The Trade Union Act 2016: What Next?

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I. Introduction

THE TRADE UNION Act 2016 is the product of the Conservative Government's promises during the 2015 election to give trade unions a greater democratic mandate. It has introduced several important changes to the law governing industrial action, and commentators have criticised the Act for lacking any coherent explanation to justify the need for a change in the law, for making it significantly more difficult for unions to go on strike, and for placing further limitations on picketing. After revisiting the main shortcomings of the Act, this paper argues for a shift in focus to alternative strategies, notably compulsory arbitration, which the UK might wish to adopt to better safeguard the rights of workers against employers.

The freedom to associate under Article 11 of the European Convention of Human Rights (ECHR) includes the right to bargain collectively,[1] and now, the right to strike.[2] But what Strasbourg has enshrined in terms of rights, it has defiled on the basis of the wide margin of appreciation accorded to the State under Article 11(2): the UK government's complete ban on secondary action is justified,[3] and the onerous pre-strike ballot and notice provisions have been glossed over.[4]

But not all is lost, at least the European Court of Human Rights (ECtHR) has affirmed the ability to strike as a right,[5] which is exactly the opposite of what has been the position under UK law: for it was only in 2009 that the Court of

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1 *Demir and Baykara v Turkey* [2008] ECHR 1345, (2009) 48 EHRR 54.

2 *National Union of Rail, Maritime and Transport Workers v United Kingdom* [2014] ECHR 366, [2014] IRLR 467.

3 ibid [76]–[78].

4 ibid [45].

5 Whether or not the right to strike is an absolute (or integral) part of the freedom to associate or not was left open by the Court, ibid [83].

Appeal affirmed that "English law does not of course recognise [such] a right", and without statutory exemption, unions would be liable for tortious activity for calling a strike.[6]

Having established that the orthodoxy of the common law must be challenged in the light of the developments of labour law standards globally, it is disappointing to note that under the banner of bringing "sunlight to the dark corners of the [trade union] movement",[7] the Conservative Government has proceeded to chip away at what little strength remains of the trade unions in the UK by introducing the Trade Union Act 2016 (TUA).

In force since the 1st of March 2017, the provisions of the TUA will undoubtedly make it more difficult for unions to organize industrial action, or to go on strike. In part I, this paper outlines the main changes to be brought about by the TUA and the criticisms commentators have levelled against the Act. In part II, an attempt is made to synthesize the UK position on collective labour law with alternative methods to ensure collective bargaining. The paper concludes with a few thoughts on how the labour market in the UK might evolve in the near future.

The TUA will have four main effects. These are: (1) introduction of a requirement that 50% of those entitled to vote must turn out to vote for the industrial action to be valid;[8] (2) introduction of a requirement that, for "important public services", 40% of those entitled to vote must have voted in favour;[9] (3) introduction of union supervised picketing;[10] and (4) two weeks' notice to be given to employers of forthcoming industrial action, unless they agree to a seven days' notice.[11]

Other major changes, which we need not discuss for the sake of brevity include the Certification Officer reforms and the opting in by union members to political funds.[12]

A. Mismatch Between Objectives and Act

To understand the objectives of the TUA, we must go back to 2010, to the right-wing think-tank Policy Exchange, and to a paper written for it, entitled "Modernising Industrial Relations".[13] Given that the correspondence between

6 *Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829, [2010] ICR 173 [37] (Lloyd LJ).
7 HC Deb 14 September 2017, col 791.
8 TUA s 2.
9 TUA s 3.
10 TUA s 10.
11 TUA s 8.
12 On this latter point, see K. D. Ewing and John Hendy, 'The Trade Union Act 2016 and the Failure of Human Rights' (2016) 45 ILJ 391.
13 Ed Holmes, Andrew Lilico and Tom Flanagan, 'Modernising Industrial Relations' (Policy Exchange, 2010).

its suggestions and the Government's legislative programme is too alike be a coincidence, Bogg rightly suggests that the relevant promises made in the Conservative Manifesto[14] likely came from this paper.[15] This in and of itself would not be an issue, after all, the government should be free to adopt whatever legislative position it chooses. However, as Bogg, Ford and Novitz point out, the paper was fundamentally misguided about the role of trade unions in the UK, portraying them as vehicles for reducing transaction costs and reducing the monopoly of the employers, when in fact the primary role of trade unions is to represent its members and provide an avenue for collective bargaining.[16] Given this bias, we must receive the stated aims of the TUA with a healthy dose of scepticism.

