup> Elias LJ noted that Article 11 of the European Convention on Human Rights (ECHR) protects a right to strike. The ECHR is an international instrument concluded under the auspices of the Council of Europe in 1950 and

<sup>37</sup> *Metrobus Ltd v Unite the Union* [2009] IRLR 851. See R Dukes, ‘The Right to Strike: Not Much More Than A Slogan?’ (2010) 39 *ILJ* 82. In addition, there is now an obligation for a trade union to notify the Certification Officer in the ‘annual return’ regarding any industrial action taken: TUA, s 7 inserting TULRCA s 32ZA.

<sup>38</sup> TULRCA 1992, s 232B.

<sup>39</sup> See *RMT v SERCO*; *ASLEF v London Birmingham Railway Ltd* [2011] IRLR 399 at [87].

<sup>40</sup> *Balfour Beatty Engineering Services v Unite* [2012] ICR 822, IRLR 452 at [32].

<sup>41</sup> *Ibid.*, at [34].

<sup>42</sup> *Ibid.*

<sup>43</sup> *The Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (UK) ss 32, 40.

<sup>44</sup> *American Cyanamid Ltd v Ethicon Ltd* [1975] AC 396 at 407.

<sup>45</sup> See for eg *British Airways v Unite* [2009] EWHC 3541, at [82]; *EDF Energy Powerlink Ltd v National Union of Rail Maritime and Transport Workers* [2010] IRLR 114; and *Milford Haven Port Authority v Unite the Union* [2010] EWCA Civ 400. For an example of the use of labour injunctions in this way in South Africa see C Cooper and P Benjamin, ‘Strike Ballots in South Africa’ (2016) 29 *AJLL* (forthcoming).

<sup>46</sup> See above n 39.

has domestic legal effect (being binding on public authorities such as the courts) by virtue of the *Human Rights Act 1998*. However, that recognition of a right to strike was not apparently sufficient to create a presumption in favour of legality of the workers' collective action called by a trade union. Rather, the legislation regarding balloting and notice requirements has to be 'construed in the normal way, without presumptions one way or the other' as to the superiority of union or employer interests.<sup>47</sup>

To all this, must also be added the restrictions on industrial action which emerged under European Union (EU) law and which will continue to apply in the absence of 'Brexit'. The EU is distinct from the Council of Europe, having a market orientation with its own legal order framed around freedom of movement (of goods, services, establishment and persons) as well as competition law.<sup>48</sup> Respect for fundamental rights, including social rights, is recognised by the EU especially under the EU Charter of Fundamental Rights (EUCFR). Notably, Article 28 of the EUCFR recognises the entitlement of workers to 'take collective action to defend their interests, including strike action'. However, the right to strike operates as a constraint on the implementation of the market freedoms of EU law, rather than a basis for independent EU regulation.<sup>49</sup> The *Viking* case established that where the exercise of a right to strike under national legislation obstructs the free movement of establishment by an employer, this can only be defensible if it is for the 'protection of workers' and proportionate.<sup>50</sup> Further, the *Laval* case indicated that if collective action affects free movement of services and, in particular, collective bargaining over the minimum terms on which posted workers are hired, this interference can only be justified by demonstrating that there has been 'social dumping', presenting an even higher and uncertain threshold.<sup>51</sup> If such defences cannot be established, the trade union calling the action can be found liable for potentially unlimited damages claimed by the employer.<sup>52</sup> Court challenges based on EU law may become more prominent given the elaboration on the causes of the trade dispute now required to be set out in the ballot paper (from 2016 onwards).<sup>53</sup>

## 2. The use of democratic rhetoric in adoption of a balloting and notice regime

There remains considerable debate over the meaning of 'democracy' for these purposes. While, in an industrial relations context, democracy could be viewed as being achieved simply through individual choice exercised through voting whereby the views of the majority prevail, this seems a weak (and impoverished) understanding of democracy. Most societies that self-define as democratic also expect 'to see precautions taken for the protection of

<sup>47</sup> *Ibid.*, at [9]. See also R Dukes, 'The Right to Strike under UK Law: Something more than a slogan?' (2011) 40 *ILJ* 302.

<sup>48</sup> For an explanation, see T Novitz and P Syrpis, 'Giving with One Hand and Taking with the Other: Protection of Workers' Human Rights in the European Union' in C Fenwick and T Novitz (eds) *Human Rights at Work*, Hart, Oxford, 2010.

