INDUSTRIAL ACTION BALLOTS: AN ANALYSIS OF THE DEVELOPMENT OF LAW AND PRACTICE IN BRITAIN

Submitted for the degree of PhD

by

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January 1997

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Table of Contents

List of tables

ABSTRACT

This thesis explores the impact of one particular change in industrial conflict legislation in the 1980s: that is, the requirement for trade unions to hold ballots before industrial action. It does so by analysing the results of an extensive postal questionnaire survey, covering 846 negotiators in 25 unions. This was part of a wider research project on the impact of changes in the law, incorporating interviews with employers and senior National Officers of trade unions. The conclusions in the thesis also draw on these findings.

The fieldwork was carried out in 1991 and 1992. It took into account a number of modifications - notably in 1988 and 1990 - to the original balloting provisions in the 1984 Trade Union Act. The thesis provides an analysis of the impact of the industrial action balloting requirement on trade union practices and the role of balloting in negotiations, looking beyond injunctions and high profile court cases. The thesis is primarily concerned to examine the impact of ballots on the processes of collective bargaining.

It concludes that the effects of the 1984 balloting laws, including their amendments, were far more complex than anticipated or claimed by the Government. Internally industrial action ballots were accommodated by trade unions into existing consultation processes. The potential for ballots to modify substantive decisions within trade unions, by centralising and formalising decision making, was thereby limited. Amendments to the balloting laws increased the difficulties for trade union negotiators in accommodating ballots in the collective bargaining process. Trade union negotiators, however, sought by and large to conduct industrial action in accordance with the balloting laws and, despite an increasingly restrictive legal framework, there was a widespread perception among trade union negotiators in the early 1990s that this could bring negotiating advantage. Generally, it is apparent that industrial action ballots were one aspect of a complex process of sometimes radical change in industrial relations throughout the 1980s.

PREFACE

Research topic

The voluntarist tradition of labour law included those who argued that in the particular circumstances of British industrial relations the law could not, as well as should not, be used as a tool of reform. This related in particular to the reform of collective bargaining or regulation of the use of industrial action. Above all it was argued that the law should abstain from attempts to intervene for the purposes of reform in the internal affairs of trade unions. The autonomy of trade unions and the absence of legal regulation and restriction were key elements of the voluntarist analysis. This was not to argue, of course, that the law could not have other auxiliary purposes, including legislation to promote and extend collective bargaining and to provide certain individual rights both to those within and outside the collective bargaining process.

In 1979 it was still possible to argue that voluntarism reflected the dominant trend within labour law. From the perspective of the early 1990s it could be argued that voluntarism has in many respects broken down, following more than a decade of legislative intervention which has sought - among other objectives - to regulate and restrict not only the use of industrial action, but also the internal affairs of trade unions. It is widely assumed by proponents of this argument that the view that the law could not be used for these purposes was mistaken. On closer examination, however, the experience post 1979 raises interesting questions of a broader nature about the impact of the law, which warrant further investigation of the relationship between labour law and industrial relations practice. The thesis will conduct such an investigation in the context of the introduction of compulsory ballots before official industrial action by the Trade Union Act of 1984.

The thesis explores the role of strike ballots[1] in regulating the behaviour of trade unions, drawing on two main strands of research, which looked firstly at the way in which unions have adapted to a more restrictive legal framework and secondly at the 'use' of the law by employers. Employers' rights of enforcement of the strike ballot provisions of the 1984 Trade Union Act represented a radical shift from earlier proposals and policies on balloting. These had focused on the power of the state to call for a ballot in the context of emergency powers legislation and had rejected the wider use of balloting as a policy option. In 1984 the introduction of a mandatory requirement on trade unions to hold ballots before industrial action, therefore, was to completely change the nature of the balloting requirement. After 1984, trade union immunities from the common law of tort depended on official industrial action being preceded by a lawful ballot.

The 1980s also saw wide-ranging legislation on secondary action and picketing which exposed industrial action outside certain narrowly defined boundaries to economic tort liabilities. Part II of the Trade Union Act should be placed within the context of this industrial conflict legislation, in terms of its intention to circumscribe trade unions' freedom to organise, and work groups' freedom to take part in, industrial action. The balloting requirement was, however, distinct. For the first time measures were prescribed, laying down the way in which trade unions would be expected to consult members over taking industrial action. In seeking to regulate the internal affairs of trade unions balloting was to strike at one of the key principles of voluntarism.

In many respects it could be argued that the 1984 Trade Union Act failed to fulfil the expectations of the 1979 Government. In simple terms, these expectations were to give a voice to the 'moderate majority' within trade unions. Their views were said not to be given expression through existing consultation channels, which were seen to be deficient

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[1]. The term strike ballot is commonly used as a shorthand for ballots on any form of industrial action. In this thesis reference to strike ballots should be understood as referring to any form of industrial action ballot.

and to allow more 'militant' leaders to misrepresent the views of members. By giving members a voice, balloting legislation was expected to contribute to a decline in the incidence of industrial action. This thesis will argue that to claim this, as the Government - supported by some commentators - has done repeatedly, is to misunderstand and oversimplify the way in which the impact of ballots takes effect. The research on which the thesis is based has shown the effect of the legislation on trade unions to be extremely complex. The thesis explores the way in which the impact of the balloting laws has been influenced not only by external environmental factors, such as the economic climate, but also existing procedures and practices within trade unions. This has been explored by looking more closely at examples of trade union government in practice.

Over the 1980s ballots before industrial action were required to conform to an increasingly prescriptive model, following amendments to sections 10 and 11 of the Trade Union Act (1984) in 1988, 1990 and 1993[2]. A draft Code of Practice on industrial action balloting was first published in 1988 and took effect in 1990. It has since been amended, most recently in 1995. The Code goes beyond the law in making recommendations about the way in which ballots should be conducted (Simpson 1995). Nevertheless trade unions have sought by and large - after considerable initial hostility - to operate within the terms of the legislation. The fact that after 1984, Conservative governments returned to the question of strike ballots on three further occasions could be seen to reflect an intentionally incremental programme of labour law reform. It could also be seen, however, as Conservative governments' attempts to secure the results anticipated, but not realised, in the 1984 Act. As they were incorporated into trade union practice, the balloting provisions had led to some quite unexpected - and, from the Government's perspective, unwelcome - results.

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[2]. The balloting provisions are now contained in the Trade Union and Labour Relations Consolidation Act 1992 ss.226-235. The 1993 changes in the law came after the fieldwork for the research was completed.

The fieldwork for the research, which was based on a postal questionnaire survey, provided new information about the impact of strike ballots in the experience of trade union negotiators. The thesis has also been able to draw on wider research, which was part of the same project, on employers' 'use' of the law[3]. At one level, the enforcement mechanisms of the 1984 Act depended on employers being prepared to seek legal remedies. Employers who sought to challenge industrial action on the grounds that a proper ballot had not been held needed to proceed by seeking 'interlocutory relief' from the High Court in the form of a labour injunction. After 1988 individual trade union members also had the right to seek an appropriate court order preventing industrial action from going ahead where a proper ballot had not been held[4]. This provision has been little used, however, and did not in any way diminish the primary role of employers in enforcing the terms of the legislation on balloting. At another level, employers were given opportunities to use the balloting laws in other ways to strengthen their bargaining position. The relative willingness or reluctance of employers to invoke the legislation, in ways beyond injunctions and solicitors' letters, was an important factor in trade union negotiators' experience. Clearly, for employers to use the law was not a decision that could be taken lightly. From an employer's point of view, the unpredictable consequences of resort to the law in the context of a complex dispute could detract from the benefits of threatening or actually seeking legal remedies.

Where employers won injunctions, there was no real issue about the effectiveness of the enforcement mechanisms of the balloting provisions. After 1984-1985 unions almost

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[3]. The research was carried out as part of the work of the industrial relations group of the Centre for Economic Performance at the London School of Economics. The results are reported in Elgar and Simpson 'The Impact of the Law on Industrial Disputes in the 1980s' in Metcalf and Milner (eds) 1993. The research on employers was published in a series of CEP Discussion Papers relating to different sectors: see Elgar and Simpson 1993a, 1994a, 1994b, 1994c, 1994d, 1994e.

[4]. After 1993 a similar right existed for consumers in defined circumstances.

invariably complied if they were faced with a court order. It should be noted, however, that a number of high profile attempts by employers to have the law interpreted restrictively by the courts were on the whole unsuccessful[5]. What the thesis seeks to understand is a wider issue relating to the impact on trade union negotiators of employers' attitudes towards using the balloting laws, which did not necessarily involve legal proceedings. A broad political consensus has emerged on the desirability of a legal duty on trade unions to consult their members about proposed industrial action by some form of ballot. There continues to be a debate about the nature of the detail of that duty. Now that strike ballots look likely to remain an integral part of industrial relations practices, it is particularly important that these issues are fully discussed.

Outline of chapters

The methodology is described in pages 12-19 of this preface. Chapter 1 provides a background analysis of industrial relations in the 1980s, the changing patterns of industrial action and the role of industrial conflict legislation. It goes on to outline the approach taken in the thesis to understanding the impact of industrial action ballots.

Chapter 2, on the historical development of labour law, places the 1980s legislation into the context of the 'voluntarist tradition' of labour law. It includes an analysis of earlier balloting proposals dating back to the 1920s and the role of strike ballots in proposals for labour law reform in the 1960s and 1970s. Most notably these proposals were in the report of the Donovan Commission (1968), the Labour Government's In Place of Strife (1969) and the Conservative policy document Fair Deal at Work (1968). Balloting proposals were implemented by the 1970-4 Conservative Government in its 1971

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[5]. Two of the more important cases in which the Courts refused to be persuaded by employers' arguments were Monsanto v. TGWU [1987] ICR 269 CA, and British Rail v. NUR [1989] ICR 678. See Simpson 1993.

Industrial Relations Act (IRA).

Chapter 3 provides an analysis of the balloting legislation of the 1980s. It begins by outlining the provisions of Part II of the Trade Union Act 1984 and the amendments to these provisions made in subsequent legislation of the 1980s and early 1990s. The chapter looks more closely at the enforcement mechanisms of the balloting provisions of the Trade Union Act 1984. This necessarily raises questions about the role of the courts in interpreting the law because of the complex interplay of forces from statute and common law.

Chapter 4 traces the development of Government policy on ballots in the 1980s. Other literature has marked the change in Conservative governments' philosophy towards the use of the law, reflecting a radical agenda of reform. Chapter four looks specifically at the role of industrial action ballots in public policy within the context of broader Government objectives which were to give new rights to employers, individual trade union members and even 'the community' in the event of actual or threatened industrial action.

Chapter 5 provides an analysis, based on the trade union negotiators' questionnaire, of the impact of the industrial action balloting requirement on trade union practices and procedures. The chapter draws on comparable material from the early and mid 1980s, updating and adding to this information. It highlights the many different ways in which trade unions have accommodated industrial action balloting and, in particular, explores any evidence for centralising tendencies within trade union organisation.

Chapter 6 is an analysis of the role of ballots in negotiations. This draws on union negotiators' own experience - beyond injunctions and high profile court cases - of the practical effect of the law. The chapter also draws on the wider research with employers, which explored the extent to which they were willing to make use of the balloting laws. Chapter 6 concerns the impact of ballots on the process of negotiations.

The conclusions in Chapter 7 focus on the processes whereby the industrial action balloting provisions have taken their effect and what this can tell us about the gap between intention and outcome relating to the role of the law in industrial relations. Chapter 7 also explores the relationship between changes in the process of negotiations, involving the greater use of industrial action ballots, and bargaining outcomes. In this way it seeks to make a contribution to the debate about the impact of balloting on outcomes in collective bargaining. The contribution of this research will, in particular, be to provide more information on the experience of trade union officers, enabling assumptions previously made about the impact of the law to be tested against this experience.

Methodology

Research Design

The objective of the research was to collect systematic information about the role of strike ballots in the experience of trade union negotiators. At one level, this could be used to challenge assumptions which underpinned Government policy, in particular that trade union members would take the opportunity provided by a secret ballot to vote against industrial action. The research design was based on the premise that the introduction of mandatory industrial action ballots did not have the results anticipated by the Government, because these expectations were unrealistic. At another level the information could be used to derive broader concepts to explain in a coherent way how trade unions responded to the requirement to ballot members before industrial action. From this it was possible to draw some general conclusions about the role of the law in industrial relations.

More specifically, the work with trade unions was conceived as a study of trade union negotiators and industrial action ballots, which could contribute to an understanding of the diverse processes by which different unions accommodated the balloting requirement. Of

particular interest was any information relating to changes in the degree of centralisation in union decision-making. The research used the concept of trade unions adapting to - and even adopting - the balloting requirement, to frustrate the Government's intentions.

The broader research project included interviews with employers, which contributed to the overall analysis. It was expected that for their part, employers would be, by and large, circumspect about the potential benefits of invoking the law. They would, therefore, carefully weigh up the benefits, but might demonstrate some reluctance to invoke legal proceedings.

The trade union negotiators' questionnaire used a range of measures to assess the significance of industrial action ballots in the experience of trade union negotiators. These were:

(i) number of ballots held in the previous three years, whether they were workplace or postal, and the extent of unballoted action that had taken place;

(ii) number of ballots won and lost in the previous three year period. This was used as a simple measure of the potential difficulties for trade unions in achieving positive strike ballot results;

(iii) whether negotiators were responsible for organising ballots and the sources of advice, both internally and from outside the union, that were available to assist them. A question also related to how frequently these were used;

(iv) the use of ballots as a means of referring agreements back to members and whether these methods of consultation had changed in recent years. This provided information on the broader role of ballots in trade union decision making and the extent to which trade union negotiators had incorporated balloting into the procedures they used;

(v) the reasons for using ballots rather than other forms of consultation on industrial action[6]. This enabled a comparison of the extent to which different trade unions had come to accept balloting. The greater the prominence given by trade union negotiators to factors other than the law, the stronger the argument that trade unions had adapted their practices to include the balloting requirement;

(vi) situations in which industrial action had been seriously considered but did not take place, whether the dispute was settled in negotiations and whether this had followed a ballot on industrial action. This provided information on the use of ballots in trade union strategies in negotiations.

The measures chosen reflect that this research is primarily an exploration of bargaining processes and the impact of ballots on the underlying power resources available to the parties involved. As noted above, however, some of the most prominent debates about ballots have related to their impact on bargaining outcomes, in particular collective bargaining settlements and the incidence of industrial action. While not offering definitive conclusions, in chapter 7 the research draws on the fieldwork to explore the potential contribution of ballots to changing bargaining outcomes and strike frequency by imposing a new legal dimension on disputes.

The structure chosen for the research was a survey of trade union negotiators carried out by postal questionnaire. It covered 846 negotiators in 25 trade unions (see further below). The broad spread of trade unions was important both because it ensured that the results would have validity and because it enabled comparisons to be drawn, from which significant differences emerged. The information contained in the returns about the structure of the unions and the nature of their membership provided important background information about the variables that could determine these differences. It was possible

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[6]. Responses to this question indicated that ballots were more usually used together with, rather than as an alternative to, other forms of consultation.

to look, for example, at the organisational features of those trade unions in which the balloting requirement appeared to have been less easily accommodated. One factor that emerged was the dispersal of their membership.

It was intended that some of the information collected would be quantifiable, for example negotiators' experience of the number of ballots held over a three year period and those either won or lost. Other information was of a more qualitative nature, seeking, for example, to establish the relative importance of different reasons for balloting. On certain questions, respondents were asked to give details and were also given the opportunity to make comments. This provided a rich source of information, although not of a quantifiable nature. One point of considerable importance emerged from the comments. This was the significance attributed by respondents to factors other than the law in determining their experience of negotiating on behalf of members throughout the 1980s and early 1990s. The framework used to give coherence to these observations was the extent to which they reflected an ability on the part of trade unions and their officers to adapt to and to accommodate the balloting requirement, and to turn it to advantage in negotiations.

Methods of data collection

Contact with trade unions was first made by writing to a senior national officer, requesting the union's participation in the research. The letter was usually sent to the General Secretary, Deputy General Secretary or a senior national officer with special responsibilities for research or legal matters. Contacts at this level were used to obtain documentary information, including union rule books and any advice or guidance issued on industrial action balloting. Interviews with national officers in some 40 unions provided a national officer's perspective. The interviews were also used as an opportunity to gain the union's co-operation with the next stage of the research which was the postal questionnaire.

The research findings reported in this thesis are based on a postal questionnaire survey of 846 union negotiating officers in 25 unions, including 15 of the 23 unions which were reported as having more than 100,000 members in 1991[7]. All were affiliated to the TUC. The unions represented in the survey covered a broad range of public and private sector, manual and non-manual workers. The overall response rate was 58%. The size of the original sample group within each union varied considerably. This was more significant than the response rate in determining the actual number of respondents from each union. The overall findings were, therefore, influenced by the results from a relatively small number of large unions. To ensure that this was fully accounted for the results were in all cases disaggregated to see how each union compared with the overall findings. To assist in the analysis of the results some paired comparisons were carried out between larger unions which shared similarities in the nature of their membership or common employing bodies in which they represented members.

The unions participating in the research were assured of the absolute confidentiality of the information provided by national officers and negotiators. It was agreed that all results would be reported anonymously.

In each case relevant officers, who were defined as the unions' negotiators, were identified with the assistance of a national officer of the union. As the breakdown in Table 1.1 shows, these were predominantly full time officers. For the most part, responses in the larger unions were from district, regional and area officers and reflected their own local experiences. In the smaller unions responses were mostly from national officers. Responses from lay officials came from three unions; the 37 NEC respondents were predominantly in one union, although there were a small number in three others.

Largely for practical reasons, the survey did not seek to include lay officials, except where

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[7]. See Certification Officer Annual Report 1992: Appendix 4.

they took on principal negotiating functions.

Table 1.1 Respondents to the trade union negotiators questionnaire

Full time officers	727
Lay officials	82
National Executive Committee	37
Total	846

Note
In addition, there were ten responses from non-negotiating officers. These were included in the analysis of the general questions in the final section of the questionnaire.

It is important to recognise the limitations of information based on the experience of full time officers, because of the role of lay officials in all aspects of branch work, including negotiations. The extent of full time officer involvement in negotiations varies considerably between unions and bargaining situations. A number of studies have explored the respective roles of full time officers and lay representatives and the relationship between the different levels in trade union government. In 1981 a survey of manufacturing establishments with 50 or more employees, reported that full time officers were often integrally involved in negotiations, although assisting rather than dominating shop stewards. The survey found that the involvement of full time officers depended to some extent on the level at which negotiations were carried out. If negotiations were multi employer they were, not surprisingly, more likely to involve a full time officer[8].

WIRS[3] provided information on the role of full time officers at the end of the 1980s (Millward et al. 1992: chapter 4). In establishments where a trade union was recognised,

[8]. See Brown 1981 69-71.

there had been a decline in the number at which there were lay representatives, from 82% in 1984 to 71% in 1990. It was suggested that this could have led to an increase in the influence of full time officers, especially in smaller establishments. The research concluded that the demands made on paid union officers were greater in 1990 than they had been in 1984, especially in the private sector, involving a much greater involvement in workplace level matters[9]. Other research has confirmed the often close and co-operative relationship between full time officers and lay representatives[10]. In the case of the current research, it was felt, therefore, that a survey of full time officers could provide valid results on the impact of the law.

The trade union negotiators' questionnaire was in four parts. The first part sought background information about the officer's length of time in post, the geographical area that they covered, and the nature and size of their membership constituency. The second part asked respondents about their own experience of disputes, industrial action and the role of the law (if any) in relation to disputes. In this section specific questions on balloting included experience of ballots held where no industrial action followed the ballot. In order to look at ballots in the negotiating situation, it was critical to include situations in which industrial action had been threatened but did not take place. Whilst there are obvious dangers in drawing conclusions of a quantitative nature about the overall incidence of threatened industrial action from this information[11], in this research it had quite a different purpose. This was to explore the influence of ballots on dispute settlements and employers' willingness to make use of the balloting laws in situations in

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[9]. Millward et al., 1992 129-130. It was suggested that the involvement of national (as opposed to regional and other) officers may have reflected the influence on the results of the shorter working week campaign in the engineering industry.

[10]. See further Fosh and Heery (eds) 1990; Kelly and Heery 1994.

[11]. See Brown 1981. In the introduction he referred to his decision not to include threats of action in the survey because 'they are always threatening' industrial action.

which industrial action was seriously considered.

In part three of the questionnaire, respondents were asked about their union's practices in consulting members. This provided further information on the use of balloting in decisions on industrial action and the reference back of agreements. All respondents, irrespective of their experience of organising industrial action ballots, were asked to respond to these questions. Respondents were asked whether they were responsible for organising ballots and whether advice was available to them. In relation to industrial action, questions focused on the reasons for balloting, rather than using other forms of consultation. In relation to broader membership consultation, respondents were asked whether ballots were used and whether there had been changes in methods of membership consultation.

The final part of the questionnaire sought to place the information about negotiators' own experience in a broader context of their perceptions of the extent to which the industrial relations climate had changed or remained constant in the 1980s and early 1990s. Rating scales were used allowing a range of responses - strongly agree, agree, disagree, strongly disagree, don't know. There were five separate questions in this format, including one on industrial action balloting which asked whether respondents thought that ballots had been a good thing for trade unions. Other statements relevant to this study, with which respondents were asked to agree or disagree, were that employers were now more 'hardline', that members were more reluctant to take industrial action, that the law had been the most important factor affecting industrial action in the 1980s and that the law had been an important weapon for employers in their own negotiations.

A copy of the questionnaire is included as Annex A.

CHAPTER 1 THE INDUSTRIAL RELATIONS CONTEXT

1.1 Industrial relations background

The 1980s was a period of, in many respects, contradictory developments in industrial relations. On the one hand were those initiatives loosely grouped under the definition of 'human resource management' which were highlighted with approval in the introduction to Government's February 1987 Green Paper, Trade Unions And Their Members:

> well designed disputes procedures, greatly reducing the likelihood of industrial action, together with improved status and security for workers, often going hand in hand with full job flexibility. There is the increasing recognition by employers of the importance of communications and employee involvement (Department of Employment 1987, para 1.5).

This strand of thinking - to promote reform and good practice in industrial relations - had a long history within the Conservative Party. It was seen, for example, in Fair Deal at Work, the Conservative Party's policy statement on industrial relations published in 1968:

> ..in the rapidly changing conditions of industry there is a particular need for greater communication and consultation between management and employees, management and unions, and between unions and their own members (Conservative Party 1968 p.10).

On the other hand, what is also clear is that in the 1980s for many workers job security was undermined by the increasing use of short term and part time contracts. Insecurity was underlined by severe recessions at the beginning of the 1980s and early 1990s, bringing large-scale redundancies in many sectors of the economy. There were high and rapidly rising levels of unemployment in these periods. Workers in some sectors were particularly hard hit. In the engineering industry, for example, even the upturn in production in the mid/late 1980s did not lead to a reversal of the decline in employment

in the industry[1]. In the late 1980s and early 1990s there were an estimated 500,000 job losses in construction[2]. In the financial services sector 100,000 job losses were said to have been implemented over the period of the early 1990s.

Workers' feelings of insecurity may also have derived from the rapid and far-reaching changes that were implemented, both in response to new technology and to meet the pressures of increasing competition. WIRS[3] - based on fieldwork in 1990 - noted a dramatic change in workplaces over the ten years since the first WIRS survey. The original WIRS study had reported a rapid diffusion of micro-electronics in manufacturing in the early 1980s; in 1990 the rate of change continued to be high. Other substantial changes, not involving new equipment or machinery, were also common. Managers in more than a third of establishments reported that changes to working practices had been made (Millward et al. 1992, 334). The theme of ACAS reports over the 1980s[3] was that there was little opposition from the workforce to changes brought about by new technology. There was much more likely to be opposition to straightforward organisational changes in the workplace. Often, however, the two issues could not be separated. The ACAS Annual Report for 1985 noted that fierce competitive pressures on industry and commerce, combined with the opportunities provided by new technology, led

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[1]. See Engineering Employers' Federation Economic Trends published in the Spring and Autumn each year. Figures from the Spring 1991 show that total engineering employment was as follows:

Year	Employment (000s)
1979	3,156
1980	3,002
1985	2,196
1988	2,107
1989	2,099
1990	2,070

[2]. Union of Construction Allied Trades and Technicians (UCATT) Kickstart (n.d.)

[3]. See, for example, ACAS Annual Report 1986, Chapter 1.

management to continue to seek increased flexibility in the use of labour. As a result, a significant upturn in the economy was accompanied by a continued rise in unemployment. There were many examples of co-operation, but also the potential for conflict over technological change and other changes in working practices throughout this period.

Despite the emphasis on communication as part of a human resources strategy, there is a considerable amount of evidence that organisations in the public and private sectors were involving trade unions less rather than more in decisions. At an extreme this could involve trade union derecognition (Gall and McKay 1994). More common than derecognition, especially in the early 1980s, was a narrowing of trade union involvement. It appears that full time trade union officers were consulted much less frequently than they had been in the past (Millward et al. 1992 chapter 2). In the survey of trade union officers on which this research is based, there was an overwhelming view that employers' attitudes towards trade unions had changed and that employers had become more 'hardline' in their dealings with trade unions (Elgar and Simpson 1993b). Many comments reflected this experience, including respondents from areas, such as the public services where in the past joint consultation and negotiation with unions had been central tenets of employees relations policies:

> The [1980s] have meant a toughening up of management, a diminished role for trade unions in the public sector, with management consulting less.

On the question of trade union recognition, WIRS[3] found that workplaces with a recognised trade union for manual workers in private manufacturing declined from 65% in 1980 to 44% in 1990. This was largely accounted for by a decline in four sectors; three in engineering and vehicles, the fourth being printing and publishing. In private services there had been a substantial decline in trade union recognition in three sectors, including transport. Newer workplaces in the private sector were found to be less likely to have a recognised trade union. In the public sector, a decline in workplaces with a

recognised trade union was largely accounted for by the removal of negotiating rights from teachers. Whilst WIRS[3] suggested that there had been an increase in derecognition in the later 1980s, which had played a more significant part than in the early 1980s in the decline in the extent of trade union recognition, it reported that derecognition did not take place on a large scale. Similarly the ACAS Annual Report for 1989 concluded that the number of recognition issues in collective conciliation cases had increased, but that whilst it was difficult for unions to achieve new recognition arrangements, derecognition continued to be rare, with the exception of P&O, the Port of London Authority and cases in the newspaper industry (ACAS 1990, chapter 1)[4]. The 1989 ACAS Annual Report went on to note that industrial action over recognition issues was almost unknown. Based on a survey of trade unions in 1992, Gall and McKay found that the rate of derecognition increased in the late 1980s and early 1990s. 'Many more' groups of manual workers were affected, but derecognition remained 'marginal and insignificant' outside a few sectors (Gall and McKay 1994)[5].

Where trade unions continued to be recognised, there had been far-reaching changes in negotiating arrangements. These were linked in many cases to the devolution of some decision making within management structures in both public and private sector organisations, although this was often combined with tighter central budgetary controls. These developments were accompanied by a move away from centralised collective bargaining[6]. In the early 1990s there continued to be sectors in which industry wide bargaining remained intact, but these were the exception. The most notable examples were shoe manufacturing and general printing. Throughout the 1980s national bargaining

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4. Cf. ACAS 1988 chap 2 which reported on the difficulties for trade unions in securing recognition and the small percentage of cases referred for collective conciliation - 25% of cases in 1987 - which resulted in some form of recognition being granted by employers.

5. Cf. Smith and Morton 1990 on union derecognition in the provincial newspaper industry.

6. See ACAS Annual Reports spanning the early and later 1980s, which reported a continuing move to company and establishment level bargaining, especially ACAS 1984, 14 and ACAS 1990, 7-8.

arrangements came to an end in a number of sectors, including water, independent television, regional and national newspapers. Employers often expressed a wish to simplify bargaining arrangements. WIRS[3] found that in manufacturing the continuing move away from multi-employer bargaining over pay had been partly offset by an increase in plant bargaining. In private services - where bargaining hardly ever took place at site level - the result had been a substantial rise in single employer multi-site bargaining. In the public sector there had also been a move towards local pay-setting arrangements, although there was only limited devolution of bargaining over pay in comparison with the private sector (Millward et al. 1992, 233). In their study of pay bargaining in the public services, Bach and Winchester concluded that:

> During the 1980s Conservative governments achieved only limited success in encouraging decentralized pay determination in the public services (Bach and Winchester 1994, 278)[7].

Towards the end of the 1980s WIRS[3] also recorded more fundamental changes in levels of bargaining over pay in all sectors, leading to a decline in the coverage of collective bargaining. In the public sector, this followed the introduction of pay review bodies in the health service and abolition of the teachers' negotiating machinery. In manufacturing:

> the results do not show a movement from multi-employer to enterprise bargaining in manufacturing, but rather a change from multi-employer bargaining to no formal bargaining over rates of pay (Millward et al. 1992, 224).

Overall there had been a significant decline in the coverage of collective bargaining from 71% of employees covered by the WIRS survey in 1984 to 54% in 1990. This had taken place across both the private and public sectors. By 1990 collective bargaining took place

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[7]. For an analysis of the future prospects for local pay determination in NHS Trusts see Corby 1992.

in fewer than half of establishments in manufacturing; in the public sector the decline in collective bargaining was associated with far-reaching organisational changes[8].

In other respects, however, trade union influence in the workplace was maintained. The results from WIRS on pay negotiations may overstate the decline of trade union influence in the workplace. Between 1984 and 1990 WIRS[3] recorded little change in the amount of reported negotiation over non pay issues (Millward et al. 1992, 253). Trade union officials continued to be widely involved in procedures for resolving disputes - over pay and conditions, disciplinary matters and grievances. This was true even where there was no formal recognition for trade unions[9].

The 1980s was also a period of fundamental change in public policy. New policy objectives, which were antagonistic to established traditions of industrial relations based on collective bargaining and a role for trade unions, increasingly characterised post 1979 Conservative governments. The full expression of this approach took time to develop, but it was clearly not the policy of Conservative governments in the later 1980s to promote collective bargaining:

> There is every reason to be confident that by the end of the 1990s we will have moved decisively away from the collectivist pay arrangements which restricted individual choice and damaged employment growth, to a situation where the pay of the great majority of employed people will reflect their individual contributions at work (Department of Employment 1992, para 4.16).

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[8]. See, for example, Financial Times 5.7.94, reporting on Government plans for the end of centralised collective bargaining and the introduction of personalised contracts for 2,000 civil servants at grade 5 and above, whose terms and conditions had previously been the subject of collective bargaining.

[9]. Millward et al. 1992 chapter 6, especially 194. A decline in the influence of full time officers was recorded, however, in relation to loss of recognition.

The culmination of this change was seen in 1993 when the remit of ACAS was changed to remove the promotion of collective bargaining from its terms of reference. The new approach provided a strong contrast with the widely-endorsed approach of the Donovan Commission (Donovan Commission 1968, para 224). In its role as employer the Government reflected this change: WIRS[3] reported that the proportion of workplaces in central government where managers said that management strongly recommended trade union membership for all employees halved between 1984 and 1990 (Millward et al. 1992, 361).

The role of trade unions, therefore, had to evolve in response to the challenges that they faced. There was a steady decline in trade union membership in the 1980s, which accelerated into the early 1990s. Some commentators argued that much of this could be attributed to the decline in areas of employment in which membership of unions had traditionally been strongest. Information from the WIRS[3] study, however, suggested that there was also a substantial drift away from trade union membership among workplaces that continued to have recognised trade unions, especially those where trade union membership density was low. WIRS[3] concluded that while the overall decline in trade union membership and recognition was largely accounted for by major shift away from employment in manufacturing and the widespread closure of large manufacturing plants, especially in the early 1980s, the drift away from trade union membership was becoming an increasingly important factor[10]. A study by Freeman and Pelletier argued that structural changes in the economy in the 1980s could not be used to explain the decline in trade union membership, which had continued to grow in the 1970s despite similar structural changes[11].

The way in which trade unions responded to the difficulties experienced in the 1980s

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[10]. Millward et al. 1992, see especially chapter 3 and concluding chapter.

[11]. Freeman and Pelletier 1990 attributed 'the vast bulk' of the decline in trade union membership to the 1980s legislation. For a criticism see Disney 1990.

depended on a variety of factors. These included the sectors in which they operated; the size and nature of their membership; union structures, policies and the composition of their executive committees; and their financial stability. Some trade unions successfully penetrated new areas of potential membership growth, but others failed in a number of high profile attempts. All unions, however, found their resources stretched. At the same time as membership was declining, many faced the need to respond to more decentralised management structures in the public and private sector, with the emphasis on line managers taking responsibility for day to day industrial relations decisions. The negotiating structures within which trade unions had traditionally worked were often becoming fragmented. Trade unions increasingly needed to be able to equip their officials for local level negotiations, which was a new challenge, especially in the public sector[12]. A recent threat to the resources of all unions has been posed by the requirement for unions to obtain members' written authorisation of the 'check-off' of subscriptions by employers every three years, following the Trade Union Reform and Employment Rights Act 1993. A common response in the face of these challenges was for unions to seek to pool their resources and running costs, leading to a number of notable union amalgamations, as well as closer working arrangements (Willman et al. 1993).

1.2 Changing Patterns of Industrial Action

These developments were reflected in the changing patterns of industrial action in the economy. The response of trade union negotiators to the balloting legislation needs to be seen against this background. A reduction in the overall extent of industrial action was seen to have been brought about by workers' fears for their job security in an uncertain economic climate. Job losses and redundancies were major issues in the early 1980s, but

[12]. See Corby 1992, who refers to restrictions on the role of trade union full time officers in NHS trust agreements.

industrial action was not necessarily an appropriate response[13]. In 1985 ACAS Annual Report highlighted the lowest recorded incidence of industrial action since the 1930s in manufacturing and private services (ACAS 1986). In the public sector, compulsory competitive tendering for the provision of services led to major job losses among manual workers and undermined any realistic expectations of job security. This was not reflected, however, in high levels of industrial action over these issues among these groups of workers. While ACAS figures on collective conciliation cases confirm that job losses and redundancies were an important issues in dispute, especially in the early 1980s, comparative WIRS data spanning the decade showed a substantial increase in the relative importance of pay as a strike issue for both manual and non-manual workers[14].

The survey of trade union negotiators in 1991-2, on which this thesis is based, showed that where industrial action had been seriously considered in the previous three years, nearly three quarters of negotiators (73%) said that pay had been an issue in the dispute(s) concerned. Issues relating to changes in working practices were referred to by 44% of respondents. Job losses and redundancies were reported as issues in dispute by just one third of respondents[15].