The government has repeatedly cited the policy objectives of the TUA as being those of "fairness, democracy, and transparency".[17] Before the election, it had done so by painting a picture of aggressive union leaders bullying union members to take part in industrial action, against the members' better judgement,[18] but over time their focus has shifted to a wider public interest argument: that the people "have a right" to expect that services that families rely on will not be disrupted.[19]

However, there is no right under domestic, European, or International Law guaranteeing that citizens can expect services that families rely on not to be affected by industrial action.[20] Rhetoric of such a right blinds us to the core of the government's position, which is that the interest of striking workers stands in direct conflict with those of other worker-consumers,[21] when in fact it has always been against the employer. The government cited its concerns of union leaders and the vocal minority strong-arming the silent majority of members into taking part in industrial action, and produced an *Impact Assessment* on ballot thresholds, which strongly criticised the current pre-strike balloting rules. As Dukes and Kountouris note, this assessment was roundly rejected by the Regulatory Policy Committee for "its lack of evidence" and failure to explain the rationale for the proposals "in a

[14] Conservative Party, 'Strong leadership, a Clear Economic Plan, A brighter, More Secure Future' <https://www.conservatives.com/manifesto> (accessed 27 January 2017).

[15] Alan Bogg, 'Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State' (2016) 45 ILJ 299, 301.

[16] ibid 301; Michael Ford and Tonia Novitz, 'Legislating for Control: The Trade Union Act 2016' (2016) 45 ILJ 277, 278-281. For a traditional account of this point see S. and B. Webb, *The History of Trade Unionism* (Longmans, Green and Co. 1894).

[17] BIS, Trade Union Bill: Consultation on Ballot Thresholds in Important Public Services (July 2015) BIS/15/418.

[18] Ruth Dukes and Nicola Kountouris, 'Pre-strike Ballots, Picketing and Protest: Banning Industrial Action by the Back Door?' (2016) 45 ILJ 337, 350.

[19] Ruth Dukes, Tonia Novitz and Alan Bogg, 'Pre-strike Ballots and the Trade Union Bill 2015: denying the workers the right to strike?' Emp. L.B. 2015, 2-4.

[20] ibid 3.

[21] ibid.

coherent manner".[22]

Notwithstanding the fundamental labour law issues that the government seems to have failed to grasp, and a lack of a coherent rationale for the legislative changes, there exists a clear mismatch between the stated objectives of the government (i.e. to improve the democratic mandate of the unions) and the actual changes that are set to be brought about through the Act.

Firstly, and most obviously, the government's claim of improving democracy within the trade unions must be called into question. If they wished to improve democracy within the unions, there is no reason why electronic balloting should not have been introduced through the TUA.[23] At present, trade unions must disseminate pre-strike ballots by post, something which, in an age of computers and instantaneous communication, is clearly dated, onerous, and only serves to increase the workload for the unions and make it more difficult for them to organize industrial action. Although s.4 TUA specifies that the Government should make provision for a review to consider electronic balloting, and the Government has committed to such a review, it by no means makes the outcome of this review binding, nor does it place any meaningful obligation on the Government to introduce such a change.

Secondly, as Dukes and Kountouris helpfully point out, the Government, believing that all union leaders are dictators coercing their members into disrupting the economy, seems to have ignored the fact that union leaders are elected by their members,[24] cannot take any action against members who refuse to take part in the industrial action even if there is majority support for it,[25] and are prohibited from using industrial action to pursue personal or political objectives.[26] The portrayal of the union leaders as tyrannical seems to be wide off the mark.