<sup>49</sup> The legislative competence of the EU on social policy under Article 153(5) of the Treaty on the Functioning of the European Union (TFEU) 'shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs'. See also EU Charter of Fundamental Rights, Articles 51 and 53. For further analysis, see T Novitz, 'The EU and the Right to Strike: Regulation through the Back Door and its Impact on Social Dialogue' (2016) 27(1) *King's Law Journal* (KLJ) 46.

<sup>50</sup> Case C-438/05 *International Transport Workers' Federation (ITF) and Finnish Seamen's Union (FSU) v Viking Line* [2007] ECR I-10779.

<sup>51</sup> Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

<sup>52</sup> K Apps, 'Damages Claims Against Trade Unions after Viking and Laval' (2009) 34 *European Law Review* 141. See for a recent review of these issues, M Freedland and J Prassl (eds), *Viking, Laval and Beyond*, Hart, Oxford, 2014.

<sup>53</sup> See above, TUA s 5.

minorities and individual dissent, as a species of human rights protection'.<sup>54</sup> Additionally, 'deliberative' democracy, namely the attempt to remove barriers to communicative action has gained further credence in both the EU and UK (as well as Australia).<sup>55</sup> This is an approach that stresses the importance of engagement with civil society and the transparent and genuine exchange of views whereby decisions may be reached by virtue of the strength of public reasoning, as opposed to the relative power of the interested parties. It is possible to detect, in the debates that surrounded legal reforms which took place in the UK during the 1980s and 1990s some appeal to these different (but overlapping) understandings of democracy. Further, an appeal to 'democracy' has been a powerful invocation of legitimacy.

Famously, mandatory 'democratic' balloting requirements in Britain were introduced by Margaret Thatcher's Conservative government with the explicit intention to address what was then seen as the tyranny of union leadership. Walk-outs led by shop stewards and votes taken on strike action by a show of hands were deemed coercive, despite their longstanding acceptance in UK industrial relations. The Conservative Government Green Paper on Democracy in Trade Unions stated that its aim was to return control of trade unions to members, prioritizing the interests of each individual member as opposed to the collective.<sup>56</sup> Part II of the *Trade Union Act 1984* therefore imposed secret ballots in respect of those members a trade union found it reasonable to believe would be called upon to take industrial action (and required description of the consequences in the ballot paper, for this was to be informed choice). Statutory amendments to industrial legislation incrementally increased the bureaucratic demands associated with balloting, which were also supplemented with a detailed Code of Practice.<sup>57</sup> Further, trade unions also lost the power to discipline members for failing to take industrial action regardless of trade union rulebooks. This was very much democracy as individual choice, such that it was not necessary even to abide by the majority decision.<sup>58</sup> That 'democratic' rationale<sup>59</sup> had, as Wedderburn observed, a neo-liberal flavour,<sup>60</sup> reflecting the view expressed by Hayek that the negative freedom of persons was to be prioritised.<sup>61</sup> The secret strike ballot offered 'a highly atomistic form of participation requiring individuals to exercise their choice in the isolation of their own homes without further participation in debate and discussion',<sup>62</sup> lacking in deliberative potential.<sup>63</sup>

The legislative reforms of the 1980s also had an economic dimension. They can be understood as a response to the recession experienced in the late 1970s and a discourse of economic decline. Those reforms offered a way in which to prevent inflationary wage settlements, but also to deflect worker opposition to dismissals and restructuring. The aim was to enable UK employers to become more competitive on international product markets

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<sup>54</sup> See McCrystal and Novitz, above n 1 at 121.

<sup>55</sup> Ibid, at 122 et seq.

<sup>56</sup> Cm 8778 (1983). P Davies and M Freedland, *Labour Legislation and Public Policy*, Clarendon Press, Oxford, 1993 at 483-488.

<sup>57</sup> Davies and Freedland, above n 56 at 501 et seq.

<sup>58</sup> *Employment Act 1988* (UK) s 3.

<sup>59</sup> See McCrystal and Novitz, above n 1 at 135 et seq.

<sup>60</sup> See Lord Wedderburn, 'Labour Law and the Individual: Convergence or Diversity?' in Lord Wedderburn, *Labour Law and Freedom*, Lawrence and Wishart, London, 1995.

<sup>61</sup> FA Hayek, *1980s Unemployment and the Unions: Essays on the Impotent Price Structure of Britain and Monopoly in the Labour Market*, 2<sup>nd</sup> edn., Institute of Economic Affairs, London, 1984, 51-2.

<sup>62</sup> S Fredman, 'The New Rights: Labour Law and Ideology in the Thatcher Years' (1992) 12 *Oxford Journal of Legal Studies* 24 at 29.