Official statistics published by the Department for Education and Employment use three

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[13]. See, by contrast, Brown 1981. The 1976-77 Warwick survey found that those plants reporting a cut in the labour force, short time working or other measures to reduce hours and any fall in market demand were more likely to report industrial action.

[14]. Millward et al. 1992, chapter 8. It should be noted, however, that manning and work allocation issues had led to increasing action short of a strike, largely in the public sector (see WIRS[3] Tables 8.3 and 8.4), which could reflect disputes arising from compulsory competitive tendering.

[15]. Elgar and Simpson 1993b. There was little significant difference between the issues reported in relation to strike action and action short of a strike. Strike action was more likely to be considered over pay and action short of a strike over changes in working practices, but the differences were not generally large.

main measures of the patterns of industrial action: number of strikes, number of workers involved and working days lost[16]. It is well-established that official strike statistics provide an inadequate measure of actual industrial action not least because of the under-recording of eligible strikes (Kelly and Nicholson)[17]. Moreover, official statistics measure strikes only above a minimum size and duration. They exclude short stoppages. Whilst it may be argued that any under-recording is likely to be consistent over time and, therefore, that patterns will be an accurate reflection of how the size and frequency of strikes have changed, the magnitude of under-recording could be very significant. Some comparisons have been made between official statistics and other survey material. Paul Edwards compared official statistics for 1978 with the Warwick survey of manufacturing industry which covered a similar period. Whereas official statistics suggested that over a three year period 5% of manufacturing plants had experienced stoppages, the Warwick survey recorded at least one strike over the previous two years in 33% of plants. They were overwhelmingly strikes of very short duration[18].

Official data also masks differences between industrial sectors. WIRS[1] reported that there was a wide variation between broad industry groups as to whether strikes of one day were a good indicator of all types of industrial action (Daniel and Millward 1983, 228). Official statistics were found to be a particularly inadequate measure in the case of local and national government, food and chemicals, textiles and clothing, miscellaneous manufacturing, and health and education services. The omission of action short of a strike from the statistics concealed, in particular, the considerable use by non-manual workers of non-strike sanctions. These findings have important implications for the application

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[16]. For the most recent annual figures for 1995 see Labour Market Trends June 1996.

[17]. See also Brown 1981, chapter 5. In this survey of manufacturing establishments carried out in the late 1970s it was estimated that official figures recorded 62% of eligible strikes and 96% of working days lost.

[18]. See Edwards in Bain (ed) 1983, 226-7. 29% of plants reported action short of a strike in the same two year period, bringing the total of plants that had experienced some form of industrial action to 46%.

of the law to industrial disputes. Moreover doubts have related to the limitations of information based exclusively on management reporting. The WIRS studies found that there was a notable discrepancy between the information provided by management and trade union respondents relating to cases of industrial action[19]. An important question in the study of industrial conflict is how certain workplace activities come to be defined as strikes. This is a problem not just with official statistics, but with all survey material which seeks to quantify features of industrial action, without drawing on a case study approach[20].

Whilst these criticisms need to be borne in mind, official statistics provide an important starting point for understanding Government claims about the impact of changes in the law on the incidence of industrial action (see Table 1.3).

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[19]. Daniel and Millward 1983, 13. It is interesting that reliance on management reports was seen in particular to underestimate the extent of non-strike action by non-manual workers, chapter 9.

[20]. For a discussion of this point see Edwards and Scullion 1982, 226, 237.

Table 1.3 Official strike statistics 1976-1995

YEAR	WORKING DAYS LOST (MILLION)	NUMBER OF STOPPAGES	WORKERS INVOLVED (000s)	DAYS LOST PER 1,000 EMPLOYEES
1995	0.41	235	174	19
1994	0.28	205	107	13
1993	0.65	211	385	30
1992	0.53	253	148	24
1991	0.76	369	176	34
1990	1.9	630	298	83
1989	4.1	701	727	182
1988	3.7	781	790	166
1987	3.5	1,061	887	164
1986	1.9	1,074	720	90
1985	6.4	903	791	299
1984	27.1	1,221	1,464	1,278
1983	3.8	1,364	574	178
1982	5.3	1,538	2,103	248
1981	4.3	1,344	1,513	195
1980	12	1,348	834	521
1979	29.4	2,125	4,608	1,273
1978	9.4	2,498	1,041	413
1977	10.1	2,737	1,166	448
1976	3.3	2,034	668	146

Source: Employment Gazette/Labour Market Trends

Notes:

[a] Average WDL 1979-88 = 9.7m; 1969-88 = 10.2m.

[b] Average number of stoppages 1979-88 = 1,271; nearly all lasted less than 4 working days. In 1989 it was reported that 701 was the lowest figures recorded for stoppages since 1935; nearly half (49%) lasted less than 1 day.

[c] Average number of workers involved 1972-81 = 1.6m; 1979 - 1988 = 1.43m.

There were a rising number of disputes and working days lost in the 1960s. The table shows a high and fluctuating number of disputes and days lost in the 1970s, which have been associated with rising unemployment, high inflation and the impact of incomes policies[21]. The 1980s as a whole saw a return to the pre-1979 levels of strike activity, with the exception of 1984 during the miners' strike. International comparisons indicated that the relative strike incidence of the UK changed little throughout this period[22]. The early 1990s brought historically low levels of industrial action, which have been maintained to date.

The WIRS studies complement official statistics, using a different measure of industrial action. Whilst official statistics measure the frequency of strikes, without attention to the number of establishments, the WIRS studies measure the extent of industrial action, according to the number of workplaces affected. Thus between 1980 and 1984 WIRS recorded a slight increase overall in the number of establishments affected by industrial action from 22% to 25%, when official statistics showed a significant decline in the frequency of strikes (Millward and Stevens 1986, Chapter 10). WIRS[3] reported that between 1984 and 1990 there was a significant decline in the extent of industrial action. The overall number of establishments affected by industrial action by manual and non-manual workers was 12% in 1990, compared to 25% in 1984. The study reported that

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[21]. See Metcalf and Milner 1991. This analysis showed the 1970s to be out of line in terms of the incidence of strikes over the hundred year period 1890s to 1990s.

[22]. See the annual article 'International comparisons of industrial disputes' in Labour Market Trends/Employment Gazette. International comparisons need to be treated with a considerable amount of caution.

whereas in 1979-1980 almost one third of manufacturing establishments had been affected by industrial action this had declined to one in ten by 1989-1990 (Millward et al. 1992, 278).

A significant feature of the 1980s was a shift in the incidence of industrial action away from areas of the economy which previously had high levels of disputes, such as motor manufacturing and mining, to those areas, in particular white collar public services, where industrial action in the 1970s was a rarity[23]. There is evidence that as their traditional bargaining strength was undermined, trade unions in manufacturing sought to build more co-operative relations with employers. By contrast in the public sector expressions of conflict increased. The Government was determined to reduce the size of the public sector and to bring about fundamental structural changes to 'commercialise' its operation. One early manifestation of the Government's attitude towards industrial relations in the Civil Service was the abolition of pay research with effect from 1981, to be replaced by an emphasis on ability to pay and market forces criteria (Blackwell and Lloyd 1989). Unprecedented industrial action in the Civil Service was borne by the government in 1981. A 1981 TUC report on the Health Service commented that whilst the level of industrial action should not be exaggerated and that there continued to be fewer working days lost per worker than in any other industry:

> industrial action has been taken in recent years, in one form or another, by virtually every major group of staff in the National Health Service from ancillaries to consultants. Staff who, not many years ago, would have never considered industrial action have been directly engaged in major disputes in recent years (TUC 1981, paras 1.17-1.18).

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[23]. Donovan 1968, para 399, highlighted four main strike-prone industries - coalmining, docks, shipbuilding and ship repairing, and motors. Cf. the chapter by Edwards in Edwards (ed) 1996 in which he explores explanations for the decline in industrial action in three of these sectors: coal, the docks and the car industry.

The Government's perception of the 'strike problem' was deeply affected by these sectoral changes in industrial action. The WIRS studies confirmed the shift in the locus of industrial action from manual to white collar workers and from the private to the public sector[24]. Towards the end of the 1980s, the incidence of industrial action in the public sector fell in common with the private sector, but it continued to remain at a higher level than in 1980 (Millward et al. 1992, chapter 8).

There were also changes in the relative importance of strike action and action short of a strike. This in part reflected sectoral shifts in patterns of industrial action, although other factors were also significant[25]. The first WIRS study found that in 1980 strikes and action short of a strike were equally common among manual workers. WIRS[2] reported that, during the period 1980-1984, short, local strikes seemed to be replacing action short of strike action for manual workers:

> This is consistent with the view that trade unionists may be resorting to a form of 'cut price' strike action in the mid-1980s as being the most efficient sanction rather than longer strikes, which may be effective but costly to organise, and non-strike sanctions, which are less costly but less effective (Millward and Stevens 1986, 273).

By 1990 action short of a strike was predominant in manufacturing establishments. These findings were supported by research using the CBI databank, which found that trends were driven by one form of action short of a strike, the overtime ban (Milner 1993). In the public sector, however, the WIRS studies reported that whereas in 1979-80 there was a preference for action short of a strike - especially overtime bans and work to rule - by

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[24]. Sectoral shifts in industrial action and the changing balance between manual and white collar workers also affected the extent of official and unofficial action. See Millward and Stevens 1986, 278-80.

[25]. The 1978-1979 Warwick survey of manufacturing establishments concluded that action short of a strike became a less powerful weapon in the 1970s because of relatively high and rising levels of unemployment. See Brown 1981, 83.

1990 strike action was more common. This was especially true of local government, central government and transport. By the late 1980s, the concentration of industrial action in the public sector meant that longer strikes accounted for a larger share of industrial action than previously.

Overall, however, WIRS[3] concluded that there had been a widespread and substantial decline in industrial action over the 1980s, which affected both strikes and action short of a strike:

> Contrary to what has sometimes been assumed, non-strike forms of action were not being substituted for strikes (Millward et al. 1992, 309).

By way of concluding this section on the changing patterns of industrial action, it should be noted that the 1991-1992 questionnaire survey of trade union negotiators, on which this thesis is based, suggested that trade union members across a broad range of sectors had taken part in industrial action in the years 1989 to 1991. Almost two thirds of all respondents said that some of their members had taken industrial action during this period. 87% of negotiators concerned said that industrial action had been seriously considered, at least on occasion, in disputes during the previous three years. For a significant number of negotiators, therefore, industrial action continued to be a live issue in the late 1980s and early 1990s, even if its overall extent had declined (Elgar and Simpson 1993b).

1.3 The 'strike problem' and the role of industrial conflict legislation

The nature of the perceived 'strike problem', therefore, changed over time and with it, successive governments' objectives for legislation in the area of industrial conflict. At the time of Donovan, there was little mention of industrial action in the public services, which came to be of central concern to legislators by the end of the 1970s. In the 1960s and early 1970s short-lived, unofficial industrial action in the private sector, often without

notice to the employer - and 'unconstitutional' in terms of being in breach of negotiated procedure agreements - was identified as the 'British problem'. This was given its clearest expression in the report of the Donovan Commission in 1968. The context had been a rapid growth in shop steward organisation, especially in the engineering industry:

> This was a period in which the public perception intensified of an industrial relations problem consisting of the inability of trade unions to control or channel into constructive form the shop-floor militancy which was causing more and more unofficial wild-cat strikes, and hence delay in delivery of orders which was fundamentally weakening the manufacturing economy and destroying foreign confidence in British exports (Davies and Freedland 1993, 241).

It was estimated that 95% of stoppages were unofficial. They were also showing an upward trend in the years immediately preceding the establishment of the Royal Commission, which was of concern[26]. This was an analysis which was supported by the two major policy documents of this period: Fair Deal at Work, the Conservative party's policy document, published in 1968 and In Place of Strife, the Labour Government's White Paper, published in 1969. Fair Deal at Work argued that:

> Britain is in a unique position in that over 90% of our strikes are in breach of agreements; and that many of these occur suddenly with little or no prior warning...in some industries, the constant day-to-day threat of [strikes] can do far more damage to our economy than the strikes themselves (Conservative Party 1968, 29).

Similarly, In Place of Strife argued:

> 95 per cent of all strikes are unofficial (and of these the vast majority are unconstitutional); they are responsible for three quarters of the working days lost because of strikes...Most unions are not prepared to recognise or support strikes in breach of procedure. Yet strikes of this sort are

[26]. Donovan 1968, paras. 370, 377. See especially the reference to McCarthy and Parker 1968, Donovan Commission Research Paper No. 10.

> increasing in many industries and their effect can be very serious (Department of Employment and Productivity 1969, paras 90-91).

There was thus no disagreement at a political level about the nature of the problem, although the proposals aimed at resolving it and the extent to which they involved legal intervention differed greatly. In the view of the Donovan Commission, the preponderance of unofficial action meant that the effective use of the law was of necessity limited. The Labour Government's proposals reflected these arguments to a very great degree, but included so-called penal clauses - one of which involved giving the government powers to order a strike ballot to be held - which appeared to be out of step with the overall analysis. The Conservative Opposition rejected the Donovan analysis and saw a much greater role for the law.

There was a wide measure of agreement between the two main political parties, however, that industrial action balloting did not provide the answers to the 'British strike problem' of unofficial and unconstitutional industrial action. The Industrial Relations Act of 1971, for all the new Conservative Government's radical intentions to overhaul and modernise the whole framework of industrial relations law, was closely based on Fair Deal at Work. Both were rooted in a traditional analysis of the 'strike problem' and did not reflect the changing nature of the debate about industrial action which was already beginning to shift to a concern over large scale official public sector stoppages (Davies and Freedland 1993, 284).

Later proponents of legal intervention could argue that the Donovan analysis was flawed because reform of collective bargaining did not lead to a decline in industrial action as predicted. Official figures showed that the 1970s was characterised by high levels of conflict, despite the fact that throughout this period formal procedures were widely put in place. By the end of the 1970s disputes procedures had become almost universal in large manufacturing plants and shop stewards had been brought into formal negotiating arrangements:

> While hesitating to place a magnitude on it, we can say with confidence that the 1970s saw a very substantial increase in all forms of disputes procedures (Brown 1981, 447).

The WIRS[1] and WIRS[2] studies found that establishments with agreed disputes procedures were not less likely to be prone to industrial action (Millward and Stevens 1986, chapter 10). As one commentator argued:

> reform was a complex and often contradictory process: the introduction of new procedures could be a source of conflict, and in the longer term the centralisation of bargaining could encourage lengthy plant-wide strikes in place of short and relatively painless shopfloor stoppages (Edwards 1983, 214).

More significantly, however, Donovan's prescription for reform was intended to have its main impact on short unofficial strikes and other forms of action short of a strike, but at the end of the 1970s public policy underwent a transformation, involving a redefinition of the nature of the perceived 'strike problem'. The great majority of strikes continued to be short and unofficial (Edwards 1982) and it was nothing new for large stoppages to have the greatest impact in terms of the number of workers involved and working days lost[27]. However, following the 'winter of discontent' of 1978/79 the new Conservative Government's particular concern was with official strikes in the public sector in which trade unions were seen to be holding the government and community to ransom. The 'winter of discontent' involved groups (amongst others) who had little previous history of industrial action, such as in the Civil Service and Health Service, whose new willingness to take part in industrial action reflected changes in public sector industrial relations. The 1978/79 dispute was also associated with carefully targeted use of action short of strike action. Public service sector strikes were at the forefront in the public and

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[27]. Edwards in Bain (ed) 1983 reported that between 1960 and 1979, 46% of all days lost were in 64 large disputes. See p.219.

political consciousness in the early 1980s. As a corollary of this change of emphasis, legislating for industrial action ballots came to have a greater role in the development of public policy in relation to industrial conflict.

By the end of the 1980s the Government could congratulate itself on the contribution of its programme of labour law reform, and in particular strike ballots, to 'dealing with' the strike problem (Department of Employment 1991). This reflected the return to the lower levels of conflict which had preceded the 1970s. There are, however, two important provisos to this interpretation of the evidence. Firstly, the ACAS Annual Report for 1990 noted that, whilst the number of officially recorded stoppages was at its lowest since 1935, the number of cases referred to collective conciliation was rising. This trend continued into the early 1990s. ACAS also noted some evidence of increasing levels of industrial conflict in the economy. At the end of the 1980s, despite a more restrictive legal framework, the 1989 ACAS Annual Report suggested that as a result of growing labour shortages,:

> The balance of bargaining power began to shift, with some trade unions exhibiting restored confidence (ACAS 1990, 5).

Secondly, incidents of industrial action are not always clearly defined and easily measurable. Although workers' ability to take large scale strike action was undermined, there were many workplaces with experience of different forms of industrial conflict and protest. Research showed that these forms of collective action were not adequately measured by a narrow focus on strikes, a formal overtime ban or work to rule (Elgar and Simpson 1993a). This suggests that no there has been no fundamental change of attitudes on the shopfloor or in the workplace.

Brown and Wadwhani concluded that:

> In times of rising expectations governments may come to regret that the

> Trade Union Act was born of the politics of recession (Brown and Wadwhani 1990)[28].

The late 1980s and early 1990s brought another recession with further severe job losses, business failures and intensified competition. This contributed to a reversal of any upward trend in manifestations of industrial conflict. The evidence suggested, however, that it would be prudent for the Government to be cautious before arguing that the British economy was now free from strikes.

1.4 An approach to understanding the impact of industrial action ballots

Explanations of changes in strike activity over time have been one of the major issues in strike literature. WIRS[3] argued that the widespread decline in industrial action across a number of sectors and workplaces pointed to the influence of factors outside the immediate working environment (Millward et al. 1992, 282). At a global level, two of the most influential theories have been those based on macro economic analyses - which have seen unemployment and inflation as the key variables - and explanations based on the law. Whilst not unreasonable to argue that the law has had some impact, it is difficult at this global level to measure the impact of legal intervention or to determine the balance of influence to be attributed to industrial relations law and to wider economic factors[29]. In their study of ballots in 1980, Undy and Martin concluded that - although some union officials believed that industrial action ballots were less likely to produce votes in favour of strikes than other forms of consultation - other factors were more important -

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[28]. See also Dunn and Metcalf 1994, a study which throws further doubt on the impact of changes in the law on the level of strikes in the economy.

[29]. See Ingram et al. 1991. Based on an analysis of economic data, their conclusions are cautious: 'the evidence is consistent with the idea that changes in the law have reduced strike incidence, but we are not asserting that this has definitely occurred'.

especially the economic climate - than the methods of consultation used (Undy and Martin 1984, 167).

Other explanatory theories of variations in strike activity have focused on the processes at work within different industrial sectors, trade unions and employing organisations. They seek to understand the influence of a number of factors, such as industrial relations procedures and bargaining structures, different labour processes and the composition of the workforce, payment methods, trade union density and organisation in the workplace. It has been possible to refine these theories in recent years with the availability of more information relating both to establishment level industrial action and to action short of a strike (Beaumont 1990). The current research owes more to this approach and, in particular, builds on two earlier studies of balloting. The first was Undy and Martin's study, Ballots and Trade Union Democracy (1984). In 1991 Martin et al. published a subsequent study of ballots in collective bargaining in the mid 1980s. Together these studies have provided a rich source of comparative information for the current research. Their results are reported in more detail in Chapter Five and Six, with the results of the trade union negotiators' questionnaire.

There are two important preliminary points about the current research. Firstly, that the thesis is not primarily concerned with the impact of strike ballots on the incidence of industrial action in any quantitative sense. A quantitative approach runs quickly into the difficulty of determining causal relations and effects[30]. This research seeks to use the rich source of information provided by the 1991-1992 questionnaire survey of trade union negotiators to build up a picture of the different ways in which trade unions responded to the industrial action balloting requirements. Comparisons have been drawn between unions, based on the nature of their different structures, the nature of their membership and the sectors of the economy in which they operate. The second point is that the key to this approach is exploring how trade union negotiators have adapted to the more

[30]. See Dunn and Metcalf 1994 for a discussion of this point.

restrictive legal framework within which they now have to operate. Understanding these processes in relation to industrial action ballots is essential to an overall assessment of the impact of ballots both on trade union government and on negotiations.

For some commentators the ideology underlying Conservative governments' programme of labour law reform not only shaped the nature of the legislation on industrial action ballots, but also raised unrealistic expectations of what the balloting laws could be expected to achieve[31]. Based on an analysis of fieldwork results from the trade union negotiators' questionnaire, the conclusions of this thesis will explore the following themes. Did ballots have an effect on the internal government of trade unions, in particular highlighting any centralising tendencies in decision making? In the experience of trade union negotiators did ballots affect the outcomes of collective bargaining? Is there any evidence that ballots reduced the incidence of industrial action and if so what processes were involved in this result? The findings of the questionnaire survey provide the basis for testing claims and challenging assumptions that have been made by the Government and other proponents of the balloting laws. More broadly, they may help to answer questions about the relationship between changes in labour law and industrial relations practice.

1.5 Conclusions

The question of the overall impact of industrial action balloting on trade unions and their negotiating strategies is complex. This is not least because the 1980s also brought a major downturn in the economic climate, leading to a greater emphasis on competitiveness and an interest in new management approaches across the economy. The Conservative Government of 1979 not only embarked on a reform of labour law, but also undertook

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[31]. For a general discussion see further below, chapter 4. See also Auerbach 1990; Wedderburn 1991; Fredman 1992; Hendy 1993.

to bring about radical organisational change in the public sector. All of these developments may also have affected a union's ability to call upon members to take part in industrial action. The research will seek to reflect the complex mix of often divergent factors which made up the industrial relations environment of the 1980s and early 1990s.

CHAPTER 2 HISTORICAL DEVELOPMENT OF LAW ON INDUSTRIAL ACTION BALLOTING

2.1 Introduction

Throughout the 1960s and 1970s a wide variety of proposals were made for the reform of industrial relations, distinguished in one respect by the extent to which the law was seen to have a role to play in the process of reform in general and, more particularly in the regulation or restriction of industrial action. This chapter places industrial action balloting within this framework of the historical development of labour law. Firstly, the chapter analyses the principles underlying the voluntarist tradition of labour law, in particular those relating to the key areas of industrial conflict and trade union government. Secondly, it reviews policies and proposals on strike ballots dating back to the 1920s, including some which were enacted - most not - and identifies the main arguments prior to the 1980s in favour of mandatory strike ballots backed by legal sanctions. The third theme of this chapter relates to the anticipated constraints on the effectiveness of models for the enforcement of balloting legislation and some problems that were experienced in practice.

Whilst it would not be true to say that proposals for industrial action balloting played a central part in the development of labour law prior to the 1980s, the historical perspective is an important one, not least because of Government claims that the thinking underlying its policies had antecedents in the influential Donovan analysis (Department of Employment 1983, para. 1). The Report of the Donovan Commission in 1968 was a restatement of the voluntarist approach to labour law. In order to understand in what respects and how far 1980s policies on industrial action balloting represented a move away from the voluntarist tradition of labour law, it is important to start with an analysis of the defining principles of voluntarism.

2.2 The voluntarist tradition

In the post Second World War period, voluntarism not only described a stage in the development of labour law, but was also a prescription for its future role. The argument was not that there was no role for the law in the field of collective labour relations. Indeed because common law doctrines were inherently hostile to collective organisations of workers, legislation had been required both to establish the legitimacy of trade union organisation and to allow workers freedom to take part in industrial action carried out peacefully. This was legislation of a particular kind, however, to provide a statutory framework to support the system of collective bargaining. It was anticipated that the processes and outcomes of collective bargaining would be largely free from legal regulation (Davies and Freedland 1993).

The framework of law as it had developed from the nineteenth century and was firmly in place by the 1950s was a series of 'statutory immunities to judge made liabilities' (Wedderburn 1986, chapter 1). Protection for the organisers of industrial action from criminal and civil liabilities was based on actions taken 'in contemplation or furtherance of a trade dispute', the 'golden formula' of British labour law[1]. Trade unions as such could not be sued in tort after 1906 (with minor exceptions).

By the early twentieth century, therefore, a number of important principles had been established which were increasingly seen to characterise British collective labour law: that it would provide a broad framework to allow the parties themselves to determine their relations and that it did not create a legally determined system of collective bargaining. An important consequence of this was that, if they could not reach agreement, the parties to collective bargaining would be free to impose sanctions against each other and, in particular, that trade unions would be free to organise industrial action without fear of interference from the courts. In particular, concern

[1]. The term 'golden formula' was coined by Lord Wedderburn. See The Worker and the Law first edition 1965, 222. In 1875 section 3 of the Conspiracy and Protection of Property Act effectively excluded the law of criminal conspiracy from the area of industrial conflict. This was the first use of the formulation 'in contemplation or furtherance of a trade dispute'.

was expressed that the courts should not be called upon to adjudicate over the merits of contentious issues arising from industrial conflict. The seminal expression of this approach to the law was in the works of Kahn-Freund. Kahn-Freund characterised the limited role of the law as 'collective laissez-faire'. He commented that:

> it is in connection with trade disputes that the retreat of the courts from the scene of industrial relations can be most clearly seen[2].

There had been periods when the law took a much more interventionist stance[3]. Kahn-Freund believed, however, that in the post-war period an equilibrium had been reached, in which the 'abstentionist' nature of collective labour law was widely accepted. He argued that 'the main object of [the] law has always been and, I venture to say, will always be a countervailing force to counteract the inequality of bargaining power which is inherent in the employment relationship'[4].

By the 1970s voluntarism faced twin challenges. Firstly, some commentators argued that it became increasingly difficult to maintain the principle of voluntarism in collective labour relations, when individual employment rights were multiplying and inevitably had an impact at the collective level. The enactment of anti-discrimination legislation was seen to pose a direct challenge to voluntary collective machinery which

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[2]. O. Kahn-Freund 'Labour Law' in Ginsberg (ed) Law and Opinion in England in the Twentieth Century (1959) reproduced in Kahn-Freund Selected Writings 1978.

[3]. See the Trade Disputes and Trade Union Act (1927), which followed the national strike of 1926. Immunities from tort liabilities did not apply, for example, in strikes aimed at coercing the government or inflicting hardship on the community. See also the Conditions of Employment and National Arbitration Order 1940 (Order 1305) which made strikes illegal in most cases. A National Arbitration Tribunal was established to resolve disputes and its awards were legally binding.

[4]. See Kahn-Freund 1977, chapter 1. In his later years Kahn-Freund became increasingly concerned about trade union power in the economy in circumstances of full employment and trade union power vis a vis their own members, but was even more reluctant to offer legislative solutions. See Kahn-Freund 1979.

might itself need regulation under the law[5].

Secondly, from the 1960s onwards governments' commitment to collective bargaining which was free from legal regulation was increasingly challenged by concern over the bargaining power of trade unions in conditions of full employment. This power was potentially damaging to the economy and threatened to undermine economic policies. The voluntarist approach also began to be questioned because of a rapid growth of industrial action - in particular unofficial action - 'and an even faster growth in the perception that this was a problem over which the government had to assert control' (Davies and Freedland 1993, 240).

The role of collective labour law was central to the debate which gave rise to the establishment of a Royal Commission in 1965. The legal context was a period of renewed judicial interventionism, which led to new and uncertain liabilities for the organisers of industrial action[6]. In its report, the Donovan Commission gave strong support to the voluntarist approach and rejected arguments in favour of collective legal sanctions[7].

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[5]. Davies and Freedland 1993, 3. They argue that the fact that abstentionism was an accurate description of the law in the 1950s disguised the extent to which British labour law even then 'contained impulses of a more interventionist kind and the difficulty of placing those impulses in an exact theoretical framework'. For a contrary view see Wedderburn 1986, where he argues that individual employment rights legislation did not threaten collective laissez-faire.

[6]. See House of Lords decision in Rookes v. Barnard [1964] AC 1129. The decision opened up liability for a tort of intimidation not protected by section 3 of the 1906 Act. In 1965 the Trade Disputes Act was enacted to provide the organisers of industrial action with immunity from this tort which had not previously been applied to labour disputes. In a subsequent decision in Stratford v. Lindley [1965] AC 209, the development of the doctrine of interference with business by unlawful means created further possibilities of economic tort liabilities outside the immunities.

[7]. The majority report rejected the case for legally enforceable collective agreements, which had been advocated as a way of reducing unofficial industrial action. See, however, paras 512-17. In exceptional cases it was argued that the Secretary of State for Employment and Productivity should have the discretion to initiate a process for making a procedure

This was a period, however, in which there were a succession of proposals for the reform of the law on collective labour relations, which reflected an ending of the consensus on the role of the law. Different views emerged about the appropriate legal regime for trade union government and industrial action. Whilst largely supporting the Donovan analysis, the Labour Government's White Paper, In Place of Strife, which was published in January 1969, also included proposals for so-called 'penal' clauses. This was based on the argument that:

> Demands have been made by employers for new laws to discourage strikes; requests have been put forward on behalf of trade unions for minimum wage legislation and Government action to force employers to recognise trade unions. In short the doctrine of non-intervention is not, and never has been, consistently preached. The need for State intervention and involvement, in association with both sides of industry, is now admitted by almost everyone. The question that remains is, what form should it take at the present time? (Department of Employment and Productivity 1969, para. 9).

In Place of Strife made three proposals for new government powers to be backed by legal sanctions: two related to industrial action. These were firstly to enable the government to secure a 'conciliation pause' in relation to unconstitutional strikes or those not preceded by adequate joint discussions and secondly to require unions to hold a ballot on major industrial action when the support of those involved might be in doubt (paras. 78-9, 93-6).

In April 1968, prior to the publication of the Donovan Commission report, the Conservative Opposition had published its policy document Fair Deal at Work. The starting point was not dissimilar from In Place of Strife. In the preface Edward Heath MP, the leader of the Conservatives, talked of:

> ..the difficulties of reconciling the concepts of full employment and free collective bargaining (Conservative Party 1968).

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agreement in an enterprise or establishment legally binding.

The proposals represented, however, the most radical attempt prior to the 1980s to change the legal framework of industrial relations. Fair Deal at Work took a positive view of the law as an instrument of reform. Whilst it was said that 'no government action can, in itself, create good industrial relations' (Conservative Party 1968, 9), it was argued that a new framework of law was needed because existing trade union law had tended to 'handicap, rather than help industry in tackling the human problems which inevitably stem from industrial change' (Conservative Party 1968, 10). Fair Deal at Work was characterised by a radical intention to break the mould of industrial relations law in relation to the overall legitimacy, parameters and methods of legislative intervention in the internal affairs of trade unions. A key proposal was to make the most important trade dispute immunities dependent upon trade union registration. As a condition of registration the Registrar had to be satisfied that trade union rules were fair, reasonable and in the public interest[8]. This would impose a much greater degree of legal regulation on trade union rule books than had previously existed.

The role of the law had been brought to the fore of the public policy debate. In April 1969 the Labour Government decided to bring forward interim industrial relations legislation to implement five core proposals of In Place of Strife, including two that could involve penal sanctions against unions, although not the strike ballot proposal. TUC opposition was intense and by June 1969 the government had accepted a 'solemn and binding undertaking' by the TUC that it would strengthen its own capacity to intervene in cases of unconstitutional industrial action and inter-union disputes.

The change of administration in 1970 brought in a Conservative government strongly committed to a policy of labour law reform. The Industrial Relations Act (1971) sought to establish a new framework of law in relation to industrial disputes - involving the creation of 'unfair industrial practices' and a new court, the National Industrial Relations Court (NIRC). The Commission on Industrial Relations (CIR),

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[8]. Conservative Party 1968, 21-22. Advantages for registered unions would include a new legal right for trade unions to be recognised and to negotiate with employers.

which had been established by the Labour Government in 1969 to carry out advisory and conciliation functions, was given an enlarged role in relation to various new procedures under the Industrial Relations Act. The Industrial Relations Act also laid down emergency procedures in the event of major industrial action, which included strike ballot provisions (see further below).

In an important break with the voluntarist tradition, the 1971 Act took a detailed interest in the internal affairs of trade unions. The provisions of the Act set out to regulate the content of trade union rule books and laid down certain guiding principles, which included that no-one should be 'arbitrarily' or 'unreasonably' excluded or subjected to any 'unfair or unreasonable disciplinary action'[9]. The Industrial Relations Act also returned to the question of legally enforceable collective agreements and a key feature of the Act was the presumption that, unless otherwise indicated by the parties, collective agreements were legally enforceable contracts. This reversed the previous legal position.

As proposed in Fair Deal at Work, section 96 of the Industrial Relations Act made the most important trade dispute immunities for the organisers of industrial action dependent upon unions registering under the Act. It was an unfair industrial practice to induce or threaten to induce a breach of any contract unless this was in contemplation and furtherance of an industrial dispute with the authority of a registered union.

Most trade unions refused to register and this rendered many of the core provisions of the 1971 Act ineffective. Proponents of voluntarism saw this as confirmation of their argument that the law could not be used effectively to intervene in collective labour relations and, more specifically, should not be used to subject the internal government of trade unions to detailed regulation and scrutiny. Allan Flanders, who

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[9]. The two sets of provisions were in Schedule 4 to and s.65 of the Industrial Relations Act. Under s.65 an individual could complain to an industrial tribunal or to the NIRC that a union had acted unreasonably or arbitrarily. In fact individual members' rights were not widely used. See Weekes et al. 1975, 69.

- together with Kahn-Freund - had a great influence on the report of the Donovan Commission, argued that the attempt to use legislation to impose changes on trade union government was based on a fundamental misconception of the way in which trade unions operated. Their leaders' authority depended on their qualities of leadership and ability to persuade members - in a 'positive process' - to support their 'line' (Flanders 1974). Thus a policy based on forcing trade union leaders to restrain and frustrate the demands of the shop floor was bound to fail. The Industrial Relations Act was also seen to have had contradictory objectives, seeking both to restrict trade unions' freedom and to carry forward the reform of industrial relations started by the Donovan Commission
(Weekes et al. 1975).

With the repeal of the Industrial Relations Act, it appeared at first as if there was a return to a non-interventionist consensus. The Trade Union and Labour Relations Act (TULRA) of 1974, brought forward by the incoming Labour government, restored the framework of law that had existed before 1971. There was no question of retaining the penal sanctions of the Industrial Relations Act. Debate centred on drawing the boundaries of the definition of a lawful trade dispute[10].

From an historical perspective, though, Davies and Freedland reached quite different conclusions. They argued that following the trade unions' successful opposition to the 1971 Industrial Relations Act, all political parties were committed to the need for labour law reform and used the experience of the Industrial Relations Act as their benchmark of how to proceed:

> So far from securing the future of collective laissez-faire, it marked an important stage on the road away from it (Davies and Freedland 1993, 273).

