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The Concept of “Protected Trade Dispute” in the UK Legislation: A (Still and Never-Ending) Fashionable Notion to be Exported to the Continent, Despite “Metrobus” and “British Airways”?!

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Abstract

Although the right to strike is increasingly “populated” by rulings issued by the “international courts” (European Court of Justice; European Court of Human Rights) and doctrinally wielded with passion, particularly in the “Continent”, there might be some reasons to think and affirm that the “Thatcherite” legacy of the immunity from the strike “made in Britain”, enshrined in the relevant 1992 statute and left basically untouched in the ensuing “Blairite” era, is still both valid domestically and viable as a paradigm for legislations across the Channel.

It is déjà vu to read among British scholars that the model of the TULR(C)A is too rigid, particularly in looking at some detailed procedures (eg balloting) which are required to be complied with, for the strike to be legitimately acted upon. However, as this legal analysis of a comparative nature manages hopefully to corroborate, an alternate model of industrial action, particularly the Italian sciopero (strike), inspired to a totally different philosophy (loose legislation and therefore ample power conferred on trade unions) and affected by so many legislative inconsistencies, might suggest the opposite, particularly in light of the serious problems of industrial productivity affecting that country. The British entrenched approach to industrial action, if looked at from this perspective and despite some recent judicial blunders (the “Metrobus” case), may well be a “family jewel” not to nonchalantly dismiss as, save for some minor flaws which are emphasised in this work, no one in Britain is keen to jump from the “frying pan” into the “fire”.

Foreword

In light of the current financial climate, the resultant economic landscape could well constitute a fertile backdrop against which to pose the question whether the right to strike is the most persuasive and effective means of safeguarding employees’ rights or, conversely, whether “softer tools” to the benefit of employees could be envisaged at legislative level, in order to reconcile the rights of employees on one hand with those of businesses on the other.

The quintessential purpose of this work then is to analyse whether the legislative avenue in the matter of industrial action in Britain, “historically” hinged upon the TULR(C)A 1992¹, remains relevant despite the passing of time, or if a revamp is needed in the wake of an inclement financial and economic turn of events.

To this end, the current work revises, by way of comparative analysis, a foreign legislation (the Italian one) where the approach adopted in launching strike action stands in stark contrast to the British one. In brief, and without disclosing the major findings of this discussion as revealed in the conclusions, the Italian approach is based, on the one hand, on a wide-ranging and comprehensive concept of protected trade dispute, *de facto* encompassing also the pure political one and, on the other, on a discretionary power conferred on trade unions in calling the industrial action. These two main features, coupled with the rather regressive form of “democracy” prevailing within the Italian trade union movement (a certification for the trade union to be officially recognised is

¹ *Trade Union and Labour Relations Consolidation Act 1992*, henceforth also the “TULR(C)A”.

still missing in that country)² are questioned in this work as aspects, *inter alia*, contributing to the current financial instability gripping the Italian economy. In addition, a “cautionary tale” may lie therein, sounding an advance warning to Britain should it, for some reason, depart in future from the traditional “spirit” to which its system of industrial action is aligned.

The outcome of this discussion shall undoubtedly elicit interest and surprise in equal measure, as the present work essentially succeeds in corroborating the view that not only is the framework of industrial action in Britain, as enshrined in the TULR(C)A, still valid, despite some arguable rulings more recently adopted at judicial level, but also it represents a set of provisions ripe for “exportation”, *mutatis mutandis*, to the Continent. This is particularly the case in countries afflicted by problems of competitiveness – such as Italy – in order to engender a more fair and modern system of industrial relations, respectful in a balanced way of the rights of employees and employers alike.

In a comparative analysis between two jurisdictions both belonging to the EU, reference shall be made, needless to say, also to the most recent decisions of the international courts, particularly the European Court of Justice and, therefore, the controversial, contrasting stances of that judicial body, as regards the existence itself of a right to take industrial action within the most recent legislation adopted in Brussels³.

The concept of “strike” in Britain: traditional common law approach

At a doctrinal level, with particular reference to the “Anglo-Saxon world”, the possibility itself to deem the right to strike a fundamental right of the individual or even a right to be safeguarded has been in some cases disputed⁴. However, prevailing opinion appears for the moment – at least “quantitatively” – to be blowing in the polar direction with the right to strike steeped in a logic which dictates that the balance of power, undeniably tipped in favour of employers with regard to firing their employees, should be offset exclusively by a power harnessed by the workers to act in concert, thereby enacting a strike.⁵ Secondly, the industrial action must be seen to be an integral cog in the collective bargaining process, thus rendering it irrefutable once the latter has been conceptually recognised⁶. Lastly, from a more empirical perspective, the right to strike,

² Despite the provisions of the Italian Constitution (art. 39, particularly paragraphs 2, 3 and 4, no legislation has never been in order to get the Italian trade unions officially recognised. Among the several commentaries to this Italian peculiarity, see G Ghezzi and U Romagnoli, *Il Diritto Sindacale* (Zanichelli 1997); G Giugni, *Diritto Sindacale* (Cacucci 2001); G Pera, *Libertà Sindacale*, *Diritto Vigente*, in *Enciclopedia del Diritto*, XXIV (Giuffrè Editore 1974) 494 534, particularly 501; from a comparative point of view, S Sciarra, ‘La Libertà Sindacale nell’Europa Sociale’ 1990 *Giornale di Diritto del Lavoro e delle Relazioni Industriali* 653,686.

³ See particularly the following Chapter 2 below.

⁴ O Kahn-Freund & B A Hepple, *Laws against Strikes* (Fabian Research Series 302, London 1972) 4. The substance of this school of thought as well as the opposite one, particularly that of Ben-Israel, is discussed and analysed in depth in S Deakin and GS Morris, *Labour Law* (5th edn Hart Publishing 2009) 890, 891, and hinted in this work in Chapter 2 and 3 *infra*.

⁵ C Grunfeld, *Modern Trade Union Law* (Sweet & Maxwell 1966) *passim*.

⁶ *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435,463, particularly the *dictum* of Lord Wright.

taken as a fundamental human right, unsurprisingly finds little support in countries lacking democracy – a scenario which tends to imply that, *a contrario*, it should be acknowledged in modern democracies⁷.