Finally, the government's intended reforms do nothing to improve the democratic mandate of the unions. By ramping up turnout requirements, the government has, essentially, given more power to abstentions.[27] Never mind the fact that in democratic societies it is not the number who voted that matters, but those who voted in favour or against a given measure—it is odd that the voting requirements for calling a strike are more onerous than voting in the local election. To provide further context, Dukes and Kountouris conclude that if the voting

[22] Dukes and Kountouris (n 18) 350.

[23] Michael Ford and Tonia Novitz, 'An Absence of Fairness: Restrictions on Industrial Action and Protest in the Trade Union Bill' (2015) 44 ILJ 522.

[24] TULRCA ss 46-61.

[25] TULRCA ss 64, 65

[26] TULRCA ss 219-244.

[27] This point has been forcefully made by R. Darlington and J. Dobson, *The Conservative Government's Proposed Strike Ballot Thresholds: The Challenge to Trade Unions* (Liverpool: IER 2015), ch 6.

requirements of s.3 TUA had applied in the recent Brexit referendum, the UK would still be a member of the European Union.[28]

It seems clear, therefore, that the TUA will not improve the democratic mandate of the trade unions. Hepple suggested that this was because the Government "failed to consider accurate evidence" on which to make its claims,[29] but many commentators go further and suggest that the Government has a hidden agenda to pre-emptively strike against unions in anticipation of austerity measures.[30] As for the stated aims of transparency and fairness, there are no provisions in the TUA that can clearly and meaningfully fulfil those values.[31]

B. Impact of the TUA

The impact of the TUA will be significant, and national ballots are likely to be affected the most, since area and workplace ballots usually have higher turnout rates.[32] Although Darlington and Dobson must be right to conclude that the new ballot turnout requirements will make it more difficult to go on strike, one must not push this argument too far because they support their argument on the basis of past ballots and retrospectively applying the ballot requirements to conclude that a significant number of those strikes would have failed the TUA requirements.

The problem with using such data is that it is being applied to a different context: one could very well say (though less convincingly) that the high turnout requirement imposed by the TUA will ensure that unions do their utmost to persuade as many members to vote as possible, thereby reducing member apathy. This does not rob the significant empirical research conducted by Darlington and Dobson of its importance. Indeed, the very opposite is true: it can be a valuable yardstick against which to measure voter turnouts for industrial action going forward to see the precise effect of the TUA on the collective labour market in the UK.

The Trade Union Congress (TUC) strongly criticized the Bill before it was passed through Parliament and has continued voicing its grievances against the TUA.[33] Three objections seem especially relevant: (1) the additional picketing

[28] Dukes and Kountouris (n 18) 362.

[29] Bob Hepple, 'Back to the Future: Employment Law under the Coalition Government' (2013) 42 ILJ 203.

[30] Ford and Novitz (n 16) 280-281.

[31] Some may suggest that the requirements to give more information per ss 5-7 TUA improve transparency, but this would be to conflate procedural red-tape for meaningful transparency.

[32] Darlington and Dobson (n 27) ch 6.

[33] Frances O'Grady, 'Trade Unions Bill: Unfair, Unnecessary and Undemocratic' (2015), <http://touchstoneblog. org.uk/2015/07/trade-unions-bill-unfair-unnecessary-and-undemocratic > (accessed 27 January 2017).

requirements; (2) the additional ballot requirements for "important public services";[34] and (3) and the draft regulations to lift the ban on agency workers.