<sup>63</sup> M Ford, 'Citizenship and Democracy in Industrial Relations: The Agenda for the 1990s' (1992) 55 *MLR* 241.



while attracting foreign direct investment on the basis of a cheap labour force.<sup>64</sup> The desire to remove ‘barriers to employment’ through a more flexible and efficient labour market surfaced during the 1980s.<sup>65</sup> This was tantamount to reduction of trade union power,<sup>66</sup> which led to a significant decrease in industrial action.<sup>67</sup> The Conservative strategy did, however, backfire in one respect. Where unions could overcome the difficult hurdles of meeting all the detailed technical procedural requirements, and nevertheless achieved a majority in the ballot, which was very difficult, they had gained a hard won legitimacy for their action.<sup>68</sup> When on strike, workers could claim a form of democratic entitlement.

In a time of relative prosperity and economic stability during the 1990s and into the ‘noughties’, ‘New Labour’ offered a ‘modernised’ and less conflictual vision of the role of trade unions within what might be regarded as a ‘third way’ or ‘deliberative’ model for industrial relations.<sup>69</sup> Yet, despite (or perhaps because of) this shift in attitude, it was not much easier to engage in strikes than had previously been the case.

The New Labour government saw no reason to depart from the legal framework established by previous Conservative governments, welcoming the end to ‘strikes without ballots’.<sup>70</sup> Instead, speeches given by the then Prime Minister, Tony Blair, to the Confederation of British Industry celebrated the flexibility of the labour market (‘the most flexible of any major economy’).<sup>71</sup> There were also echoes of democratic rhetoric, so that Blair was prepared to say that trade unions were ‘a healthy part of any proper democracy’, but he also added that ‘the best unions ... are working in partnership with their employers’.<sup>72</sup> This insistence on trade unions operating through ‘partnership’ rather than conflict would seem to indicate a shift in orientation from majoritarian to deliberative democracy.<sup>73</sup> This transition was evident

<sup>64</sup> B Towers, ‘Running the Gauntlet: British Trade Unions under Thatcher, 1979–1988’ (1989) 42 *Industrial & Labor Relations Review* 163.

<sup>65</sup> See the White Papers: *Employment: The Challenge for the Nation* (1985) Cm. 9474, *Employment for the 1990s* Cm. 540 (1988) and the Green Paper *Removing Barriers to Employment* Cm 655 (1989).

<sup>66</sup> Davies and Freedland, above n 56 at 517 et seq; and Regarding the effects of the legal framework, see R Freeman and J Pelletier ‘The Impact of Industrial Relations Legislation on British Union Density’ (1990) 2 *British Journal of Industrial Relations* (BJIR) 141 at 156. Coverage of collective bargaining fell from 70% of all employees in 1984 to 41% in 1998. See M Cully, S Woodland, A O’Reilly and G Dix, *Britain at Work: As Depicted by the 1998 Workplace Employee Relations Survey*, Routledge, London, 1999 at 235 - 42. Trade union membership as at 2014 stood at less than 29%. See [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/431564/Trade\\_Union\\_Membership\\_Statistics\\_2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/431564/Trade_Union_Membership_Statistics_2014.pdf); and <http://www.worker-participation.eu/National-Industrial-Relations/Countries/United-Kingdom/Collective-Bargaining>.

<sup>67</sup> Industrial action has declined from 32,129,000 working days lost in 1980, to 1,338,000 in 1997. By 2014, the sum was only 483,000. See the latest Office for National Statistics records at: [http://www.ons.gov.uk/ons/dcp171778\\_385648.pdf](http://www.ons.gov.uk/ons/dcp171778_385648.pdf)

<sup>68</sup> J Elgar and B Simpson, *Industrial Ballots and the Law*, Institute of Employment Rights, London, 1996, 20-21; and R Undy, P Fosh, H Morris, P Smith and R Martin, *Managing Trade Unions: The Impact of Legislation on Trade Union Behaviour*, OUP, Oxford 1996, 260-1.

<sup>69</sup> T Novitz and P Skidmore, *Fairness at Work: A Critical Analysis of the Employment Relations Act 1999 and its Treatment of Collective Rights*, Oxford, Hart, 2001; P Smith and G Morton, ‘New Labour’s Reform of Britain’s Employment Law: the devil is not only in the details but in the policy too’ (2001) 39 *BJIR* 119; A Bogg, ‘New Labour, Trade Unions, and the Liberal State’ (2009) 20 *KLJ* 403.

<sup>70</sup> See the White Paper, *Fairness at Work* Cm3968 (1998), Foreword by Tony Blair.