Yet, despite the enthusiasm of the many and the apathy of the few, caution should be exercised⁸ as such a right is prescribed exclusively in international treaties relating to socio-economic matters, rather than in matters of a civil or political nature; a *caveat* which may be perceived, albeit optimistically, as a possibility for the state to set forth procedural limits, rather than limitations of a substantive law nature⁹.

Said of the conceptual debate surrounding this area of law trans-nationally and turning to the *ius positum*, it is well known that Britain, unlike most other European countries¹⁰, has no right to strike duly legislated. The strike itself remains officially prohibited at common law as there is a duty for employees to complete work given to them by their respective employers¹¹. As a result of the unequivocal rigor of this stance, a breach of contract will inevitably result in cases where an employee decides to go on strike rather than fulfil his contractual obligations¹².

As if to further compound matters, the international “frameworks”, vested with the powers to instigate changes which permeate through to the domestic courts, do not offer great support for an opposing theory to be corroborated.

In fact, with regard to the EU legislation firstly, the same *decisum* in “Viking” adopted by the European Court of Justice¹³ might tenuously and vaguely suggest, on the one hand, that the different jurisdictions in Britain should somehow recognise a right to “strike”, albeit exclusively in matters of EU relevance and competence¹⁴. On the other hand, it is also practically conceded, in a doctrinal sense, that this *dictum*, if analysed in

⁷ Eg The International Covenant on Economic, Social and Cultural Rights guarantees the right to strike, so long as “it is exercised in conformity with the laws of the particular country”.

⁸ S Deakin and GS Morris, *Labour Law* (5th edn n 4) 890,891.

⁹ R Ben-Israel, *International Labour Standards: The Case of Freedom to Strike* (Kluwer 1988) 82.

¹⁰ For instance, in the Italian legislation, the “comparator” adopted for the purposes of this analysis, scholars (A Vallebona, *Istituzioni di Diritto del Lavoro vol I Il Diritto Sindacale* (7th edn CEDAM 2010) 250) take for granted that the right to strike is a discretionary right (*diritto potestativo*) conferred on each employee.

In the same jurisdiction, it is emphasised that the combined reading of an “ordinary” right to strike, as above defined, and some principles existing in the same constitution of that country, particularly Art. 40 (the “right to strike so long as it is exercised within the law provisions aimed to govern it”) and art. 3(2) (principle of equality), means that it can be categorised as “the absolute right of freedom for the defence of fundamental interests of the human being.” (A Vallebona, *op. ult. cit.* 250)

See more extensively Chapter 5 *infra*.

¹¹ Among the others, see more recently M Sargeant and D Lewis, *Employment Law* (6th edn Pearson 2012) 359, 366 and A Emir, *Selwyn's Law of Employment* (17th edn Oxford University Press 2012) 641,643.

¹² See Chapter 3 *infra*.

¹³ *International Transport Workers Federation v Viking Line* [2008] All ER (EC) 127 (Case C-438/05).

The ECJ, in this specific case, held that the union organising the strike, because of the decision of the employer to relocate its activities from one Member to another, was against the employer's right to freedom of establishment pursuant to what was that time Art. 43 of the EC Treaty. Therefore the union might have had a right to strike, so long as this would not have restricted the employer's movement rights.

¹⁴ Cfr. ACL Davies, ‘One step forward, two steps back? The Viking and Laval cases in the ECJ’ (2008) 37 ILJ 126.

It is well known that the “Viking” decision follows the wake of “Albany” (Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, para 54), where the stances of the Court leaning on the recognition of a right to strike were even more tenuous, as basically hinged exclusively on the statement of the Advocate General Jacobs.

its essence, might “restrict in future, rather than facilitate, the industrial action”¹⁵. In fact, the matter still remains debatable and in evolution in this respect; at judicial level, the further cases of “Rüffert”¹⁶ and “Luxembourg”¹⁷, more recently ripened and where the principle of the territorial effect of the national legislation is somehow undermined¹⁸, may corroborate the view that a recognition of social rights, *ergo* the right to strike, is far from being a consolidated trend on the part of the Court, despite the widespread but not totally grounded criticism of the Scholar. In fact, the Court, in somehow hinting at such a right - whose existence at legislative level, at least from the humble perspective of this work, is far from being demonstrated on purely legal grounds¹⁹-, does recognise that the right to the collective bargaining, as well as that to strike, may be subject, in some circumstances, to those limits required under specific rights – particularly economic rights – established in the Treaty.²⁰

In addition to this, the same Chapter of Fundamental Rights of the European Union does little to throw any further light on the matter; in detail, art. 28, in requiring each Member State to recognise the right of both the workers and employers to collective action in cases of conflicts of interest might somehow include the strike of the employees, although it is clearly added – *quoad erat demonstrandum* – that it must be clearly exercised “in accordance with Community law and national law and practices.”²¹ In a work whose purpose is to analyse from a comparative perspective two different jurisdictions in connection to the same concept (the right to strike), a more contentious element is the opt-out regime that (mainly if not exclusively) Britain has exercised, in force of Protocol 30 of the Treaty of the Functioning of the European Union as regards the Chapter. Theoretically, the result of this derogation, partly applicable to Poland, would be the fundamental immunity of the UK national legislation in respect of matters contained in the Chapter, unless it relates to areas already contained in UK national

¹⁵ ACL Davies, *Perspectives on Labour Law* (2nd edn Cambridge University Press 2009) 228.

¹⁶ Case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] IRLR 467.

¹⁷ Case C-319/06 *Commission v Luxembourg* [2009] IRLR 388.

¹⁸ S Deakin and GS Morris, *Labour Law* (6th edn Hart Publishing 2012) 109. See also F Vecchio, 'Dopo Viking, Laval e Rüffert: verso una Nuova Composizione tra Libertà Economiche Europee e Diritti Sociali Fondamentali?' in <http://www.europeanrights.eu/index.php?funzione=S&op=5&id=480>.