[10]. The amendment of the law in 1976 - TULR(C)A - to include breach of commercial contract within the scope of the golden formula immunities represented the end of a short-lived compromise on this point. See Auerbach 1990, chapter 2.

Rather than being a temporary, transitory episode, therefore, the Act was seen to have had a profound effect on the future development of labour law and was seen in many respects to pave the way for legislation in the 1980s. One thing was clear: the Conservative Government of 1979 had learned the dangers of embarking on a 'comprehensive' reform of industrial relations[11]. The 1984 balloting legislation could be seen to have emerged, therefore, from an end to the consensus over the role of the law in collective labour relations in general and, in particular, in relation to trade union government and industrial action. More specifically the industrial action balloting provisions of the Trade Union Act 1984 could be linked both to traditional Conservative concerns over the rights of individual members vis a vis their unions[12] and to earlier proposals and policies on industrial action balloting.

2.3 Compulsory strike ballot policies and proposals

Irrespective of the broader debates over the 'end of voluntarism' and arguments about the need to regulate trade union government, there had been a large degree of consensus at a political level about the drawbacks inherent in legislating for compulsory strike ballots. Whilst proposals for the introduction of compulsory secret ballots before industrial action were not new in 1984, they had previously centred on emergency powers for governments to intervene in major disputes. There had also been some interest in ballots 'triggered' by trade union members.

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[11]. See Robert Carr MP, then Opposition front bench spokesperson on labour and subsequently Secretary of State for Employment in the foreword to Fair Deal at Work. He wrote of the need for 'comprehensive modernisation' of the laws governing industrial relations. The Conservative Government of 1979 was well known for its step by step approach to collective labour law reform. On whether this was purely pragmatic, see further below chapter 4.

[12]. There was particular emphasis in the Industrial Relations Act (1971), on protecting individuals in the event of industrial action. Section 65(7), for example, prohibited a union from disciplining any member who refused to take part in industrial action which was an unfair industrial practice.

In the 1920s Conservative Party backbenchers made what appears to have been the first sustained effort to persuade a government to introduce strike ballots. These did not make any headway[13]. The general strike revived interest in industrial action balloting and the Legislation Committee of the Cabinet claimed that there was:

> a strong public demand for legislation providing that the protection of the Trade Disputes Act shall not apply to a strike not sanctioned by a secret ballot... (Ewing 1986, 21).

By the time the Trade Disputes and Trade Union Bill was enacted in 1927, however, all balloting proposals had been dropped. This was in large part because of the opposition of employers' organisations and, in particular, the strong objections of the National Confederation of Employers' Organisations[14]. The next significant policy document on labour law reform was A Giant's Strength published by the Inns of Court Conservative and Unionist Society in 1958. The requirement for strike ballots was considered, to complement proposals for limiting trade union immunities to official industrial action by registered unions, but was rejected. It was argued that ballots could lead to a greater, rather than lower incidence of unofficial industrial action. In relation to official industrial action, proposals for strike ballots were seen to be misconceived. If, as anticipated, trade union officers held ballots prior to negotiations in order to strengthen their hand in the bargaining process, trade union members were unlikely to deny their leaders support. Once a ballot had been held, leaders would be unable to settle on less favourable terms than those demanded at the outset of negotiations and thus would be at the mercy of 'extremists'. Strike ballots also raised a number of practical difficulties, including drafting the wording of the ballot paper and preventing dishonest balloting practices. As in the 1920s, such arguments rehearsed some of the later reservations about strike balloting proposals.

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[13]. See Ewing 1986, especially 20-21.

[14]. Reflecting later concerns, employers argued that ballots would be an 'automatic vote of confidence' in trade union leaders. Furthermore ballot decisions could tie the hands of negotiators, increasing the difficulties of resolving disputes. See Ewing 1986, 21.

Ten years later, in evidence to the Donovan Royal Commission on Trade Unions and Employers' Associations of 1965-1968, proposals for strike ballots were notably absent, compared to the extensive consideration of the legal enforcement of collective agreements. There was just one detailed submission on ballots from an employer, which was from Unilever. The Institute of Personnel Management (IPM) also gave evidence on strike ballots, which broadly rejected the case for them.

In its written evidence to Donovan the IPM identified a range of practical difficulties with strike ballots. These included defining the issues in dispute and wording the question to be asked on the ballot paper. Ballots were seen to run the risk of introducing an undesirable degree of rigidity into negotiations and the settlement of disputes. The IPM argued that there was a danger of reducing the trade union officials' role from that of representative to delegate, thus hindering constructive negotiation which depended essentially on flexibility and compromise[15]. In its oral evidence[16], the IPM reiterated its rejection of strike ballots. It expressed two further points of concern: firstly, that if ballots were to precede industrial action, trade unions would probably need to ballot for a return to work; but more fundamentally, that the proposals were only applicable to official industrial action.

By contrast Unilever believed that the introduction of ballots would be of value both to management and to trade union officers. The company's evidence referred in some detail to both the advantages and disadvantages of compulsory strike ballots[17]. Ballots were seen as a way of strengthening the influence of trade union officials against the considerable power of 'disruptive elements' within trade unions. The company put forward an argument that 'extremists' were able to overawe colleagues at meetings where decisions were taken by a show of hands. Strike ballots could mean pause for

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[15]. Donovan Commission 1968. Written evidence of the Institute of Personnel Management, para. 45.

[16]. Donovan Commission 1968. Oral evidence of the Institute of Personnel Management paras 6471-6482.

[17]. Donovan Commission 1968. Written evidence of Unilever WE 246, paras. 29-32. For Unilever's oral evidence see Minutes of Evidence Ref no. 46.

thought and more representative and, therefore, more responsible decisions. Unilever, however, also argued that assumptions underlying balloting proposals had not been clearly thought through. An important proviso, for example, was whether the issues in dispute could be clearly defined and would remain unaltered during the course of a dispute. Supporters of industrial action balloting also assumed, Unilever argued, that once a ballot result was known it would necessarily facilitate an agreement.

From its discussion of ballots, it was clear that Unilever believed that employers as well as trade unions would be given the right to hold industrial action ballots. This raised potential difficulties about the right of employers or trade unions to hold a ballot even if the other party objected. There could also be disagreements over decisions about the timing of ballots and the conditions under which they would be held. Nevertheless the company concluded that balloting represented a democratic process of decision making and, providing these difficulties could be overcome, balloting legislation should be welcomed.

This was not a view widely shared at the time. The dominant thinking among academic commentators, which shaped the outcome of the Donovan Commission's Report, was that proposals for compulsory strike ballots should be rejected. In his evidence to the Commission, a leading academic, Cyril Grunfeld, described strike ballot proposals as one of several legal short cuts [to better industrial relations] which would be fruitless[18].

The Donovan Commission Report in 1968 did not support proposals for strike ballots, which it believed were based on 'the belief that workers are likely to be less militant than their leaders and that, given the opportunity of such a ballot, they would often be likely to vote against strike action' (Para 426). Donovan rejected this assumption, drawing on evidence from its own workshop relations survey as well as experience in USA and Canada. Moreover, echoing the concerns of the IPM, the Commission suggested that any legislation, if it were to be effective, would necessarily be confined

[18]. Donovan Commission 1968. Minutes of evidence Ref no. 12.

to major official strikes:

> A law forbidding strike action before the holding of a secret ballot could not be enforced in the case of small-scale unofficial stoppages, which make up the overwhelming majority of the total number of strikes (para 427).

Two other particular objections were raised: that a ballot in favour of strike action could delay a dispute settlement by restricting union negotiators' freedom of action; and that there were difficulties relating to the way in which the question on the ballot paper was framed. The example given was of a ballot over an employer's 'final offer' which was then slightly improved (para. 429). In rejecting proposals for strike ballots, the Commission argued that the responsibility for deciding to call a strike and call it off should be with - and be seen to be with - trade union leaders. The decision about whether this should include a strike ballot should continue to be with the unions themselves (para. 430).

The Commission considered whether strike ballots should be held in certain defined 'emergency' circumstances. Evidence was drawn from the United States and the national emergency provisions of the federal Taft Hartley Act (1947). The Donovan Commission did not see a role for compulsory cooling off periods and strike ballots on the model of United States legislation. Firstly because they did not fit easily with the Donovan Commission's analysis of the UK 'strike problem' as small scale unofficial action. Emergency provisions, and the use of ballots in them, were rejected on two other grounds. The first was the record of the legislation in the US:

> there has not been a single case in which a vote has gone in favour of acceptance of the employer's latest offer (para. 421).

Secondly, such provisions were seen to be rigid and inflexible in comparison with the range of powers already available to a British government, including conciliation,

arbitration and appointed inquiries[19].

Fair Deal at Work, the Conservative Party policy document which was published shortly before the Donovan report, supported strike ballots as part of wider legal provisions to deal with national emergencies, to be invoked in exceptional circumstances where all other voluntary methods to resolve a major dispute had failed (Conservative Party 1968). Its proposals were closely modelled on the Taft Hartley Act, without appearing to answer the objections raised in the Donovan Commission's report. Indeed, Fair Deal at Work argued that Taft Hartley had a 'record of success' because in 17 out of the 24 occasions on which an injunction had been granted between 1947 and 1967 a settlement was reached within the 80 day 'cooling off' period and no industrial action had taken place. The Industrial Relations Act of 1971 was to show that strike ballots as part of the Government's response to 'national emergencies' was now accepted within Conservative Party thinking.

By contrast, In Place of Strife, the Labour Government's White Paper of January 1969, broadly endorsed the Donovan Commission's conclusions that the idea of imposing obligatory ballots before official strike should be rejected (Department of Employment and Productivity 1969). It was argued that trade union members were very often much more 'militant' than leaders in major disputes and that they were likely to be less closely in touch with the progress and prospects of negotiations. Trade union leaders might well find their hands tied by a vote in favour of a strike intended only as a bargaining move at an early stage of negotiations. Nor was there anything to be gained from a ballot where leaders were ready to call a strike and there was no doubt about the support of members (para 97).

The White Paper argued, however, that there did seem to be a role for ballots when there was a possibility of a major official strike being called but the support of those

[19]. Donovan Commission 1968, para. 422. See also para 431 onwards which detailed the powers available.

involved was in doubt[20]. In Place of Strife proposed, therefore, that where a major strike was threatened, the Secretary of State would discuss the desirability of holding a ballot with trade union leaders. Where no agreement was reached the Secretary of State would have the power to require the union(s) involved to hold a ballot. This power was to be used where the Secretary of State believed that the strike would involve a serious threat to the economy or public interest and doubted whether it had the support of those involved (para 98).

The White Paper argued that the object was not to ban such strikes, but to ensure that before they took place trade union members were convinced of the need to strike. There was no reference, however, to how the 'doubt' about members' support could be determined. It was noted that trade unions had a wide variety of rules relating to industrial action balloting. Some required ballots be held, some made provision for discretionary ballots and other union rule books did not mention balloting in respect of industrial action. The White Paper proposed that trade unions should in future be required to include a provision on strike ballots in their rules which were to be approved by the Registrar of Trade Union and Employers' Associations[21].

It was proposed that the Secretary of State should not intervene in the conduct of the ballot except in relation to approving the question to be put to vote. Any questions raised by members about balloting procedures and entitlement to vote were to be resolved in the same way as for a ballot called by the union itself. The powers of a union under its rules to decide whether or not to strike and end a strike would also remain unaltered. Like the other penal clauses in In Place of Strife this proposal was

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[20]. See Jenkins 1970, 33-34. Harold Wilson, then Prime Minister, was particularly concerned that during an engineering dispute Hugh Scanlon, General Secretary of the AEFWU had refused to conduct a ballot of members. Other unions involved in the dispute had balloted members who had rejected industrial action. Wilson believed that, as a result, in October 1968 the country had come to the verge of a national engineering strike.

[21]. Department of Employment and Productivity 1969, para 109. Refusal to have these rules would leave a union open to a financial penalty imposed by the proposed new Industrial Board. The alternative sanction recommended in the Donovan report of confining the protection of s.3 of the Trade Disputes Act 1906 to registered unions was rejected.

dropped by the Labour Government later in 1969.

The Conservative Government elected in 1970 enacted a variant of the Fair Deal at Work proposals as part of the Industrial Relations Act (IRA) 1971. The emergency procedures in sections 138-145 came into effect by way of an application from the Secretary of State to the National Industrial Relations Court (NIRC). In reality, however, the NIRC had a limited role in reviewing the Secretary of State's decisions. Like the provisions of the Taft-Hartley Act, on which they were based, the IRA emergency procedures included provisions for a 'cooling off period' and a strike ballot. Unlike the American law the cooling off period and strike ballots were separate procedures, but on the only occasion on which they were used, during a 1972 pay dispute in British Rail, the Government successfully applied first for a cooling off period and then for a strike ballot[22]. No industrial action occurred during the balloting period. The result of the ballot, however, was an overwhelming majority in favour of industrial action. Many political, legal and industrial relations lessons were drawn from this experience.

The 1968 and 1969 labour law proposals and the strike balloting provisions of the Industrial Relations Act (1971) need, therefore, to be located within the special body of law relating to emergency situations. This was an important period when Governments were searching for an appropriate legal framework for trade union government and industrial action. They clearly articulated a possible role for strike ballots. The experience of the Industrial Relations Act affected Conservative opinion and made it unlikely that future Conservative governments would favour the inclusion of industrial action ballots in emergency provisions. It is notable that the Government did not invoke the emergency procedures during coal disputes in 1972 (before the rail dispute) and in 1974 (after the rail dispute) possibly because it had been advised that the ballot results would demonstrate strong membership support for the union's position.

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[22]. See Secretary of State for Employment v. ASLEF [1972] ICR 7 NIRC and Secretary of State for Employment v. ASLEF (No 2) [1972] ICR 19, NIRC and CA reporting the rail unions' unsuccessful appeal against the Order for a strike ballot.

After the repeal of the Industrial Relations Act in 1974, during five years of a Labour administration, strike ballots did not seem to be high on the agenda for labour law reform. Indeed there was a widely held view that the strike ballot provisions had been one of the most demonstrable failures of the IRA. Ballots in general, however, were prominent in the Conservative Party's rethinking of its policies in Opposition. Whilst the focus was on ballots for the election of trade union leaders, Conservative support for strike ballots gained greater prominence during the 1978-1979 'winter of discontent'[23]. Prior to 1984, therefore, the 1979 Government introduced legislation to encourage use of postal ballots by unions in disputes by providing state funding (section 1, Employment Act 1980). Section 1 provided for the Government to establish a scheme under which some of the costs of postal ballots, on among other things industrial action, could be refunded by the Certification Officer[24].

2.4 Enforcement mechanisms

Any legal provision for mandatory balloting on industrial action necessarily confronted complex issues about enforcement of the law, in particular the vicarious liability of trade unions for the actions of officials and members. These difficulties were minimised by an approach, as in the Industrial Relations Act (1971) which placed balloting within the context of emergency procedures. If, in exceptional circumstances, emergency procedures were invoked by the Government and a Court Order was granted, the question became one of whether trade union(s) would comply with the Order. A more general provision, such as emerged in 1984, raised more complicated issues in relation to defining trade union liability. A new dimension was added in 1982, which repealed the TULRA section 14 immunity for trade unions as such (previously in section 4 of the 1906 Trade Disputes Act), which had protected unions from actions in tort. Whilst Kahn-Freund had argued that the repeal of section

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[23]. See Lewis and Simpson 1981, 126.

[24]. See Lewis and Simpson 1981, chapter 6 on sections 1 and 2 of the 1980 Employment Act. On the repeal of Section 1 see further below.

14 would make little difference in practice, this was in the context of trade dispute immunities which were much broader in the 1970s than they were to become in the 1980s (Kahn-Freund 1977, 275). Moreover the repeal of section 14 was of considerable symbolic importance.

In the 1960s and 1970s the extent to which trade unions should be held liable for the actions of officials and groups of members was an issue of central concern to policy makers. A number of different approaches emerged. The Donovan Commission report recommended by a majority that the trade dispute immunities in section 3 of the Trade Disputes Act 1906 (and the corresponding provision in the 1965 Act) should be limited to those acting on behalf of a registered trade union[25]. The Labour Government's In Place of Strife rejected this proposal, arguing that 'the great majority of employers would probably not be prepared to sue unofficial strike leaders'. Moreover, unions could simply declare strikes by their members to be official, thus bringing the leaders of such strikes once more under the protection of section 3, but that, in other circumstances, strike leaders might have no defence against legal action by employers even if their unofficial action was justified (para 88).

The Conservative Party's Fair Deal at Work proposed repeal of immunity from tort liability for trade unions as such and basing immunities on a system of trade union registration. Registered unions would not be held liable for breach of agreements if they could satisfy the court that 'they had done all in their power to prevent the breach' (Conservative Party 1968, 33). Following closely the proposals in Fair Deal at Work, the Industrial Relations Act (1971) removed immunity from trade union funds. Its failure to define the boundaries of trade union liability, and in what circumstances a union would be held responsible for the actions of officials, created confusion which was never fully resolved. Officials of **registered** trade unions were to be protected when 'acting within the scope of their authority from the trade union'

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[25]. Donovan 1968 para 800. Section 3 provided immunity for a person who in contemplation or furtherance of a trade dispute induced another person to break a contract of employment.

(section 167(9)). Most unions, however, were not registered and therefore did not qualify for the immunity against liability for inducing breach of contract under section 96 of the Industrial Relations Act. In the cases that came before them, the Courts made use of a common law test of trade union liability. One of the leading cases, Heatons Transport v TGWU[26], went to the House of Lords where it was held that the TGWU was responsible for the acts of shop stewards who had 'general implied authority' to act on behalf of the union.

In its review of the Industrial Relations Act, Trade Union Immunities (1981) noted:

> the operation of the Act was overshadowed by the fact that it led fairly swiftly to the imprisonment of individual workers and a growing anxiety about the extent to which its provisions could be operated in practice (Department of Employment 1981, para 79).

The experience of the Industrial Relations Act suggested a number of lessons about the enforcement of the law. Firstly, trade union liability needed to be defined to avoid some of the difficulties that had arisen in the courts between 1972 and 1974, including the danger of creating individual martyrs. Secondly, employers showed little interest in making damages claims against unions, following the removal of immunity from trade unions as such[27]. Thirdly, trade unions could not always be expected to comply with injunctions[28].

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[26]. Heatons Transport v TGWU [1973] AC 15,HL. See also Midland Cold Storage v Steer [1972] ICR 435, [1972] All ER 773; Midland Cold Storage v Turner [1972] ICR 230. Con Mech Engineers Ltd v AUEW Engineering Section (no. 2) [1974] ICR 332; (no. 3) ICR 464.

[27]. The biggest claim was brought by General Aviation Services. See General Aviation Services v. TGWU [1976] IRLR 224. The action was finally dismissed in 1976.

[28]. See Auerbach 1990, 92. Evidence to the House of Commons Select Committee on Employment 1981, showing that some trade unions were now prepared to defy the law, led to a majority recommendation that TULRA section 14 should be repealed despite the limited use by employers of their rights to sue unions for damages between 1971 and 1974.

At the end of the 1970s, the legislative approach with regard to the trade union government was briefly restored to the pre 1971 situation. In the 1982 Employment Act, however, the 1979 Conservative government enacted legislation to limit immunity for trade union as such in the context of industrial action. Section 15 (subsequently amended) added to the law a statutory code of vicarious liability. The changes were made despite reservations recently expressed in Trade Union Immunities, the Green Paper preceding the Employment Act 1982, based on a concern that removal of immunity would increase unofficial action (paras 123-129). The CBI was among employers' organisations pressing strongly for this change in the law. Evidence of injunction applications in relation to industrial action balloting was to show that employers took the opportunity to seek orders against trade unions rather than named officials.

2.5 Conclusions

This chapter has reviewed the voluntarist tradition of labour law from which, it has been argued, the 1984 balloting legislation marked an important departure. Detailed proposals and policies on strike ballots arose in the period of the late 1960s onwards. They were part of a changing approach which represented the beginnings of an end to the consensus about the abstentionist role of the law in collective labour relations, especially in relation to trade union government and industrial disputes.

Perceived practical difficulties with regard to implementing strike ballot proposals and the effects of enforcing the law under the 1971 Industrial Relations Act initially made the 1979 Conservative Government approach strike balloting proposals with some caution. Whilst by 1979 there was a growing belief among influential sections of the Conservative Party that ballots should be held before industrial action because they could reduce its extent, there was equally a strongly held view that a legal requirement to ballot could be unenforceable. There were perceived problems both in leaving it up to trade union members to enforce ballots or in depending on employers to enforce the balloting requirements, if neither trade union members nor employers wanted to become involved with the law. It was recognised that the legal issues themselves

would be complex if the question of trade union vicarious liability was raised, as it almost certainly would be if the enforcement mechanism was linked to the trade dispute immunities.

CHAPTER 3 THE LAW

This chapter provides a legal framework for the analysis of the fieldwork. This includes (i) an outline of the balloting legislation of the 1980s; (ii) a review of labour injunction procedures; and (iii) judicial interpretation of the balloting requirement in some of the main cases that have come before the courts in the 1980s and early 1990s.

3.1 Legislation

The first legislative provisions relating to strike ballots enacted in the 1980s were in the Employment Act 1980 sections 1 and 2. Conservative Party support for ballots (Ewing 1986) was given effect in a scheme, under section 1, to provide state funding for postal ballots on certain issues. This was complemented by a legal right for trade unions to hold workplace ballots as an alternative. The ballots covered included those for 'obtaining a decision or ascertaining the views of members of a trade union as to the calling or ending of a strike or other industrial action'. This apparently excluded reference back balloting, even though this was often closely allied to the question of whether or not industrial action should be taken. In 1982 the provisions were amended to include ballots on acceptance or rejection of employers' offers[1].

These provisions did little to encourage the holding of strike ballots up to 1984 because TUC policy was that affiliated unions should not take advantage of the availability of state funds[2]. In fact after 1985, when TUC policy changed, the funds began to be used by a

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[1]. Sections 1 and 2 of the Employment Act were consolidated as sections 115 and 116 of the Trade Union and Labour Relations (Consolidation) Act 1992.

[2]. The Certification Officer's Annual Reports show that only four applications were made for financial support in relation to industrial action ballots in the period 1981-83.

number of TUC affiliates, especially the AEU and EETPU[3]. But since the assistance was restricted to postal ballots, and most unions that held strike ballots used workplace rather than postal ballots, the provisions continued not to be of central importance to the practice of most unions in relation to holding strike ballots[4]. These provisions remained in place throughout the 1980s, but were prospectively repealed by section 7 of the Trade Union Reform and Employment Rights Act (TURERA) 1993 with effect from 1 April 1996, with financial support for postal ballots being phased out over the period 1993 to 1996. In 1984 the Government adopted another, quite different approach and legislative attention turned to mandatory industrial action ballots.

Trade Union Act 1984 ss.10-11[5]

Broadly speaking the Trade Union Act 1984 (s.10(3)) imposed three requirements on the organisers of industrial action if industrial action was to retain immunity under section 13(1)(a) of TULRA 1974[6] from tort liability for, or dependent on, inducing breach of or interference with contracts of employment[7]. These three requirements were that:

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[3]. In 1989 the AEU and EETPU merged to form the AEEU.

[4]. Though there were important exceptions in addition to the EETPU. Unions, such as the AUT, had always used postal ballots.

[5]. The provisions originally enacted in ss.10-11 TUA 1984 were consolidated in ss.226-235 TULRCA (1992). The original provisions came into force on September 26 1984.

[6]. This provision was consolidated as section 219(1)(a) of the Trade Union and Labour Relations (Consolidation) Act (TULRCA) 1992.

[7]. These were the direct tort of inducing breach or interference with contracts of employment, or indirectly inducing breaches of or interference with commercial contracts by the unlawful means of inducing breach of or interference with the performance of contracts of employment. See Hadmor Productions v Hamilton [1983] 1 AC 191 which confirmed that this included interference with commercial contracts as well as breach of them.

(i) a ballot must have been held in respect of the strike or other industrial action and there must have been majority support for the action among those voting;

(ii) the ballot must have complied with the provisions of section 11 of the Act; and

(iii) authorisation or endorsement - and in the case of authorisation the industrial action itself - must have taken place after the ballot but within a period of four weeks from that date.

Where, therefore, acts were done by a trade union without a ballot which satisfied these requirements, the basic immunity from civil lability in the economic torts was lost.

(i) The need for a ballot

One feature of the provisions in the Trade Union Act was that immunities were withdrawn from unballoted action which involved a breach of contracts of employment, but not necessarily all industrial action[8]. A second feature of the provisions was that section 10 of the Act only affected 'acts done by a trade union', although where no ballot had been held immunity was removed not only from the union itself but also the individual organisers of industrial action. The limitation of trade union liability to 'official' action was generally assumed to be coterminous with the statutory code of vicarious liability for the economic torts originally enacted in Employment Act 1982 section 15. Action not 'authorised or endorsed by a responsible person' (EA 1982 ss.15(2) and (3)) would not expose the union or the organisers of the action to liability in tort on the grounds that it

8. Trade Union Act 1984 section 10(1)-(2).

was taken without reference to a ballot[9]. These two features of section 10 served to preserve some discretion for trade unions in decisions about ballots before industrial action. The law was tightened up in both respects in 1990, following case law in relation to these two issues which highlighted uncertainties in the original 1984 provisions (see further below).

(ii) Requirements for a valid ballot

On the timing of the ballot the 1984 Act envisaged two situations. First, where the ballot was held before the industrial action started and second where a ballot would be held to endorse industrial action that was already underway. Where the ballot preceded authorisation and the start of industrial action, industrial action had to be implemented within four weeks of the ballot if immunity was not to be lost. Where the industrial action had already begun, action could be endorsed, but the immunities would not cover any period before a ballot was held. It is notable that under the 1984 Act the question of whether there had been a breach of the balloting provisions could only be raised by an employer in a tort action against the union - there was no provision in 1984 to give individual members of a union the right to secure the calling of a strike ballot[10].

A number of requirements had to be satisfied if the immunities were to remain operative. Section 11(1)(a) provided that entitlement to vote in the ballot must be given equally to:

> all those members of the trade union who it is reasonable at the time of the

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[9]. For the other criteria that could be applied see Heaton's Transport v TGWU [1973] AC 15, HL, which set out the criteria for the purposes of unfair industrial practices under the Industrial Relations Act 1971 or the common law. The difficulties experienced in relation to the responsibility of trade unions for the acts of officials under the Industrial Relations Act are referred to above in chapter 2.

[10]. This was changed in the 1988 Employment Act, which gave members a right to challenge unballoted (or 'improperly' balloted) action. See further below.

> ballot for the union to believe will be called upon in the strike or other industrial action in question to act in breach of or to interfere with the performance of their contracts of employment.

No other persons were to be allowed to vote in the ballot (s.11(1)(b)). Industrial action would not retain immunity where any member of the trade union at the time of the ballot 'was denied entitlement to vote in the ballot'(s.11(2)(a)) and was then 'induced by the union' in the course of the action in respect of which the ballot was held to break or interfere with the performance of his/her contract of employment.

The conduct of the ballot was covered by section 11(3)-(8). Section 11(3) required the person voting to mark a ballot paper, so that a 'show of hands' would not be sufficient to meet the Act's requirements. Section 11(4)(a) and (b) related to the wording of the ballot paper itself, which was to include a question requiring members to indicate whether they were prepared to take part in industrial action involving a breach of their employment contracts. Subject to this requirement, the union had the freedom to frame the question(s) on strike action and action short of a strike[11].

Section 11(5)(a) invalidated a ballot if voters were subject to any 'interference or constraint' imposed by the 'union or any of its members, officials or employees'. Section 11(5)(b) required that voters should be given the opportunity to vote 'so far as is reasonably practicable', without incurring any direct cost. Section 11(6) related to the timing and location of the ballot and imposed an obligation on trade unions 'as far as is reasonably practicable' to make available or supply ballot papers to every person entitled to vote. Essentially the requirement was to use workplace ballots, if postal ballots were not held. Ballot papers were to be distributed immediately before or after or during 'working hours' - at the workplace or at a more convenient place. Similar provisions related to arrangements for votes to be cast. Section 11(7) covered the secrecy of the

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[11]. This freedom was removed by the Employment Act 1988.

ballot and counting of votes - to be carried out 'fairly and accurately', although with a proviso that an accidental inaccuracy could be disregarded if it had not affected the result of the ballot. Section 11(8) laid down requirements for the union to inform voters of the outcome[12].

Once enacted the 1984 balloting provisions were amended and added to by Conservative governments, up to 1995, on three subsequent occasions: 1988, 1990 and 1993.

Employment Act 1988

In broad terms the Employment Act 1988 made three relevant changes in the law on industrial action balloting. Firstly, it introduced a right for members to seek appropriate court orders where they were called upon by their union to take industrial action without a ballot in which members voted in favour of taking action and which satisfied the requirements of section 11. Industrial action was deemed to be taken without the support of a ballot unless the union had held a ballot in respect of the industrial action and the applicant had been accorded entitlement to vote in the ballot[13]. Prior to 1988 members did have rights at common law, but these were limited to a right to enforce the rules. If union rules contained a positive obligation to hold a ballot, a member could apply to the High Court for an interlocutory injunction to restrain the union from acting in breach of its rules. This was seen, however, to be a 'very exceptional form of relief'[14].

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[12]. Further requirements were added in this respect in future Acts.

[13]. This implemented proposals in the Green Paper Trade Unions and their Members Cm. 95 (London: HMSO) February 1987, although in an important respect the 1988 provisions were different from the 1987 proposals which were dependent on a breach of contract (see para 2.4). What section 1 did not do was to give members an independent right to require a ballot to be held. It was a right to challenge a union's decision to go ahead with unballoted action.

[14]. See Taylor v. NUM (Yorkshire Area) [1984] IRLR 445.

Section 1(1) of the Employment Act 1988 provided that:

> A member of a trade union who claims that the union has, without the support of a ballot, authorised or endorsed any industrial action in which members of the union (including that member) are likely to be, or have been, induced by the union to take part or to continue to take part may apply to the court for an order under this section.

A member's right to demand a ballot was not linked to industrial action which involved the member in breaking, or interfering with the performance of his/her contract of employment; it was much broader than that. Any unballoted action could be restrained by a member[15].

This gave rise to a potentially wide, but indeterminate, balloting obligation. Uncertainties were inherent in the meaning of 'inducement' where this was not linked to breach of contract, as well as situations in which members were 'likely to be, or have been, induced by the union'. One question raised was whether this would cover a recommendation to members to refrain from voluntary overtime pending the outcome of a ballot. Moreover, it was argued that:

> The uncertainty is compounded by the fact that a member may obtain a section 1 order on showing that it is 'likely' that he will be induced to take part in industrial action; thus the industrial action need not yet have taken place (McKendrick 1988).

What the Act did make clear was that an inducement did not have to be effective for the

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[15]. This had been the result of a Government amendment introduced in the House of Lords. The change had the effect of enlarging trade unions' loss of immunity for unballoted action from s.13(1)(a) to the other s.13 torts of intimidation and conspiracy, but this could only take effect if a member initiated proceedings.

balloting requirement to arise[16]. Further uncertainty was created because no definition of industrial action was provided beyond section 1(7) which referred to 'any strike or other industrial action by persons employed under contracts of employment'[17]. Wedderburn has argued that any and all forms of collective action would be caught by this definition:

> Under section 1 of the Act wherever a group of workers make a demand supported by their union with an implied threat to take action (and that is not difficult to prove) a dissident member can obtain a court order whether or not there is evidence that the action threatened itself would be by any rule of the general law unlawful. Breach of the employment contract is no longer the boundary of illegality. Now it is not the unlawful act but the group pressure, the collective organisation *itself* [italics in original] that is the target (Wedderburn 1991, 217).

The 1988 Act also created the post of Commissioner for the Rights of Trade Union Members (CROTUM). Her powers included a discretion to assist members who want to restrain their union from proceeding with a call for unballoted, or 'improperly' balloted action. The ballot itself had to comply with the requirements of section 11 of the 1984 Act.

Section 1(2) empowered the Court where it found that the balloting provisions had not been complied with to make an order requiring the union to ensure that no further inducement of the members took place. In addition the union was required to ensure that

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[16]. Employment Act 1988 s.1(6).

[17]. For interpretation lawyers and practitioners were left to look at other legislation. In the context of section 62 Employment Protection Consolidation Act a concerted refusal to work overtime might constitute industrial action, at least where the purpose was to apply pressure on the employer or disrupt the business Power Packing Casemakers v. Faust [1983] QB 471, although a threat to take industrial action Midland Plastics Ltd. v. Till [1983] ICR 118 or attendance at a mass meeting held in working time without the consent of the employer might not Rasool v. Hepworth Pipe Co. Ltd. (No.1) [1980] ICR 494. The guidance, though, could not be certain. See Naylor v. Orton & Smith Ltd. [1983] IRLR 233.

'no such member engages in any conduct after the making of the order by virtue of having been induced before the making of the order to take part or to continue to take part in the action', thus entitling the court to issue an order requiring the union to put pressure on its members not to continue with industrial action.

The second area of change in the balloting legislation in 1988 was the introduction of more detailed regulation of the form and content of the ballot paper. This involved an amendment to section 11 of the 1984 Act. The ballot paper was now required to include a statement that could not be qualified or commented on by anything else appearing on the ballot paper. It had to read:

> if you take part in a strike or other industrial action, you may be in breach of your contract of employment[18].

Thirdly section 17 of the 1988 Act amended the provisions relating to the balloting constituency in section 11(1) of the 1984 Trade Union Act[19]. The new general principle introduced in 1988 was that separate ballots must be held for each workplace and that immunity would only be enjoyed in respect of a strike at any place of work where the workers at that workplace had voted by a majority to take industrial action. Ballot results could be aggregated in certain cases if they fell within one of the three exceptions to the general principle, which were that:

> (i) at the time of the ballot it was reasonable for the union to believe and it did believe that all the members accorded entitlement to vote had the

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[18]. Section 11(3) of the Trade Union Act 1984 as amended in Schedule 3 to the Employment Act 1988.

[19]. Now TULR(C)A section 228.

same place of work;

(ii) all the members who worked for a particular employer were balloted;

(iii) all the union members balloted had a factor or factors in common which was a factor relating to their terms and conditions of employment or occupational description and all members with the factor in common were balloted.

The Act therefore created the presumption of a separate ballot at each place of work except where workers were linked by a 'common factor'. These were complex provisions. The Code of Practice on Industrial Action Balloting (1990) in sections 15-18 only served to compound the uncertainties:

> In stating that separate place of work ballots are not required when a union ballots all its members, paragraph 15 provides a questionable interpretation of TUA 1984 s.11(1B) (Simpson 1990, 29).