<sup>71</sup> Speech by Tony Blair to the CBI in 2001 available at: [http://www.theguardian.com/world/2001/nov/05/september11\\_usa2](http://www.theguardian.com/world/2001/nov/05/september11_usa2); see also speech to the CBI in 1997, available at: <http://www.ukpol.co.uk/2015/09/07/tony-blair-1997-speech-to-the-cbi/>.

<sup>72</sup> See <http://www.theguardian.com/politics/1997/apr/27/election2001.uk1>, in which the Guardian newspaper reports an interview in May 1997.

<sup>73</sup> McCrystal and Novitz, above n 1 at 142-144.

in section 238A of TULRCA (introduced by New Labour in 1999) which sought to encourage non-conflictual communication by the design of protection from dismissal for workers participating in industrial action. If the union of which the employee is a member is willing to take all appropriate steps to resolve the dispute and behaves rationally during this period, then the ‘protected period’ for dismissal can be extended beyond the standard period of twelve weeks from the commencement of the action.<sup>74</sup> There is an assumption here that more can be achieved through effective communication than through conflict, as might be the case in an ideal world.

The inadequacies of the New Labour approach to UK industrial relations have been explored elsewhere and that approach certainly did not revitalize trade union representation or collective bargaining.<sup>75</sup> What is notable in respect of the most recent legal reforms under the TUA is that democracy is no longer such a significant part of the rhetorical game played by the now Conservative Government. There is now a further move away from democratic justifications towards a particular kind of explicit economic pragmatism.

### 3. Economic justifications for the TUA

Democratic values were less prominent in the justifications offered for the TUA. Rather the reasons for the reforms were largely pragmatic and economic in character. The aim of the legislation appeared to be utilitarian, namely to maximise wealth.

Adopting a contemporary political economy perspective, wealth maximisation may (as Picketty has explained)<sup>76</sup> serve the interests of a small elite group of the very rich, as opposed to society generally. In the UK, the income gap between wealthy and poor is steadily increasing, with all the social ills this encompasses.<sup>77</sup> While there are strong indications that effective trade union representation and collective bargaining could close the income gap,<sup>78</sup> this strategy for repairing societal fracture is being resisted.

That resistance is taking place in the context of the global financial crisis, for which the mainstream recipe has been austerity. Austerity programs have tended to involve the reduction of wages, removal of job security and diminution of collective bargaining mechanisms. In part, this has been an endeavour to reduce public spending, in order to reduce the public debt generated by the monies used to assist financial institutions in the wake of the crisis. These policy prescriptions have also been part of an effort to boost growth in the domestic economy, with an effort to assist employers in making profits and attract foreign direct investors, (hence the need for lower wages and reduction of collective bargaining which could create wage premiums).<sup>79</sup> In this setting, the prioritization of economic

<sup>74</sup> TULRCA s 238A. See text accompanying ns 9 – 11 above.

<sup>75</sup> McCrystal and Novitz, above n 1 at 144 – 146; see also P Smith and G Morton, ‘Nine Years of New Labour: Neoliberalism and Workers’ Rights’ (2006) 44 *BJIR* 401.

<sup>76</sup> T Picketty, *Capital in the Twenty-First Century*, Harvard University Press, Cambridge Massachusetts, 2014.

<sup>77</sup> L Hayes and T Novitz, *Trade Unions and Economic Inequality*, CLASS/Institute of Employment Rights, London/Liverpool, 2014 available at: <http://classonline.org.uk/pubs/item/trade-unions-and-economic-inequality>.

<sup>78</sup> Ibid, and see more recently (and controversially) F Jaumotte and CA Buitron, *Power from the People* IMF, Washington, 2015 available at: <http://www.imf.org/external/pubs/ft/fandd/2015/03/pdf/jaumotte.pdf>.

<sup>79</sup> For this general austerity-related trend, see J Peters, ‘Neoliberal Convergence in North America and Western Europe: Fiscal Austerity, Privatization, and Public Sector Reform’ (2012) 19(2) *Rev. Int’l Pol. Economy* 208 especially 218 et seq. There is also a vast array of literature on the implications of EU-led austerity including: S Clauwert and I Schömann, *The Crisis and National Labour Law Reforms: A Mapping Exercise*, ETUI Working Paper, Florence, 2014; A Koukiadaki and L Kretsos, ‘Opening Pandora’s Box: The Sovereign Debt Crisis and

objectives (arguably always a feature of the EU market agenda raising concerns regarding a ‘democratic deficit’) has become starker.<sup>80</sup>