With regards to picketing, the Government's concerns were with "intimidation" and the use of leverage tactics by workers while picketing,[35] purportedly based on evidence submitted to the Carr Review.[36] However, as Mr Carr QC gave his report, he added a warning that the evidence supplied to the Review was "one-sided" and "untested", with the result that he did not state his findings as findings of fact, but rather as a record of the evidence submitted to him.[37] Ostensibly, therefore, the Government has started off with a misstep, much like its objectives discussed in the previous section, but this misstep is a more serious one: under s.220(1) of TULRCA 1992, the only lawful form of picketing is peaceful, which means that the concerns about intimidation while picketing is a non-issue because it is already a criminal offence.[38]

Nevertheless, the TUA introduces union-supervised picketing,[39] and, crucially, requires the picket supervisor to identify himself with the police[40] and wear something that makes the supervisor readily identifiable as a picket supervisor.[41] Arguably, it will be difficult to find enough volunteers to take on this role, especially in the light of the recent blacklisting scandal which left many active union members unable to find jobs because of their union-related activities. Simply put, workers do not have enough trust in the government to ensure that their details and privacy will be safeguarded, and indeed the government has made no firm assurances that it will take steps to do so.

Another major impact that the TUA will have is that it will limit the ability of workers working in "important public services" to strike. These services include health services, education of those aged under 17, fire services, transport services, border security and decommissioning of nuclear installations and management of radioactive waste and spent fuel.[42] Unions in these services will require 40% of those entitled to vote in the ballot to have voted yes. This is a significant hurdle to overcome, one more onerous than voting requirements of referendums and

[34] See n 9 above.
[35] BIS, Trade Union Bill: Consultation on Tackling Intimidation of Non-Striking Workers (July 2015) BIS 15/415.
[36] Bruce Carr, The Carr Report: The Report of the Independent Review of the Law Governing Industrial Disputes (October 2014).
[37] ibid [1.11].
[38] For an excellent discussion on why the government's "evidence was misleading", see Dukes and Kountouris (n 18) 355-359.
[39] TUA s 10.
[40] TUA s 220A(4)(a).
[41] Trade Union Act 2016 (TUA 2016), s 220A(8).
[42] TUA 2016, s 3(2E).

of general elections. Moreover, it has been argued that pre-strike ballots are only compatible with international labour standards, set by the International Labour Organisation (ILO), if they do not present a "substantial limitation" on the means of action open to trade unions.[43] It is not clear why the Government chose not to impose a minimum service agreement between the unions and employers for these "important public services" if their core aim was to ensure that consumers would not be disadvantaged by a strike. A minimum service agreement is one where the union and the employer agree that, should union take industrial action, a minimum service will run during the time.[44] This ensures that a strike does not deprive the general public of any essential services (e.g. ambulances), whilst still giving industrial action teeth because the employer will suffer some degree of economic loss. This should encourage the employer to agree to better terms for the workers. By increasing the voter turnout threshold for pre-strike ballots in disputes involving "important public services", the Government has taken a step towards rejecting any industrial action for these services altogether.

Finally, the requirement that two weeks' notice must be given to the employer[45] will severely limit the effectiveness of the industrial action because the employer will now have time to anticipate and pre-empt any losses that might be incurred.

In sum, it is becoming clear that the UK is an increasingly hostile environment for the development of collective labour law rights. Indeed, the General Secretary of the TUC, Frances O'Grady, has claimed (perhaps rightly so) that the cumulative changes will "effectively end the right to strike in the public sector".[46]

II. An Alternative to Strike Action

There are two reasons why an alternative to industrial action is necessary if we are to ensure that meaningful collective bargaining takes place in the UK. First, the TUA will have the effect of making industrial action all the more difficult to occur in the UK, because "important public services" may well become an unattainable goal, and the onerous notice period requirements may well render many threatened strikes less likely to lead to an agreement with the employer. Secondly, the changing market in the UK, the rise of the "gig-economy" and a call

[43] Bernard Gernigon, Alberto Odero and Horacio Guido, *ILO Principles Concerning the Right to Strike* (Geneva, ILO Office 2000) 25.

[44] International Labour Organisation, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th edn, Geneva 2006).