¹⁹ Admittedly, what propounded under this work, quite sceptical towards any too much idealistic interpretation of rights not clearly recognised at legislative level, may appear isolated, doctrinally. For example, see: F Vecchio (n 18) 1,13; P Syrpis and T Novitz, 'Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation' 2008 33(3) *European Law Review* 411,426; T Novitz, 'Taking Industrial Action' 2008 7(4) *Comp. L I* 10,12).

See also: U Carabelli, 'Il Contrasto tra le Libertà Economiche Fondamentali e i Diritti di Sciopero e di Contrattazione Collettiva nella Recente Giurisprudenza della Corte di Giustizia: il Sostrato Ideologico e le Implicazioni Giuridiche del Principio di Equivalenza Gerarchica' 2011(2) *Studi sull'Integrazione Europea* 217; D Comandè, 'Il Diritto di Negoziazione Collettiva cede il passo alle Norme Europee sugli Appalti Pubblici: quale Compromesso è sostenibile?' 2011(3) *Rivista Italiana di Diritto del Lavoro* 903; S Giubboni, 'Dopo Viking, Laval e Rüffert: in cerca di un nuovo Equilibrio tra Diritti Sociali e Mercato, in A Andreoni and B Veneziani (eds), *Libertà Economiche e Diritti Sociali nell'Unione Europea* (Ediesse 2009) 121.

²⁰ E Ales and T Novitz, 'Collective Action and Fundamental Freedoms in Europe: Striking the Balance' 2011 40(1) *ILJ* 108,111, particularly in commenting on "Laval" and "Viking".

²¹ S Deakin & GS Morris, *Labour Law* (5th edn n 4) 892.

It is well known that there is an entrenched attitude of the ECJ to use both this piece of legislation and art. 153(5) of the Treaty on the Functioning of the EU with generosity in order “to give content to the notion of ‘general principles’ of the EU law” (Case C-173/99 *BECTU v Secretary of State for Trade and Industry* [2001] ECR I-4881, as recalled in S Deakin and GS Morris, *Labour Law* (6th edn n 18) 108).

laws.²² More practically, because some rights contained in art. 28 of the Chapter had already been elevated to general principles of the EU by the ECJ, the derogation under Protocol 30, “*would appear to be of political or symbolic, rather than legal, significance.*”²³

Finally, in respect to the liaison between the British legislation in the matter of industrial action and a further but different legislative over-layer (the European Convention of Human Rights),²⁴ the possible interpretation of the right to strike as inferable from the principle under Art. 11(1) of that framework, where in reality a mere right of association is recognised, has been quashed - unceremoniously but probably on serious legal grounds - by the British domestic courts. The decision in *National Union of Rail, Maritime & Transport Workers v Serco*²⁵ bears recent testament to lack of room to manoeuvre, although – admittedly – an opposing view expressed by the same European Court of Human Rights in *Demir v Turkey*²⁶ could offer a prospective intellectual inspiration for the national courts of some countries (seemingly not the UK) in the years to come. In this respect, although the position of the UK, for some reason quite isolated in the Continent, seems to be legally justified, the impression the interpreter can get, particularly in contrasting *Schmidt and Dahlstrom v Sweden*²⁷ with the above mentioned “*Demir*”,²⁸ is that the political logic tends to prevail on the legal one, in the same fashion as that emphasised earlier on in describing the evolution of the other judicial body (the ECJ)²⁹.

²² For details of the outcome of the opt-out at stake, see S Deakin and GS Morris, *Labour Law* (6th edn n 18) 111.

²³ S Deakin and GS Morris, *Labour Law* (6th edn n 18) 112.

²⁴ Remarkably, art. 6 of the Treaty of the European Union stipulates that the fundamental rights of the ECHR are *de iure* “general principles” of the EU.

²⁵ *National Union of Rail, Maritime & Transport Workers v Serco Ltd (t/a Serco Docklands)* [2011] IRLR 399. A pendant of “*National Union*” could be *Ministry of Justice v Prison Officers Association* [2008] ICR 702.

In “*National Union*” Elias LJ stated: «[.]. The [domestic] legislation should simply be construed in the normal way, without presumptions one way or the other. The starting point should be that the 1992 Act should be given a likely and workable construction».

²⁶ (34503/97) [2009] I.R.L.R. 766 (12 November 2008). In this court decision, art. 11 is explicitly evoked, for the first time, as a possible avenue to justify the right to strike. In this respect, see: H Collins, 'The Protection of Civil Liberties in the Workplace' 2006(69) *Modern Law Review* 619; A Emir (n 11) 37.

²⁷ [1978] E.C.C. 17 (6 February 1976).

²⁸ In more general terms, the entrenched topic of the "dichotomy and parenthood" existing between social rights and human rights is dissected, among the others, in H Collins, 'Theories of Rights as Justifications for Labour Law', in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) 137; G Kolben, 'Labour Rights as Human Rights' 2010(50) *Virginia Journal of International Law* 449.

A justified criticism towards the "alchemy" of the court to turn into obligations against States non-binding frameworks, particularly the recommendations of the ILO, is expressed by A Perulli, 'Globalizzazione e Dumping Sociale: quali Rimedi?' 2011(1) *Lavoro e Diritto* 33.

²⁹ The threat posed by a *ius positum* bestowed upon the discretionary, unpredictable and mutable decisions of the ECHR, is properly dissected by some commentators (see, among others, V Brino, 'La Giurisprudenza degli Organi di Controllo OIL ed il Dialogo Virtuoso con la Corte di Strasburgo' in S Borrelli, A Guazzarotti and S Lorenzoni (eds), *I Diritti dei Lavoratori nelle Carte Europee dei Diritti Fondamentali* (Jovene 2012).