A further change in the law of a rather different nature increased the perception within the trade union movement that the legislation was increasingly weighted against the collective interests of trade union members. In addition to introducing a right for trade unions members to restrain unballoted industrial action, the Government also enacted, in section 3 of the 1988 Employment Act, protection for individual members who refused to participate in industrial action. Section 3 made it unlawful for trade unions to discipline members - which might take the form of fines or, in exceptional cases, expulsion - 'unjustifiably'. This included situations in which members had failed to take part in or support industrial action which had been given majority support in a ballot held in accordance with the Trade Union Act 1984. The Government argued that this special protection was necessary for individuals because a ballot provided a union and the organisers of industrial action with immunity, but did not protect members from dismissal

by an employer[20].

Code of Practice

Section 18 of the Employment Act 1988 amended the Employment Act 1980, section 3, to empower the Secretary of State to issue Codes of Practice concerning 'the conduct by trade unions of ballots and elections'. Codes do not in themselves give rise to legal obligations, but can be taken into account in proceedings before any court where they appear to be relevant (Simpson 1990)[21]. The normally accepted function of a code of practice is to provide clarification of the law. A draft code of practice was issued in November 1988, which many felt went much further than this. Its proposals for good practice included suggestions that a ballot should only be held after the union had assessed whether there was sufficient support among members for holding one (para 14), that industrial action should not follow a successful ballot unless the majority voting for industrial action was substantially more than a simple majority (para 97) on at least a 70% turnout (para 98). The format of model ballot papers in the draft code placed the box for a no vote above that for a yes vote. In the event the code which came into effect in Spring 1990 was a substantially modified version of this draft[22], but it continued to contain a large amount of highly prescriptive detail and was:

> a highly controversial document, which calls into question both the function of codes of practice and the role of ballots in the law on industrial

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[20]. See Trade Unions And Their Members (1987) chap 2, especially para 2.11. It should be noted that the Commissioner for the Rights of Trade Union Members was only empowered to provide assistance in cases before the High Court, not those issues that were dealt with by industrial tribunals, such as section 3 of the 1988 Act.

[21]. See also McIlroy 1991, 159-161, 180.

[22]. The code was revised in February 1991. A draft revised code was issued in 1994 to take account of the changes in the law in the Trade Union Reform and Employment Rights Act 1993. This came into effect in November 1995.

conflict (Simpson 1990).

Wide-ranging requirements relating to the information that unions were to give members imposed greater obligations than were contained in sections 11(3) and 11(4) of the Trade Union Act. The amount and nature of the detail could seriously restrict trade unions' freedom of manoeuvre in disputes[23]. Paragraph 8 of the code advised that industrial action should not take place until any agreed disputes procedures had been exhausted, a proposal that did not command widespread support. ACAS expressed concern that this might provide the basis of judicial determination on whether or not agreed procedures had been observed, despite the fact that the collective agreements containing those procedures were not intended to be legally binding. Its inclusion reflected the influence of the views of the Engineering Employers' Federation (EEF 1987). The EEF's concern to protect procedure agreements had informed its response to the balloting proposals in the Green Paper, Democracy in Trade Unions (Department of Employment 1983). The EEF commented then that:

> the...obligation to hold a ballot could be misused to 'legitimise' unconstitutional strike action and to pressure employers during the course of negotiations' (EEF 1983).

The 1988 code on balloting also aroused criticism because by anticipating future changes in the law, it went well beyond providing an interpretation of existing legislation. The

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[23]. See below London Underground Ltd v NUR [1989] IRLR 341 and Blue Circle v TGWU 7 July 1989 (unreported) on the significance of the wording of the ballot paper and accompanying information. The 1988 code on balloting required that the union 'should' give to members relevant information, including the background to the ballot and issues to which the dispute related, the nature and timing of industrial action that the union might be prepared to authorise and any considerations in relation to turnout or size of majority that would be relevant to a decision about whether the industrial action would go ahead (para 33).

code expressed a preference for postal ballots and the use of independent scrutineers (Department of Employment 1990, paras 20 and 23), practices which were not part of the then current balloting laws. They were incorporated into later balloting legislation.

Employment Act 1990

In 1990 a number of changes were made to the balloting legislation, both to extend the circumstances in which industrial action had to be preceded by a ballot and to tighten the requirements for a lawful ballot.

(i) The need for a ballot

Firstly, the 1990 Act redrafted section 10 of the 1984 Trade Union Act to remove immunity from acts done by trade unions to induce members to take industrial action. In other words, the balloting requirement was no longer expressed by reference to the tort of inducing breach of contract[24]:

> Contrary, perhaps, to the popular perception of the law, it is not the case that all industrial action has to be preceded by a ballot. After the amendments in EA 1990, however, the law has come as close as possible to that position without making the obligation to ballot completely independent of the immunities (Simpson 1993).

The balloting obligation was also extended under section 5(1) to workers who were not employees, such as many of those working in the construction industry, who were classified as self-employed. The amendment to section 10 had in effect already done this,

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[24]. Employment Act 1990 schedule 2 paras 2-3, now section 226(1) TULRCA 1992. The effect was to bring the basis for actions by employers into line with those for individual members.

so the change had little independent significance.

Secondly, section 6[25] widened the area of vicarious liability, which made a union legally responsible for the acts of any groups which included an official of the union, even though these groups might be wholly unofficial. Under section 15 of the 1982 Act, a union had been liable for the actions of full time officers and the committees to which they reported, unless they had no power to act as they did under the rules, or the acts had been repudiated by the President, General Secretary or Principal Executive Committee of the union. In 1990 liability was extended to responsibility for the acts of all officials, including lay officials and any committee even if not constituted under the rules, unless the union repudiated the actions in accordance with a complex procedure. This raised the possibility that industrial action organised by a group acting outside the constitution of the union, but including an official of the union, could be held to be the actions of the union.

The Employment Act 1990 section 6(4) imposed additional requirements on trade unions if they sought to 'repudiate' unofficial action. The President, General Secretary or Principal Executive Committee of the union had to act 'as soon as is reasonably practicable' to give written notice to the committee or official 'without delay'. The union was also required to 'do its best' to give written notice to every member whom it had reason to believe was taking part or might be called on to take part in industrial action and to give notice to employers. The wording of the statement to members had to be as follows:

> Your union has repudiated the call (or calls) for industrial action to which this notice relates and will give no support to unofficial action taken in response to it (or them). If you are dismissed while taking part in unofficial industrial action, you will have no right to complain of unfair dismissal (EA 1982 s.15 (5A)).

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[25]. These provisions were consolidated as sections 20 and 21 TULRCA 1992.

Moreover, if a request was received within three months of repudiation from a party to a commercial contract the trade union had to confirm the repudiation, otherwise the repudiation would be ineffective (s.6(7)). A related change in section 9(1) provided that workers dismissed whilst taking part in unofficial industrial action would not be able to bring a claim for unfair dismissal to an industrial tribunal[26]. Section 9(2) removed all the golden formula immunities for industrial action related to a dismissal in these circumstances.

(ii) Requirements for a valid ballot

In a third important change in the law, section 7(1) of the 1990 Employment Act required that the ballot paper should specify the person or description of persons 'who is or are authorised to call for industrial action in the event of a yes vote'[27]. A problem had been identified during a dispute at the Ford Motor Company, in which shop stewards allegedly called workers out after a ballot without waiting for the TGWU National Executive Committee to consider its response.

Section 7(3)(a) required that:

> there must have been no call by the trade union to take part or continue to take part in industrial action to which the ballot relates, or any other authorisation or endorsement by the union of any such industrial action, before the date of the ballot[28].

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[26]. This provision inserted s.62A Employment Protection Consolidation Act. Section 62 had previously been narrowed by Employment Act 1982 s.9. See Simpson 1991, 436.

[27]. This was consolidated as section 233(1) TULRCA 1992.

[28]. This was consolidated as section 233(3) TULRCA 1992.

It was clear that this posed a potential threat to the freedom of unions to campaign for a 'yes' vote. One further small, though significant, change in section 8, was of potential benefit to unions in protracted disputes. This allowed the four week time limit on the call for industrial action to be extended where legal proceedings otherwise meant that a further ballot would have to be held. Section 8(6)[29] provided that where a court order which had restrained a trade union from calling industrial action was set aside, a union could apply to the court for an order that the period during which it was prohibited from calling industrial action should not count towards the four week time limit[30].

Trade Union Reform and Employment Rights Act 1993

TURERA came into effect after the fieldwork for the research was completed. This section will outline the changes made, some of which had already been flagged up in the 1990 and 1991 strike ballot codes of practice.

Requirements for a valid ballot

1993 TURERA imposed changes in the law to require all industrial action ballots to be fully postal, rather than workplace. Since the 1993 Act also provided for the phasing out of the Scheme under which unions could apply to the Certification Officer for the costs of certain postal ballots to be reimbursed, this change had serious implications for all

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[29]. This was consolidated as section 234(2)-(6) TULRCA 1992.

[30]. This would avoid the situation which arose in Associated British Ports Ltd v TGWU [1989] ICR 557, where an injunction restraining the union from proceeding with its call for a strike was lifted by the House of Lords after the four week period had elapsed, so that the union had to hold a fresh ballot.

unions and not just those which had hitherto relied wholly or in part on workplace ballots[31]. The 1993 Act made it mandatory for industrial action ballots to be subject to oversight by an independent scrutineer where the numbers entitled to vote exceeded 50[32].

The 1993 Act introduced obligations on a union to give four written notices to each employer of members being balloted. This was possibly the most important of all the changes made to the law since 1984 (Elgar and Simpson 1996). The four notices were seven days notice of the union's intention to hold a ballot, to provide the employer with a sample ballot paper at least three days before the start of the ballot, to give the employer notice of the ballot result and, what is technically an obligation independent of the balloting requirement, to give seven days notice of the start of industrial action. The 1995 Code of Practice effectively extended the period of the notice requirements by suggesting that time should be allowed by the union to check that the employer received all the relevant details (paras 20, 24, 56(d), 64). Where the action was to be discontinuous, the seven days notice of industrial action was required to include details of the dates on which action would be taken[33]. Where, as in the Monsanto case (see below for further details), industrial action was called off to assist negotiations, seven days notice to the employer would be required before its resumption. The section 234A notice obligations contained one particularly contentious requirement. The notice of intention to hold a ballot and notice of industrial action was required to 'describe so that [the employer] can readily ascertain them' the members to be balloted or called on to take

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[31]. Section 115 TUR(C)A 1992 repealed by TURERA section 7.

[32]. TURERA 1993 section 20, [now TULRCA sections 226B and 231B]. This brought industrial action ballots into line with the requirements for trade union elections of national officers and national executive committees.

[33]. TURERA 1993 section 21 [now TULRCA 1992 section 234A]. This imposes a potentially impossible obligation on organisers of industrial action if the apparent requirement to notify employers of all the dates in advance is interpreted literally.

industrial action.

In October 1994 a draft revised Code of Practice, entitled Industrial Action Ballots and Notice to Employers, was issued to take account of changes in the TURERA 1993. This came into effect in November 1995. The Code suggested that:

> it will always be up to the union to satisfy the requirement to provide a notice which will enable an employer readily to ascertain which of his employees are likely to be given entitlement to vote (para 21. See also paras 65-66).

Whilst in some cases the union could meet its obligations by providing general information, in other cases 'if the employer would otherwise be left in doubt, more specific information (possibly including names and workplace locations) may be needed' (para 22). The requirement on unions to provide employers with the names of members who were to be balloted or called on to take industrial action was confirmed in case law[34].

3.2 Enforcement provisions

(i) Legal mechanisms

The 1984 Trade Union Act completely changed the nature of the balloting requirement from that which had previously been canvassed as a workable option (as well as from the legislative precedents in the Industrial Relations Act of 1971). It provided for mandatory ballots in defined circumstances, rather than discretionary ballots, and the 1984 Act placed enforcement mechanisms in the hands of employers, rather than individual trade union

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[34]. Blackpool and the Fylde College v. NATFHE [1994] ICR 648.

members or the state[35]. Employers were given new rights to make an application for a court order requiring industrial action, which did not have the support of a lawful ballot, not to go ahead or to cease[36]. Orders were enforced through the labour injunction procedure, which has been a considerable hurdle for trade unions seeking to defend their freedom to take industrial action.

(ii) The labour injunction

Labour injunctions are ultimately enforceable by contempt of court proceedings, but most cases in labour disputes do not go to a full hearing. Interlocutory proceedings, in which the courts make an interim order pending a full hearing of the case - which invariably does not take place - have usually been adequate to prevent or stop industrial action. More often than not, courts have required unions not to proceed with industrial action, on the basis of the interlocutory evidence before the court. Even if applications have not been granted, however, the union will certainly have been involved in considerable expense and diversion of resources away from the industrial dispute at issue[37].

Following American Cyanamid v Ethicon[38] in 1975 interlocutory proceedings have been determined by reference to whether there was a serious issue to be tried on points of substantive law. If there was, the application was then decided on the 'balance of

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[35]. Davies and Freedland 1993 comment on the terminology in the Green Paper, Democracy in Trade Unions (Department of Employment 1983) which refers to 'employer triggered ballots' (para 67). This did not actually propose to give employers powers to trigger ballots; employers were to deploy sanctions if trade unions failed to hold a ballot.

[36]. Between 1984 and 1990 this right existed only if the industrial action amounted to inducing employees to break their contracts of employment. It still does not exist if organising the industrial action does not amount to a tort.

[37]. See, for example, the sequence of events in Monsanto v TGWU [1989] ICR 269 and Tanks and Drums v TGWU [1992] ICR 1.

[38]. American Cyanamid v Ethicon [1975] AC 396.

convenience'. This has generally weighed against the union. One factor favouring employers was the perceived adequacy of damages for both the plaintiff and defendant if ultimately they should be successful in the case. In general the courts have not been prepared to take into account trade unions' need to take industrial action without undue delay, although this had been recognised by the House of Lords in NWL v. Woods in 1979[39].

Section 17(2), which was inserted into the Trade Union and Labour Relations Act (TULRA) 1974 by the Employment Protection Act (1975), required the court to take into account the likelihood of the defendant being able to establish that the act was 'in contemplation or furtherance of a trade dispute' (17(2)). Since 1984 section 17(2) had the potential to be of particular relevance in relation to the balloting requirement because of the complexity of the legislation and the potential ease with which an employer could establish 'a serious issue to be tried'[40]. Auerbach comments:

> [a]s is well known, the practical impact of [s.17(2)] in trade dispute cases has been minimal. Yet if it has any life left in it at all, it may well be found in cases where the technicalities of the ballot are attacked (Auerbach 1990, 122).

However, in a significant new development, which had the potential to override the protection of section 17(2), the courts gave emphasis to the public interest as a factor to

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[39]. [1979] ICR 867, 886. It was given less weight in Dimbleby and Sons v. NUJ [1984] 1 WLR 427, 432. In this case Lord Diplock ruled that repeal of section 14 made it easier for a judge to exercise discretion in interlocutory hearings and grant an injunction to an employer who had an arguable case because the case was now more likely to proceed to trial and final judgement where the defendant was the trade union itself and not a mere office holder in it. Cf. Wedderburn 1986, 687-93.

[40]. Monsanto v TGWU [1987] ICR 269; Post Office v UCW [1990] ICR 258.

be weighed in the balance of convenience[41]. If the balance of convenience did not weigh decisively one way or the other, the judge was required to have regard to the desirability of preserving the status quo. Where industrial action had not started, the status quo argument could be used to prevent industrial action taking place.

During the seafarers' dispute of 1988 an injunction was granted to P&O restraining the NUS from **holding** a ballot on the grounds that if the action went ahead, it would be unprotected secondary or sympathetic action under section 17 of the Employment Act 1980. Although the ballot was not in itself unlawful, the union was denied the opportunity of holding a ballot which could have been of strategic advantage in the dispute[42].

For trade unions, a series of procedural hurdles were also associated with labour injunctions. One of the most significant was the ability of employers to use the timing of applications to tactical advantage in disputes. In a number of balloting cases, injunctions were sought by employers only immediately before the proposed action was due to take place, although it is likely that the application was based on facts which were known considerably earlier. This applied to three of the high profile balloting cases of

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[41]. Associated British Ports Ltd v TGWU [1989] ICR 557. This decision was overturned in the House of Lords, but not on this point. See Simpson 1989, 239. The courts have taken the view - see for example, NWL V Woods [1979] ICR 867, 886 - that even where there was no case in the law of tort against the organisers of industrial action, they retained a residual power to award an injunction in the public interest. In the Associated British Ports case, the employers relied on the argument that all strikes were in breach of the National Dock Labour Scheme. The Court of Appeal decision to grant an injunction both accepted that this was arguable and referred to the court's right to take account of the public interest.

[42]. Auerbach 1988, 227, 229. See in particular P&O European Ferries (Portsmouth) Ltd v NUS The Independent March 28 1988. There were other cases involving P&O. Sealink also subsequently obtained an injunction on similar grounds.

1989 involving major employers[43]. It should be noted, however, that the tactical use of the injunction procedure was not a guarantee for employers of a successful outcome to the dispute. The way in which senior managers within British Rail handled the 1989 dispute and, in particular the application for a labour injunction, was seen to have undermined management's position and contributed to an increase in support for industrial action among NUR members (Elgar and Simpson 1994e). In the 1989 docks dispute the timing of the labour injunction application proved decisive in undermining industrial action[44].

A further difficulty for unions was that injunctions could be sought by employers ex parte, often with little or no notice being given to the union[45]. Section 17(1) provided that where a trade dispute defence could be raised, the court 'shall not' grant the order unless satisfied that all reasonable steps were taken to give proper notice so as to enable the other party to be heard. The protection that this gave to unions has been severely limited in practice[46].

(iii) Complying with an injunction

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[43]. British Railways Board v NUR [1989] ICR 678; London Underground Ltd v NUR [1989] IRLR 341; (No.2) 343; Blue Circle v TGWU 7 July 1989 (unreported). See Simpson 1989, 234, 235-236.

[44]. The employers delayed their legal challenge until after the ballot on industrial action had been held and in the course of the legal proceedings the four week time limit was exceeded. This case subsequently led to the amendment in the law in 1990 noted above p.80. On the implications for the industrial action see Simpson 1989, 240.

[45]. See Barretts and Baird Ltd v IPCS [1987] IRLR 3, where notice was given on the union's answering machine after 5pm on Friday and the application for an injunction was granted on the following Sunday. In London Underground Ltd v ASLEF 1995 the application led to a hearing in the judge's house on a Friday evening! See the Finanacial Times 26.7.95

[46]. However see Auerbach 1990, 121. This was one of the grounds on which the employers were refused an injunction in the case of Post Office v UCW [1990] ICR 258.

Most often, trade unions have sought to comply with labour injunctions, but on occasion, compliance to the satisfaction of the courts has proved to be difficult. One reason has been the time necessarily taken by trade union in consulting and reporting back to members. There were more intransigent problems where unions were required to instruct members to call off (or to conduct) action in accordance with the terms of a court order (Auerbach 1988). In a number of cases unions have been held to be 'tacitly condoning' unlawful action[47].

Cases of contempt of court have been rare in labour disputes. It has been suggested, however, that where the issue of contempt has arisen, there has been a tendency for the courts to define the parameters of a court order widely[48]. Contempt proceedings could mean that not only unions but also employers found the conduct of disputes taken out of their hands. In the seafarers dispute, the attempt by Sealink to both use the courts and to seek a negotiated settlement in parallel led the judge, Michael Davies J, in ordering sequestration of the assets of the NUS to say:

> I acknowledge that Sealink has never sought to say it really wants the NUS put out of business by a writ of sequestration. But if that is their view, perhaps they should wonder to what extent they ought, in future, to use that as a threat and then not wish to pursue it (Auerbach 1988, 234).

Judges have wide discretionary power in contempt proceedings in relation to the sanction to be imposed. In eleven of the twelve contempt cases arising from labour injunctions

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[47]. See Express & Star v NGA [1985] IRLR 222 (CA). See also P&O European Ferries (Dover) Ltd v NUS July 6 1988 cited in Auerbach 1988, 236. Similar issues had arisen during the Wapping dispute. See Messenger Group Newspapers v NGA 14 October, 17 and 25 November 1983 [1984] ICR 345. The company successfully pursued a claim for damages in Messenger Group Newspapers Ltd v NGA [1984] IRLR 397.

[48]. See O'Regan 1991, 385. This is a complex area of law and this section relies heavily on the work of O'Regan. See also Wedderburn on the Ready Mixed Concrete case in 'Contempt of Court: vicarious liability of companies and unions' Industrial Law Journal 1992, 21(1) 51.

since 1974, fines were the initial sanction. The highest fine against an individual defendant was £110,000[49], against a union it was £525,000[50]. Sequestration is a remedy of last resort in contempt cases. This took place in four disputes[51]. The evidence was that sequestration could impose particularly draconian restrictions on trade union (as well as third party) freedom of action in disputes. The costs to the unions concerned were considerable: an estimated £2 million in the case of the NGA in the 1983 Stockport Messenger dispute. It also proved difficult for trade unions to have sequestration orders lifted. In the case of the NUM this took well over a year after the coal dispute of 1985-85 ended. In this dispute, the full range of legal sanctions was invoked against the union and some of the area unions (Ewing 1985).

3.3 Judicial interpretation of the balloting requirement

Research on the recorded labour injunction cases over two periods in the 1980s showed that after 1984 the majority related to balloting[52]. There was a change in emphasis from the early 1980s when more applications from employers related to unballoted action and later cases in which the technicalities of the ballot held were under scrutiny. These cases amply demonstrated that the 1984 Act had not established precise limits to (i) the need for a ballot and (ii) the requirements for a valid ballot in disputes. Based on the case law of the 1980s and early 1990s, this section explores the role of the courts in setting the

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[49]. Mirror Group Newspapers v Harrison 7 November 1986.

[50]. Messenger Group Newspapers v NGA [1984] IRLR 397. The total fines levied in this dispute amounted to £675,000.

[51]. NGA in a dispute with the Stockport Messenger 1983; NUM and South Wales Area NUM in 1984 in the coal dispute of 1984-1985; SOGAT as a result of the Wapping dispute in 1986; and the NUS in 1988. See O'Regan 1991, especially 402-403.

[52]. See Evans 1985, 133-137; and Evans 1987, 419-435.

limits of lawful conduct in relation to industrial action balloting.

(i) The need for a ballot

The balloting requirement in the Trade Union Act of 1984 established a wide but circumscribed area of liability for trade unions. Interpretation by the courts of the parameters of the balloting requirement centred on two main issues. Firstly whether the action was in breach of workers' contracts of employment. In Solihull MBC v NUT[53], the NUT unsuccessfully argued that its call for members to refuse to cover for absent teachers and not to take part in lunchtime or after school activities was not in breach of their contracts of employment. These were interlocutory proceedings and it was sufficient for the judge to hold that there was a serious issue to be tried that some of these duties were contractual for the NUT to lose its case[54].

The second limitation on the balloting requirement in 1984 was that it applied only to 'official' industrial action. Interpretation centred, therefore on the definition of 'an act done by a union' without the support of a ballot. Much was made in debate at the time of the 1984 Bill, for example in the House of Commons second reading, that unofficial action was outside the scope of the provisions. This was true of unofficial action not 'done by a union', but as the Heaton's Transport case showed, the popular label 'unofficial' was not necessarily reflected in what the law would regard as acts for which a union was not responsible. Litigation arising from a dispute at Austin Rover in late 1984 raised the issue of when a union could be liable for the acts of joint union

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[53]. Solihull MBC v NUT [1985] IRLR 211,214.

[54]. The Teachers' Pay and Conditions Act (1987) would make this argument impossible now in the case of teachers. More broadly, the law was changed in 1990 to include industrial action which did not involve a breach of contract. See above p.77.

committees without resolving it[55].

It was in response to widespread unofficial industrial action on the London Underground in 1989 that the Government extended the range of circumstances in which a union would be legally responsible for industrial action. There was evidence that LUL had taken extensive legal advice relating to the liability of ASLEF for unofficial action by drivers, although this did not become an issue in the courts. The 1990 Act restricted the scope for trade unions to dissociate themselves from unballoted industrial action by making them responsible, inter alia, for the acts of wholly unofficial groups which included an official of the union. As a result of this change in the law and the uncertainty surrounding the issue of who was (and when they were) acting on the authority of the union, unions were encouraged to look very carefully at, and to tighten up, their practices for authorising industrial action (see further below).

(ii) Requirements for a valid ballot

Whilst it is clear that since 1984 unions have generally undertaken to ballot members before industrial action, what is not clear is that the ballots held have necessarily complied with legal requirements, which have become more complex with each new piece of legislation. Issues in the courts have related to four main areas: the wording on the ballot paper, the balloting constituency, time limits on the start of industrial action following a successful ballot, and those bodies and individuals with the authority to call for industrial action.

Ballot paper wording: the wording that was required to appear on the ballot paper gave rise to some litigation. In 1984 it appeared to be sufficient for unions to ask a single

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[55]. Injunctions were obtained against six of the eight unions. Proceedings against the EETPU were dropped after it announced it would hold a ballot, while the AUEW(E) successfully argued that it had done nothing unlawful. See Hutton 1985.

question covering both strike action and action short of a strike so long as this invited a simple yes or no answer from members on the question of whether they were prepared to participate in a strike or other industrial action which would involve them in breach of their employment contracts. In 1988, as part of the process of tightening up the balloting requirements, the law introduced separate questions to be asked. A UCW ballot held in August 1988 inadvertently breached these requirements which had come into effect in July. More intractable issues about the precise wording on the ballot paper - what should and should not be included - and the content of accompanying information came before the courts in the Blue Circle v. TGWU case[56] and arose again in 1995 in a case involving a ballot of ASLEF members in London Underground[57]. In the Blue Circle case the judge held that the extent of immunity conferred by a ballot was limited by reference both to what was stated on the ballot paper and in the accompanying literature - in this instance one 24 hour strike per week. In the same year, the wording on circulars accompanying the ballot paper was an issue in the case of London Underground v. NUR(LUL)[58]. An injunction was granted to the company restraining strike action on the grounds that only one of the issues identified in the circulars sent out by the union with ballot papers clearly fell within the definition of a trade dispute[59]. By contrast in Associated British Ports v.

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[56]. 7 July 1989 (unreported). See Simpson 1989, 234, 235.

[57]. It was reported that LUL succeeded in obtaining an injunction which restrained ASLEF from proceeding with a call for a 24 hour strike on the grounds that the ballot, in which a majority of ASLEF members had voted for industrial action, sought support for strike action to secure an improved pay offer from LUL, and that before the strike was called, LUL had made a small improvement in the offer.

[58]. [1989] IRLR 341.

[59]. This was held not to satisfy section 10(3)(a), thus the validity of the ballot was linked to the requirement for the union to show that it was acting in contemplation or furtherance (ICFTD) of a trade dispute. Arguably, however, these were two separate issues.

TGWU[60] the judge held that the only evidence required for a valid ballot was that the strike called was the strike voted for.

Further potential difficulties were posed for trade unions in relation to the wording of the ballot paper - especially in the case of protracted or complex disputes - by the decision in Newham LBC v. NALGO[61]. The Court of Appeal accepted the argument that if the situation arose in which there ceased to be a dispute over the issues identified on the ballot paper, but the industrial action continued, this could not be action supported by a valid ballot; although on the facts of this case the dispute was considered to be still 'live'. Woolf LJ. argued that the approach adopted by the court should in general be that so long as one party honestly and genuinely believed that the dispute continued, this was sufficient. Woolf LJ stated clearly, however, that:

> The legislation requires the appropriate questions to be identified in the ballot paper: section 11 of the Act of 1984. If there has ceased to be a dispute over those questions but the industrial action continues, then the subsequent industrial action cannot be action that is supported by the ballot.

This, it has been argued, was 'misleading to the extent that it suggests that a ballot paper necessarily identifies the issues in dispute' (Simpson 1993). There is evidence that following the Blue Circle case, unions have often confined the wording on ballot papers to the minimum required by legislation. They have either sent no accompanying information or phrased this in very broad terms[62].

Balloting constituencies: this has been a particularly complex area of the law. In case law

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[60]. Associated British Ports Ltd v TGWU [1989] IRLR 29.

[61]. Newham LBC v NALGO [1993] ICR 189,198.

[62]. The judge in the Blue Circle case agreed that other statements by the union would not similarly restrict the immunity conferred by the ballot.

there were two main avenues for employers to challenge the validity of a union's decision over the balloting constituency. The first was whether there should be separate place of work ballots. Following the 1988 Act there was a presumption in the law that separate place of work ballots would be held. In 1989 during the engineering hours dispute, BAe failed in its challenge to an MSF ballot at its Preston factory. Interestingly, the company sought to argue that the union could not disaggregate the votes for different occupational groups, which separately gave a majority for industrial action in one group, but overall represented a vote against[63].

Following the change in the law in 1988 the normal requirement was for unions to conduct separate ballots at each place of work and to treat each of the results independently. A ballot might, however, cover more than one place of work where all the members balloted were linked by a 'common factor' (section 228). In University of Central England v NALGO[64] it was held that this common factor exception permitted a union to hold a single ballot of members covered by the same bargaining arrangements but employed by different employers. The University of Central England failed in its argument that NALGO could not lawfully hold a single ballot of members who were employed by colleges affiliated to the Polytechnics and Colleges Employers' Forum which negotiated terms and conditions for administrative staff with NALGO.

Secondly, employers have challenged the validity of balloting constituencies on the grounds of changes in union membership between the date of the ballot and industrial action. In the Post Office v UCW case (1990) before the Court of Appeal, which related to a programme of industrial action following a ballot in August 1988, the employers sought to argue that a change in the workforce of some 30% by January 1990 meant that

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[63]. See Financial Times 27, 28 and 31 October 1989.

[64]. University of Central England v NALGO [1993] IRLR 81. The Polytechnics and Colleges Employers' Forum (PCEF) was arguing, in effect, that disaggregation of the results was always required.

the ballot was no longer valid. This was rejected by the court, on the basis that section 11(1) only required that those members **at the time of the ballot** whom the union reasonably believed would be called upon to take industrial action should be accorded entitlement to vote. Lord Donaldson did suggest, however, that it would seem to follow that only those employed by the employer and given an opportunity of voting at the time of the ballot should be called upon to take action, subject to de minimis changes in the workforce[65]. This was to argue that a union could not claim immunity for calling industrial action by members who at the time of the ballot were not employees of the employer party to the dispute. The key issue related to entitlement to vote in section 11 of the 1984 Act, which invalidated a ballot if a person was denied entitlement to vote and was a member of the union at the time of the ballot (s.11(2)). It has been argued that Lord Donaldson's obiter dicta, therefore, misconstrued the provisions of section 11. The question of whether individuals had been given an opportunity to vote was a separate matter covered by s.11(6) (Auerbach 1990, 122). A decision of the Court of Appeal in 1995 in the London Underground case[66] confirmed that a union was not required to restrict its call for industrial action to those members who were members at the time of the ballot and given an opportunity to vote in it.

The distinction in law between the entitlement of members to vote which is unqualified (section 11(1) Trade Union Act 1984) and the qualified obligation on a union (section 11(6)(a)) to 'so far as is reasonably practicable' make available or supply ballot papers to those entitled to vote was central to the case of British Railways Board v NUR (BR)[67] (1989). British Rail failed in its attempt to challenge a ballot on the grounds that a number of members had not received ballot papers. It was held that there was a 'profound difference' between the situation in which a small number of members (said

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[65]. Post Office v UCW [1990] ICR 258. This was technically obiter.

[66]. London Underground Ltd v National Union of Rail, Maritime and Transport Workers [1996] ICR 170 CA.

[67]. British Railways Board v NUR [1989] ICR 678.

to be 200 in a ballot in which some 64,000 ballot papers were issued) inadvertently did not have ballot papers supplied or made available to them, and denying someone the entitlement to vote. The small numbers involved were said to be insufficient to amount to a breach of either section 11(1) or section 11(6). The union, therefore, won this case:

> But the case still points up the existence of an avenue for challenge to ballots through the labour injunction proceedings. Because of the imprecise nature of the obligations imposed, s.11 provides others...Legal challenges to the validity of strike ballots are therefore likely to continue (Simpson 1989, 234).

Time limitations: a further balloting issue which was subject to judicial interpretation was the maximum time allowed to lapse between the ballot and industrial action taking place. In 1984 a four week time limit was imposed on the validity of a ballot[68]. Up to 1990 this meant that the act of inducing workers to break their contracts of employment had to take place within this four week period. The Scottish prison service sought to argue that this condition was not satisfied where, in order to keep the ballot mandate alive, the POA instructed branches to take action short of a strike in the form of holding meetings without permission, but not all branches followed this instruction. In Secretary of State v Scottish Prison Officers Association[69] the court rejected the employers' submission. In the judge's view the legislation did not require the relevant act of inducement to be successful.

The courts have also drawn a distinction between negotiating situations in which industrial action was suspended and was subsequently resumed without the need for a further ballot and, on the other hand, the cessation of industrial action and its reintroduction at a later date, albeit in the same campaign of action, when a second ballot would be needed. In Monsanto v TGWU[70] the Court held that no further ballot was required where industrial

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[68]. For the limited exceptions introduced in the 1990 Act see above p.80.

[69]. Secretary of State v Scottish POA [1991] IRLR 371.

[70]. Monsanto v TGWU [1987] ICR 269 CA.

action was suspended for 14 days to enable negotiations to take place. In the Post Office v UCW[71], by contrast, although the dispute referred to in the ballot was still continuing, action resumed in autumn 1989 after a gap since December 1988 was held not to be protected by the original ballot in August 1988 and a fresh ballot was required. One reason for the distinction drawn between the two cases was the difference in the time that had elapsed in the respective cases between the cessation and resumption of industrial action. In the Post Office case, Lord Donaldson suggested that, in line with section 10(3)(c) which imposed a four week time limit on calling industrial action, to be protected by a valid ballot, action once started 'shall continue without substantial interruption'. The second distinction drawn by the Court of Appeal in the Post Office case was between resumed industrial action anticipated at the time it was suspended and a new programme of industrial action not previously contemplated. Section 10(3) of the 1984 Act provided that a ballot must have been held 'in respect of the strike or other industrial action'. This requirement was held not to have been fulfilled in the Post Office case, even though the dispute was continuing, a decision which could raise particular difficulties for unions in disputes involving action short of an all-out strike of an intermittent nature. The Post Office case indicated that for a ballot to be valid, the union would need to have balloted on specific action and that it might not be lawful for a union to envisage this developing in the course of a campaign on the basis of a single ballot[72].