[45] TUA 2016, s 8.

[46] Ben Tufft, 'Conservatives to "effectively end the right to strike" in the public sector, union leader says' *Independent* (10 January 2015) <http://www.independent.co.uk/news/uk/politics/conservatives-to-effectively-end-the-right-to-strike-in-the-public-sector-union-leader-says-9969693.html> (accessed 29 January 2017).

to synthesize labour law reform under a coherent guiding principle all indicate a need to develop new frameworks to tackle new problems as they arise.[47] But before moving on to the alternatives, it is important to consider whether strikes are the best way to ensure that collective bargaining actually takes place.

Collective Bargaining, Not Collective Action

Otto Kahn-Freund argued that the primary purpose of the law is "to regulate social power",[48] and while that may be a contentious claim for some commentators, one cannot deny that there are exists an inherent tension between the employer—whose main expectation is to ensure maximum profits, and the worker—whose main expectation is to work in a "stable and dignifying" environment. The individual employee is subordinated to the power of the employer, and quite significantly so.[49] For Kahn-Freund, therefore, it is clear: "only power stands against power",[50] and organized labour provides the "countervailing power" against the employer's to ensure that employers treat their workers fairly, and with dignity.[51] For Kahn-Freund, collective bargaining is persuasion,[52] and by bargaining collectively the employer gives effect to its legitimate expectation not to have work interrupted, and the employee has her legitimate expectation of fair conditions of work upheld.

But willingness to bargain is quite different from willingness to agree,[53] and even if the employer is willing to come to the table and negotiate, it would serve no meaningful purpose if the employer refused to concede any requests made by the workers. Since the contract of employment is still just that—a contract—the law cannot force an agreement between the parties (though it can, and does, provide a floor of rights that the employer must respect).[54] It is on the level of persuading an employer to agree to a change in the terms of the employment contract that

47 On this last point see Simon Deakin and Frank Wilkinson, 'The Law of the Labour Market' in Paul Davies, Keith Ewing and Mark Freedland (eds), *Oxford Monographs on Labour Law* (OUP 2005) 342-353.

48 Otto Kahn-Freund, *Labour and the Law* (2nd edn, Stevens & Sons Ltd 1977) 14.

49 ibid 22.

50 ibid 69.

51 Further on the use of the term "dignity", see Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011).

52 ibid.

53 ibid 88.

54 ibid 58. A focus on voluntary collective bargaining and a non-intrusive legal regime is an aspect of what Kahn-Freund called "collective laissez-faire". For further details see Otto Kahn-Freund, 'Labour Law' in Morris Ginsberg (ed), *Law and Opinion in England in the 20th Century* (Stevens & Sons Ltd 1959). For an interesting discussion of the impact of individual rights on the role of trade unions, see Trevor Colling, 'What Space for Unions on the Floor of Rights? Trade Unions and the Enforcement of Statutory Individual Employment Rights' (2006) 35 ILJ 140.

industrial action comes in.

Nobody likes a strike: employers suffer from the disruption of work, consumers suffer as services are disrupted,[55] the economy suffers as productivity is reduced, and the process of organising industrial action is complex for both employees and unions. Many recognise the ability to go on strike to be a necessary feature of the labour market in order to protect the employee. The ECtHR has gone so far as to declare it a part of Article 11, a right that workers are entitled to exercise.[56] However, the ECtHR has wisely refrained from embroiling itself in a political nightmare by refusing to comment on whether a right to strike is a necessary part of the freedom to associate or whether it is contingent on the principles of effective collective bargaining.

Why is the "right of workmen to strike…an 'essential' element in the principles of collective bargaining?"[57] If the answer is that it is essential to give collective bargaining teeth, then it begs the question: why is it essential? If the purpose of a strike is to ensure the employer is encouraged to listen to the concerns of the workers, then surely a strike is a means to an end, and so there may be other means which lead to the same end, perhaps in a manner that does not fundamentally force the employee and employer into an overtly antagonistic position.