The “immunity” under the British statute

In this scenario, Britain is frequently accused of offering only limited protection to employees who engage in strike action, from a statutory point of view. In itself, the inducement (by a trade union) to abstain from work and therefore break the contract of employment³⁰ would spark off a liability in tort, unless the legislator did not provide for specific immunities, as it does accord at s 219 of the TULR(C)A 1992.³¹

The long-established common law stance is reflected in the case of *Lumley v Gye*³² and in its eloquent narrative, which addressed the act of inducing a breach of contract. It was eventually held that the claimant - an employer - could successfully sue the defendant - a third party - because the latter was inducing an employee (in this case, an opera singer) to break the contract.³³ The concept has been further elaborated upon in *Allen v Flood*³⁴, whose *ratio decidendi* was that unlawfulness is a further condition which must be met, in addition to the intention to harm, for such a liability in tort to arise. As a result of this, and still from a common law perspective, it is worth noting that trade unions would face claims for damages - as well as an interim injunction to halt the action - from two potentially injured parties. An action could be raised firstly by the employers and secondly by any other person, extraneous to the employer-employee contractual relationship, that might have suffered a loss as a result of the unlawful action.³⁵

Thus, within such rigorous legal confines, there can be little room for doubt - and from a domestic perspective this is fundamentally trite law - that the British trade dispute is ordered to march along a regimented and closely marshalled perimeter where the terms are set in stone, those being that the dispute must be - firstly - exclusively one between workers and employers.³⁶

Secondly, the industrial action must relate wholly, or at least predominantly, to the overarching objective of “collective bargaining”, as per the legislative definition more recently laid out under the TULR(C)A³⁷, specifically under s 244(1)³⁸. Admittedly, this

³⁰ Further hypotheses, *de relato*, would be those set forth under s 219 of the TULR(C)A 1992. See in this respect the explanations of S Honeyball, *Honeyball & Bowers' Textbook on Employment Law* (12th edn Oxford University Press 2012) 401.

³¹ See, doctrinally, H Collins, *Employment Law* (Oxford University Press 2003) 148.

³² (1853) 2 E&B 216.

³³ The rationale behind *Lumley v Gye* is reiterated in the case of *Torquay Hotel Co Ltd v Cousins* [1969] IRLR 331 where it was held that a union official could be constrained by an injunction so as not to induce a fuel supplier to breach its contract to supply oil. It is correctly emphasised by scholars (S Deakin and GS Morris, *Labour Law* (5th edn n 4) 903) that such a liability has expanded more recently insofar as to encompass the inducement to breach a statutory duty as well as to breach an equitable obligation.

³⁴ [1898] AC 1. For an extensive comment, see S Deakin and GS Morris, *Labour Law* (5th edn n 4) 889,1008, particularly 899,900.

³⁵ This is reflected in the *dictum* *Torquay Hotel Co Ltd v Cousins* (n 21).

It is properly affirmed (M Sargeant and D Lewis (n 11) 361) that this court decision expands the principle of Lord Denning MR in *Quinn v Leatham* [1901] AC 495, according to which “*it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for this interference.*”

³⁶ It is s 218 of TULR(C)A that clarifies the unique concept of the dispute as being a “matter” between workers and their employer, therefore the two parties between which the contractual relationship subsists.

³⁷ *Trade Union and Labour Relations (Consolidation) Act 1992*, henceforth the TULR(C)A 1992.

³⁸ It is worth paraphrasing the tenor of the law provision: “*A dispute between workers and their employers which relates wholly or mainly to one or more of the following:*”

requirement is not so simple to decipher, since it may prove troublesome to assess the causation link existing between the industrial action and the areas specified in the legislation and therefore deemed “protected”. In all likelihood, in dealing with an industrial action in the public sector, the matter would turn out to be inherently more straight-forward as the demarcation line existing between a dispute which is politically motivated and one which is “genuinely” economic would appear to be decidedly evanescent, given the “public” nature of the entity in charge of paying the remuneration.³⁹ More recently, the cases of *Unison v Westminster County Council*⁴⁰ and *University College London Hospitals NHS Trust v Unison*⁴¹ may have clarified the gist of a trade dispute “protected” for the purposes of the British legislation. Particularly, in “*University College London*”, the injunction requested by the employer was granted as, it was held, the dispute merely related to a prospective employer (a consortium favourable to the unions because, in contracting the services of the hospital, it would hire the employees previously engaged with the hospital) rather than the current employer. In other words, the dispute did not fall within the meaning of s 244 of the TULR(C)A 1992.

Thirdly and finally, in order that the industrial action be rendered lawful, it must be taken “in contemplation or furtherance of a trade dispute” as illustrated in *Bent’s Brewery Ltd v Hogan*⁴², with the politically motivated trade dispute therefore existing outwith the legal safeguard of the “protected trade dispute”⁴³. In this latter respect, the British legislator, in adopting this “formula” as early as 1992, has clearly encapsulated the *ratio decidendi* underpinning landmark cases, such as *BBC v Hearn*⁴⁴.

Recent British authorities in the matter of industrial action (“Metrobus” and “British Airways”)

As far as the modalities of the strike are concerned, in Britain the trade dispute is not protected if it is not preceded by a ballot. This is clearly prescribed under the TULR(C)A, at s 226, which reads as follows: «An act done by a trade union to induce a person to take part, or continue to take part, in industrial action [...] is not protected unless the industrial action has the support of a ballot [...]»

The subsequent section (s 227) clarifies that the right to strike in the ballot is conferred exclusively on the members of any participating trade unions and only so long as it is reasonable that those members take part in the industrial action at stake.

(a) *terms and conditions of employment, or the physical conditions in which any workers are required to work; [omissis]*”.

³⁹ In actual terms, the political decisions of the government as “employer” sometimes affect the terms of conditions of employment.

⁴⁰ [2001] EWCA Civ 443.

⁴¹ [1999] ICR 204.

⁴² (1945) 2 All ER 570.

There belongs to the same school of thought *Conway v Wade* (1908) 24 TLR 604 with relevant narrative, when a union official informed employees that there would be a strike unless a worker was dismissed; however, the union official did this to try to get the worker fined. It was held that although the dispute existed, the act was not done in furtherance of the dispute.

⁴³ Among scholars, A Emir (n 11) 647.

⁴⁴ (1978) 1 All ER 111.

From an empirical point of view, a certain degree of criticism must be voiced with regard to the judicial attitude directed more recently towards some provisions of the legislation under discussion, particularly those enshrined within the TULR(C)A, although in broad terms the British legislation in the matter of the strike, as encompassed by the TULR(C)A, seems to demonstrate a fair and balanced statutory recourse. In this respect, the discussion may well go beyond the Channel so as to embrace the common law systems *lato sensu* considered.