Call for industrial action: the conduct of disputes was further complicated by section 7 of the 1990 Act, which required that there must have been no call for industrial action by the union before the ballot. This raised the issue of the freedom of a union to campaign for a yes vote in a ballot, which came before the Court of Appeal for consideration in

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[71]. [1990] ICR 258 CA.

[72]. Auerbach 1990, 124. Following the 1993 Act unions are required to give advance notice of the days of discontinuous industrial action. It is not yet clear whether this requires all days to be notified before the first of them. This would be the most restrictive interpretation of the law.

Newham LBC v NALGO[73]. NALGO balloted its members in a dispute over redundancies affecting members in all departments and the council's threat to dismiss members in the poll tax section who were already taking industrial action in protest over three officers in the section being made redundant. Before the ballot a letter was sent to all members emphasising the importance of a 'yes' vote. This was challenged by the employer, but was found not to be in breach of the requirement that there must have been no call by the union for industrial action before the ballot. The Council also failed in its further argument that because NALGO included in the ballot members who were already on strike, the ballot was by definition in breach of this requirement. In the judgement of Woolf LJ, it was said that to accept the argument made on behalf of the council would mean that 'in a situation such as this the union would be required to call off all existing action before it held a ballot as to its proposed action'. The judge accepted the argument on behalf of NALGO that this was not what was intended by section 7 of the 1990 Act.

The 1990 Act required that, following a ballot showing a majority for industrial action, the action was called by a specified person, who was the person specified on the ballot paper as authorised to call on union members to take part or to continue to take part in industrial action. In Tanks and Drums v TGWU[74] the TGWU successfully argued that this allowed negotiators to go into a negotiating meeting with the prior authorisation of the General Secretary to call for industrial action if they were unable to negotiate a successful agreement. In the Court of Appeal, on refusing the employer's appeal against the discharge of an interlocutory injunction, Neill LJ said:

> It seems to me that in the field of industrial relations it would be impracticable to leave matters in such a way that there was no possibility for the exercise of judgement on the ground. Some matters must be left for the judgement of those on the ground who have to decide how and when

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[73]. Newham LBC v NALGO [1993] ICR 189, 198.

[74]. Tanks and Drums v TGWU [1992]ICR 1.

as a matter of common sense the call for action is to be put into operation.

Uncertainty has continued to surround the concept of 'calling for' a strike (Wynne-Evans 1991). It has been argued that whilst an unspecified official could be given limited discretion governed by the decision in principle of the specified official, this would shade into the situation where the specified official was actually deemed not to be calling for the industrial action. The Government argued that the 1990 Act would create greater certainty by broadening the definition of 'official' industrial action and encouraging unions to tighten up their control over this action. The uncertainty over when a specified official has 'called' for industrial action, however:

> detracts from the certainty of the Act by providing generalized principles and individualized decisions and may reinforce the feeling that the Act's technicality can only be a spur to litigation and legalistic obstruction of unions (Wynne-Evans 1991, 296).

It has also been suggested that one practical effect of the provisions in the 1993 Act, which required unions to give employers seven days notice of industrial action, could be that employers would insist that union officials referred back to the specified person on the ballot paper, although this is not in fact required in law, before the seven days notice of industrial action was given (Simpson 1993).

3.4 Conclusions

This chapter has provided an account of developments in the laws relating to balloting in the 1980s. This has shown the increasing technical complexity of the legislative requirements, relating both to the need to ballot in defined circumstances and the requirements for a valid ballot. The legal mechanisms for enforcing the balloting provisions have relied on the labour injunction procedures. Where they have been invoked by employers, these have imposed considerable restrictions on trade unions'

ability to continue to conduct a dispute effectively.

Case law has reflected the increasingly complex and restrictive nature of the balloting laws, in relation to the wording on the ballot paper, balloting constituencies, time limitations, and the call for industrial action, which now includes a series of notice requirements. The courts, however, have in general displayed a limited willingness, in response to some highly technical applications from employers, to add further to the already extensive requirements placed on the organisers of industrial action by the 1980s balloting legislation.

CHAPTER 4 THE DEVELOPMENT OF GOVERNMENT POLICY ON BALLOTS IN THE 1980s

4.1 Introduction

This chapter looks at the development of Government policy on industrial action ballots in the 1980s. It briefly reviews the debate about the ideological origins of the legislation, provides an analysis of policy documents relating to ballots and the encouragement given by Government to employers to make use of the law.

There is no doubt that the 1980s saw a fundamental change in industrial relations law. Balloting was a key element of Government thinking on changes in the law and, as such, a central part of the broader programme of reform. One debate about the legislation of the 1980s has been whether it was essentially a pragmatic response to industrial relations problems - this is not to say that it was without strategic objectives - or one part of a broader ideological approach to restructuring the labour market and the economy, which included the vision of a labour market freed from the constraints of trade union power. On the one hand Wedderburn has argued that Conservative governments had a number of key objectives which could be achieved in part through legislation. These included inhibiting collective organisation of workers - what Wedderburn refers to as 'destabilising collectivism' - and more specifically restricting trade union activity to individual workplaces. Both objectives could be seen to have informed the balloting legislation and, in particular, to have characterised the 1988 provisions. Writing in 1989, Wedderburn commented:

> This insistence that so-called individual rights must always prevail, and be made by the state to prevail, against the association or group - and in particular against the union - is the latest marker clearly to characterise the

new British labour law[1].

This argument was given weight by Government assertions that changes in the law had been necessary to achieve rises in productivity and greater labour market competition (Department of Employment 1989a, para 1.1). Such assertions, which had a clear ideological bias, were criticised by some commentators for the absence of a factual justification[2].

Others, including Auerbach (Auerbach 1990; Hendy 1993), have argued that the legislative programme had more pragmatic origins and purposes as it gradually unfolded, although accepting that the Government was acting within a broad ideological framework. The balloting legislation could not be seen to reflect in any simple way the thinking of the 'New Right'. In Striking Out Strikes, Hanson and Mather argued that ballots only served to give a spurious legitimacy to industrial action (Hanson and Mather 1988). The development of Government policy was clearly a complex process. Unlike in 1970, the Government did not come to power in 1979 with a predetermined policy and programme of legislation. This evolved more gradually as a result of internal debates within the party (Fosh et al. 1993). The replacement in 1982 of James Prior by Norman Tebbit as Secretary of State for Employment was widely seen as a significant turning point. It could also be argued that in adopting a step by step approach, the Government was reacting to the decline in trade union power as well as contributing to it (Disney 1990).

Whilst the debate about Conservative Party ideology could overstate the anti-thesis

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[1]. Wedderburn 1991, 218. See also McIlroy 1991.

[2]. See Brown 1989 on the misguided Government belief that fragmentation of bargaining was a means to greater labour market competition. See also Brown and Wadwhani 1990; Dunn and Metcalf 1994.

between acting pragmatically and ideologically, it highlights the range of possible objectives attached to balloting as an instrument of wider economic and social policy. There were some apparent contradictions in the thinking behind Government policy on ballots, which seemed to aim to give additional powers both to members and leaders of trade unions. Was the Government, in fact seeking to empower national leaders and members over shop stewards? Dunn and Metcalf have argued:

> If legal responsibilities make the national leadership more cautious at the same time as its authority is strengthened by popular support, then the active minority, the stewards and other lay volunteers, who have traditionally given British trade unionism some radical energy, are likely to find themselves sandwiched and sandbagged (Dunn and Metcalf 1994).

If this Government intentions in 1984, did balloting policy change over time in recognition of the difficulties of achieving these policy goals?

4.2 Balloting legislation: ideology or pragmatism

The policy goals that have informed the various strike ballot proposals up to and including those of the 1980s have not always been clearly articulated. It is apparent, however, that historically one of the expectations of those who favoured strike ballots was that they would reduce the incidence of industrial action. In broad terms, it was anticipated that this would be achieved by restraining the influence of 'militant' leaders by improving trade union 'democracy' and making decisions more representative of members' views (Department of Employment and Productivity 1969). Strike ballots could, however, also be seen to reinforce the position of trade union officers over unofficial leaders and workgroups. The desire to restrain 'militant' trade union leaderships while at the same time requiring the same leaders to exert greater control over unofficial industrial action were not necessarily compatible, but both were consistent with a general concern to maximise individual members' rights. Not surprisingly, given unprecedented levels of

industrial action in the 1970s, Conservative governments of the 1980s shared the overriding policy goal of seeking to reduce industrial action. The 'militant leadership/moderate membership' argument appeared to be most influential in Conservative thinking leading up to the 1984 Act.

A feature of earlier policy proposals on strike ballots was that they formed part of emergency provisions to deal with industrial action in circumstances of a national emergency. This gave strike ballots a specific and limited purpose as in the Industrial Relations Act of 1971. Conservative governments of the 1980s were to shy away from any form of emergency procedures, including strike ballots, for two main reasons. Firstly, there was doubt that the emergency procedures, including strike ballots, could achieve their objectives. On the only occasion that a ballot was held under the emergency procedures of the Industrial Relations Act, it resulted in an overwhelming majority in favour of industrial action[3].

Secondly, Conservative governments were reluctant to become directly involved in the enforcement mechanisms of the legislation. This approach meant that Conservative governments were also reluctant to legislate on strikes in essential services. Whilst strikes in essential services - and in the public sector more broadly - were of central concern to the 1979 Government, it resisted pressure to legislate directly on this issue[4]. Trade Union Immunities (Department of Employment 1981) raised the possibility of proposals for legislating to restrict strikes in essential services, but without ever appearing to have the conviction that this was an effective approach in practice (paras 333, 337). This reflected, in part, a reluctance to establish pay review mechanisms. Debates leading up to the 1984

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[3]. On the Industrial Relations Act see Weekes et al. 1975.

[4]. The Conservatives had undertaken to consult on legislating on strikes in essential services in the 1979 election manifesto and regularly made a similar commitment on other occasions up to and including 1996.

Act confirmed that industrial action balloting legislation was seen as one way of way of dealing with threat of the strike weapon in major public sector disputes[5]. This was always with the proviso that enforcement would be in the hands of employers. A reluctance to become directly involved was characteristic of the Government's approach to the legislative programme in general and strike ballots in particular[6]. In 1984 the decision to introduce mandatory ballots before all official industrial action and to place the enforcement mechanisms in the hands of employers was implemented, despite the serious reservations expressed by some employers' organisations (Ewing 1986).

In many respects the 1984 Trade Union Act represented a new departure in policies on industrial action balloting. As noted above, both Conservative and Labour governments since the 1960s had begun to look for measures to control the disruptive potential of industrial action by imposing a tighter framework of regulation on trade union practices and procedures. There had not been widespread support, however, for using industrial action ballots to achieve this. After 1984 the principle of requiring trade unions to hold a secret ballot of members before industrial action, appeared to be fairly quickly accepted, not only by employers but also trade unions. Debate was fuelled, however, by the development of an increasingly restrictive legal framework for ballots throughout the 1980s. Critics argued that whilst the law could legitimately have a role in contributing to the reform of industrial relations, the balloting legislation increasingly overstepped the parameters of reform and became a vehicle for restricting and controlling the legitimate activities of trade unions in the sphere of industrial action (Fredman 1992). While both strands of policy were apparent in balloting legislation since 1980, the emphasis on reform

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[5]. See the House of Lords debate on the Green Paper Democracy in Trade Unions (Department of Employment 1983) House of Lords Debates Volume 4, cols 727-797 16 March 1983, especially 730.

[6]. See Auerbach 1990, chapter 5. The Government came under pressure in particular from the small business lobby to assist employers in enforcing the law. This was resisted.

was steadily replaced later in the 1980s by a policy which was more overtly restrictive in intent. The commitment of Conservative governments to promote individual rights was particularly controversial[7], because it appeared to be at the expense of collective rights and was seen to reflect the development and growing influence on Government policies of a traditional Conservative ideology. The Government's rationale for strike ballots often placed more emphasis on the need to protect individuals who took part in industrial action, rather than the intrinsic value of ballots per se.

In taking a more positive view of the benefits of strike ballots than previous administrations, Conservative governments, therefore, imported into the arguments more of an ideological element. It was in part as a result of this ideological perspective that Conservative proposals for strike ballots have often seemed to take it for granted that the reasons for introducing ballots, both for trade union elections and industrial action, were too obvious to require stating let alone arguing in any detailed way. From the perspective of the Right of the political spectrum strike ballots were seen as a quid pro quo for trade union 'privileges'. The influence of this approach was clearly reflected in Government publications and policy statements such as Democracy in Trade Unions (Department of Employment 1983). The existence of TULRA section 13 immunities, the absence of any tight regulation of the internal affairs of trade unions and even the non-enforceability of collective agreements were seen to place trade unions in a position which was 'above the law' and required special regulation. This was repeatedly stressed in parliament in debates[8] even though trade unions had recently lost complete immunity from civil liability

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[7]. Although it should be noted that the Government's decision in 1984 to place the enforcement mechanisms for the balloting requirement in the hands of employers appeared to be at odds with this policy objective.

[8]. See the House of Lords debate on the Green Paper Democracy in Trade Unions (Department of Employment 1983) House of Lords Debates Volume 4, cols 727-797 16 March 1983, especially 765.

in tort and the narrowing of the application of the immunities for organising industrial action had excluded most forms of secondary action, secondary picketing and action in support of union only and recognition only practices. The special privileges argument characterised the thinking of Hayek which, it has been argued, had an increasing influence on government policy during the Thatcher administrations (Wedderburn 1991).

Conservative governments' policies on industrial action balloting could be seen to have a significant ideological element in another important respect. As balloting policy developed over the 1980s, it could be argued that an underlying (and not entirely unspoken) goal of mandatory strike ballots was that they formed one plank - or one step - of a policy of undermining rather than reinforcing the authority of trade unions in the workplace and hence further reducing trade union power. The introduction of ballots could, therefore, be seen to dovetail with wider policy objectives which consistently led to an attack on industrial relations policies based on joint regulation, in order to free the labour market from unnecessary restrictions. The key to the success of this policy objective was for ballots to produce votes against industrial action. The gradual tightening up of the legislation, in response to evidence that by and large members were voting in favour of industrial action, was consistent with this view of a broader ideological element to Government policy.

The evolution of Government thinking on industrial action ballots had taken place alongside a development in its approach to changes in industrial conflict law more generally. This at first focused on dealing with so-called abuses of union power rather than on pursuing broader policy objectives. While the 1979 Government,therefore, initially approached the idea of mandatory ballots before industrial action with some caution and recognised the dangers inherent in its balloting policy, concern to encourage unions to use ballots, and specifically postal ballots, was already at the top of the Government's agenda for reform. In July 1979 the Government published three working papers. These covered picketing, the closed shop and funding for ballots (Lewis and Simpson 1981). A scheme to provide public funding for certain postal ballots was introduced in the Employment Act

1980. Subsequent developments in the policy on balloting can be traced through a series of Green Papers during the 1980s.

4.3 Development of policy on industrial action ballots in the 1980s

In the introduction to Trade Union Immunities, which was the first of the Green Papers on labour law reform of the 1980s, the Government set out a broad agenda for reform:

> For at least a generation now our industrial relations have failed us because they have inhibited improvements in productivity, acted as a disincentive to investment and discouraged innovation. The results are apparent in our poor industrial performance and lower standard of living compared with our major competitors overseas (para 1).

And, more specifically, it was argued that:

> The readiness to threaten industrial action has imposed serious obstacles to necessary change, greater efficiency and improved performance in many of our industries. As a result our ability to compete in home and overseas markets has seriously declined (para 4).

By the 1980s the debate had moved away from some of the proposals for reforming industrial relations which had been prevalent in the 1960s and 1970s (Donovan 1968). This was particularly true of proposals for the legal enforceability of collective agreements. As Trade Union Immunities commented:

> If both employers and trade union negotiators had accepted that it was in their interests to conclude legally binding agreements they could have done so at any time in the last 100 years. They have hardly ever done so (para 239).

It was not immediately apparent, however, that an important shift had taken place. Trade

Union Immunities was a discursive, wide ranging document in which many options for the role of the law in the reform of industrial relations were considered. Whilst industrial action balloting was considered, Trade Union Immunities did not promote the idea of strike ballots. Some of the more general themes, however, which later underlay the balloting legislation were already apparent.

The first of these themes was that unions' 'freedom' to strike should be used 'responsibly' and that measures needed to be taken to prevent unofficial and unconstitutional industrial action:

> Many strikes effectively repudiate agreements made by those organising them or by their representatives and the vast majority are called without reference to senior trade union officials and without their endorsement (para 4)[9].

The Green Paper went on to argue that 'trade unions have too few obligations and too much power' and that there was a growing public concern over the impact of 'unregulated industrial action':

> It has brought into focus the issue of the role of the law in restraining excesses and abuses of industrial power and it has led to renewed questioning of the legal framework within which employers and unions operate (para 12).

Whilst Trade Union Immunities expressed concern about 'trade union power' without ever clearly defining this, it did recognise that any proposals for legislation would need to address the reality of shopfloor bargaining and 'current propensity for unofficial action' (para 13). Trade Union Immunities went on to argue that an increase in formal plant level bargaining had not led to improved procedures and a decline in industrial conflict

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[9]. Para 15 reported that some 90% of strikes were unofficial.

in the way that Donovan had envisaged (para 16). As such, the Green Paper was setting the scene for a wider debate about the role of the law in shifting the locus of power within trade unions: between national officers, executive committees, shop stewards and members.

A second theme of Trade Union Immunities, which was to become key to legislative developments in the 1980s, was the protection of individual trade union members:

> If trade unions are to restore their authority and regain or sustain the confidence of their members they must be fully democratic both in the way they take critical decisions and in the method of electing their officials (para 20).

Trade Union Immunities argued that the practice within unions of holding secret ballots on industrial action (and elections and pay offers) was still very far from being general and that progress in extending the use of balloting had been slow (para 245). It was suggested that 'too often in recent years' strikes had been called 'without proper consultation' with union members and sometimes against their express wishes (para 246).

A number of questions remained unanswered, including the potential conflict between concerns to address the issue of unofficial action on the one hand and, on the other, to enhance the rights of individual members (Hutton 1985). Proposals founded on a concept of enhancing trade union democracy also raised a priori questions about the appropriate standards and criteria for judging trade union democracy. At what level would decisions be taken? Would a 'democratic' trade union in fact best serve the needs of its members? Industrial action ballots were seen by Trade Union Immunities to be a natural extension of ballots for the election of trade union officers. If, however, trade union officers were democratically elected, it could be argued that it was inconsistent with the objective of promoting democracy within trade unions to circumscribe their authority to organise industrial action.

The Green Paper outlined two main approaches to industrial action ballots, the objectives and underlying justification for which were very similar:

> [The approaches] share a strong belief that, in a matter of such importance to an employee's livelihood as a strike, it is right that he should have the opportunity of registering his view on the issue in a secret ballot (para 253).

The first was to make statutory provision for ballots to be 'triggered' by union members. The proposals reflected calls from Conservative backbenchers during debates on the 1980 Employment Bill for the introduction of a legal mechanism whereby strike ballots could be triggered by a demand from trade union members[10]. The second approach was to rely on encouraging ballots in a non-mandatory way. This had been the approach of section 1 of the 1980 Employment Act which had made funds available to reimburse trade unions for the costs of certain postal ballots. The difference between the two approaches was said to be one of emphasis and practicability; between those who believed that the extension of the practice of balloting would only take place if established in law, as against those who believed that to impose a requirement on unions to hold ballots could inhibit the greater use of ballots as a normal union practice and undermine 'responsible' union leaders who sought to make use of the funds under section 1 EA 1980 to move towards the wider use of ballots:

> It could be claimed by unions that the government was seeking to interfere in their internal affairs, overriding their constitutions and rules which are themselves democratically determined (para 258).

Trade Union Immunities took into account the implacable opposition of the trade union

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[10]. See summary in Trade Union Immunities para 252 of proposals put forward by Conservative backbenchers in the debates on the Employment Bill 1980.

movement to previous compulsory strike ballot proposals[11]. It was argued that 'triggered' ballots avoided some of these difficulties by placing enforcement in the hands of trade union members[12]. The Green Paper recognised, however, that the practical problems of legislating for 'triggered' ballots were considerable (para 259). These were difficulties that had previously concerned public policy makers. They included determining when the threshold of members required to trigger the ballot had been crossed; deciding, in cases of uncertainty, who was to determine when a ballot should be held; and whether in the meantime industrial action would attract trade dispute immunities. It was also recognised that there would be particular difficulties where more than one union was involved. Where these issues could not be resolved, it might be necessary to involve an outside supervisory agency and then 'the expected advantage of this approach - that it did not intervene in the affairs of the trade union - would be lost' (para 259).

Trade Union Immunities argued that the most difficult issue to resolve was the question of sanctions. This was presumed to be loss of immunities which led naturally to the question of the applicability of such provisions to unofficial action. As paragraph 260 stated:

> ...perhaps the greatest problem posed by "triggered" ballots is whether they should apply to unofficial industrial action.

If they did not apply to unofficial action, the Green Paper argued that 'a premium would be placed on irresponsible behaviour'. If they did, 'it might be possible for unofficial strike leaders to use the ballot procedure to secure respectability and recognition'. Overall,

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[11]. The trade union movement was very hostile to the then Labour Government's proposals contained in In Place of Strife (1969). See also Weekes et al. 1975, on the experience of the 1971 Industrial Relations Act.

[12]. Department of Employment 1981 para 256; see also para 318 on Taft-Hartley.

therefore, while Trade Union Immunities was supportive of balloting as such, its tone did not appear to promote either the legislative requirement to ballot or legal regulation of industrial action ballots. The technical complexities associated with 'triggered' strike ballots might help to explain why they were not taken up - despite their obvious initial attractions for a Government committed to enhancing the role of individual trade union members in decision making - in its 1982 labour legislation.

Whilst the tone of the Green Paper Democracy in Trade Unions (Department of Employment 1983) was not noticeably more enthusiastic about the requirement to ballot and cited a number of practical difficulties, there was a change of emphasis. It now seemed to be assumed that the case for ballots had been made and the need was to devise a scheme that would overcome these difficulties. The arguments were based on two themes similar to those in the earlier Green Paper. The first of these was to ensure the protection of the rights of individual union members vis a vis the union as a body and to ensure that union leaders were 'properly accountable' to the members. The second theme related to the 'power' of trade union leaders 'to initiate industrial action which could damage the economic and commercial interests of others'. This reflected a broader concern that trade unions should operate 'in a manner which commands public confidence' (para 3).

Once again the primacy of the 'militant leadership/moderate membership' argument is notable. There continued, however, to be a note of caution in the Government's approach. The Government was concerned to ensure that, in legislating for strike ballots, this should avoid giving trade unions an unintended advantage in negotiations. There was a particular concern[13] that if trade union members saw ballots as a vote of confidence in

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[13]. See Lord Gowrie, Government spokesperson in the House of Lords in the House of Lords debate on the Green Paper Democracy in Trade Unions (Department of Employment 1983) House of Lords Debates Volume 4, cols 727-797 16 March 1983, especially 744.

their leaders, this could result in ballots invariably producing votes favour of industrial action by large majorities. The Government did not respond, however, to arguments such as those of Lord McCarthy, the Opposition front bench spokesperson, that once a ballot had been held this could make it more difficult to settle a dispute.

The focus of the Government's concern in relation to strike ballots was, therefore, to protect the interests of individual union members and the public. The need to regulate trade union behaviour was assumed to go unchallenged. The rationale for legislative proposals relied on the assertion that 'trade unions have refused the opportunity to reform themselves voluntarily' (para 2). It should be noted that this assertion in itself confused two separate issues, which were, firstly, balloting per se and, secondly, the use of postal ballots.

Chapter 3 of the Green Paper, which was by far the shortest substantive chapter in Democracy in Trade Unions, detailed the proposals on industrial action balloting. It made the assumption that - as in the case of trade union elections - the case for industrial action ballots was simple and unanswerable. The chapter amplified and combined the two themes outlined in the introduction to the Green Paper. Industrial action ballots had a role in reducing the incidence of industrial action by giving a voice to 'responsible' trade union members:

> Society has a right to expect that the strike weapon will be used sparingly, responsibly and democratically. It is wholly unacceptable if this power is exercised irresponsibly or by leaders who are out of touch with their members' views (para 56).

Democracy in Trade Unions was quite circumspect about the practical difficulties of implementing a requirement to ballot before industrial action. Like Trade Union Immunities, it recognised the problems of enforcing the balloting requirement in relation to small-scale unofficial stoppages, but equally the danger that to confine the requirement to official action could have the result of encouraging unofficial action. This reflected

once again the difficulties inherent in a policy of putting more power into the hands of trade union members at the expense of allegedly militant stewards and officials, without undermining the power of trade union leaders to control unofficial action. This concern was reflected among Government supporters in the House of Lords debates on the Green Paper, Democracy in Trade Unions[14]. Democracy in Trade Unions also raised the question of overtime bans, go-slows and work-to-rule, concluding that 'it would be even more impractical to apply a balloting requirement to action short of a strike than to unofficial strikes' (para 60).

The 1983 Green Paper commented that, in responses to the 1981 Trade Union Immunities, there had been a lack of enthusiasm for imposing mandatory ballots before industrial action. Fuller consideration was, therefore, given to more limited proposals which were said to have been the focus of public debate. These were ballots triggered by trade union members and ballots initiated by employers. Consideration was also given to the reintroduction of powers for the Secretary of State to order ballots to be held in certain defined emergency circumstances. Consistent with the Government's unwillingness to be seen to play a direct role in industrial relations matters and in particular its aim to distance itself from the handling of disputes, this option was not favoured by the Green Paper. It is also notable that the Government was faced by evidence from both UK and US experience which showed that ballots in emergency situations by no means always led to a 'moderate' vote by trade union members.

The proposal for ballots 'triggered' by union members was seen to have a particular advantage:

> If the demand for a ballot comes from within the union, it cannot so easily be turned into a test of union solidarity or so easily be represented as an

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[14]. See the House of Lords debate on the Green Paper Democracy in Trade Unions (Department of Employment 1983) House of Lords Debates Volume 4, cols 727-797 16 March 1983, especially 786.

"external interference" in union affairs (para 63).

This point was reinforced by the Government spokesperson in the Lords, Lord Gowrie, who said that the USA experience of the Taft Hartley Act showed that ballots held under the emergency provisions legislation tended to become a test of membership solidarity and so obscure the 'real' issues[15]. In outlining the potential disadvantages of 'triggered ballots' Democracy in Trade Unions echoed Trade Union Immunities. Practical difficulties were associated in particular with defining the constituency for the ballot once it had been triggered, which would have a crucial influence on the outcome of the vote. Questions were also raised about the percentage of members required to 'trigger' the ballot, possible sanctions, the question on the ballot paper and who should decide on this, and whether there should be provision for more than one ballot to be held in protracted disputes. Furthermore, in the context of considering the case for member 'triggered' ballots, the Green Paper did not discount the danger that the wording and timing of ballots could be turned to advantage by trade unions (para 66).

Consideration was also given in the Green Paper to ballots called at an employer's initiative, conducted either by the employer or trade union(s). This was an approach that had not previously been canvassed in Trade Union Immunities. Whilst ballots 'triggered' by employers were seen to have the advantage of reducing the risk of a trade union - or militants within the union in the case of weak leadership - using ballots tactically (para 67), practical difficulties were seen to lie, as in the case of ballots triggered by union members, in defining the eligibility of those who should be included in the ballot. Moreover:

Whom should the ballot cover if the strike had not yet started but the

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[15]. On the 1947 Taft Hartley Act emergency provisions see above chapter 2. It was recognised that the advantage of triggered ballots would be lost if it was necessary to appoint an external supervisory agency to ensure that ballots held by trade unions were conducted fairly and 'to check on abuse and manipulation' (para 66).

> employer had been given notice that it would be called in the near future or if a strike were simply threatened? Would the trade union decide the questions to be asked? How would the problems of supervision be solved? (para 68)

Remarkably, the Green Paper went on to suggest that an advantage of employer 'triggered' industrial action ballots conducted by the employer would be to ensure that non-union members could be included. A further possibility canvassed was that funds should be made available for employers to hold strike ballots where unions had refused to ballot their members.

In the event neither of the two proposals was included in the provisions of the Trade Union Act 1984. It may be that the complexity of the issues involved persuaded the Government that a mandatory requirement for unions to hold a ballot before official industrial action was the only way of achieving the policy objective of promoting the use of ballots in relation to industrial action. As noted above, mandatory strike ballots, whilst not rejected as an option in Democracy in Trade Unions were acknowledged not to have attracted widespread support in response to the Government's earlier Green Paper, Trade Union Immunities (1981). It has been suggested, therefore, that the provisions in the 1984 Trade Union Bill were of recent, and perhaps hasty, consideration (Hutton 1985).

At the time of the 1984 Bill, Parts one and three, elections for trade union officials and political fund ballots, had far more prominence. The importance of the strike ballot provisions to the Government was evident, however, in that it pressed ahead despite 'the absence of consensus' surrounding the proposals (ACAS 1985, chapter 1). Whilst Government and Ministerial policy statements between January 1983 and the time that the Bill was passed in July 1984 emphasised the importance of promoting trade union democracy, which was linked in public policy terms to requirements for union elections and political fund ballots, there was also a concern to give employers new rights in disputes. The mechanisms of the law on strike ballots bear out this policy objective.

Thus, the Government did not address one of the key questions posed by critics, which was that if one of the principal purposes of the balloting legislation was to 'enfranchise' individual union members, it could not be justified that no power was put in the hands of individuals to call for a ballot to be held; remedies depended on employers. This in fact changed with section 1(1) of the Employment Act 1988, which gave a broad right to individual union members to restrain unballoted industrial action. The choice of a right for individual members rather than 'triggered' ballots did nothing to abate the controversy surrounding the enforcement provisions. Some commentators suggested that section 1 of the 1988 Act could be used by employers to gain advantage in the bargaining process by encouraging a single dissident union member to apply for an order under section 1 (McKendrick 1988).

In the Green Paper, Trade Unions And Their Members (Department of Employment 1987), the Government claimed 'profound and wide-ranging effects' (para 1.2) from the changes already made in industrial relations law. By this time mandatory industrial action balloting had been in operation for over two years. Trade Unions and Their Members was able to place the law on strike ballots at the forefront of the perceived achievements of the Government's policy of labour law reform since 1979. Workers now expected to be consulted and employers were said to be more willing to use the law. Paragraph 1.2 continued:

> Significantly, union members have on a number of occasions refused to be precipitated into industrial action contrary to their best interests and to their own better judgement.

A combination of pressures was seen to have been exerted on trade unions by both members and employers as a result of the industrial action balloting legislation, leading to a reduction in industrial action:

> There is now a firm and widespread expectation amongst members that they will be consulted by secret ballot. Together with the willingness of

> employers to use the legal rights now available to them - which they have done in about a hundred cases - this is securing important and beneficial changes in our industrial relations system. The country as a whole has gained from the consequent avoidance of much unnecessary and damaging industrial action (para 1.2).

The Government did not respond to continuing concerns about the impact of industrial action ballots expressed by ACAS. In its Annual Report for 1985, for example, ACAS argued that industrial action ballots might give decision making within unions a greater validity and legitimacy, but could be an oversimple way of assessing membership opinion in a complex situation (ACAS 1986, 16). ACAS went on to argue that the involvement of the courts and use of legal processes was no substitute for discussion, consultation and negotiation (ACAS 1986, 22).

There was, however, an underlying feeling of dissatisfaction with the balloting legislation in Government circles. On analysis much of this dissatisfaction appeared to relate to the fact that, as ACAS commented in its 1985 Annual Report, trade union negotiators appeared to have accommodated ballots into their negotiating strategy and had often denied to Government its goal of securing ballots in which members voted against industrial action. The experience of the early years of the industrial action balloting legislation was that a majority of ballots were producing votes which supported industrial action[16]. The Government's response, which was to increase the complexity of the legislation and the difficulties for trade unions in winning a 'yes' vote, was consistent with an intention of using the law on ballots, as in the earliest proposals on strike ballots, to reduce the incidence of industrial action. As noted above there were, however, much wider implications to the policy of promoting 'no' votes in ballots because these could clearly undermine trade union leaders' authority and credibility in negotiations. Arguably, increasing the technical difficulties of balloting would do little in reality to increase the

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[16]. See further below chapter 5.

rights of trade union members and democracy in the workplace, which depended on the effective collective representation of workers, who individually did not have bargaining power vis a vis their employer. But increasing the number of 'lost' ballots would have the potential to undermine the standing of trade union leaders, a trade union's bargaining strength and thus its ability to maintain the support and allegiance of members.

The Government associated a number of practical difficulties with the implementation of the 1984 Act, which had prevented the balloting legislation from meeting its expectations. These were blamed in part on deficiencies in the 1984 Act, but also on examples of abuse. Trade unions were perceived to be exploiting loopholes in the legislation to their advantage. This related in particular to unions' freedom under the original provisions to define the balloting constituency. This allegedly enabled union officials to create artificial constituencies to maximise the possibility of votes being in favour of industrial action (Wilkinson 1987).

In the 1987 Green Paper, Trade Unions and Their Members it was proposed that individual union members should be given the right to restrain a trade union from authorising or endorsing industrial action before a ballot had been held. Giving rights to individual members against their unions, which were not based on trade union rule book provisions, represented a further move away from the middle ground. In practical terms, giving this right to individuals, rather than relying on ballots 'triggered' by a certain number of members was seen to avoid problems - such as 'undue delay' (Department of Employment 1987, para 2.7). The Green Paper recommended that members should not be given a right to insist on a ballot being held because of the danger that this might interfere with the settlement of a dispute (para 2.8). The Government failed to answer criticisms that the enforcement mechanisms proposed would do little to further the cause of trade union democracy.

There was a highly controversial proposal in the 1987 Green Paper to provide protection for trade union members who refused to take part in industrial action, even if a ballot had

been held and a majority had voted in favour of the action. This was presented as a matter of fundamental principle, which, the Government argued, could be traced back to Trade Union Immunities (1981) and earlier legislative proposals. Simply put:

> Every union member should be free to decide for himself whether or not he wishes to break his contract of employment and run the risk of dismissal without compensation (Department of Employment 1987, 2.22).

The emphasis in the Green Paper was on the individual, acting as an individual, not on trade union membership and the collective rights and responsibilities to which this gave rise.

Moreover:

> it must be noted that it is a very particular type of individual who is the beneficiary of these new rights. It is the individual who does not wish to go on strike and who wishes to restrain his union from embarking on 'unlawful' activity. No new rights are given to the union member who wishes to strike or who wishes to engage in industrial action despite the fact that no immunity is provided for such action (McKendrick 1988).