The first point to be made must be that we should not ignore the possibility that alternatives to collective bargaining as an underlying concept have been suggested,[58] and indeed when the Webbs first explored the purposes of trade unions in 1894, they identified three equally important and equally likely methods by which trade unions could ensure regulation of the labour market.[59] These alternatives will not be considered in depth because they would require an overhaul of collective labour law in the UK, something which is not likely to happen in the near future.[60] Instead, the focus should be on alternatives that can work within the system of minimal legal regulation for collective bargaining that our current system so prominently enshrines (at least in so far as there is no mandatory obligation for employers to bargain; it is very largely still voluntary).

The second point to be made is that the number of successful strikes that are called has declined.[61] The reasons for this are varied, and differ from year to

55 Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016) 189.

56 See n 5.

57 *Crofter Harris Tweed v Veitch* [1942] 1 All ER 142, 157 (Lord Wright).

58 Sidney Webb and Beatrice Webb, *The History of Trade Unionism* (Longmans, Green & Co. 1894).

59 Simon Deakin and Frank Wilkinson, 'The Law of the Labour Market' in Paul Davies, Keith Ewing and Mark Freedland (eds), *Oxford Monographs on Labour Law* (OUP 2005) 200.

60 For an excellent discussion of the different theoretical views, see Alan Bogg, 'Labour Law and the Trade Unions: Autonomy and Betrayal' in Alan Bogg and others (eds), *The Autonomy of Labour Law* (Hart 2015) 76–106.

61 A.C.L. Davies, *Perspectives on Labour Law* (2nd edn, CUP 2009) 219. On trade union membership

year because of successive changes in government policies, but there is a strong argument to be made that the idea of "partnership" between employers and workers, outlined in the *Fairness at Work* White Paper,[62] has tried to undermine the traditional portrayal of employers in a constant state of conflict with their workers, and to encourage conciliation and dialogue between the unions and employers.[63]

Thus, one argument is that the Government should take more steps to encourage dialogue between workers and employers. This can be done in a number of ways, including the promotion of worker participation in management, and the modification of information and consultation rules so as to encourage a more meaningful exchange of information between unions and employers for the purpose of collective bargaining. Although there have been countries who have done so quite successfully, like Sweden, a country where collective bargaining is pervasive and strike incidence is low,[64] these methods are not alternatives to strikes. Instead, they aim to reduce the need, or incidence, of industrial action.

One alternative to industrial action is the introduction of a national works council to collectively manage certain terms (usually wages) of a category or class of contracts of employment. The example of Germany should serve as inspiration, because, as Addison, Teixeira and Zwick demonstrate, it seems that German works councils have had the effect of promoting higher wages than it situations of voluntary collective bargaining.[65] In general, the rates agreed by representatives at these councils tend not to be disputed, and the need for industrial action is avoided.

The arguments against such a scheme, however, are conclusive. First, the German works councils have very high levels of government support, whereas the necessary governmental or legislative support for such councils is "non-existent" in the UK.[66] Moreover, the works councils manage specific terms of the contract of employment, usually wage-related. Industrial action occurs for a variety of reasons, not just one term of the contract, and in some circumstances, can be simply a show of solidarity in support or against a particular decision taken by the employer. Replacing industrial action with a works council removes this flexibility that accompanies industrial action, flexibility inherent in the idea of collective

density see Organisation for Economic Co-operation and Development (OECD), 'Trade Union Density' <http://stats.oecd.org/Index.aspx?QueryId=20167≥ (accessed 27 January 2017).

62 Department of Trade and Industry, *Fairness at Work* (Cm 3968, 1998).

63 Further, see M. Terry and J. Smith, *Evaluation of the Partnership at Work Fund* (DTI URN 03/512 2003).

64 Nils Elvander, 'The New Swedish Regime for Collective Bargaining and Conflict Resolution: A Comparative Perspective' (2002) 8 European Journal of Industrial Relations 197, 215-216.