In Britain, the legal case of “*Metrobus*”,⁴⁵ where an interlocutory injunction was generously granted to the employers to stop what would have otherwise been an inevitable and lawfully organised strike,⁴⁶ is telling in its augmentation of a trend; yet, it represents a partial departure from the decision in “*British Airways*”,⁴⁷ where the principle conveyed by the court was that a minor infringement (in this case the announcement of an imminent strike by the Unions via text and email, rather than via Royal Mail correspondence) could not affect the legality of the process. Despite the more recent judicial developments, “*Metrobus*” would appear to be a *bête noire* which continues to exert considerable influence over the concept of strike action in Britain. In this respect, attention should be drawn to the fact that “*British Airways*” case marks merely a Pyrrhic victory for the unions, as the principle of law favourable to the employees (*ie* the strike not preventable by the employer on the grounds of minor infringements) was only successful at the climactic stage of proceedings (*vis-a'-vis* the Court of Appeal), whereas at the commencement of the dispute (interlocutory stage) the employer had already *de facto* succeeded in stopping the initiative⁴⁸. The “return to the common sense” of the judiciary system, as so eloquently articulated by a scholar,⁴⁹ and not without plausible logical justification, seems to be confirmed by the case of *NURMT (National Union of Rail Maritime and Transport Workers v SERCO Ltd (t/a Serco Docklands)*⁵⁰ where it was held that the invalidation of a ballot is the *extrema ratio* whereas the ordinary approach by the court, to be invoked in cases of minor infringements, is the *de minimis* principle.

The aforementioned cases taken together, although with particular reference to “*British Airways*” at first hearing where the strike was clearly blocked by the judicial body based exclusively on a legal and indeed formal stratagem, demonstrate that Britain may offer a sanctuary from strike action tantamount to the Trojan walls under siege from the Greeks, ostensibly strong but susceptible to being bridged, or rather circumvented, by way of tricks and legal artifices, and with a timing of such speed and agility that Achilles' feat in breaching “*Priam's fortress*” would pale into insignificance.

⁴⁵ *Metrobus v Unite the Union* [2009] EWCA Civ 829.

⁴⁶ The infringement was, based on the motivation of the court decision, both a defect in the information contained in the ballot papers and irregularities in the name of those going on strike, provided to the employer. Tangentially, it was also observed that the unions had communicated the strike to the employer with 48 hour delay, although in reality s 231A of the TULR(C)A mentions more generically the wording “as soon as reasonably practicable”.

⁴⁷ *British Airways v Unite the Union* [2010] EWCA Civ 669. Among the textbooks, a description of these two cases (“*Metrobus*” and “*British Airways*”) may be read in G Pitt, *Employment Law* (8th edn Sweet & Maxwell 2011) 423,424; S Taylor and A Emir, *Employment Law An introduction* (3rd edn OUP 2012) 582,583.

⁴⁸ For the factual circumstances of that dispute, it is worth remembering that the “*British Airways*” strike should have taken place in coincidence with the Christmas holiday 2010/2011, causing therefore mayhem and carnage across the skies of Europe.

⁴⁹ G Pitt (n 37) 427.

⁵⁰ [2011] EWCA Civ 226.

In drawing this Chapter to its conclusion, it is clear that the limitations placed upon strike action are quite strongly defined in British legislation, under a rigorous and precise set of norms. However, to further truncate the entitlements of employees - based on interpretations of the relevant courts which can be deemed arguable and doubtful (from a legal point of view) as well as mischievous (from an economic perspective) and through motivations that are hardly justified *de iure* - would seem to be too quick a step towards, ultimately, a denial of the same *ratio essendi* of the “immunity”. Interestingly, *de iure condendo*, therefore in considering amendments to the current legislative scenario in Britain in this matter, there may be room, as is the case in Italy⁵¹, for law provisions impeding the trade unions from instigating strike action or, better still, from staging trade disputes during “protected periods”, such as Christmas, Easter and other specified holidays. Thus, the strike, in itself legitimate, would be prevented from taking place, albeit having satisfied the balloting requirements, given the widespread damage which it would wreak on a vulnerable public.

Conversely, the idea put forward by some British scholars, particularly in the wake of “Metrobus”, suggesting that the strike “made in Britain” should be radically reformed⁵² does not appear particularly persuasive. In reality, as hopefully demonstrated in this work, the structure of the TULR(C)A seems to have played a significant hand in the comparatively steady wealth accumulated and economic prosperity enjoyed over recent decades in Britain, especially when compared with economies where a rather loose approach to tackling strikes taken by the respective incumbent legislators has meant that any form of business is really problematic⁵³.

The scenario across the Continent

The finalities of the strike in Italy

Based on the black letter of the legislation applicable in this area, strike action in Italy should have been simply “economic” in the same fashion as its British counterpart.

At doctrinal level this is recognised by scholars when they affirm: «The strike in a traditional sense is the economic one for contractual purposes, aimed to achieve an improvement of the work conditions»⁵⁴.

⁵¹ See Chapter 5 *infra*, particularly 5.2. See P Pascucci, *Tecniche Regolative dello Sciopero nei Servizi Pubblici Essenziali*, Utet 1999); A Vallebona, *Le Regole dello Sciopero nei Servizi Pubblici Essenziali* (Giappichelli 2007).

⁵² It has been suggested (J Prassl, 'To strike, to serve? Industrial action at British Airways. *British Airways plc v Unite the Union (Nos 1 and 2)*' 2011 40(1) ILJ 91) that “[...] the detailed and rigid drafting of its formality provisions can in effect be invoked by the employer to precisely the opposite effect”. See also R Duke, R. ‘The Right to Strike under UK Law: Not Much More than a Slogan?’ 2010 39(1) ILJ 82,91).

It may be well counterclaimed that in reality, as the “yardstick Italy” teaches, the problem is not the method (the too many formalities affecting the procedures), rather some loopholes that the legislator has left in terms of legislation. This gap can be filled not via a reform or a revolution of the TULR(C)A, as alleged, rather through an adjustment of the wording of the law provisions currently in force. For instance, as suggested in this work, the provisions that some periods of time, not coincidentally the easy target by the trade unions (*eg* Christmas), are crucial in some specific sectors (*eg* transportation) and cannot be affected by strikes.