The 1988 Act could, therefore, be seen to reflect a new approach on the part of the Government to the role of ballots in industrial action. Ballots had been presented in policy documents of the early 1980s as a democratic means of ensuring that industrial action would only ever be taken with the full support of trade union members. But the inclusion of separate place of work ballots in the 1988 Bill and the emphasis on the right of individuals **not** to take part in industrial action, together with the draft code of practice on balloting published in November 1988 reflected another strand of policy, which was to maximise the constraints on unions to call industrial action even if this had been supported by members in a ballot.

In March 1989 Removing Barriers to Employment was published (Department of

Employment 1989a). Its approach was to place balloting in the context of new freedoms, rights and protections which had been provided to individuals and employers. Balloting was also linked to the wider objective of removing barriers to the efficient working of the labour market:

> The harm which inappropriate and unnecessary forms of industrial action can do to the economy, and to jobs, needs no emphasis. Much has been achieved already, not least through the right which both employers and trade union members now have to insist on a properly-conducted secret ballot before industrial action (para 1.9).

The Green Paper argued the case on the basis of evidence from ACAS which suggested that balloting on industrial action had become a common practice among unions (para 3.13). The expectation among union members that they would be consulted had been 'a major step forward to secure union members' rights and make unions properly accountable to their members' (para 3.14). Notable examples of trade union members voting against industrial action were reported within the previous year, as in the cases of local government workers, miners and dockers. The main proposal on balloting was to extend the statutory requirement to ballot before industrial action to the authorisation or endorsement by a union of industrial action taken by its members working under contracts for services, in other words self-employed. This was hardly a major issue outside construction, where ballots were difficult to hold anyway and did not often take place.

A much more radical extension of the balloting requirement was put forward in Unofficial Action and the Law in October 1989 (Department of Employment 1989b). Chapter one of this Green Paper outlined the case for legislation to curb unofficial action (see especially paras 1.2 and 1.3). Government concern for unofficial action was not new. What had changed was a belief that a legislative response was possible[17]. Following the

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[17]. See Michael Howard on the day after the Employment Act 1990 became law said that it tackled the 'longstanding problem of unofficial action' Financial Times 2.11.90.

'summer of discontent' in 1989, the Government expressed a particular concern about unofficial action which took place prior to the holding and outcome of a ballot. As a result of extensive unofficial action by members of ASLEF, the train drivers' union, on London Underground during a dispute in 1989, the Government recognised that carefully orchestrated campaigns of unofficial industrial action within the context of a major dispute could frustrate the intentions of the balloting legislation. It now proposed in Unofficial Action and the Law that to deal with this unacceptable scenario the balloting requirement needed to be extended to unofficial action:

> Unofficial action can threaten an employer's business without the union having to take responsibility either in terms of giving financial support to the strikers or in terms of accepting legal liability for the consequences of the strike. In particular, unofficial industrial action has immunity even if there has been no secret ballot. **To this extent it is easier to organise an unofficial strike than it is to organise an official strike**[18].

An extension to the balloting requirement was linked in the Green Paper to the need to protect essential public services:

> Essential public services have also been the target of unofficial action in recent years. In some cases this has caused widespread hardship to the community (para 1.9).

The Government was not deterred from a further legislative response, even though the London Underground dispute could be seen to support arguments that the use of the legal process had contributed to an increase in unofficial industrial action by delaying and frustrating the ability of trade unions to offer official support. There was little evidence that in the London Underground dispute, trade union leaders welcomed the unofficial action. The proposals in Unofficial Action and the Law, together with stricter repudiation

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[18]. Department of Employment 1989b, para 1.14. Emphasis in the original.

requirements, were enacted in the Employment Act of 1990. Whilst the law did not make it a requirement to ballot before all industrial action, the extension of the vicarious liability of trade unions so that they became legally responsible for some unofficial action, led to a widespread perception that this was the case. Where trade unions repudiated action in accordance with the provisions of the 1990 Act trade union members were liable to dismissal by their employer without redress regardless of the circumstances of the dispute.

The 1990 Act represented a shift of emphasis in public policy[19], but further broadening and tightening the balloting requirement was entirely consistent with the 'step by step' approach to the reform of industrial relations law which progressively circumscribed and restricted trade unions' freedom to organise, and work groups' freedom to take part in, lawful industrial action. The 1991 Green Paper, Industrial Relations in the 1990s (Department of Employment 1991) highlighted the achievements of the balloting laws, linking the requirement to ballot to a decline in working days lost through disputes (Department of Employment 1991, see especially paras 3.2, 3.4). The Green Paper also returned to the theme of trade union democracy, welcoming the fact that 'unions themselves are now more committed to consulting their members before calling on them to take industrial action' (para 3.5)[20]. The Green Paper stated that:

> The fundamental purpose of the statutory requirements for unions to hold strike ballots is to guarantee the democratic rights of union members, and thereby prevent the abuse of union power (Department of Employment 1991, para 3.7)

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[19]. Davies and Freedland 1993 suggested that it was only following the experience of the 1989 disputes that the Government determined to make such a radical extension of the balloting requirement.

[20]. For a criticism of Government claims see below chapter 5.

The Green Paper proposed further major changes in the law. The first was the extension of mandatory postal ballots to industrial action. The earlier Green Paper Trade Unions and Their Members (Department of Employment 1987) argued that postal ballots for the election of trade union officers had given trade union members 'the opportunity to vote away from possible pressures which might arise at the workplace (Department of Employment 1987). It is notable that in the House of Lords debates on section 1 of the 1988 Act the Government resisted an amendment which sought to make postal ballots mandatory for industrial action on the grounds that such a proposal was 'impractical'[21]. By 1991, however, the Government believed that postal ballots on industrial action were required to provide 'a greater assurance that voting will be both secret and free of intimidation' (para 3.22). Arguably, although the Government often emphasised the individual rights argument, given the generally lower turn out in postal ballots than for workplace ballots there was little merit in the decision to impose fully postal ballots on industrial action (after 1993)[22].

Secondly, it was proposed that unions should be required to comply with a series of notice and information requirements before and after a ballot on industrial action. These were to provide the employer with notice of the intention to hold a ballot (para 3.25), a sample copy of the voting paper, details of the ballot result and a copy of the report by an independent scrutineer[23], and seven days' notice of the start of industrial action (para 3.18). Where a union planned to call for intermittent industrial action, such as a series of one day strikes, it was proposed that the union would be required to give at least seven days' notice of each day or other separate period of industrial action (para 3.20). The proposal for seven days' notice of industrial action contained a particularly controversial

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[21]. House of Lords debates 1987 vol 495, col 449.

[22]. There is some evidence that it is not always the case that turnouts in postal ballots on industrial action are low.

[23]. The Green Paper also proposed to make independent scrutiny mandatory for all ballots on industrial action.

requirement:

> [The notice] would have to identify which workers (or class of workers) were to be called upon to take the industrial action..(para 3.18)

A complex notification process to employers, based on these proposals, came into effect in 1993. This imposed considerable new constraints on unions' freedom of manoeuvre in the use of industrial action ballots and timing their call for industrial action to begin:

> It may be that the 1993 changes in the law will prove to be the key to making the law on strike ballots achieve what it has so far failed to achieve: weakening trade unions' bargaining power by removing the force of the threat of collective action by the workforce (Simpson 1993, 296).

4.4 Encouraging employers to use the law

In practice, the onus for making the balloting provisions work was clearly on employers and the Government needed to be able to persuade employers to 'make use' of the law. The 1979 Government initially approached with caution the question of whether employers would be prepared to use the law. A change of tone and approach could be seen over time in Government claims, as later administrations became more confident about the 'success' of the balloting legislation. This is not to argue, however, that this necessarily reflected the reality of employers' position (see further below chapter 6). In 1981 Trade Union Immunities argued:

> The Industrial Relations Act 1971 was frustrated both because trade unions were able to build a concerted campaign of opposition to it and because employers did not generally see it as in their immediate interests to make

use of its provisions[24].

Trade Union Immunities reported 33 applications by employers for relief from industrial action between 1972 and 1974 under the Industrial Relations Act (para 133). These did not, of course, relate specifically to balloting. Only one of these cases reached a full hearing of a claim for damages[25]. This was the Con Mech case. The refusal of the AUEW to pay any fines or to co-operate with the court led to sequestration of its assets. The union called a national strike, but called it off when the court accepted an offer from anonymous donors to discharge all the union's liabilities. Trade Union Immunities concluded:

> the experience of the operation of the 1971 Act must raise doubts about the extent to which employers might exercise their right to claim damages from unions (Department of Employment 1981).

The policy documents of later Conservative governments adopted a less cautious approach and the Government gave a high profile to cases in which employers had taken action in the courts to deter or put a stop to industrial action. Following repeal of section 14 of TULRA in 1982 most employers' actions were against unions rather than individual officers. In 1989 Unofficial Action and the Law argued:

> Previous legislation has shown the effectiveness of such legal proceedings against trade unions and their funds[26].

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[24]. Department of Employment 1981, para 13. See also McCarthy in McCarthy (ed) 1992. None of the small number of applications from employers under the unfair industrial practices were from employers of any size.

[25]. Weekes et al. 1975, 198.

[26]. Department of Employment 1989b, para 2.12. It should be noted, however, that employers' actions were invariably not damages claims.

Whether in practice the repeal of section 14 was as significant as some have argued[27], the repeal had considerable symbolic importance for the Government (and trade unions). It was an important part of extending the rights of employers and improving their prospects for substantial financial recompense were they to make use of the law. The Government clearly wanted to promote the use of legal remedies.

There was Government encouragement too for employers to take advantage of the vulnerability of individuals taking part in unofficial action:

> The government believes that employers should not be liable to penalties for dismissing employees who choose to take industrial action which has not been authorised or endorsed by a trade union and which has not been put to the test of a secret ballot by the union (Department of Employment 1989b, para 3.8).

It was claimed that over the 1980s employers were making greater use of new rights under the balloting legislation. In February 1987 the Green Paper Trade Unions and Their Members (para 2.2) asserted that:

> Employers have made increasing use of the remedies available to them against industrial action called without a properly conducted ballot (Department of Employment 1987, para 2.2).

The Green Paper referred to 'almost 40 cases' relying on part II of the Trade Union Act 1984. It made particular reference to Austin Rover and News International, two disputes that gave rise to high profile legal proceedings.

Norman Fowler, then Secretary of State for Employment, said in a speech to a CBI

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[27]. See Auerbach 1990, who calls the repeal of section 14 the 'lynchpin' of Government policy.

Conference June 1989:

> Today, employers can in general settle pay rates with employees, or their trade unions, free from external interference. They are free to take legal action against unacceptable forms of industrial action, and against strikes which have not been supported by a majority of workers in a secret ballot. And the courts have shown clearly that these are not just paper rights; they are effective in practice[28].

Conservative Government's of the 1980s did not appear to share the concerns expressed by ACAS that the 'growing willingness of both sides' to apply to the courts posed a serious potential danger to longer term industrial relations[29]. The Government believed unequivocally that, if employers could bring a case against trade unions which would undermine industrial action, it was 'good' for employers to make use of the law. It is notable that, despite Government claims focusing on a handful of high profile cases, an analysis of the case law shows that overall there were not a large number of court cases and these were limited to a small number of industrial sectors. There is also a question about using legal proceedings as the accepted measure of employers' 'use' of the law. In later chapters this thesis goes on to explore the achievement of the Government's policy objectives in relation to broader measures of employers' 'use' of the balloting laws in their dispute strategies.

4.5 Conclusions

Some important conclusions emerge from this review of ideology and Government policy on industrial action ballots.

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[28]. Speech reported in International Journal of Manpower 10,4 (1989) 28.

[29]. ACAS Annual Report 1984, 12.

Firstly, that from the beginning of the 1980s there were some clear guiding principles which included the unwaveringly individualistic conception of the rights of trade union members. This underpinned two apparently contradictory objectives in Government policy. On the one hand the Government argued that existing trade union practices for consulting the membership on industrial action were inadequate and undemocratic and opened the way for intimidation. The Government described its policy as 'giving trade unions back to their members'. On the other hand, though, the Government sought to promote a 'responsible' union bureaucracy which would be encouraged to take control over the activities of shop stewards and workgroups. The overriding emphasis, however, was on the individual trade union member and their role in restraining industrial action.

Secondly, that it is at least arguable that the industrial action balloting legislation was conceived as an arm of wider economic and labour market policy. It is notable that in its response to the 1984 Act in August of that year the TUC was already very clear about the unstated intention behind the balloting provisions:

> The purpose claimed for the Trade Union Act by the government is that it will 'give trade unions back to their members' and 'safeguard the rights of members in relation to their unions'. The TUC General Council however reject this wholly spurious claim. The real intention is to weaken unions, and thereby weaken their ability to serve and protect their members' (TUC 1984).

Thirdly, that the incremental nature of changes in the law could also be seen, however, to reflect the more pragmatic roots of the legislation and that as a result of learning from experience the Government approach to balloting evolved over time. Part I of the Employment Act 1988, giving new rights to trade union members, was at least in part a response to events during the bitter miners' dispute of 1984-1985. The extension of the balloting requirement to unofficial action in 1990 met concerns that arose, inter alia, from the dispute between ASLEF and London Underground in 1989. The elusive 'success' of the industrial action balloting legislation, from the Government's perspective, depended

in part on adding to the complexity of the balloting laws to make it more difficult for trade unions to win yes votes.

Conservative Government policy was to maximise all possible avenues for legal challenges to trade union decisions on industrial action in relation to the balloting legislation - through employers, trade union members, consumers and most recently, in 1996, the users of public services. Encouraging employers to take advantage of greater opportunities for challenging decisions on industrial action had been at the heart of the Government's balloting policy since 1984. In 1988 the establishment of the office of the Commissioner for the Rights of Trade Union Members (CROTUM) was specifically intended to encourage trade union members to use the law, under trade union rules or section 1 of the 1988 Act, to restrain unballoted action. In this respect, the Government's policy clearly promoted the rights of individual trade union members over and above the collective responsibilities of their membership. The 1993 Act introduced consumers' rights to restrain unballoted action and a new Commissioner for Protection Against Unlawful Industrial Action to encourage the use of these rights[30]. The range and extent of these rights suggested that ultimately a concern to deal with the 'strike problem', rather than a genuine concern for the rights of trade union members and trade union 'democracy', can be seen to have informed balloting policy.

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[30]. Neither the CROTUM nor the Commissioner for Protection Against Unlawful Industrial Action (in practice the same person and office as the CROTUM) have dealt with more than a handful of enquiries and have not been successful policies from the Government's point of view.

CHAPTER 5 TRADE UNIONS AND THE BALLOTING REQUIREMENT

5.1 Introduction

The central themes of the chapter will be developed by analysing the results of original fieldwork for the research. This included a questionnaire survey of trade union negotiators in 1991-1992. The analysis draws on information from the trade union negotiators' questionnaire, supplemented, where appropriate, by the wider research including interviews with national trade union officers and employers' interviews. The trade union negotiators' questionnaire used a number of measures of how trade unions, through their negotiators - most respondents were full time officers - adapted to the new legal framework of the 1980s which required ballots to be held before most industrial action. This chapter relates to information on the impact of changes in the law for the internal government of trade unions. (The next chapter will provide an analysis, based on the trade union negotiators' questionnaire, of the role of ballots in collective bargaining.) While information from the research project will be used to provide contextual information on trade union rule books, the focus in this chapter will be on changes in practice.

The information from the trade union negotiators' questionnaire will be analysed in the context of the history of balloting among trade unions. This chapter is particularly interested in information relating to the ability of trade unions to adapt to a mandatory balloting requirement and the effect of ballots on the internal distribution of power. The research indicates that while the imposition of industrial action ballots had the potential to formalise and centralise decision-making powers within trade unions, this development was limited by the wide discretion accorded to full time officers in the conduct of collective bargaining and disputes, which has continued to be a feature of trade union organisation post-1984.

Before presenting the results of the fieldwork, the chapter places the research in the context firstly of the trade union movement's response to the balloting legislation and secondly of two important studies of the use of industrial action and reference back

ballots before and after the 1984 Trade Union Act. These studies provide important comparative material for the research (Undy and Martin 1984; Martin et al. 1991)[1].

5.2 The TUC's response to legislative proposals on balloting

In 1984 the TUC issued a detailed analysis of the balloting legislation and the trade unions' position (TUC 1984). The trade union movement's opposition to the industrial action balloting legislation was unequivocal. It was based primarily on the principle of maintaining the autonomy of trade unions in relation to their internal affairs. The TUC made clear its very strong objection:

> to unwarranted and unacceptable state interference in unions' internal affairs, overriding unions' constitutions and rules which are democratically determined by their members (TUC 1984, 1).

The approach of the TUC and its affiliated unions concentrated, therefore, not on specific alternatives to balloting, but on the principle of trade union autonomy. This was in part because decisions taken by a show of hands at members' meetings, which prior to 1984 was a widely used method of consultation on industrial action, received an almost universally bad press. Trade unions did not find it easy to defend to a wider audience this way of consulting members. There were not necessarily widespread abuses; criticisms were often based on little more than impressionistic evidence of manipulation by leaders or unofficial work groups. In proposals for legislation on industrial action ballots, however, the Government asserted that:

> The methods trade unions use to consult their members are often totally inadequate. Few things have done more to lower public regard for trade unions than the spectacle of strike decisions being taken by a show of hands at stage-managed mass meetings to which outsiders may be admitted and where dissenters may be intimidated (Department of Employment 1983, para 56).

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[1]. See also Martin et al. 1996.

The TUC also expressed a number of more pragmatic concerns about the anticipated effects of mandatory strike ballots. Firstly that the result of the balloting provisions, combined with section 15 of the 1982 Act, would be to create internal divisions and the result 'could be to encourage the disengagement of trade unions and their officers from involvement in 'unofficial' disputes' (TUC 1984, 9).

It is notable that the TUC document did not anticipate the argument that trade unions would respond to the balloting requirement by strengthening central control[2]. This was an argument which gained currency as trade unions began to adopt ballots into their procedures. A shift in the balance of authority to the centre could, for example, be a product of the detailed advice and guidance issued by many union head offices and the onus on officers and lay officials to abide by this because of the threat, if they did not, of laying the union open to legal action. The trade union negotiators' questionnaire and the interviews with National Officers explored this question in some detail.

Secondly, the TUC argued in 1984 that the law depended on a model of a clear distinction between official and unofficial industrial action, which did not in practice reflect the reality of the way in which trade union decisions were made and carried through. In the past the issue would have arisen in many trade unions only in relation to strike pay. This was highlighted by the WIRS[2] study. WIRS[2] included a question which sought to distinguish the extent of official and unofficial action. Whilst respondents did not have any difficulty reporting on the status of strike action, they had more difficulty identifying whether action short of a strike had been official or unofficial (Millward and Stevens 1986, 278-81).

Thirdly, the TUC's response criticised the insistence on strike ballots in unions and industries where they were inappropriate because of practical difficulties relating to their organisation and conduct. This could be seen to apply in particular to industries such as construction and shipping. More broadly:

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[2]. See chapter 4 above on the contradictory objectives of Government policy.

> [the Government's] insistence on strike ballots even in inappropriate circumstances could serve to restrict the negotiator's room for manoeuvre in seeking a settlement to the dispute and make the task of reaching agreement more difficult. The Act is likely to create a degree of inflexibility which is wholly undesirable (TUC 1984, 9).

Some trade union leaders urged non-compliance with the law. The TUC did not explicitly condone defiance of the law by its affiliates, but the General Council agreed to support unions facing legal actions by employers based on a failure to comply with Part II of the 1984 Act, in accordance with decisions taken at the 1982 TUC Wembley Conference (TUC 1984, 10)[3]. Where unions pursued dispute strategies which came into direct conflict with the requirements of the law, some trade union leaders believed that TUC support had been, at best, equivocal. There were heated debates within the TUC about what the nature of this support should be. What was clear, however, was that even those within trade unions who urged compliance with the law were unequivocally hostile to the imposition of industrial action balloting through legislation and advocated its early repeal.

One of the consequences of trade unions' experience of the operation of the 1984 strike ballot provisions was a major rethinking of trade union (and Labour Party) policy on ballots. After initial legal skirmishes[4], including injunctions won by some major employers over unballoted industrial action, unions that had not done so started to ballot, although this was by no means always according to the law. At the 1985

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[3]. In 1982 the TUC organised a conference of affiliates to establish policy towards changes in the law. This became known as the Wembley Conference. Decisions were made which enabled unions to seek the assistance of the General Council where their actions were threatened by the new employment laws.

[4]. See Ewing and Napier 1986 generally on the use of the law in the Wapping dispute. Other reports of injunctions being awarded against unions on the basis of their failure to hold ballots before industrial action include: CPSA in respect of unballoted action in the Civil Service (FT 23.3.85); UCW in the Post Office (FT 2.4.85); injunctions against the NUR in relation to unballoted action were obtained by both British Rail (FT 24.7.85) and LUL (FT 17.5.85); Guardian Newspapers successfully applied for an injunction against NGA over unballoted action (FT 6.7.85).

NUR Conference the General Secretary of the TUC supported trade unions' use of ballots in relation to industrial action. He called for a 'firm and flexible' response to Conservative labour laws and said that the use of ballots was not necessarily inconsistent with Wembley Conference decisions[5]. In 1988 the response of trade union leaders to the further balloting provisions of the Employment Act was much more circumspect than it had been in 1984. There continued to be a progressive rethinking of trade union policy, so that by 1993 an MSF submission to an House of Commons Employment Committee did not include balloting in its discussion of changes in the law which had hindered the union's ability to organise industrial action[6].

In the event, therefore, trade union leaders by and large pragmatically accepted the need to ballot. In two major unions, the NUR and NAS/UWT, the change in union practice took place under the threat of legal action from employers. In the NUR a formal change in union policy was agreed at the 1985 Annual Conference[7]. In general, however, there did not prove to be a widespread or sustained campaign of principle against the balloting laws. This was in part because the practice of using ballots was already well established in a number of trade unions. This is an important point because the Government did not acknowledge the widespread practice of the use of ballots in the union movement prior to 1984 - both reference back and industrial action ballots - as well as those for the election of officials. In the current research, one negotiator, responding to the statement that ballots were a good thing for unions, commented: 'ballots are a good thing but we have always had them!'.

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[5]. Financial Times 2.7.85.

[6]. House of Commons Employment Committee Session 1992-3 The Operation of Employment Legislation Governing Industrial Disputes Minutes of Evidence 19 May 1993 Manufacturing, Science and Finance Union (London: HMSO).

[7]. It was reported that British Rail was seeking £200,000 damages from rail unions over unballoted action in support of the miners in January 1985, which was used as a lever by BR to demand a change of union policy. See Financial Times 10.6.85.

5.3 Industrial action balloting: the historical context

Undy and Martin's book, Ballots and Trade Union Democracy, is the seminal work on the use of ballots by trade unions in the early 1980s, prior to the introduction of the legal obligation to ballot on industrial action in 1984[8]. Undy and Martin found that the information on industrial action balloting was not easy to separate from the use of ballots to refer back to members agreements reached by negotiators. They suggested, however, that in broad terms the use of industrial action ballots would reflect that for the reference back of agreements; if anything, ballots might be more extensively used by trade unions in relation to industrial action.

Two general points of some importance were highlighted by Undy and Martin's study. The first was that in the context of negotiations balloting did not, in the view of trade union officers, provide a single means of consulting members; balloting, where it was used, was an integral part - but only a part - of the consultation process. It was customary, for example, for unions to organise workplace meetings to accompany ballots. Undy and Martin argued that ballots should not be seen, therefore, as the sine qua non for union democracy (Undy and Martin 1984, 118). The second point related to the complexity of the issues surrounding industrial action balloting. This was well illustrated by the row over the NUM's decision in 1984 not to call a national strike ballot as provided for in the union's rules. It was ironic that a union which made extensive use of balloting prior to 1984 and achieved high levels of participation should be used by the proponents of strike ballots as an example of bad practice and deficiencies in union 'democracy' which not only made the case for the balloting requirement but later for extending its enforcement mechanisms to individual members (Undy and Martin 1984, 135).

Undy and Martin's research was updated by a later survey of the use of ballots by

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[8]. Undy and Martin 1984. Chapter three covers ballots in collective bargaining.

trade unions in negotiations, both reference back to members and industrial action ballots (Martin et al. 1991). This was an extensive survey of trade union rule books and of practice in 24 unions accounting for 75% of TUC membership. More detailed case studies were carried out within 6 unions: the AEU, TGWU, GMB, CPSA, NCU, EETPU. The fieldwork was carried out in 1987.

5.3.1 Trade union rules

In summary Undy and Martin found that in the early 1980s union rule books regulated collective bargaining procedures less precisely than electoral procedures. Only nine out of 103 union rule books were found to require reference back of agreements (Undy and Martin 1984, 119. For more details see Annex B). There was much more often a discretionary power which was, however, used frequently. Unions consulted extensively before accepting agreements or deciding on strike action, although the form that this took varied widely:

> among manual workers voting by show of hands at meetings remains the most frequent method, whilst among non-manual workers workplace ballots are most common, although few unions confine themselves to only one method (Undy and Martin 1984, 118).

Undy and Martin found that union officials saw themselves as representatives of their members in negotiations (and not simply delegates). Officials argued that to carry their members with them did not depend on direct consultation in all circumstances. Where consultation did take place, the particular methods chosen depended upon a number of factors, including bargaining tactics, practicalities (such as the most effective way of consulting a dispersed membership) and the priority attached to consulting members. The most common form of ballot was workplace. Where postal ballots were used they increased the formal nature of the consultation process.

In 1987 there was a similar picture in which few unions had mandatory requirements in their rules on the reference back to members of agreements, but approximately one third of rule books included discretionary provisions. What was noted as a significant

change was that more than a third of those unions with discretionary reference back provisions required this to be by ballot. In the earlier study no union rules had included this provision (Martin et al. 1991, 200).

Mandatory provisions for ballots before national industrial action also increased in the period between the studies. In the case of strikes, Undy and Martin found that in the early 1980s the emphasis in union rule books was on authorisation of industrial action. There was little formal devolution of the powers of National Executive Committees, although where strikes began unofficially, it may well have been that they came before the NEC for endorsement or authorisation once the industrial action had started or even after it was over[9]. Twenty five unions (a quarter of the total number surveyed) laid down a procedure for calling national industrial action; sixteen of these required some form of ballot. A further 41 unions were found to have rules which included the discretionary use of ballots before national strike action and these included seven of the twenty five unions with over 100,000 members, including the TGWU[10]. By 1987 there were mandatory provisions for ballots before national industrial action in about a third of unions (Undy and Martin 1984, 200). There was also some evidence of change in rule book provision in relation to local industrial action. In 1980 17 of the unions required the membership to be consulted before local industrial action and a further 43 made provision for discretionary consultation, including the GMWU and AUEW(E). Most did not specify the method to be followed. By 1987 nearly a quarter of unions specified that ballots were required.

Those unions with well established use of ballots included two in the 1980 survey

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[9]. In the fieldwork for the current research this was found to be the experience in particular of one union covered by the fieldwork which ballots extensively on industrial action.

[10]. Undy and Martin 1984, 121. TGWU rules required a ballot to be held in national disputes involving more than one trade group. It is notable that the definition of balloting used by Undy and Martin appeared to incorporate votes taken at members' meetings and delegate conferences. See Undy and Martin Table 3.3 p.123.

(BIFU and the NUS) whose rules provided for fully postal ballots. The provisions in the GMWU rule book required a vote in favour by two thirds 'of the members belonging to the Branch or body immediately concerned'. The vote could be by ballot or show of hands and in practice this varied between regions - workplace ballots being frequent in the Northern region. Thus there were variations in the use of ballots between different regions within the same union. In these unions the key features of their rule books which predated the 1984 Act had not changed by 1987.

5.3.2 Trade union practice

The provisions in union rule books alone would, however, clearly underestimate the importance of consultation with members, including the use of ballots. Undy and Martin's findings suggested that in trade unions some form of consultation with members was 'the norm', both prior to signing a collective agreement and undertaking industrial action. This was not reflected in union rule books, firstly because to specify procedures, including ballots, would be seen by trade union officials as restricting their room for manoeuvre. Secondly, consultation tended to be according to local needs and circumstances and 'national and even regional officials are not fully aware of the precise extent of methods of consultation used' (Undy and Martin 1984, 126).

The WIRS[1] study provided more detailed information which confirmed the broad conclusions reached by Undy and Martin. WIRS[1] found that at the beginning of the 1980s consultation with members over the acceptance of agreements was widespread (Daniel and Millward 1983, 194). Consultation took place in 72% of bargaining units covering manual workers and 64% covering non-manual workers[11]. WIRS[1] reported that differences in the use of reference back did not necessarily reflect union policy:

> Although there were differences reported in the extent of consultation between unions, in general these reflected differences in the industries

[11]. No similar figures were available for industrial action. Since WIRS[3] this is now a question in the WIRS survey.

> in which the unions recruited rather than in the policies of the unions concerned (Daniel and Millward 1983, 126).

Consultation was found to be the norm, but was more likely to be reported in industries, like engineering, where local bargaining was of major importance. It was also more likely in larger establishments:

> Not surprisingly, this norm is less likely to be achieved in small establishments, or in the service sector; however, it is also less likely to be achieved by unions organising non-manual workers in the public sector (Daniel and Millward 1983, 127).

WIRS[1] reported that unions with non-manual members were more likely to have experience of balloting, a show of hands was rarely used - even in the non-manual sections of predominantly manual unions. This was true of TGWU/ACTTS and GMWU/MATSA for consultation on collective agreements.

By the end of the 1980s Martin et al. concluded that, while trade union rules changed little between 1980 and 1987:

> practices changed more extensively, with increasing use of ballots in the reference back of collective agreements and in decisions on national or local industrial action (Martin et al. 1991, 200).

In the 1987 survey, however, where unions did refer agreements back to members, a slightly greater number of officials referred to the use of delegate conferences than secret ballots (62% as against 57%).

In relation to industrial action, by 1987 all 24 unions reported that ballots were 'usually' held[12]. For 11 of the 23 unions which made use of ballots at the time that

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[12]. Martin et al. 1991, 201. The research did not say whether this finding related to national industrial action only.

the fieldwork was carried out[13] this represented a change of policy. The remaining unions had previously made use of ballots, but for them what had been an occasional practice became universal.

The AEU provided one case study example of the impact on trade union practices of the change in the law in 1984. In 1980 the National Committee was the major policy making body of the AUEW(E), which had the power under the rules to call and terminate strikes. Members were almost invariably consulted over calling and calling off industrial action. This was most often voting by a show of hands, although there was some small use of non-postal ballots. The National Committee had the power to hold postal ballots, but the provision was rarely used, '[n]or is there any intention to extend the use of ballots either in reference back or in disputes: extending the use of ballots in such circumstances is seen more as a media preoccupation than as a real concern of union politics' (Undy and Martin 1984, 152). The rules required a ballot to be held where a strike involved the whole membership of a district. In this case, industrial action had to be endorsed by a three to two majority of members voting in a ballot, but disputes very rarely involved the whole district membership. Undy and Martin noted an increase in the number of offers referred back to members. This was attributed partly to members' increased expectation of consultation and partly to officers' unwillingness to take responsibility for accepting or rejecting offers, which in a recession were often unsatisfactory. Consultation over wage agreements, however, did not generally involve ballots, which were used only in exceptional circumstances to resolve particular issues. The absence of ballots in collective bargaining was noted in comparison with the union's well-developed electoral system based on secret ballots. After the Trade Union Act of 1984 the AEU changed both its policy and practice to encompass the use of industrial action balloting.

Undy and Martin found that ballots were a response to both external and internal stimuli: external related to bargaining strategies (see further below chapter 5). In terms of the internal stimuli, not surprisingly, practical and logistical considerations

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[13]. One union had changed its practice subsequent to the fieldwork.

played an important part in the extent to which trade unions, prior to 1984, had made use of ballots. Practical considerations included the dispersal or concentration of members; the availability of other channels of communication - such as, for example, the regional industrial conferences in the GMWU; the potential for a ballot to resolve conflict within bargaining units; and difficulties in gathering members together for meetings, especially in the case of those members working shifts. There were also examples of ballots being used by union officers on occasion to manage or undermine opposition, such as by the GMWU during water industry pay negotiations in 1977-8 and 1980 (Undy and Martin 1984, 148). Undy and Martin reported that, in addition to the well-established use of ballots in electricity supply and among oil tanker drivers, occasional ballots were organised in the TGWU at regional and local level in other sectors, although the practice was rare.

In these cases officers used ballots in anticipation that members would reject a call for industrial action:

> Secret ballots are thus likely to produce less militant responses than alternative methods of consultation, in part because secret ballots are likely to be used in circumstances in which it is known or suspected that the membership holds non-militant views: the circumstances in which the method is likely to be used, rather than the method itself, is the crucial factor (Undy and Martin 1984, 151).

This should add a note of caution to any analysis of ballots 'won' and 'lost'. Undy and Martin reported that little information was available about whether members voted in ballots with or against the recommendations of the National Executive Committee (NEC). This information could in itself be somewhat misleading. In the NUM 11 ballots were held on wage offers between 1969 and 1982. Three went against the recommendation of the NEC, but:

> on all three occasions the moderate majority recommended a vote for strike action for tactical reasons, being anxious to avoid being outflanked by the broad left: the NEC was thus not unhappy when its

recommendations were rejected[14].

Undy and Martin concluded that as a means of resolving internal union conflicts ballots had been successfully used by officers, but it was argued that they, nevertheless, had one key weakness. Although decisions made by ballot were clear-cut, the reasons for the decisions could be unclear:

> Where ballots result in positive majorities, whether for endorsing agreements or for strike action, this limitation on knowledge is not important. However, where ballots result in negative votes there is little basis for future policy formulation: doors are closed but none is opened (Undy and Martin 1984, 166).

The results of Undy and Martin's work presented a complex picture of the role of ballots in the early 1980s. This complexity was ignored by those who argued that ballots would lead automatically to an increase in 'democracy' within trade unions.

5.4 The nature of trade union democracy

To assess the impact of the widespread increase in balloting after 1984 on trade union government, it is important to understand the nature of decision-making processes within trade unions. It could be argued that, far from enhancing trade union democracy, balloting served to centralise power within unions at the expense of lay officials and members. Historically, trade union organisation depended upon a strong network of local representatives.