On election to government in May 2015, the Chancellor, George Osborne, announced £12 billion of spending cuts.<sup>81</sup> In the Queen’s Speech, which sets out the legislative agenda for the parliamentary year ahead, it was said (tellingly) that: ‘My government will continue with its long-term plan to provide economic stability and security... They will continue the work of bringing the public finances under control and reducing the deficit, so Britain lives within its means. Measures will be introduced to raise the productive potential of the economy ...’<sup>82</sup> In the list of measures that followed, the fifth was ‘legislation to reform trade unions and to protect essential public services against strikes’.<sup>83</sup> Government ministers in the Commons and the Lords did claim ‘democratic’ legitimacy for the TUA.<sup>84</sup> However, their claims were undermined by the failure of the Conservative Government to meet, in the General Election of 2015, the ‘democratic’ balloting thresholds they advocated for ‘important’ public sector industrial action.<sup>85</sup>

It would therefore seem that the measures proposed in the Trade Union Bill 2015 (now the TUA) were intended, largely, to fulfil economic objectives or as the Minister put it, to preserve ‘the economic welfare of the nation’.<sup>86</sup> The high threshold of support for ballots in ‘important public services’ can be linked to an attempt to ensure that trade union action would not interfere with wage cuts, restructuring and redundancies entailed in bringing public finances under control. Indeed, this would diminish the ability of trade unions to challenge the impact on members of privatization of public services, treatment of junior doctors and creation of universal academy schools being a live issue at the time that the Bill was debated.<sup>87</sup> In this respect, the slippage from mention of ‘essential public services’ to reference to ‘important public services’ in the TUA was significant. While ILO supervisory bodies would allow restrictions on strikes to prevent danger to ‘the life, personal safety or health of the whole or part of the population’,<sup>88</sup> the UK Government’s aim here was rather to reduce public spending and thereby the national budgetary deficit.<sup>89</sup> For this reason, the ILO

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Labour Regulation in Greece’ (2012) 41(3) *ILJ* 276; and R Torres, ‘European Labour Markets in Crisis’ (2012) 152 *ILRev* 167, 168.

<sup>80</sup> See F W Scharpf, ‘Economic Integration, Democracy and the Welfare State’ (1997) 4 *Journal of European Public Policy* 18; L Betten, ‘The Democratic Deficit of Participatory Democracy in Community Social Policy’ (1998) 23 *European Law Review* 20; and B Bercusson, ‘Democratic Legitimacy and European Labour Law’ (1999) 28 *ILJ* 153.

<sup>81</sup> See discussion at <http://uk.reuters.com/article/2015/06/20/uk-britain-economy-cuts-idUKKBN0P00VH20150620>.

<sup>82</sup> Available at: <https://www.gov.uk/government/speeches/queens-speech-2015>.

<sup>83</sup> *Ibid.*

<sup>84</sup> See Hansard, House of Commons (HC), 14 September 2015, col. 761 per Sajid Javid; and House of Lords (HL), Trade Union Bill, Second Reading 11 January 2016, col. 13 per Baroness Neville-Rolfe.

<sup>85</sup> Hansard HL, Trade Union Bill, Second Reading 11 January 2016, col. 13 per Baroness Bakewell at col. 41 noted that Conservatives had not gained the 40% approval threshold of all those eligible to vote.

<sup>86</sup> Hansard HC, 14 September 2015, col. 772 per Sajid Javid.

<sup>87</sup> Hansard HL, Trade Union Bill, Second Reading 11 January 2016, col.20 per Baroness Burt of Solihull; see also HL, 8 Feb 2016 : Column 1991 per Lord Watson of Invergowrie (Lab).

<sup>88</sup> ILO Committee on Freedom of Association (CFA) *Digest of Decisions*, 5<sup>th</sup> ed, ILO, Geneva, 2006, at [585]. See also the specific observation of the ILO Committee of Experts (CEACR) on UK compliance with Convention No. 87 (2015) available at:

[http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3255351](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3255351).

<sup>89</sup> A desire to prevent the ongoing junior doctors’ action in the NHS was for example observed during Parliamentary debates; see per Rachael Maskell and Helen Hayes in the Hansard HC consideration of Lords’

Committee of Experts on the Application of Conventions and Recommendations (CEACR) requested: ‘the Government to review this matter with the social partners concerned ... so as to ensure that the heightened requirement of support of 40 per cent of all workers does not apply to education and transport services’.<sup>90</sup> There has been no sign of such a review to date.