⁵³ See following Chapter, with the example of Italy.

⁵⁴ Namely: “*Lo sciopero in senso tradizionale è quello economico a fini contrattuali, diretto ad ottenere un miglioramento delle condizioni di lavoro*”. A Vallebona, *Istituzioni di Diritto del Lavoro vol I Il Diritto Sindacale* (n 10) 267.

This statement is coupled with the assertion that in Italy, just as in any logically developed jurisdiction, the “recipient” of the strike is the employer (at the other end of the contractual spectrum from the employee). Thus, there should not be any reason for a strike to be “infused” with motivations of a different or further variety, *i.e.* political. It is obvious that political strike action does not have any connection with the contractual relationship existing between employer and employee; *ergo* the political strike is theoretically not sanctioned.

However, as the result of a very broad interpretation of the Italian constitution advocated by the same Italian constitutional court, it is a well-established concept in that country that the “political” strike must also be deemed to be legal. More specifically, the reasoning adopted by the highest judicial body in Italy in its entrenched and perpetually endorsed rulings⁵⁵ is that the economic-political strike, for claims raised against public bodies including the government and representing, as it does, the vast spectrum of interests held by employees⁵⁶, must be considered legal. In this respect, the explanation of the constitutional court is that the different rights set forth in that specific part of the Italian constitution are conferred on individuals as employees.

As a result of this, in Italy a long-standing equation has been drawn *de facto* between economic-contractual industrial action⁵⁷ (which is likewise recognised in the UK) and economic-political⁵⁸ industrial action (totally illegal in the UK). The latter then is a strike to which the employer may be – and so often is – subjected to industrial action not because any wrongdoing has been claimed by employees against him, but simply because he ends up being the unwanted third party ensnared in a dispute which is, in reality, between the employees and a public body, for instance the government.

To further endanger the prospects of businesses operating in Italy, it is worth noting that the Constitutional Court has gone yet further in its judgements by recognising, during the '70s, the legitimacy of purely political strike action, thereby giving legal footing to a strike which is not, directly or indirectly, connected to the economic conditions, but whose purpose is exclusively to protest against authority⁵⁹.

From a contractual point of view, the outcome of these judgements emanating from the Italian Constitutional Court gives rise to a certain degree of legal aberration. The “party” entirely extraneous to the subject of the political or economic-political strike

See also M Biagi with M Tiraboschi, *Istituzioni di Diritto del Lavoro* (5th edn Giuffrè Editore Milan 2012) *passim*.

⁵⁵ Constitutional Court, 28th December 1962, n. 123; Constitutional Court, 15th December 1967, n. 141; Constitutional Court, 14th January 1974, n. 1.

⁵⁶ In other words, the interests and rights bestowed upon employees in the part of the Italian Constitution concerned with the “economic relations”, namely title (*titolo*) III of the first part (*parte uno*), more specifically the articles encompassed by from 35 until 47.

⁵⁷ *Sciopero economico a fini contrattuali*. As regards the strike for contractual reasons, G Branca, ‘Riflessioni sullo Sciopero Economico’ 1968(I) *Rivista di Diritto Civile* 151.

⁵⁸ “*Sciopero economico-politico*”, to use the Italian terminology. This would be a strike that is directly political but indirectly economic, as the result of the industrial action is to get either the government or the public authority to change a policy or a direction so that employees may benefit from it, in their own collective agreements. See, among the others, P Calamandrei, ‘Significato Costituzionale del Diritto di Sciopero’ 1952(I) *Rivista di Giurisprudenza del Lavoro* 221; F Santoro Passarelli, *Nozioni di Diritto del Lavoro* (ESI 1994); on the history (in Italy) of the right to strike, G Neppi Modona, *Sciopero, Potere Politico e Magistratura, 1870-1922* (Cacucci 1969); R Nania, *Sciopero e Sistema Costituzionale* (Utet 1995).

⁵⁹ Constitutional Court, 27th December 1974, n. 290. As a result of this, the British case *BBC v Hearn* would be, *mutatis mutandis*, totally legal in Italy, whereas it is quite clear that conclusions would be different in the UK.

(the employer) ends up bearing the brunt of a contractual breach of obligations exercised by his own employees, bereft of any obvious motive of the strike being traced back to him, either directly or indirectly.

Not only: the decisions of the Italian Constitutional Court in the '60s and '70s, in sanctioning any unfettered form of strike action including those of a political nature, appear to have been based, quite arguably, on a very broad interpretation of a principle allegedly contained in the Italian constitution (art. 40), whose black letter simply affirms that the right to strike is exercised within the laws governing it⁶⁰. It is quite clear and logical that, based on the tenor of this law provision, the strike should have been subjected to a law (therefore, not to be exercised in the absence of specific legislation), rather than given over to the “creative” interpretation of the “local” constitutional court. This latter digression has, on the one hand, rendered the ordinary law, to which the strike should have been otherwise subject to, something merely to be tolerated in its absence while, on the other, the expression “right to strike” has been artificially “inflated” and therefore perceived, with unfettered intellectual enthusiasm but with dire consequences for business and foreign investors, as the “absolute” right to strike for various reasons (including for a purely political one) and without the backing of any statutory provision⁶¹. It is therefore mysterious just how the Italian Constitutional Court came to act so differently when dealing with apparently similar issues, on the one hand by blatantly turning a “blind eye” to the lack of legislation governing over strike action while, on the other, opening the floor to such speculative interpretations around the concept of the strike, so as to embrace the purely political form.

Furthermore, it appears contradictory that the constitutional court in Italy has been so quick and enthusiastic to throw its weight behind the right to strike, manifested in entrenched and consolidated judgements and unburdened by limitations or boundaries, while showing scant regard for other rights which originate from the same constitutional chart and which are unduly affected by an expansion of the right to strike. In this respect, it is perhaps naïve to attach a literal reading to the reference in art. 41 of the Italian constitution where it is stated, in the opening paragraph, that private economic activity is free⁶². In comparing the two rights (the right to strike, on one hand, and the right to do business in a free market, on the other) in the most superficial and cursory way, it is clear that the balance between the two has been dramatically altered over recent years so as to render the latter all but neutralised, if not erased, as a result of the expansion of the former.