Throughout the 1960s and 1970s, with the development of shop steward networks, a number of unions, including notably the TGWU and NUPE, decentralised their

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[14]. Undy and Martin 1984, 135. The ballots took place in 1973, 1979 and 1982.

structures, to devolve decision-making and to increase direct membership involvement[15]. In some cases the impetus for wider consultation had come from representatives acting under pressure from their own members. This had been achieved in major unions such as the TGWU without the extensive use of balloting. In the GMWU, as in the TGWU, the practice of referring agreements back to members increased in the 1970s, but ballots were rarely used, one exception being the fibreboard packing case industry national agreement. There were pressures in other unions which tended towards the consolidation of decision-making authority in the hands of full time officers. These were, notably, the development of political factions surrounding the election of the National Executive Committee and full time officers in the EETPU and AEU. This involved the greater use of balloting in elections, but not widely in collective bargaining[16]. The success of radical factions within the NUM and NUS, however, did lead to a greater use of balloting accompanied by devolution in decision-making processes.

Undy and Martin's study found that ballots in collective bargaining could be seen as a potential threat to established representative structures. TGWU officers expressed reluctance to increase the use of balloting in collective bargaining and apparently faced little pressure from lay activists to do so. One reason was that both officers and shop stewards feared that ballots could exclude representatives from involvement in the bargaining process. TGWU officers emphasised the priniple that:

> lay representatives should be fully involved in the negotiating process through the union's representative system; this could be obtained most easily by organizing lay delegate conferences to formulate policies and to discuss proposals in detail with full-time officers, rather than by relying upon a system of full-time officers dealing directly with the membership (Undy and Martin 1984, 143).

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[15]. See Hyman 'Trade Unions: Structure, Policies and Politics' in Bain (ed) 1983. The development of shop steward networks also took place in white collar public sector unions.

[16]. The EETPU was an exception because ballots were used both in elections and in collective bargaining.

There was a concern that organisational changes which aimed to improve consultation with members should not be allowed to jeopardise the integrity of representative institutions (especially shop steward networks). Where ballots were used, unions sought to protect the collective nature of decision making and tended, therefore, not to make use of postal ballots. Undy and Martin found that in the early 1980s the unions making most use of postal ballots were EETPU, MATSA (GMWU), NUPE, and BIFU. Only in the EETPU, however, were postal ballots the most commonly mentioned method of consultation and even in the EETPU postal ballots were reported only in a minority of instances. Undy and Martin concluded that in 1980 there was 'a general presupposition that postal ballots were not, in general, desirable' (Undy and Martin 1984, 162). In 1987, 17 of the 23 unions surveyed used workplace ballots (Martin et al. 1991, 206).

A key point of interest for the current study was Undy and Martin's finding that the use of industrial action balloting prior to 1984 had not brought about any major devolution of authority within unions. Their research suggested that ballots brought about a limited increase in membership participation, but were often used to confirm decisions already taken elsewhere. Ballots were favoured as a means of consulting members in situations in which collective bargaining was centralised. One reason that balloting was favoured by TGWU officials in electricity supply was that it posed less of a threat than delegate conferences might to the centralised structures of the industry (Undy and Martin 1984, 141). Whilst balloting might, therefore, broaden consultation it did not necessarily lead to the devolution of decision-making power[17]. Ballots could be seen to have contributed to a process of centralisation of decision making and formalisation of trade union internal government, which was not necessarily consistent with the aim of putting more decision-making power into the hands of individual members (Undy and Martin 1984, 164-66). From the results of their later survey, Martin et al. concluded:

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[17]. It is of interest that the ballots covered a number of unions and were organised by the National Joint Industrial Council (NJIC) which was seen to avoid any potential inter-union problems.

> the major effect of the balloting provisions is to increase centralisation (Martin et al. 1991, 205).

Twenty two of the 24 unions covered by the study were found to issue detailed instructions on the conduct of disputes to workplace representatives. Trade unions had needed to develop bureaucratic efficiency and a more formal approach to the conduct of disputes in response to the balloting legislation. The nature of these developments in trade union organisation and decision-making was explored in the fieldwork for the current research, which tended to throw doubt on findings that trade union government became more centralised.

5.5 Analysis of the results of the research: changes in union rules

The 1984 Trade Union Act did not require changes to be made in trade union rules. Union rule books have traditionally been more concerned about the authorisation of industrial action, than the processes whereby, once authorised, industrial action was called. There were, however, a number of notable examples of changes in trade union rules following the 1984 Act. In some cases, including for COHSE and NUPE, the legislation seemed to be an opportunity to update and clarify rule book provisions. COHSE and the Health Visitors' Association incorporated changes which included specific reference to industrial action balloting legislation[18]. Other public sector unions amended their rules on industrial action to incorporate balloting. The POA constitution and rules 1990 provided that:

> The NEC shall be required to hold a workplace ballot of the Association's entire membership whenever national strike action is contemplated (Rule 5).

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[18]. See COHSE Rules 1990, the new 14(ii); the Health Visitors' Association's Action for Health (1988).

The NAS/UWT rules did not incorporate the requirement to ballot, but laid down procedures for running a postal ballot should one take place and for the appointment of independent scrutineers. At the time of the survey, none of the education unions had made rule changes to incorporate the central requirement of the legislation to ballot before industrial action. The unions concerned emphasised that members were fully consulted about industrial action and that the balloting requirement of itself did not necessitate any wholescale procedural changes. Moreover, it was unusual for these unions' rules to cover in detail the procedural arrangements for calling industrial action. The AMMA (now ALT) referred to industrial action in the context of the objects of the Association. As in the case of the NAS/UWT, noted above, the AUT, NATFHE and AMMA made provision for independent scrutineers. Among education unions there were no major rule book changes, but there was evidence that trade unions had taken account of the law.

In NUPE, rule changes reflected a major change in practice from branch-based block votes to workplace-based consultation with members voting as individuals. This change complemented the wider use of ballots, whilst not specifically providing for them. There were other unions, notably the GMB and NALGO, in which detailed rules on calling industrial action already existed and these were not changed. The GMB rules required a two thirds majority in a vote of members before industrial action could take place[19]. GMB rules did not include any specific reference to ballots, but it is clear that in practice this rule was used to cover the conduct of ballots[20]. Provisions for industrial action balloting were not incorporated, however, into the rules of all unions. NALGO's rules (1990) formally maintained the discretion of the Conference and Executive Council to issue an instruction to members to take industrial

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[19]. As in many trade unions this specific rule was subject to the overriding authority of the Central Executive Committee to waive the requirement.

[20]. See GMB Rules 46 and GMB Guidance on Industrial Action Ballots revised 12.11.92.

action[21].

The TGWU rule book referred to balloting in the context only of national industrial action. The creation of RMT brought together two unions, the NUR and NUS, with very different rule book provisions relating to industrial action. NUS rules had included a requirement to ballot where industrial action was likely to involve a majority of members[22]. This did not appear in the rule book of the merged union which was based much more closely on the NUR's rule book and provided that the Council of Executives should have the power to 'order and direct' members to withdraw their labour.

Most unions tended not to have separate, detailed rules on industrial action, but subsumed these within rules governing the functions of the NEC. Thus IPCS [now IPMS] and the NUT restricted the authorisation of industrial action to the National Executive Committee (NEC); the BMA to the Council of the Association; CPSA to the National Disputes Committee (NDC). NUCPS rules (1989) emphasised that it was 'only' the NEC or NDC that had the power to authorise industrial action. The Society of Radiographers, which operated under the authority of a Royal Charter and did not have a rule book as such, restricted the authorisation of industrial action to two senior officers. In 1985 the AEU National Committee took away from district committees their longstanding powers to endorse strikes and vested them solely in the National

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[21]. There were further regulations covering industrial action in NALGO's 'Industrial Action Handbook' [n.d]. These provided for the Emergency Committee of the NEC to 'authorise and/or instruct' industrial action without a ballot in two situations. The first was 'where in its judgement those circumstances are such as to preclude the taking of a ballot' and the second was action short of a strike 'where the Committee is satisfied that such action enjoys the support of the membership concerned'.

[22]. The NUS rules also included a provision for a ballot to be held before industrial action was called off.

Executive[23].

At the time of the survey, RCN rules had the distinctive feature that they included a no-strike commitment. The General Meeting could, however, empower the Council to take a decision:

> ..in respect of limited industrial action if circumstances should be such as to warrant such action'.

The RCN rule book also stated that its no-strike policy:

> ..does not preclude action taken by College members in the interests of safe standards of professional practice, which does not breach their contractual obligations to their employer or their professional duty to their patients.

Whilst this included representations made by RCN members, it 'does not include so-called 'working to grade'. The fact that many nurses, including some RCN members, 'worked to grade' during the clinical regrading dispute in the Health Service in 1988 became the subject of media comment. This rule was changed in 1995, following a two thirds vote at Conference in favour of balloting members, who subsequently voted by over nine to one to lift the no-strike commitment[24].

5.6 Analysis of the results of the trade union negotiators' questionnaire 1991-2: changes in union practice

The analysis of the results of the trade union negotiators' questionnaire begins by reporting on negotiators' experience of ballots held.

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[23]. On the change in AEU rules see Evans 1987.

[24]. See The Guardian 30 June 1995.

Overall, 82% of respondents reported ballots held in the last three years. See Table 5.1 below.

Table 5.1 Number of negotiating officers reporting industrial action ballots within the last three years

Number of respondents reporting industrial action ballots in the last three years	Percentage of total responses to the questionnaire
691	82%

Table 5.1 shows that in the period between 1989 and 1991 negotiators had widespread experience of industrial action ballots. There were no significant variations between unions. The experience of balloting was as widespread in white collar unions in the public sector as manual unions in the private sector. Just a half of respondents in one Civil Service union had experience of strike ballots, but this was exceptional. More than three quarters of all respondents in two large public sector unions, with a mixed manual and white collar membership, had experience of strike ballots. In certain sectors responses reflected national campaigns of industrial action in which ballots had played a central part. In one education union, 93% of respondents reported experience of industrial action ballots within the previous three years.

Responses to the questionnaire suggested that, by the end of the 1980s, unions and their officials sought by and large to conduct industrial action lawfully, in accordance with the balloting requirements. Ballots were unlikely to have involved major changes in the practices of white collar unions. The caution with which the strike weapon had traditionally been used and the care taken over consultation with members facilitated an easy transition to balloting procedures. Moreover, whether or not contained in the rules a number of public sector unions, including NUCPS, CPSA, NALGO and

COHSE had used ballots prior to 1984. As one respondent in a Civil Service union commented:

> The consultation methods used by this union have not changed as a result of the legislation because we have always balloted. Only the wording on the ballot papers has changed.

Other unions, including notably NUPE, AEU and RMT, had not balloted on industrial action before the changes in the law. Whilst consultation was well-established in each of these unions, methods other than balloting were used. They too had accommodated the requirement. A National Officer, in a large public sector trade union which did not ballot on industrial action prior to 1984, commented that he could not envisage circumstances now in which full time officers were involved in a dispute in which members took industrial action without a ballot being held. Despite one union's policy of retaining discretion for the NEC to authorise unballoted action, the National Officer who took part in the research commented that the NEC was now requiring a ballot to be held in most situations. Action short of a strike and demonstrations of half or one day were still, on occasion, authorised, however, without a ballot being held.

Interviews with National Officers endorsed the view that some unions, including those in the public sector, were at first slow to make the changes in their practices necessary to comply with the balloting legislation. This was not necessarily a deliberate policy of defiance of the law. Whilst the Legal Officer of one public sector union said that holding ballots did not in itself pose particular difficulties, she also commented that early industrial action ballots probably did not meet the strict requirements of the law. In some cases union head offices were slow to issue advice to officials on the balloting laws. Often advice was issued in response to a specific dispute. COHSE's guidance was issued in October 1988 during the nurses clinical regrading dispute; NUCPS issued detailed guidance on ballots in preparation for a one day protest strike against market testing in November 1993. Evidence from interviews with Health Service managers confirmed that in the mid 1980s some union officials were not aware of the obligation to make a dispute official and hold a ballot. Health Service managers

commented that balloting - in particular the specific requirements of the legislation - 'perplexed' union officials (Elgar and Simpson 1994d).

What was clear from the trade union negotiators' questionnaire was that by 1989-1991 the practice of balloting before industrial action was a well-established part of disputes procedures for negotiators across a broad spectrum of trade unions - manual and white collar, public and private sector.

There were, however, wide variations in the number of industrial action ballots reported by individual officers. Table 5.2 is a summary of the results.

Table 5.2 Number of strike ballots held in the previous three years

Number of ballots held	Number of respondents	Percentage of responses
1	104	15%
2-5	350	51%
6-10	124	18%
11-25	79	11%
26-50	23	3%
>50	11	2%
Total responses	691[a]	100%

Note:

a. 691 respondents reported ballots held. A further 102 reported that no ballots had been held within the previous three years.

Overall, more than a half of respondents reported between two and five ballots held over the previous three years. Negotiators in three predominantly manual unions, which were both craft-based and general, reported significantly higher than average numbers of ballots. In part this simply reflected that some unions had more experience of industrial action and, therefore, that a greater number of ballots were

held. Within the large general unions there were also particular industrial sectors which made greater use of ballots. The average number of ballots tended to be lower for unions representing white collar members and for unions in the public sector. As respondents commented:

> In large sections of the civil service industrial action is still a very rare event.
>
> The members I represent do not have a tradition of industrial action - they work in professional grades.

In one public sector trade union representing members in a specialised area of work, however, all respondents reported high numbers of ballots - an average of 15 industrial action ballots in the last three years. This was the highest number of ballots reported by any of the unions in the survey. Moreover negotiators in one large white collar union, including professional and technical members, reported a higher than average number of ballots.

Variations in the number of ballots reported could also reflect campaigns of national industrial action during the period 1989-1991. Ballots were held in public sector national disputes - in education, the Health Service and local government. The most striking example, however, was provided by unions in the engineering industry. Higher numbers of ballots reported reflected trade union strategy during the engineering hours disputes of 1989 to 1991, in which ballots played a central part. A rolling programme of ballots were held in individual workplaces. 83% of respondents in one engineering union reported experience of strike ballots, the average number of ballots being seven.

Another factor was the national and local trade union response to the nature of the issue in dispute. Both interviews with National Officers and the trade union negotiators' questionnaire confirmed that industrial action was often not an option for unions in response to major developments in the delivery and management of public sector services that were gathering pace in the mid and late 1980s. These included the

contracting out of services in the National Health Service and local government. Contracting out and competitive tendering were major issues at the time of the fieldwork, but trade union negotiators saw themselves in a difficult position, which was reflected in the following comment:

> As an official my job is more one of delaying changes than stopping them. Of getting the best deal for members rather than saving their jobs.

This was quite a common response from negotiators in the public sector. Interviews with managers found little evidence of locally-organised industrial action ballots in the Education and Health Services (Elgar and Simpson 1994c).

Interviews with Health Service managers confirmed that the special circumstances of the NHS included the existence of the RCN as the largest union, following a strong growth in its membership throughout the 1970s and 1980s[25]. At the time of the fieldwork the RCN had a policy of not taking industrial action. Other Health Service unions found it increasingly difficult to compete with the RCN in recruiting and retaining members[26].

Similarly in the Civil Service, where far-reaching organisational changes were taking place, including privatisation, contracting out and, more recently, market testing:

> The [1980s] have meant a toughening up of management, a diminished role for trade unions in the public sector with management consulting less. The law has not been a big factor since disputes rarely get to the stage when strike action is contemplated.

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[25]. See Certification Officer's Annual Reports.

[26]. It is interesting to see how rapidly this situation changed in mid 1995. The nature of the relationship between the major Health Service unions became increasingly complex during the dispute which led up to RCN members voting to end the College's long standing ban on industrial action.

Overall, union negotiators in the survey did not give the impression that balloting had caused particular difficulties. There was a perception among some respondents, however, that ballots made it more difficult for members and officials to respond quickly in disputes:

> Union law has made 'immediate action' ie. walk outs almost impossible, yet this was always the most effective. [The law] has helped in controlling some unofficial action.

The legal detail was also seen by some respondents as a way of undermining industrial action:

> The law on industrial action ballots...stacks the odds against authorisation for industrial action. It is also a nightmare to follow to prevent the possibility of legal challenge by employers.

There were more specific circumstances, in which the difficulties associated with balloting could reduce the number of ballots held. Where unions faced particular difficulties in organising ballots, they tended to fall into three categories: dispersal of members across a number of different workplaces; the administration of balloting and membership records; and co-ordinating ballots in a multi-union situation. Respondents' comments illustrated the very practical nature of their concerns about meeting the requirements of the industrial action balloting legislation:

> It is only with the advance of new technology that, with so many workplaces, unions like [ours] are in the position of being able to conduct ballots so as to comply with the law.

> Prior to industrial action ballots it was far easier to obtain agreement by a show of hands. The most difficult aspect is ensuring that every member receives a ballot paper, especially where I have so many workplaces, depots, etc. and plus the fact it is now extremely difficult with so few who are prepared to become stewards/convenors etc. The areas of responsibility are far greater and time is the greatest enemy.

Where some unions in a multi-union workplaces used postal ballots, which was the

policy and practice of the EETPU, this could create additional difficulties in co-ordinating dispute strategies and industrial action.

The results from the questionnaire showed, therefore, that industrial action balloting was widespread during the period 1989 to 1991. There were significant variations in the experience of negotiators in terms of the number of ballots held. While a number of practical difficulties related to the organisation of ballots were highlighted, by and large these were not seen to be insurmountable. Other factors, such as the nature of the membership and existence of campaigns of national industrial action, accounted to a greater extent for differences in the number of ballots held.

5.7 Industrial action balloting and trade union procedures

The questionnaire sought information on the use of workplace and postal industrial action ballots. Questions relating to trade union consultation procedures and the role of negotiators in holding ballots provided an opportunity to explore further any centralising tendencies imposed on trade union government by the balloting requirement.

There was considerable evidence from the trade union negotiators' questionnaire that ballots had been integrated by trade unions into existing consultation procedures. Table 5.3 summarises the results of a question on methods of consultation with members about industrial action.

Consultation on industrial action took a number of forms, but invariably included a ballot, either workplace or postal. Just 23 respondents (3%) referred only to a show of hands at a members' meeting and no other method of consultation.

Table 5.3 Methods of consulting with members about taking industrial action

Method of consultation	Number of respondents[a]	Percentage of total responses
Workplace ballots	589	71%
Postal or semi-postal ballots	374	45%
Show of hands at a members' meeting	177	21%
Total responses	832	100%

Note:

a. The figures reflect the fact that more than one method of consultation was used in a number of cases.

The preponderance of ballots were workplace. Overall, 71% of respondents referred to workplace ballots and 45% to postal ballots. In just two of the trade unions with a predominantly manual membership a greater number of respondents referred to postal ballots; in addition, respondents in three white collar unions reported greater use of postal than workplace ballots.

The information from the trade union negotiators' questionnaire thus confirmed the findings of earlier research that union negotiators had greater experience of workplace ballots (Undy and Martin 1984). This reflected in part a concern among negotiators to minimise the 'decollectivising' tendencies of balloting, which were associated in particular with postal ballots:

> I do not disagree with the concept of secret ballots. If handled properly they can be put to the advantage of our members, providing that prior to the ballot taking place the members have a crystal clear understanding about the issue concerned and have had ample opportunity to debate.

Some negotiators shared concerns expressed by National Officers in a number of unions about the longer term impact of balloting on trade union organisation and membership participation. They believed that if decisions were no longer taken at branch meetings - whether about industrial action or on pay offers - an important function of branches would be removed. Trade unions might then find that their organisation at local level was seriously weakened. One negotiator commented:

> The practice of balloting - particularly postal balloting - has proved a disincentive to attendance at branch meetings and this has meant that 'grass-roots' membership does not participate in the formulation of union policy nor are policies subjected to the kind of scrutiny and debate that ought to prevail. In short, government legislation which purports to widen democracy has had the effect of reducing it.

In most unions, however, at least a third of negotiators said that they made use of postal ballots. While this may at first sight appear surprising, the relatively widespread use of postal balloting needs to be seen in the context of ballots as one method of consultation, used in conjunction with others. One Civil Service union, for example, combined members' meetings with postal ballots, whereas others opted for workplace ballots. Negotiators' comments emphasised the broad nature of the consultation process:

> Consultation on industrial action is first by members' meeting, then secret workplace ballot.

> I think there is some confusion between consultation and industrial action ballots. On a personal note, I would have already consulted our members prior to an industrial action ballot. A negative ballot result only weakens the negotiators hand.

At the time of the survey the evidence was that trade unions had, therefore, accommodated the balloting requirement. While this had the potential to undermine the role of existing decision-making bodies, their role was protected by using ballots as part of a broader consultation process.

The research sought evidence from the trade union negotiators' questionnaire about

centralising tendencies imposed on trade union decision-making by industrial action balloting[27]. The information from interviews with National Officers provided some clear examples of where this had taken place. These related in particular to occasions on which Officers of the union had appealed directly to members by means of a ballot, either reference back or industrial action[28]. The General Secretary of one Civil Service union said that activists within the union were 'less willing to flout the law than the union's constitution'.

For most unions, however, the trade union negotiators' questionnaire produced little evidence that decisions had been taken out of the hands of negotiators because of the requirement to ballot before industrial action[29]. Table 5.4 is a summary of the results.

Table 5.4 Trade union negotiators responsible for organising industrial action ballots

	Responsible for organising industrial action ballots
Number and percentage of respondents	731 (88%)
Total responses	834

[27]. For a theoretical discussion of the power of trade union leaders see Heery and Fosh in Fosh and Heery (eds) 1990, especially 15. They argue that the domination of trade union leaders is based on three factors: control of administration, monopoly of expertise and exercise of charismatic authority.

[28]. Examples included the use by IRSF National Executive Committee of a ballot of members in 1988 as a device to overturn a Conference decision to reject a new pay deal.

[29]. It should be noted that this was primarily a survey of full time officers, rather than lay activists.

Overall, 88% of negotiators said that they were responsible for organising industrial action ballots. This figure was significantly lower than two thirds in only two unions.

The extent to which negotiators had freedom over the nature and timing of ballots varied between unions. This reflected, in part, the degree of centralisation which already existed in the union's organisation and the level at which, in practice, decisions would be taken about industrial action. In one Civil Service union, for example:

> industrial action has taken place, but will all have followed the same pattern as the NEC has to sanction all industrial action and give clearance to ballot forms.

In the advice and guidance issued to members on balloting, unions were careful to take into account traditional channels for authorising industrial action. NUCPS guidelines cautioned branches against organising ballots without prior authorisation:

> Do remember that legally only the NDC [National Disputes Committee] can authorise ballots and industrial action on behalf of the union[30].

In practice larger unions, in particular, relied on Regional Officers to organise ballots and gave them freedom to do so, if necessary, prior to seeking NEC authorisation. In one large general union, Officers had considerable autonomy within their regions. The Legal Officer emphasised that the union's approach to balloting had to respect their authority and recognise the limits to their tolerance of 'the minutiae of legislative requirements'. Elected officials in manual unions (who were more often former members, less often professionally trained) might often be less willing to adapt their practices to conform with the detailed requirements of the legislation, than their appointed counterparts in white collar unions.

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[30]. NUCPS Legal Guide on Industrial Action Ballots September 1993, 2.

The trade union negotiators' questionnaire and interviews with National Officers provided evidence of the increasing importance of detailed advice and guidance on balloting issued by most major unions. In two large general unions this covered methods of voting, the wording of ballot papers and balloting procedures, including the complicated requirements for separate balloting constituencies in different workplaces. In many trade unions there were circulars and detailed guidance from headquarters on organising ballots. In a number of unions ballot papers were prepared centrally in consultation with the union's solicitors. Whilst, therefore, balloting on industrial action had taken place in a number of unions prior to 1984, this new legal dimension made pre-and post-1984 ballots very different from a trade union negotiators' perspective. It increased negotiators' dependence on specialist Officers at headquarters and procedures administered nationally.

Some of the advice was highly prescriptive, as for example circulars issued by the AMMA (now ALT). After 1993 NUCPS guidance included 13 required stages to the balloting procedure. Other unions tried to maintain a low key approach to the balloting requirement. The Guidance on Balloting of one public sector trade union, first issued in 1988, was described by the union's Legal Officer as 'unintimidating and practical'. It was only three pages long and was intended to be 'permissive, rather than prescriptive'.

Another measure of the potential of the industrial action balloting requirement to increase centralisation within trade unions was the use of advice and guidance. National Officers believed that there had been an increase in the demand from negotiators for advice and information. The trade union negotiators' questionnaire included questions on negotiators' access to advice on balloting and how often they made use of this advice. Table 5.5 is a summary of the responses about the sources of advice.

Table 5.5 Sources of advice on industrial action ballots

Sources of advice	Number of respondents	Percentage of total responses[a]
Legal Officer	369	50%
Other Full Time Officer	310	42%
Solicitors	77	11%
Other	85	12%
No-one	79	11%
Total responses	731	-

Note:

a. Percentages reflect the fact that more than one source of advice was used by a number of negotiators.

Advice was widely sought[31]. A half of those negotiators who were responsible for organising industrial action ballots said that other Full Time Officers were their main source of advice; 42% referred to the union's Legal Officer. Where unions employed Legal Officers negotiators often appeared to have direct access to them, which was reflected in the high proportion of negotiators who consulted them. Smaller numbers in other unions referred to Legal Officers who may not have been legally qualified, but a Full Time Officer with special responsibility for legal or balloting matters. Only a small minority referred to seeking advice from outside solicitors.

[31]. One large public sector union was an exception in that almost a quarter of respondents said that no-one provided them with advice or assistance.

Negotiators were asked how often they made use of this advice. Nearly two thirds of those responding to the question said often or always. See Table 5.6 below.

Table 5.6 Use by negotiators of advice on industrial action balloting

Use of advice	Number of respondents	Percentage of total responses
Never	27	4%
Seldom	50	8%
Sometimes	149	24%
Often	131	21%
Always	271	43%
Total responses	628	100%

The evidence of the trade union negotiators' questionnaire was, therefore, that negotiators sought by and large to conduct industrial action within the law, in accordance with national policy. Their dependence on specialist knowledge and advice clearly had the potential to centralise decision-making powers within unions. National Officers believed that the complexity of the legal requirements served to increase negotiators' dependence on head office advice because negotiators were not always fully confident about the details of the legislation. In turn, the advice from head office was clear. In the words of the Legal Officer in a large general union: when there was a trade dispute, officers must get the law right first. Many negotiators had experience

of a time when it did not matter what the law said. Information from the trade union negotiators' questionnaire confirmed that there was a new legal dimension for them in disputes, which they saw as a notable development. Respondents were aware of the concern from headquarters that in organising ballots they had complied with all the legal detail. This may help to explain why a high proportion attributed influence to the law in general terms, although it should be noted that this question did not relate specifically to balloting. In response to a question about the general influence of the law, nearly two thirds responded that the law had been the most important factor affecting industrial action. This compared with a smaller proportion, although still more than half (52%) who believed that the law had been an important weapon favouring employers in their own negotiations.

Seeking advice should not necessarily be seen, however, to undermine the autonomy of negotiating officers. It is notable that 88% of respondents reported that they were responsible for organising industrial action ballots. Unions rely crucially on the experience and expertise of their negotiating Full Time Officers - and the relationship that they have built up with workplace representatives[32]. The research did not provide any evidence that the balloting legislation had encouraged trade unions to take decision-making authority away from negotiators. The requirements of the law were seen to demand this only in exceptional circumstances. A significant factor working against centralisation of union decision making powers was the fragmentation, throughout the 1980s, of employing bodies and national negotiating structures in both the public and private sectors. This required unions to rely more on local representatives.

The evidence from the research, therefore, was that trade unions tended to favour workplace ballots, although a significant number of negotiators also had experience of postal ballots. Ballots had been incorporated into procedures which included other methods of consultation and there was a concern among National Officers and

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[32]. The study by Kelly and Heery (1994) highlighted the wide discretion of negotiators in their work. They also pointed to the small number of Full Time Officers, which increased the importance of building up lay representation.

negotiators to protect these. Negotiators were widely responsible for organising ballots. On this measure, therefore, there was little evidence that decision-making powers had been centralised in trade unions in response to the balloting legislation. Trade unions continued to rely on negotiating officers, who in practice operated with considerable autonomy. There was, however, evidence that the balloting requirement had added a new legal dimension in disputes, which made trade union negotiators more dependent on head office advice and assistance and centrally determined procedures.

5.8 Balloting, unofficial action and local disputes

In relation to major industrial action, there was considerable evidence that both National Officers and negotiators would require a ballot to be held. One National Officer in a public sector union commented:

> In the last national dispute management didn't resort to the law, but then the union was very careful not to infringe the law, particularly in relation to balloting and picketing.

There did appear, however, to be a distinction drawn between national and local industrial action. The respondent quoted above went on to say: 'local industrial action would present a very different picture'. Another respondent commented:

> If a group of members feel strongly enough to take immediate action, I would support them. That would represent a failure of previous discussions and negotiations to resolve a particular problem. In my experience, management has accepted some responsibility for that failure. The law might be mentioned in passing, as a fact, not a threat.

It was clear from the questionnaire that balloted industrial action had not replaced unballoted action. This was neither the expectation of National Officers nor the experience of respondents to the questionnaire. On occasion this would involve a trade union taking a calculated risk that employers would not make use of the law,

where there was clearly membership support for the action.

While, therefore, there was evidence in the trade union negotiators' questionnaire of an increasing use of ballots, which had become very much part of organising industrial action for trade unions, they were not universally held before all industrial action. 30% of all respondents were aware of unballoted action that had taken place within the last three years. The use of ballots in relation to local industrial action depended on the nature of the dispute and many other factors in addition to the law. The following excerpts reflect comments made by respondents in a range of unions:

> when three branch officers at [one] college were suspended without pay, 90% of members 'deemed themselves locked out too' (ie. went on strike) without a ballot, instantly and without questions asked by either side.
>
> H&S issues which may threaten workers may mean that you do not have the luxury of winning an official ballot as it takes time.
>
> Members are aware that the short, sharp, unofficial action without a formal ballot is very effective.

In some of the larger unions the proportion of respondents who were aware of unballoted action taking place within the previous three years was considerably higher. While balloted and unballoted action co-existed, respondents' comments did reflect concern that the requirement to ballot could be a source of conflict, on occasion, between officers on the one hand and members and lay activists on the other:

> It should not be forgotten that we still have bad areas of work where conditions are so bad that members have taken industrial action immediately - eg. walk outs. In these areas our members look at us suspiciously and often think that we are management's tool in that they see us stopping industrial action when they themselves have very serious problems.
>
> Legislation in the 1980s has made industrial action more difficult. Trade unions cannot officially support any action taken if it does not strictly comply with (a) the law, (b) the union rulebook. This has led to increasing frustration for members with FTOs having to tell them what they 'cannot' do rather than what they can. This has all been part

of an obvious intention to decrease the trade union influence in the workplace[33].

Following the 1990 Act unions had to be prepared to 'repudiate' unofficial action if a ballot had not been held. At the time of the research these changes in the law were still relatively new, so did not feature greatly in responses to the trade union negotiators' questionnaire. Some employers, notably engineering employers on the advice of the Engineering Employers Federation, had been quick to require repudiation of action that started without a ballot. The National Officers interviewed appeared confident that unions could move quickly to repudiate unofficial action and organise a ballot. They were well aware, however, that repudiation could leave members exposed to dismissal without the possibility of legal redress, if the industrial action was not immediately called off and a ballot organised. The potential for decisions which were unpopular with local officials and members leading to divisions within trade unions was thereby increased[34].

The evidence from the research suggested, therefore, that unballoted industrial action was quite widespread during the period 1989 to 1991 and co-existed with balloted action. There was little evidence that the balloting requirement had created internal divisions within trade unions. The impact of changes in the law in 1990, however, which introduced complex procedures for trade unions to negotiate in order to 'repudiate' unofficial industrial action, had not been fully realised at the time of the fieldwork[35].

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[33]. It should be noted that in 1984 the TUC had expressed concern that the balloting legislation would create divisions within trade unions and increase the incidence of unofficial action. See above pp. 133.

[34]. See Miller and Woolfson 1994. The AEEU repudiated the industrial action in Timex dispute. This created tensions between shop stewards and full time officers.

[35]. There were also subsequent changes in the law in 1993 which imposed a requirement for all industrial action ballots to be fully postal, which had the potential to create further internal divisions.

5.9 Accommodating the balloting requirement: reasons for balloting on industrial action

In the questionnaire survey of trade union negotiators, respondents were requested to rank seven possible reasons for balloting in order of importance. The seven were: (i) members expected to be balloted, (ii) union policy, (iii) to provide information on the views of members, (iv) that balloting was a requirement of the law, (v) to strengthen the hand of negotiators, (vi) to provide a breathing space in negotiations, (vii) ballots were required by employers. The aim was to explore the extent to which, in the early 1990s, the legislation itself was still seen to be the driving force, or whether other factors had come to play a more important role. In terms of the hypothesis that trade unions had accommodated the balloting requirement, the research would expect to see prominence given to factors other than the law. Table 5.7 is a summary of the responses.

The table shows that, overall, the main reason for holding strike ballots was the law - mentioned by 63% of respondents - although there were some unions including the Civil Service unions, in which the law did not figure as a significant factor in determining the use of ballots. Whilst nearly two thirds of respondents referred to the law as one of the two most important reasons for balloting on industrial action, almost a half (48%) also referred to union policy and members' expectations (46%). In some unions, including one large general union, a high proportion of respondents (80%) referred to the law, but also to union policy (69%). In another large general union, 66% referred to the law as one of the two most important reasons for balloting on industrial action and 49% referred to members' expectations that they would be balloted. In these cases it could be concluded that the law had become one of a number of reasons for balloting on industrial action. As one respondent commented:

> we first started balloting because the law forced us to - we now think on the basis of experience that ballots are democratic and give great strength to the members when they are won.

Table 5.7: Most important reasons for using ballots to consult members about industrial action

Reason for balloting	Number of respondents	Percentage of all responses
Required by law	482[a]	63%
Union policy	366	48%
Members expect to be balloted	353	46%
Strengthen hand of negotiators	245	32%
For information on members' views	105	14%
Breathing space in negotiations	42	6%
Required by employers	30	4%
Total responses	760	-

Note:

a The figures refer to the number of respondents who ranked the reason first or second in order of importance out of the seven reasons for balloting. They also include those who indicated that a number of reasons were significant without ranking these in order of importance.

Not surprisingly, the importance attributed to union policy was particularly high in those unions in which the use of ballots pre-dated the Trade Union Act 1984. It is also notable, however, that in some unions where complying with the legislation had involved a change of policy, respondents now cited union policy as well as the law as an important reason for balloting. Negotiators in other unions attributed less

importance to union policy as a reason for balloting on industrial action. In these unions, in common with many other unions, members' expectations were referred to by a significant number of respondents. There was just one union in which the law emerged clearly as the most significant factor, far above all others: this was a union in the education sector. In this union 90% of respondents referred to the requirements of the legislation whilst only 31% referred to members' expectations and 24% to union policy.