Further, the reference in the 2015 Queen’s Speech to the ‘productive potential of the economy’<sup>91</sup> assists in explaining the measures taken which apply not only to the public but also to the private sector. For example, the more general threshold turnout requirement of 50% and the more detailed voting paper requirements both limit potential access to strikes and thereby the bargaining power of workers generally, indirectly offering benefits to potential employers considering investment in the UK economy.

The ‘Background Notes’ to the Queen’s Speech of 2015 did make some small mention of ‘democratic’ objectives, stating that aims of the new trade union legislation would be: ‘Ensuring that strikes are the result of clear, positive and recent decisions by union members’ and ‘[e]nsuring that disruption to essential public services has a democratic mandate’.<sup>92</sup> However, this seemed to mean ‘democratic’ in the sense of ‘super-majority’ voting not yet contemplated in other parts of British public life, and overlooked human rights protection such as the entitlement to freedom of association. The latter was perhaps not surprising, given the threat made by the Conservative Party prior to the election, that if elected, there would be renegotiation of the UK’s commitment to implementation of the judgments of the European Court of Human Rights under the ECHR.<sup>93</sup> Subsequently, little reference has been made by the Conservative Government to ‘democratic’ objectives, with other ambitions taking prominence.

One of the three consultation papers issued with the Trade Union Bill (later the TUA) was specifically devoted to *Ballot Thresholds in Important Public Services*.<sup>94</sup> It is perhaps notable that there was no consultation on other aspects of the Bill’s provisions, such as the changes to voting paper requirements, additional strike notice provisions and limitation on the duration of a ballot mandate.<sup>95</sup> This consultation paper said that disruptive action based on low ballot turnouts was ‘undemocratic’, presumably being aimed at an explanation of the 50% turnout threshold. However, it seems doubtful that the Conservative government genuinely wished to promote greater participation in strike ballots, since the legislative requirement for a report on electronic balloting, as a means by which this could be achieved, was agreed only reluctantly by the Government due to pressure from trade unions and the House of Lords.<sup>96</sup> Further, this was the first and last mention of ‘democracy’ in this consultation paper.<sup>97</sup> Instead, the key

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amendments on 27 April 2016; available at: <https://hansard.parliament.uk/Commons/2016-04-27/debates/16042764000002/TradeUnionBill>.

<sup>90</sup> See above, n 88.

<sup>91</sup> See above, n 82.

<sup>92</sup> Queen’s Speech 2015: Backgrounding Briefing Notes (27 May 2015) at 38 available at: <https://www.gov.uk/government/publications/queens-speech-2015-background-briefing-notes>.

<sup>93</sup> <http://www.theguardian.com/law/2015/may/27/threat-exit-human-rights-act-convention-dropped-tories-cameron>; <http://www.independent.co.uk/news/uk/politics/david-cameron-refuses-to-rule-out-quitting-the-european-convention-on-human-rights-10294385.html>.

<sup>94</sup> <https://www.gov.uk/government/collections/trade-union-bill>.

<sup>95</sup> Even though the newer lengthy notice period of 14 days was such a significant step as to merit a Direct Request to the UK Government from the CEACR (in 2016). See [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3255355:YES](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3255355:YES).

<sup>96</sup> HC consideration of Lords’ amendments on 27 April 2016, see above, n 89.

<sup>97</sup> See n 94 above at [3] - though curiously the term reappears in BIS/15/416, [18].



objectives were ‘to ensure that industrial action is only used as a measure of last resort’;<sup>98</sup> and to avoid the far-reaching effects of strikes in public services. Reference to what might be ‘democratic’ (or otherwise) was replaced by appeal to the need for ‘clear and ongoing support’.

This phraseology and the notion of the need in ‘important public services’ for 40% approval of those eligible for vote had a precedent. It was set, not by a Conservative government, but by New Labour in 1999 in respect of balloting thresholds for statutory recognition of a union so as to enable collective bargaining on pay, hours and holidays. Statutory recognition must be supported ‘by a majority of the workers voting’ *and* ‘at least 40 per cent of the workers constituting the bargaining unit’.<sup>99</sup> As was observed at the time, a ‘yes’ vote from 40% of the electorate was more than the Labour Party received in the 1997 general election, which was widely regarded as a landslide victory.<sup>100</sup> Today, there is no such super-majority requirement in respect of any other election for political representation in the UK or in Europe (nor is there any turnout threshold).<sup>101</sup> As the 40% rule could not be defended on a democratic basis, the then Labour government articulated the issue as follows: ‘First, without real and substantial support amongst employees, collective bargaining simply will not work. Second, since collective bargaining has an impact on all employees, not just those claiming union representation, it is right that it should be granted only in circumstances where substantial support is demonstrated.’<sup>102</sup>