65 John T. Addison, Paulino Teixeira and Thomas Zwick, 'German Works Councils and the Anatomy of Wages' (2010) 63 Industrial and Labour Relations Review 247.

66 Indeed, the two periods when such councils were actively introduced in the UK were the two world wars. For a detailed treatment of this topic, see F. J. Bayliss, *British Wages Councils* (Blackwell 1962).

bargaining.[67] One could very well argue that the works council could be introduced to manage specific terms and hence make only those issues fall outside the scope of industrial action, or indeed retain the possibility of industrial action as it stands now. However, there is something to be said about such works councils (assuming they can ensure higher wages) bringing down the total revenue of the employers, as some of their profit will fund the corresponding higher wages.[68] There may well be strong motivation for the employers to resist the implementation of such measures.

III. Compulsory Arbitration

The meaning of compulsory arbitration has always been a subject of debate,[69] but at its core is a simple concept: workers and employers can bargain meaningfully through arbitration processes, and where the option of going on strike is unfavourable (for example for essential services like ambulances) it may be worthwhile to have state-sanctioned arbitration between the parties as a platform for negotiation.

Compulsory arbitration "does not have as its necessary corollary a prohibition against industrial action",[70] that is to say, compulsory arbitration and industrial action are not mutually exclusive: in fact, after the second Great War, a modified version of compulsory arbitration existed[71] (arguably successfully) alongside the right to strike in the UK.[72] Having said that, this paper assumes the higher burden of showing that compulsory arbitration has the potential to wholly replace industrial action, and hence, is a viable alternative to effectuate meaningful collective bargaining. To clarify, the argument is not for any particular type of compulsory arbitration mechanism. Indeed, that would require extensive research into the alternatives available and likely be the subject of a different paper altogether. One must further concede that a sudden overhaul of the system will be unlikely; it will be more attractive to have a system where both compulsory arbitration and the right to strike coexist in the near future.

We could start the argument from case-studies, from States which have successfully implemented compulsory arbitration, Singapore for example, which has its own Industrial Arbitration Court and despite criticisms, is generally seen

67 Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016) 162.

68 John T. Addison and others, 'Do Works Councils Inhibit Investment?' (2007) 60 Industrial and Labour Relations Review 187, 188–189.

69 James A. Jaffe, 'The Ambiguities of Compulsory Arbitration and the Wartime Experience of Order 1305' (2003) 15 Historical Studies in Industrial Relations 1.

70 Otto Kahn-Freund and Bob Hepple, 'Laws against strikes' in Brian Lapping (ed), *International Comparisons in Social Policy* (Fabian Research Series 305 1972) 29.

71 Conditions of Employment and National Arbitration Order of 1940 (Order 1305) LAB 10/547.

72 Carl M. Stevens, 'Is Compulsory Arbitration Compatible with Bargaining?' (1966) 5 Industrial Relations 38, 42.

as a success.[73] But this would be a mistake. The greatest hurdle that compulsory arbitration faces in the UK is the unique social, political, and economic context, and the deep-rooted history of strike action that shapes British politics to this day. From the *Taff Vale*[74] dispute in 1901, to the miners' strikes of 1984-85, to the 2017 Tube strike, large-scale industrial action has been instrumental in shaping the history of political development in the UK. Any suggestion to abolish the right to strike must therefore be taken with a great degree of suspicion. But, keeping in mind the changes in the labour market in the UK, stringent restrictions on trade unions' ability to strike and the general decline of strike activity may well provide the catalyst for change.