Limits to the strike in Italy

As alluded to above, the Italian constitution required the legislator, under ordinary law, to legislate over the right to strike. However, this constitutional right in Italy has never been legislated in its modalities, in stark contrast to British statutory advancements in

⁶⁰ Namely: “*Il diritto di sciopero si esercita nell'ambito delle leggi che lo regolano*”.

⁶¹ In Italy there is a very limited legislation in terms of strike, concerned with the industrial action affecting public service, for which a specific previous notice must be given, according to Law n. 146 of 1990. Apart from this specific piece of legislation, no law provision limits and rules the strike. See again footnote 2 and also A Accornero, 'Conflitto, Terziario e Terzi' 1985 *Giornale di Diritto del Lavoro e delle Relazioni Industriali* 17; T Treu and Others, *Sciopero e Servizi Essenziali* (Cedam 1991); F Carinci, *Lo Sciopero nei Servizi Pubblici Essenziali: dall'Autoregolamentazione alla l. N. 146/1990*, 1990(I) *Rivista di Giurisprudenza del Lavoro* 13.

⁶² Namely: “*L'iniziativa economica privata è libera*”.

this regard, particularly in light of the law provisions enshrined within the TULRCA 1992⁶³.

The sole law in Italy which pertains to regulate and somehow limit strike action, albeit in a decidedly superficial manner, is law no. 146, enacted in 1990 and later amended, in 2000, in force of law no. 83. Sadly, it must be acknowledged that the magnitude of this statute cannot be overemphasised, as it applies only to the “indispensable public services” (such as transport, hospitals and so on) and protects the consumer, while ironically refraining from extending the same “courtesy” to the employers!

Also, the structure of the law opens it up to a great deal of criticism and reveals a quite clearly limited and humble ambit, as the rules of conduct imposed on the strikers are hardly exacting. The “basic” requirements include a previous notice; an obligation of written communication of the duration of the strike; the modalities of execution and the motivations⁶⁴. Interestingly, the law establishes a body, *commissione di garanzia*, whose purpose is to carry out functions of moderation and conciliation in addition to levying sanctions, mainly against the unions, in cases where the limits of the law were exceeded. However, the legislation at stake still spectacularly fails to address the main issue plaguing industrial relations in Italy, that being the discretionary and undemocratic power bestowed upon the unions to call a strike, where no ballot is a condition for the relevant “immunities” to be bestowed upon the participants.⁶⁵ No less important is the fact that the issue seems to be particularly aggravated in Italy as trade unionism in that country does not have to undergo a minimal process of certification, as is the situation in Britain⁶⁶.

Conclusions

The discussion conducted, by way of a comparison of two different legislations (British and Italian) with regard to the “ontology” of the strike⁶⁷, seems to have arrived at some surprising conclusions.

First and foremost, the Italian legislative system utilised for the purposes of comparison (with the British) appears to have been entirely manipulated over recent years by a rather too partial interpretation of the constitutional provisions of that country in the matter of the right to strike. The result has left industrial action in Italy unfettered by the reasonable limitations placed upon it in Britain, where strike action is restricted to an “economic” form, because the courts of the country of the “*bel canto*”, endorsed by the same local constitutional court, extended the concept of the strike so as to account for

⁶³ Paradoxically, a country with no formal constitution like Britain has deeply and properly legislated in the matter of strike, whereas a jurisdiction like the Italian one with a constitution delegated to specific ad hoc regulations has never delivered the delegated piece of legislation.

⁶⁴ A Vallebona, *Istituzioni di Diritto del Lavoro, vol I Il Diritto Sindacale* (n 10) 275.

⁶⁵ N Selwyn's, *Selwyn's Law of Employment* (16th edn Oxford University Press 2011) 651. The A. emphasises that “[t]here is no legal requirement which insists that a ballot be called by the union before industrial action be taken. However, a failure to do so will have [some consequences, such as the loss of the statutory immunity under s 219.]” Therefore the demarcation line in the modality of the strike between Italy and the UK appears significant.

⁶⁶ See above footnote 2 as well as, more recently, R Del Punta, *Lo Sciopero* in F. Carinci (ed), *Il Lavoro Subordinato, Vol. I, Il Diritto Sindacale* (Utet 2007).

⁶⁷ The present analysis has not extended, as it could have, to the proper “modalities” of the strike, therefore the ballot.

one of a purely “political” nature. It is possible to deduce from this observation that trade unions on the Continent – and Italy is the paradigm of this extremist approach – act more and more frequently purely out of political motivations, bereft of any democratic background and minus the control which exists in Britain, where unions are subject to certification.

Secondly, in respect to the British approach to industrial action, it can be affirmed, thanks to the comparative analysis proposed in this work, that the system, in its current legislative form, continues to “work” efficiently, despite its “age” and sporadic criticism of doctrinal nature. Firstly, it strikes a reasonable balance between the two principle and contrasting interests on the table, the well-being of the employees, on one hand, and the right of an individual to do business on the other. Secondly, the modalities whereby the industrial action is required to be exercised seem to be respectful of the prerogatives of the trade unions, in a scenario where the rights of the members, through the democratic process a of ballot *et similia*, are nonetheless protected.

From a British perspective, the only perplexity arising out of this brief but thorough examination of the British provisions for industrial action is the “attitude” of the “judiciary” towards the concept in discussion. The recent cases dissected in this work highlight the need for a more pondered and fair approach so that, ultimately, an imminent strike is not reduced to nothing more than farce; in this respect, the *Metrobus* case certainly and sadly *docet!* Yet, a “lifebelt” slung from Italian shores could surprisingly hold the key to addressing this unsavoury state of affairs. The provision in question, introduced in the Italian courts and ‘ripe’ for export to Britain, *mutatis mutandis* states that a strike action cannot be exercised in protected periods, particularly those coinciding with major festivities or national events. This would undoubtedly allow the British judiciary to unshackle itself from a persistent and detestable “legal contortionism” displayed more recently in its *decisa*, *ie* the search for legal stratagems and not totally plausible interpretations of the legislation in order to rule out strikes that, legally, appear above board but, *de facto*, due to their timing, inopportune. Conversely, the idea of a radical reform of the TULR(C)A, more recently considered in the agitated fallout from domestic judicial blunders, such as “*Metrobus*”, whose ultimate purpose would be to drift away from its same philosophy (the formality and legality in the steps conducive to the strike), would seem akin to negotiating a risky departure, through perilous waters and towards an unknown port.