That iteration of ‘substantial’ or ‘clear’ or ‘clear and ongoing’ support is now relied on by the Conservative government due to the ‘far-reaching effects on significant numbers of ordinary people who have no association with the dispute’. The 40% requirement is apparently designed to ‘get the balance right between the interests of union members and the interests of the majority of people who rely on the services they provide’.<sup>103</sup> The initial Impact Assessment (IA) of 2015, which attempted to provide a monetary picture of this balance,<sup>104</sup> was found by the UK Regulatory Policy Committee (RPC) not to provide ‘a clear enough basis for consultation’.<sup>105</sup> The second IA issued in January 2016,<sup>106</sup> rated by the RPC this time as ‘fit for purpose’, provided a second opportunity to explain the rationale for the Conservative Government policy, which is done in terms of what is ‘democratic’<sup>107</sup> but also in the language ‘clear’ support.<sup>108</sup> The IA estimated that the 50% turnout requirement would reduce work stoppages by 37%, with the 40% threshold reducing industrial action by a further 8%. The 50% threshold is costed as saving the ‘sectors’ affected upwards a total of £11 million per annum; while the full costing for 40% threshold is only to be provided when the relevant secondary legislation regarding ‘important public services’ is set before Parliament.<sup>109</sup> Costings are provided relating to union familiarisation and adjustment to the

<sup>98</sup> BIS/15/418 at [1]. Discussed in Ford and Novitz, above n 2 at 530.

<sup>99</sup> TULRCA, Schedule A1, [29], inserted by the *Employment Relations Act 1999* (UK).

<sup>100</sup> Novitz and Skidmore, above n 69 at 94.

<sup>101</sup> See R Darlington and J Dobson, *The Conservative Government’s Proposed Strike Ballot Thresholds: The Challenge to Trade Unions*, Institute of Employment Rights, Liverpool, 2015 at 11.

<sup>102</sup> White Paper, *Fairness at Work* Cm3968 (1998), [4.16].

<sup>103</sup> BIS/15/418 at 3-4.

<sup>104</sup> Impact Assessment, *Ballot Thresholds in Important Public Services* (July 2015) BIS/15/418 IA.

<sup>105</sup> RPC15-BIS-2402 (2015).

<sup>106</sup> Impact Assessment, *Trade Union Bill 2016* (January 2016) BIS/16/70 available at

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/493636/BIS-16-70-trade-union-bill-impact-assessment.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/493636/BIS-16-70-trade-union-bill-impact-assessment.pdf).

<sup>107</sup> *Ibid.*, at 23, 85, 87 and 94.

<sup>108</sup> *Ibid.*, 5, 11, 22, 23

<sup>109</sup> *Ibid.*, 11.

new legislation as if these are the only effects on unions and their members by virtue of reduced access to industrial action;<sup>110</sup> the impact on the income of workers and issues of profit-sharing are entirely overlooked.

However, even the savings of £11 million a year identified by the IA (less than £8 million approximately in respect of strikes in important public services)<sup>111</sup> does not get the Government close to Osborne's target cuts of £12 billion. The economic explanation is arguably important but lies elsewhere. It emerged in the written evidence submitted regarding the Trade Union Bill and, in particular that of Tom Flanagan Consulting,<sup>112</sup> which reveals the relevance of a Policy Exchange (Conservative think tank) document of 2010 titled 'Modernising Industrial Relations' (of which Flanagan was a co-author).<sup>113</sup> That policy paper reads like a shopping list for the measures adopted in the TUA: more detailed information on the ballot paper; requiring that a majority of employees in the balloted workplace vote; establishing different rules for 'essential' goods and services; extension of notice period for strikes to fourteen days; permitting use of agency staff as replacement labour; imposing opt-in (rather than opt-out) choices for political funds; and stipulating that 'no union membership fee should be deducted directly from a pay packet'.<sup>114</sup> Indeed, the resemblance to the content of the legislation is uncanny. There is also in this list a measure already taken by the former Coalition Government in 2014, namely 'an annual audit of union membership'.<sup>115</sup>

In the Policy Exchange paper, unions are conceived solely as a mechanism to curb the 'monopsony power' of certain dominant employers and thereby achieving a legitimate wage premium where wages have been driven down 'below the efficient market equilibrium level'.<sup>116</sup> On this basis, the entitlement to withdraw labour can only be justified collectively, rather than individually; hence the case for aggregating preferences via balloting thresholds and super-majorities. Unions are there to reduce transaction costs (which would follow from individually negotiated wages) and to counterbalance monopsony power, but only to the extent that the latter cannot be addressed through competition law.<sup>117</sup>

Following the authors' reasoning, further reforms advocated in the Policy Exchange paper could still be introduced, such as reduction of protections from unfair dismissal for participants in industrial action<sup>118</sup> and judicial review of action which causes 'significant economic damage'.<sup>119</sup> Further, the paper advocates breaking up large unions and making them compete as 'service providers'.<sup>120</sup>

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<sup>110</sup> Ibid, 6 and 12-18.