Several criticisms can be levelled at compulsory arbitration. The first, and perhaps the most crucial of these, is that compulsory arbitration is not compatible with collective bargaining.[75] The answer to this depends on the kind of compulsory arbitration system being envisioned, and, as Stevens rightly suggests, compulsory arbitration could well have a voluntary element (despite the misnomer of "compulsory") in so far as it may allow unions or employers to "contract out" of the system.[76] Our argument is more succinct: if the focus is on collective bargaining (bringing the employer to the table) then industrial action, or the threat of it, is sufficient, but if the focus is on collective agreement (getting the employer to agree to changes), then arbitration provides an avenue where there is both certainty and (relative) fairness in terms of outcome for both parties. There is no inherent reason why compulsory arbitration rules out collective bargaining, in so far as collective bargaining involves the employer hearing out the requests of the workers (usually but not necessarily) through unions.

Other criticisms which have been put forward include: (1) a greater likelihood of "non-observance" of an arbitral award compared to agreements voluntarily entered into; (2) the "tendency to hold back on any concessions" so as to prevent influencing the award; and (3) the fact that arbitration serves as a "crutch for weak union leadership" who can take shelter behind an award instead of taking unpopular decisions.[77] These problems are only minor when compared to the state of collective labour law in Britain today. Legislative amendments can be made to tackle the non-observance of arbitral awards (including the imposition of criminal

[73] Paul L. Kleinsorge, 'Singapore's Industrial Arbitration Court: Collective Bargaining with Compulsory Arbitration' (1964) 17 Industrial and Labor Relations Review 551, 564–565.

[74] Taff Vale Railway Co v Amalgamated Society of Railway Servants [1901] UKHL 1.

[75] Otto Kahn-Freund, 'Legal Framework' in Allen Flanders and H. A. Clegg (eds), *The System of Industrial Relations in Great Britain* (Blackwell 1954) 101.

[76] Carl M. Stevens, 'Is Compulsory Arbitration Compatible with Bargaining?' (1966) 5 Industrial Relations 38, 42.

[77] Otto Kahn-Freund and Bob Hepple, 'Laws against strikes' in Brian Lapping (ed), *International Comparisons in Social Policy* (Fabian Research Series 305 1972) 30.

sanctions), and the lack of concessions will usually go against the employer's interests in securing a favourable award. Equally, a weak union leader who takes shelter behind arbitral tribunals might be voted out in the next election, so they should not pose a significant concern. Indeed, arbitration is developing rapidly across the globe, especially in cases which concern international contracts, and various arbitration models are being refined and improved. The UK should take notice of these developments, rather than stick to a dated model of collective bargaining in an environment averse to industrial action.

In sum, this paper argues for three main propositions. First, industrial action is likely to be less effective in encouraging a compromise between workers and their employers because of the TUA. Secondly, it is the right of workers to collectively bargain that is paramount, not the right to take industrial action, although the two often intertwine. Thirdly, compulsory arbitration is a dispute resolution model that may well serve as a viable alternative to industrial action. The introduction of compulsory arbitration in certain essential public services may well be more beneficial to protect the rights of workers than the current legislative framework. Over time, it may become the primary mode of collective bargaining in the UK, though perhaps that is looking too far ahead into the future.

IV. Conclusion

To conclude, it is clear that the TUA will have significant adverse consequences on a trade union's ability to proceed with industrial action. These consequences will be more keenly felt in national-level strikes where a massive turnout requirement will be imposed through the TUA, and for jobs that fall within the uncertain boundaries of "important public services". There may be further repercussions on the ability of workers to peacefully picket, and the complex balloting requirements coupled with the substantial notice periods will fundamentally undermine any meaningful strike action to compel employers to bargain with the unions for better terms for their members.

Even with this development, we must not lose sight of the woods for the trees: industrial action gives weight to collective bargaining. Nobody benefits from a strike, especially in circumstances where the employer is not persuaded to negotiate better terms. Lastly, there may be something in the suggestion that alternative mechanisms to induce employers to bargain or come to an agreement should be tested, and compulsory arbitration being one viable alternative.

There is also a hope that the ECtHR will find the provisions of the TUA in breach of the ECHR, or that the CJEU will find them in breach of EU law, and that may prevent the government from dealing a death-blow to the public-sector trade unions.