Thirdly, and from a constitutional law perspective, it is a worthy exercise to draw a parallel between the two jurisdictions at stake as regards the way a right (the right to strike) has been left unlegislated in Italy in its modalities, although the local constitution required to this to be carried out⁶⁸; contrasting with this is the more practical and measured approach of the British legislation, where paradoxically industrial action has been regulated in detail despite the United Kingdom having no recourse to a consolidated constitutional chart. From a wide-ranging perspective, the “story” narrated above seems to be a warning for future constitutional developments in Britain, for the reason that the “Italian job”, as regards the industrial action, may be an example of the many inextricable distortions a complex and articulated constitutional architecture may often give rise to⁶⁹. To elaborate, and keeping in mind what happened in Italy, the presence of a constitution, conferring powers on constitutional bodies created *ad hoc* (in this specific case, the Italian constitution and the Italian constitutional court,

⁶⁸ A fundamental piece of legislation (the constitution) not implemented in one of its major principles.

⁶⁹ The example is that of Italy, but the example could be replicated for other continental countries.

respectively), has produced an unclear set of rules which basically obstruct the right to do business (ironically enshrined in art. 40 of the same Italian constitution), whereas in Britain, despite (or thanks to!) the absence of traditional “constitutional pillars”, apart from its consolidated set of laconic constitutional laws, the legislator succeeded in creating a more efficient, clear and probably fair employer-employee relationship, with reasonable boundaries set particularly in the matter of industrial action.

Furthermore, and with regard to the concept of the strike itself, so passionately deliberated over during the past three decades in its “ontology”⁷⁰, the outcome of the analysis carried out in this work does not - and actually cannot - clarify which of the two doctrinally polarised approaches in place to explain the *ratio essendi* of the strike (laissez-faire *versus* idealistic),⁷¹ is the correct one. However, in all likelihood, the failure of the Italian model, a paradigm of the latter, relative to the performance of the British, encapsulating the essence of the former, seems to mark, if not an overarching triumph in war, at least a small victory of strategic importance for the “laissez-faire” approach⁷². Incidentally, the Italian interpretation of the strike, prompted and inflated by “revolutionary idealism” on the part of the judiciary (and the lesson could be learned also from the philosophy displayed in this matter by “international” courts, such as the ECJ and the ECHR!), may suggest that “idealism” in this matter is the source of trouble for an economy and, ultimately, for an entire country.

More critically and speculatively, a question to be asked is whether in future a (new and proper) right to strike should be affirmed and legislated, at international level, with regard to the occurrence of a possible violation at work of equality matters (*ie* protected characteristics such as race, sexual orientation, sex). This new innovative concept of the right to strike, rather than the intellectually wearing and conceptually outdated one (the undemonstrated absolute right to strike connected to the abstention from work within the employer-employee dualism), could be the new “frontier” of industrial action and, in general terms, of the employment law discipline⁷³.

Finally, from a perspective which is no longer legal but purely economic, in a country like the UK, currently basking in its low rate public borrowing⁷⁴, as opposed to a country (Italy) notoriously underperforming in terms of public finance virtuosity⁷⁵, it would be somewhat intriguing to pose a question whether a causation link exists

⁷⁰ See previous Chapter 2 *supra*.

⁷¹ Freund-Kahn versus Ben-Israel, just to simplify the matter according to the relevant most representative supporters of each theory.

⁷² In reality, reference could be made to a more vast scenario extended to non-EU countries, and infer that the laissez-faire approach has definitely “won the war”, not simply the battle. Emerging countries such as the BRICS do not adopt a so accentuated concept of absolute right to strike, and not coincidentally their economies are currently booming.

⁷³ Obviously, because this proposal is adumbrated from scratch, without any literature supporting it, it is legitimate to self-define it as totally speculative, albeit logically justified.

⁷⁴ As opposed to the Italian one, with one of the worst public debt in the world.

⁷⁵ It is quite interesting to note that Italy, in the table of the world countries periodically assessed by the World Bank as regards the parameter of the ease of doing business, currently (2012) enjoys a non-enviable 87th position, with 4 ranks lost in comparison to the previous year (see World Bank for Reconstruction and Development, Doing Business, Italy, *passim*, in <http://www.doingbusiness.org/~media/fpdkm/doing%20business/documents/profiles/country/ITA.pdf>, retrieved on May 21st May 2012). It is reasonable to infer that, if the criteria utilised for the purposes of the assessment (currently administrative burdens and bureaucratic constraints) had included the strike, currently not taken into account, the Italian rank would be even worse. In addition to this, Italy has been entrapped by an “explosive” public debt for at least 25 years, currently cruising towards the non-enviable figures of more than 120% of the GDP.

between these positive achievements on the former side of the Channel, and the legislative system therein employed in the matter of strike action and trade unions, a system left basically unchanged since the early '90s, despite a succession of governments holding office in the interim⁷⁶. Of course, it would be too speculative to conclude that the sole reason for the positive results that Britain is today reaping in terms of public finances is *per se* entwined exclusively within the legislation of the TULR(C)A 1992 and its detailed blueprint on governing strike action. However, to sincerely regard the legislation promoted by the Conservative Government of that time and the battles fought by its incumbent Prime Minister as being a contributory factor is not simply an act of fairness, but one of moral necessity. Thus, in sowing the seeds which have contributed to a bountiful annual public finance harvest, one must give thanks in remembrance: *suum cuique tribuere*, to paraphrase the ancestors, or more prosaically, “God bless the Iron Lady”!

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⁷⁶ The statement could appear simplistic, from a standpoint of a historian of the trade unionism. However, as far as the legal structure of the industrial action is concerned, the statement can be hardly confuted. For in-depth analysis in the matter of the evolution of the industrial action in this matter, see P Davies and M Freeland, *Towards a Flexible Labour Market* (Oxford University Press 2007) *passim*.