<sup>111</sup> Ibid, 27.

<sup>112</sup> Hansard HC TUB 42, 28 October 2015.

<sup>113</sup> 'Policy Exchange Paper (2010)' available at:

<http://www.policyexchange.org.uk/images/publications/modernising%20industrial%20relations%20-%20sep%202010.pdf>

<sup>114</sup> Ibid, 5-7.

<sup>115</sup> Ibid, 6. See TULRCA, s 24 and ss 24ZA – ZK introduced by Part 3 of the *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (UK).

<sup>116</sup> Policy Exchange Paper (2010), 25.

<sup>117</sup> Ibid, 26.

<sup>118</sup> Ibid, 38.

<sup>119</sup> Ibid, at 39

<sup>120</sup> Ibid, at 27-28.

This is a peculiarly narrow economic agenda; and it is worth remembering that there are alternatives. Also arguing within an economic paradigm, Marc Moore has argued that industrial action does not lead to the ‘resource misallocation’ alleged by neo-liberals such as Hayek,<sup>121</sup> but rather that ‘adversarial counter-pressures’ are necessary to labour acquiescence in the managerial discretion required in capitalist systems.<sup>122</sup> According to this alternative narrative, the ability to strike promotes, rather than detracts from, administrative efficiency, reducing agency costs and enabling economies in production costs.<sup>123</sup> Moreover, it has long been recognised that laws promoting and protecting trade union activity can have beneficial developmental effects, from an institutional economics perspective.<sup>124</sup> Further, the paucity of the Policy Exchange prescriptions lie in their disregard for the notion of development as freedom, which would encompass access to freedom of association as a matter of dignity as well as democracy.<sup>125</sup> Nevertheless, thus far, it would seem to this very limited economic rationale that is driving balloting and notice reform in the UK.

#### 4. Conclusion

There remains scope for challenge of the recent UK balloting and notice requirements within the ILO and under Council of Europe human rights mechanisms.<sup>126</sup> In this respect, the sensitivity of *Elias LJ* in the Court of Appeal to international jurisprudence on the right to strike is reassuring,<sup>127</sup> but it is doubtful that human rights protections can altogether compensate for the evaporation of attention to democratic values. Even though labour law commentators (including the present author) were critical of and concerned by some ‘democratic’ justifications given for past UK balloting and notice statutory provisions, the narrow economic justificatory basis offered by the current Conservative government places a greater constraint on the ways in which procedural requirements are to be imposed and applied. The dominance of a such a narrow macro-economic justification for balloting and notice reforms is worrying, especially where this goes beyond a temporary desire to reduce public debt, and tends instead towards a more far-reaching neo-liberal understanding of UK industrial relations centred around transactional costs and monopsony. The outcome is likely to be significantly reduced access to industrial action alongside the further erosion of bargaining power and voice for UK workers.

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<sup>121</sup> See text accompanying n 61 above.

<sup>122</sup> M Moore, ‘Reconstituting Labour Market Freedom: Corporate Governance and Collective Worker Counterbalance’ (2014) 43 *ILJ* 398.

<sup>123</sup> *Ibid.*, at 427-8.

<sup>124</sup> S Deakin, ‘The Contribution of Labour Law to Economic Development and Growth’ lecture presented at the 21<sup>st</sup> Congress of the International Society for Labour and Social Security Law, Cape Town, 21 September 2015. See also S Deakin, J Malmberg and P Sarkar, ‘How do labour laws affect unemployment and the labour share of national income? The experience of six OECD countries, 1970–2010’ (2014) 153 *International Labour Review* 1.

<sup>125</sup> A Sen, *Development as Freedom* (OUP, Oxford, 1999); M Nussbaum, ‘Capabilities as Fundamental Entitlements: Sen and Social Justice’ (2003) 9 *Feminist Economics* 33; and A Bogg and T Novitz, ‘Purposes and Techniques of Voice’ in A Bogg and T Novitz (eds) *Voices at Work*, OUP, Oxford, 2014 at 10.

<sup>126</sup> See Ford and Novitz, above n 2.

<sup>127</sup> See *RMT v SERCO*, above n 39.