An additional point made by some respondents, although it was not specifically asked, was that balloting was used where members were dispersed.

The significance attributed by respondents to union policy and members' expectations of being balloted suggested that in many unions, despite the persistent modification of the law, strike ballots had been accommodated as an aspect of internal union procedures.

5.10 Wider use of balloting in consultation with members

The questionnaire provided evidence of the use of balloting in the reference back of agreements to members. This was a further measure of the extent to which the balloting requirement had been accommodated by trade union negotiators.

The vast majority of negotiators (84%) in trade unions covered by the survey reported that they found members were more reluctant to take part in industrial action. It could be argued that as a result, considerable importance was attached to prior consultation with members to avoid exposing negotiators to a no vote in an industrial action ballot. Balloting increasingly provided a framework for this wider consultation, although there were significant variations between unions. A summary of the results is in Table 5.8.

Table 5.8 The use of ballots in consultation on pay offers[a]

Method of consultation	Number of respondents	Percentage of total responses
Workplace ballots	472	58%
Members' meeting show of hands	420	52%
Postal ballots	263	32%
Stewards committees	146	18%
Delegate conferences	117	14%
Feedback from activists	94	12%
Varies	276	34%
Changes in methods of consultation in recent years	276	34%
Total responses	811[b]	-

Note:

a. The figures reflect the fact that balloting was one among a number of methods used.

b. 811 negotiators reported that members were consulted over accepting or rejecting pay offers. This was 96% of the 844 who answered the question.

As Table 5.8 shows, the trade union negotiators' questionnaire found that balloting was the most commonly used method of consultation with members. Show of hands at a members' meeting, however, was still widely used and was the most common method of consultation in a number of major unions, both manual and white collar, in the public and private sector. Changes in methods of consultation were reported by more than a third of negotiators and this invariably included the greater use of ballots. In all cases, where balloting was used it was one among a number of methods of consultation used.

The interviews with employers confirmed that members' meetings continued to be a prevalent method of decision making in reference back:

> While balloting before industrial action had become normal, the TGWU also maintained traditional methods of consultation with members through conferences of garage delegates and garage meetings (Elgar and Simpson 1994e, 12).

This could be seen to indicate that union officers preferred to make use of a show of hands where they still had discretion over the decision-making process - or where a show of hands was considered to be more appropriate. National policy in some unions supported the use of methods of consultation other than balloting. Not all unions welcomed the general increase in consultation on pay offers which balloting seemed to have generated. The practice was resisted by one union which made the point that if there was strong feeling among members, national officers would be aware of this.

There was no evidence, however, that union negotiators would favour a return to a show of hands in decisions over industrial action. This was as true of the large general unions as of more specialist and white collar unions. Despite the widespread use of members' meetings in reference back, it was said by a number of respondents that balloting was popular among members - and not unpopular among officers - although the legal detail and the difficulties this created for unions was seen as a device to restrict industrial action by some respondents:

> The membership, it has to be said, seem to favour the workplace secret ballot before strike action, but do not support other areas such as having to reballot after 28 days and dismissal while taking industrial action.
>
> Members have quickly adopted balloting procedures and have come to expect to be asked as to whether they accept or reject offers and take industrial action. They are happier that these decisions are not taken at mass meetings.

The information suggested, therefore, that by 1989-91 ballots had become an important aspect of consultation on pay offers. While a significant number of negotiators continued to favour a show of hands at a members' meeting, balloting was increasingly used. Workplace ballots and members' meetings were notably more common in reference back consultation than postal ballots.

5.11 Conclusions

The research showed how trade unions adapted both their rules and, more importantly, their practice to meet the balloting requirement. From responses to the questionnaire the picture that emerged was of unions and their officials who by and large sought to conduct industrial action lawfully. Negotiators had widespread experience of industrial action ballots. There was little evidence that ballots were primarily seen as an external imposition. Many negotiators listed union policy and members' expectations that a ballot would be held as important reasons for balloting.

Industrial action ballots were integrated into existing consultation processes. This helped to reduce any practical difficulties and minimised the dangers of no votes. The complexity of these practices and procedures - reflecting the nature of the membership, different levels of decision-making within unions and a variety of policies on industrial action - led to wide variations in negotiators' experience of the number of ballots held, whether these were workplace or postal, and how they related to other methods of consultation. Although ballots were widely held and were now very much part of trade unions' dispute strategies, they were not universally held before all industrial

action.

It is notable that the balloting laws were seen to have engendered a more cautious approach to industrial action among trade union officers. Some negotiators believed that this was as a result of the demonstration effect of the use of the law by major employers in a number of high profile cases:

> This has imbued senior TU officials and myself with a fear that contravention of a law or a court order would not be worth the effort that it brought about.
>
> The secret ballot is a good thing as it often strengthens members' commitment to action. However the law is entirely weighted to the employers' side and this makes unions very careful (in my opinion often too careful).

Caution among trade union negotiators had been reinforced by the complexity of the balloting requirements. This increased the potential for ballots to centralise decision-making within trade unions. The influence of the law was felt by negotiators in the form of detailed guidance issued by union legal and research departments. The evidence from the questionnaire was that negotiators widely made use of this advice and information. National Officers believed that there had been a significant increase in demand. There was clearly a new legal dimension in disputes.

There was little evidence, however, from the trade union negotiators' questionnaire that the balloting requirement had undermined negotiators' role in disputes, leading the research to conclude that industrial action balloting had been accommodated without a notable centralisation in trade union decision making. A high percentage of negotiators (88%) reported that they were responsible for organising industrial action ballots. Balloting was used alongside other methods of consultation and encompassed both workplace and postal ballots, although negotiators expressed a preference for workplace ballots. Negotiators also reported an increase in the use of reference back ballots, which in many respects reflected expectations engendered by

the balloting legislation. The interviews with National Officers and results of the trade union negotiators' questionnaire suggested that direct consultation with members using both industrial action and reference back ballots was not unwelcome to trade unions. Nor did the use of ballots affect the pivotal role of negotiators in trade union workplace organisation.

CHAPTER 6 INDUSTRIAL ACTION BALLOTS: EMPLOYER AND TRADE UNION STRATEGIES IN DISPUTES

6.1 Introduction

This chapter focuses on the role of ballots in negotiations, drawing on the results of the questionnaire survey of trade union negotiators, interviews with National Officers of trade unions and employers. It will explore the impact of ballots on the processes of negotiations, relating this to the likely effect on negotiated settlements and industrial action, and changes in the balance of power in the bargaining relationship. The impact of the balloting legislation on disputes and industrial action has been the subject of widely differing interpretations. In the words of one respondent to the union negotiators' questionnaire:

> It is probably easy at this time to assume that the law has played a greater role in reducing industrial action, than is the case.

Tom King, then Employment Secretary interpreted the impact of the balloting legislation quite differently. He asserted in 1985 that the law requiring ballots before industrial action was the most important factor in the fall in the number of disputes which was at its lowest for 50 years. In support of this argument, he quoted 21 cases of legal action, involving 11 companies and 21 unions[1].

In 1984 the trade union movement saw ballots as one aspect of the Government's determination to impose restrictions on industrial action and thus undermine the ability of trade unions in disputes to use the credible threat of industrial action to defend the interests of their members. The TUC response to the balloting legislation placed the requirement to hold industrial action ballots clearly within the framework of the Employment Acts 1980 and 1982 which had trespassed into the area of trade union immunities. Part II of the Trade Union Act was seen as 'a further erosion of the right

[1]. See Financial Times 31.5.85.

to take industrial action' (TUC 1984, 9).

In 1984, before the addition of further complexities to the balloting requirement, the TUC had already expressed concern that a failure to comply with the technical detail of the law would leave ballots open to challenge by employers:

> [T]he difficulties of obtaining a legally valid ballot would appear to be considerable (TUC 1984, 10).

Conversely, with the benefit of the experience of eleven years of the balloting requirement, it has been argued that ballots have assisted trade unions in negotiations. Ballots undoubtedly 'quickly became an established feature of the industrial relations scene'[2] and ACAS statistics provided evidence that the majority of ballots produced votes in favour of industrial action. See Table 6.1 below.

Table 6.1 ACAS figures on the number of industrial action ballots 'won' and 'lost' in the 1980s.

	Number of ballots	Number in favour of industrial action	Percentage in favour of industrial action
1985-6	253	196	77.5%
1987	280	251	90%
1988	331	305	92%
1989	359	336	94%

Source: ACAS Annual Reports

As the table shows, the proportion of 'yes' votes steadily increased. It has been

[2]. ACAS 1987,14. See also Labour Research 1995, 3.

argued, therefore, that if ballots resulted in strike action not taking place, this was seldom because 'moderate' members had overturned the recommendations for action of more 'militant' leaders, but more often because a 'yes' vote in a ballot proved to be an effective negotiating tactic for union officials, assisting them to obtain a satisfactory settlement without the industrial action going ahead (Auerbach 1990, 120).

This chapter provides an analysis of evidence from the trade union negotiators' questionnaire to test the argument that ballots strengthened the hand of union negotiators and also evaluates the evidence in relation to the opposite argument that ballots increased the difficulties for trade unions in winning membership support for dispute strategies involving industrial action and thus increased the power resources available to employers. The analysis begins with information on ballots won and lost.

6.2 Industrial action ballots won and lost

The overwhelming evidence from the fieldwork was that, in the experience of trade union negotiators, most ballots produced votes in favour of industrial action. Overall, nearly three quarters of respondents (74%) reported more ballots won than lost. The results are summarised in Table 6.2 below.

Unions in which respondents reported a significantly higher proportion of ballots won than lost included manual and white collar unions, in both the public and private sectors. In two unions, respondents reported that all votes had been in favour of industrial action. Negotiators in most unions had experience, however, of members voting against industrial action. In two unions covered by the survey, negotiators reported more ballots in which members had voted against industrial action than ballots in which they had voted in favour.

Table 6.2 Yes and no votes in ballots held in the previous three years

Proportion of ballots in favour of industrial action	Number of respondents	Percentage of total responses
Up to 25%	95	14%
25-50%	85	12%
50-75%	74	11%
More than 75%	427[a]	63%
Total responses	681	100%

Note:

a 339 respondents said that all ballots held had produced votes in favour of industrial action.

The trade union negotiators' questionnaire provided information to test whether officers who reported a greater number of ballots held were more likely to report a higher percentage of 'lost' ballots. In most unions the percentage of yes and no votes in ballots was not significantly affected by the number of ballots which the respondent had experienced. Contrary to expectations perhaps, in some unions - notably those in the Civil Service and one major public and private sector union respectively - where only one ballot had been held, officers were somewhat more likely to report a vote against industrial action than where a number of ballots had been held. In some unions a greater number of ballots did lead to a significant decline in the likelihood that ballots would be won. In one large public sector trade union, for example, where only one ballot had been held, all officers reported a vote in favour of industrial action. Where between two and five ballots had been held, 75% produced yes votes.

In a large general union, Officers reporting more than five ballots were as likely to lose as win them, compared to 60% overall who reported more ballots won than lost.

The wording on the ballot paper was one possible influence on the chances of winning or losing ballot decisions. Despite the increasing complexity of the requirements, trade unions retained discretion over whether questions on strike action and action short of a strike should be included on the same ballot paper. The research revealed a wide range of different practices. It might be anticipated that a potential danger for trade unions in combining questions on strike action and action short of a strike was that this could encourage members to vote for a 'lesser' form of industrial action by rejecting strike action and supporting action short of a strike. There was very little evidence from the trade union negotiators' questionnaire to suggest that members voted against strike action and for action short of a strike[3]. A wide range of advice was issued by trade unions. Legal departments of two large general unions recommended to negotiators that as a general rule only one question, relating either to strike action or action short of a strike, should be included on the ballot paper, except where it was anticipated that the action was likely to escalate from action short of a strike to strike action. In practice, though, the Legal Officer in one of the unions believed that in most cases the model ballot paper, which included both questions, would simply be reproduced. In the other union guidance had been revised to include three separate model ballot papers. National officers believed that since this guidance had been issued, negotiating officers were increasingly likely to use the appropriate ballot paper rather than ask both questions in all cases. One Civil Service union advised that if members were being asked to vote on both questions separate ballot papers should be sent out.

By contrast, there was evidence from a number of unions that both questions about

[3]. National Officers, notably in two large general unions in the survey, believed that it would be surprising if this had not happened rather more frequently than these results would suggest. Assuming that most officers reported this situation as a vote in favour of industrial action, this would in one sense overstate the proportion of ballots won.

strike action and action short of strike action would be asked on the ballot paper. This included one union in the education sector, which had a tradition of industrial action combining action short of a strike and short strikes. Ballot papers included questions on strike action and action short of a strike and National Officers were confident that members would vote in favour of both.

Respondents' comments did not suggest that votes against industrial action and for action short of a strike had been common in the experience of negotiators. There were a small number of exceptional cases, which suggested that when this happened it completely undermined dispute strategies:

> Members voted against strike action. Action short of a strike was ineffective and was not supported at a number of units.

Negotiators in all 25 unions expressed more concern that low turn outs or a narrow majority in favour of industrial action, whether strike action or action short of a strike, were most damaging to their negotiating position.

A potential difficulty of a more technical nature of including both questions on the same ballot paper related to the counting of the votes. In West Midlands Travel Ltd v TGWU[4] the Court of Appeal rejected an employer's attempt to invalidate a ballot on the grounds that the majority vote for strike action represented fewer than half of those members who took part in the ballot. The situation had arisen because a number of members had not answered both questions on the ballot paper. TGWU guidance subsequently warned officers that where two questions were asked but only one was answered, these should be treated as spoilt ballot papers.

The advantage of asking both questions could be the flexibility this provided in conducting disputes. In 1991 guidance issued by one Civil Service union suggested that if both questions were included, decisions about appropriate action could be taken

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4. West Midlands Travel Ltd v TGWU Court of Appeal [1994] ICR 978.

following the ballot result:

> In the light of the extent of membership support for the action, the size of the turnout and any subsequent negotiations, decide on the preferred form of action to be taken (eg one day strike or indefinite strike).

Information from Electoral Reform Balloting Services in 1994 suggested that in the early 1990s questions about strike action and action short of a strike were usually both included on the ballot paper[5]. This would tend to confirm the findings of the negotiators' questionnaire, which suggested that asking both questions on the ballot paper could be a positive part of negotiating strategies.

The evidence from the trade union negotiators' questionnaire that more ballots were won than lost is consistent with the evidence from ACAS Annual Reports of the increasing ability of trade unions to hold ballots which produced majorities in favour of industrial action. Overall, the high proportion of ballots won suggested that balloting could be a positive factor of some significance in trade union negotiating strategies. Whilst, however, it could be argued that it was a 'serious misjudgement' for any union to lose an industrial action ballot[6], there were situations in which negotiators were not in a position to make a decision to hold a ballot independent of other factors. These included union policy, the balance of interests of different groups or factions within the union, the attitude of employers and members' expectations that they would be balloted. All had an impact on the use of ballots in trade unions' negotiating strategies and could lead to 'no' votes. Centralised decision-making within some unions enabled Executive Committees to control the number of ballots held. One Civil Service union, for example, maintained the practice throughout the 1980s

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[5]. Information from Electoral Reform Balloting Services reported in Industrial Relations Services Employment Trends 553 February 1994. 120 postal ballots were monitored between 1st September 1993 and February 1994: 52% sought a mandate for both strike action and action short of a strike.

[6]. This was said during an interview by a former General Secretary of a Civil Service union.

of organising ballots only where the Executive was confident that there was membership support for industrial action. Other unions had less centralised procedures.

6.3 Prescriptive nature of the balloting requirement and maintaining flexibility in negotiations

One of the most powerful potential constraints on the use of ballots by trade union negotiators in disputes was the prescriptive nature of the legislation - a feature which was accentuated by amendments to the law in 1988 and 1990. Unions' freedom to determine the nature of the ballot and the questions posed prior to 1984 was replaced by an increasingly rigid regime. The advice issued by trade union national and local officials sought to balance the need to prevent legal challenges against maintaining flexibility in negotiations. National Officers emphasised that if the guidance was followed it was not impossible to comply with the law and organise an effective campaign of industrial action. The TGWU's 1987 guidance, The Law and You, for example, assured representatives:

> '[t]here is nothing in law to prevent our members from continuing to take strong, effective dispute action including a strike action if necessary..'.

Respondents in a number of unions expressed concern, however, about the practical difficulties associated with balloting. Negative comments focused on the complexity of the provisions:

> the complexities which now surround the process of balloting cannot be construed as a 'good thing' for unions, being clearly designed to trap unions in a legalistic morass, rather than a means of establishing members' wishes.
>
> Ballots as such cause me no practical, moral, or philosophical problems. What does cause me problems are the legislative requirements within which the ballots are conducted, as the legislation

is designed to give advantage to the employers at the expense of employees and their trade unions.

Potential difficulties for trade union negotiators in the successful conduct of disputes related to a number of different requirements associated with the balloting laws.

6.3.1 Combined reference back and industrial action ballots

The use of combined reference back and industrial action ballots was common in trade unions which used ballots prior to 1984 Whilst the evidence from research in the 1980s confirmed that the practice continued (Martin et al. 1991, 201), combined ballots could not satisfy the requirements of the legislation and trade unions became increasingly cautious about their use.

By the time of this research, combined ballots - although still used within certain trade unions[7] - did not emerge as a significant issue for trade union negotiators. This may be, in part, because most unions had incorporated ballots as an integral part of the consultation process. A number of respondents commented that the research had confused consultation, which took place first, with the ballot which then followed the consultation. This enabled union officers to avoid situations in which a vote against industrial action would have been particularly damaging to their negotiating position. As one officer commented, a ballot was not held because: 'initial indications showed a lack of support for action'.

6.3.2 Wording

The research suggested that a key issue for trade union negotiators was complying with the required wording on the ballot paper. This in turn raised a broader issue about trade unions' freedom to define the nature of the dispute. Some employers saw the wording on the ballot paper as an opportunity for trade union leaders to influence

[7]. A National Officer of one large general union commented that negotiators still used ballots that combined decisions on offers and industrial action as part of the negotiating process. See also Elgar and Simpson 1994e, 10. Managers reported that unions in British Rail held ballots which combined reference back and industrial action.

the outcome of the vote. Employers expressed more concern that questions on the ballot paper and accompanying information should give a 'fair' account of the issues in dispute, than that ballots complied with the technical detail of the law. For their part, however, union National Officers said that the increasingly prescriptive nature of legislative requirements for the ballot paper created the greatest opportunities for employers to intervene in, and influence, decisions on industrial action.

Evidence from the trade union negotiators' questionnaire was that the wording on the ballot paper was the most common basis for legal challenge to ballots. Overall, 60% of employer threats of legal action related to balloting, and more than two thirds of these concerned the wording on the ballot paper. National Officers believed that key to avoiding a legal challenge was to define disputes carefully with an eye to the law. The advisory circular on ballots of one of the large general unions warned negotiators to avoid a situation in which developments in a dispute following a ballot could enable an employer to question the validity of the ballot. Recent case law has confirmed the importance for trade unions of ensuring that all written documentation associated with a dispute points to there being a dispute within the trade dispute definition. The wording of the ballot paper can be a very important factor[8].

Officers were also advised that the accompanying information should state:

> The industrial action authorised by the ballot will be the full extent of that contained on the ballot paper and is not restricted to that currently intended[9].

This would enable negotiators to maintain a flexibility in dispute tactics and escalate

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[8]. See the case of Wandsworth LEA v NAS/UWT [1994] ICR 81 where the Court of Appeal ruled that the NAS/UWT had successfully established the existence of a trade dispute. Neill LJ said: 'we attach considerable importance to the wording of the question posed in the ballot paper'.

[9]. See discussion of this issue regarding Blue Circle v TGWU in Simpson 1989, 234.

industrial action without the requirement for a further ballot[10]. In practice the sample ballot papers collected in the course of the research indicated that there were considerable variations in the wording of ballot papers within, as well as between unions.

6.3.3 Time limits on industrial action

The legislation required that industrial action should take place within 28 days of the date of the ballot. The effect of court proceedings during the 1989 docks dispute over the abolition of the National Dock Labour Scheme provided evidence that this could in certain circumstances undermine trade unions' dispute strategies[11]. The research highlighted cases in which unions were encouraged to implement industrial action to stay within the time limit. In October 1987 the Scottish POA balloted members on industrial action. Having won a mandate for industrial action, the union faced the prospect of the four week time limit being exceeded. Members were, therefore, instructed to refuse to fill in time sheets. In 1989 the General Secretary referred to the ongoing action as 'more technical than anything' to keep alive the mandate of the 1987 ballot[12].

Meeting the 28 day time limit did not emerge as an issue of any widespread significance for negotiators in the current research[13]. The balance of negotiators'

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[10]. Maintaining flexibility has become increasingly difficult since 1993 with the imposition of the four notice requirements.

[11]. Associated British Ports Ltd v TGWU [1989] IRLR 29. But see now the possibility of the extension of the four week time limit in these circumstances, TULRCA section 234, discussed above pp.81-2.

[12]. See Secretary of State for Scotland v. Scottish Prison Officers' Association [1991] IRLR 371. For a general discussion of the case, see Simpson 1993.

[13]. It should be noted that the fieldwork was carried out before the 1993 changes in the law which added requirements for notifying employers of industrial action. This could further delay industrial action. No compensatory provisions were made to lift the restrictions on the timescale.

responses indicated that the time limit was a positive element in negotiations, enabling trade union negotiators to successfully put pressure on employers, leading to the satisfactory settlement of the dispute:

> Following positive ballot result for strike action I contacted the employer and gave notice that in the event of no further progress being made in negotiations (by a specific date), we would implement the ballot decision of our members. Subsequent talks resolved the difficulties.

In a small number of cases, however, exceeding the time limits was said to have led to industrial action being called off without the dispute having been settled in negotiations:

> The employer started talks that did not resolve the problems. Because of the legal time limits members had to be re-balloted.

This could impose an additional delay because of the time taken to hold a ballot.

In the experience of negotiators covered by the questionnaire, the complexity of the provisions for the wording of the ballot paper was the most significant of the prescriptive requirements imposed on trade unions in relation to industrial action balloting post-1984. It led to a number of legal challenges from employers and, of wider significance, enabled employers to exert an influence over the conduct of the ballot. It also led to a greater reliance among negotiators on detailed advice and guidance from National and Legal Officers.

6.4 Ballots and trade union negotiating strategies

The findings of Undy and Martin's survey of trade union practices in the early 1980s suggested that prior to 1984, the use of ballots in collective bargaining was relatively limited. In the TGWU, for example:

> union full-time officers preferred to consult via lay committees, shop stewards meetings or, as in cars, mass meetings rather than to use formal ballots, arguing that the method was more flexible, and less open to employers' influences (Undy and Martin 1984, 144, 163).

There was, however, long experience of ballots in certain negotiating groups and the more general, although occasional, use of ballots by trade unions to meet particular needs. More systematic evidence on the use of industrial action ballots by trade unions in negotiations has been lacking. The trade union negotiators' questionnaire sought to explore this issue. Overall the evidence of the questionnaire suggested that ballots assisted trade unions in negotiations, but that this was qualified in certain important respects.

Respondents were asked about the most important reasons for balloting on industrial action. A third of respondents said that strengthening the hand of negotiators was one of the two most important reasons. This compared with two thirds who referred to the legal requirement to ballot and almost a half who referred to union policy and the expectation of members that they would be balloted[14]. In some unions, notably a large general union and large public sector union, almost a half of respondents referred to strengthening the hand of negotiators.

Whereas, overall, only a third of respondents referred, therefore, to strengthening the hand of negotiators as one of the most important reasons for balloting on industrial action, the use of ballots emerged clearly as a feature of union strategy in negotiations. The trade union negotiators' questionnaire sought information not only about industrial action that had taken place, but also industrial action seriously considered. Where industrial action did not take place, negotiators were asked whether disputes had been settled in negotiation or whether there had been a failure to reach a negotiated settlement. In each case negotiators were asked whether a ballot had been held. Of those who reported that industrial action had been seriously considered but did not

[14]. See above chapter four for more details.

take place, an overwhelming majority said that in their experience disputes had been settled in negotiation and that, at least on occasion, this had followed a ballot. For a summary of the results see Table 6.3 below.

TABLE 6.3 Strike ballots in negotiations

	Number of respondents	Percentage of total responses
Occasions on which threatened industrial action did not take place	599	88%[a]
Ballot held	489	82%
Dispute settled in negotiations	519	87%
No industrial action/dispute not settled	169	28%
Total responses	599	-

Note:

a There were 683 respondents to this question. 599 (88%) reported that there had been occasions on which threatened industrial action did not take place. The following percentages are out of the 599 responses.

While it is not possible from the available information to determine how the terms of a settlement differed from those on offer before the ballot, the evidence suggested that there was a strong correlation between successful ballots and a negotiated outcome to disputes. The results also indicated, however, that ballots alone did not determine negotiators' ability to reach a negotiated settlement. The relationship between the absence of a ballot and failure to achieve a negotiated settlement was far less marked than the positive correlation between a successful ballot and negotiated settlement of

a dispute. There were unions in which notably fewer respondents referred to ballots, but a high proportion of disputes were settled in negotiations. This was particularly true of unions in the Civil Service. Similarly, in one education union fewer than a half of respondents who reported that disputes had been settled in negotiations said that, at least on occasion, this followed a ballot. In a major public sector union, fewer than two thirds of respondents reported a ballot held in this situation.

While, therefore, achieving a negotiated settlement did not depend on ballots, other evidence suggested that they were a factor of critical importance. Respondents' comments in all unions confirmed that a convincing yes vote in a ballot could often lead to an improved offer or withdrawal of proposals in dispute without industrial action going ahead:

> I think that the legislation on ballots, if followed, helps to strengthen the union at the workplace. It gives a legitimate and legal view of the workforce which I find most employers have a problem with. In the past the employer often argued that the impending action was brought about by coercion, this is now virtually impossible.
>
> I believe that whilst creating administrative and financial burdens for the trade unions, industrial relations law is in fact a double-edged weapon and tactically can be used very effectively against employers.

Evidence from two craft unions - one with and one without a history of using ballots in collective bargaining - indicated that negotiators in both unions had made use of ballots in negotiations widely. In these unions, respondents' comments confirmed that they recognised the positive aspects of balloting:

> In factories where trade unions are strong and well organised...it is possible by the exercise of a disciplined approach to put pressure on managements through the use of industrial action ballots.
>
> In the past employers used to say that members were coerced into voting one way or another. This they cannot now do.
>
> When the members felt strongly and expressed their views in a ballot a settlement by negotiation [was] common. A settlement was sometimes reached before we balloted the members.

The tactical advantages of balloting on industrial action were also recognised by negotiators in white collar unions:

> Ballots on industrial action have proved a useful bargaining tool in demonstrating [the] extent of members' support.
>
> Employers now have to be aware that their offer will be put to ballot and they are also under pressure to be realistic in what they offer.

It was notable, however, that more than a quarter of respondents, (28% overall), reported occasions when no industrial action had taken place for reasons other than settlement of the dispute through negotiations. This was normally because members had voted against action or where the majority and/or numbers voting were not convincing enough to sustain the taking of industrial action. This would suggest that negotiators were not always in a position to decide when to hold a ballot and then have the best opportunity to persuade members to vote in favour of industrial action to improve their bargaining position. A substantial minority of negotiators in a number of unions, for example, said that an important reason for using ballots was members' expectations. It may be that, on occasion, members' expectations required a ballot to be held in situations where a no vote, a narrow majority in favour of action or a low turnout was the likely outcome and this did not help a negotiator's bargaining position. Unions in which a relatively high proportion of respondents reported disputes not settled in negotiations, but where no industrial action took place, included public and private sector and manual and white collar unions.

Negotiators were aware that a successful ballot result was no guarantee of success in negotiations. One of the negative effects that seemed to be of concern to some negotiators, especially in two large predominantly manual trade unions, was that they could find themselves exposed in negotiations if a ballot majority was not reflected in support among members for actually taking industrial action:

> A nil increase meant that over a three year period wages had been seriously eroded. Members balloted to take strike action convinced that management would then concede something. When this did not happen

> they were worried that the company would pull up stakes and move from the area (management threat). They really could not afford to be without money and had to accept the situation bad as it was.
>
> Due to the factory being closed and transferred out of the area, members were afraid of being sacked whilst in breach of their contract and losing their redundancy pay. [This was] even though they had voted for action short of a strike.

This was the negative side of the element of bluff which a number of full time officers claimed to have built into the bargaining process by using ballots. A number of negotiators reported that ballots had given a 'false picture' of the strength of membership support for industrial action. As one commented:

> After voting yes in the ballot, the members just decided to accept the proposed change.

Particular problems were associated with the use of industrial action ballots in multi-union workplaces, or where disputes involved a number of different unions. This could explain why in two major public sector unions the use of ballots did not emerge more strongly as a feature of union strategy in negotiations. In fact the loss of a ballot or insufficient membership support was more likely to be reported as a factor in an unsatisfactory outcome of a dispute. The wider research suggested that unions in the public transport sector often failed to co-ordinate their response in disputes, undermining the effective use of ballots in negotiations. This reflects the difficulties some unions face in overcoming traditional rivalries, even though individual officers might be well aware of the potential tactical advantages in co-ordinated ballots (Elgar and Simpson 1994e, 11).

Some respondents referred to the difficulties of organising a ballot where issues affected members' interests differentially. One respondent representing members in a large car plant commented:

> We were among the first to move to mass meetings followed by workplace ballots. We believe that this way is excellent and democratic for issues of plant significance. However on 'lesser' issues - eg. a sacking - we also have to ballot at plant level, which causes problems. On the set piece battles the changes in the law ironically have strengthened us. On other questions it has made strike action very difficult to organise - therefore the employer is stronger in negotiations.

In general, however, there was little evidence from the negotiators' questionnaire that balloting had made it more difficult for negotiators to win the support of members for industrial action. More trade union negotiators believed that balloting had strengthened members' resolve and commitment to industrial action. Moreover, there was little evidence from the interviews with employers that they believed that ballots were more likely to produce 'moderate' rather than 'militant' outcomes.

A more general measure of the importance attached to ballots in trade union negotiating strategies was provided by negotiators in response to the statement that strike ballots were a good thing for trade unions. Overall slightly more than two thirds (68%) of respondents agreed. In a number of major unions more than three quarters of respondents agreed that ballots were a good thing for trade unions. In one manual union with a long standing practice of balloting on reference back if not industrial action, 96% of respondents believed that ballots were a good thing. The balance of respondents' comments on balloting was positive. Negotiators recognised that the emphasis on consultation with members and a strategic, planned approach to industrial action, as a corollary to balloting, was not without a positive element:

> The requirement to ballot and all the petty stipulations surrounding the ballot form are more nuisance value than a deterrent. If you can't win a ballot, you will never win a strike.

A number of employers welcomed ballots as a useful 'cooling off' period. Equally, however, the trade union negotiators' questionnaire provided evidence that trade unions could benefit from a more carefully planned approach to the threat of industrial action.

In this section it has been noted that the trade union negotiators' questionnaire found a strong correlation between a successful ballot and negotiated settlement of a dispute, without the need for industrial action to go ahead. This supports the argument that ballots have assisted trade unions in negotiations. The research has also highlighted a number of provisos, which qualify the general conclusion. These include the evidence of settlements reached by negotiators without the assistance of a ballot, ballots lost or where the majority was not sufficient to sustain the taking of industrial action, and negotiators' concern about the complexity surrounding the balloting provisions.

There was one further important proviso. To strengthen the hand of negotiators, the threat of industrial action backing the ballot needed to have credibility with employers. Interviews with regional trade union officials in the construction industry confirmed that balloting played a very small part in their negotiating strategies. Union influence in the construction industry was not based on strong site organisation and respondents recognised that a ballot would not carry with it a credible threat of industrial action:

> While there is evidence that in other industries holding a strike ballot is seen as a useful negotiating tactic by trade unions, the obstacles in the way of organising a lawful ballot of construction workers mean that this is far less likely to be the case in this industry. Moreover there was no tradition of balloting before industrial action on construction sites (Elgar and Simpson 1994b, 11)[15].

This was a particular feature of the construction industry, reflecting its distinctive industrial relations practices.

6.5 Employers' use of the law

The trade union negotiators' questionnaire provided information on legal proceedings

[15]. For a general discussion of developments in construction which have affected site based union organisation see Evans and Lewis 1989.

initiated or threatened by employers under the balloting provisions. Whilst this contributes to a body of information on this issue[16], it can only lead to a partial understanding of the impact of the law. The analysis here is based on the broader 'use' of the strike ballot laws by employers in negotiations and the extent to which the balloting requirement played a part in employers' negotiating strategies.

6.5.1 Background

The enforcement mechanisms of the 1984 strike ballot provisions depended on employers' willingness to invoke their new legal rights against the organisers of industrial action. It has been argued that:

> [The] eventual decision to link the statutory immunities to pre-strike ballots appears to have been heavily influenced by the increasingly hard-line attitude taken up by employers' organisations towards trade union law reform since the June 1983 election (Hutton 1984, 214).

The Government believed that employers would be willing to make use of the law by challenging unlawful industrial action in the courts. This, however, made huge, largely untested assumptions. As Poole and Mansfield have argued, whilst the level of interest in studies of management has increased in recent years:

> our knowledge of the extent to which managerial attitudes and behaviour in industrial relations are sensitive to major shifts in the external political environment is still circumscribed (Poole and Mansfield 1993).

The TUC in its response to the balloting legislation proposals argued that employers would recognise that seeking injunctions could easily inflame situations, harden attitudes and jeopardise the early settlement of a dispute (TUC 1984). Experience has confirmed that for employers there was an immense difference between expressing support for the principle of ballots before industrial action and willingness to make use

[16]. See especially Evans 1985, 133-137; and Evans 1987; Labour Research Department 1988, 1990, 1991, 1993.

of new opportunities to challenge industrial action in the courts by taking legal action.

Evans' work involve collating and analysing evidence of employers' injunction applications. His research showed that in the period 1984 to April 1987, 47 of the 80 recorded injunction applications arose from the balloting legislation (Evans 1987). Labour Research found that in the period to July 1988 there was one further injunction application relating to balloting (LRD 1988). While this approach has produced invaluable information, it has limitations as a measure of the impact of the law. One is that it is based largely on newspaper reports of proceedings and is, therefore, sometimes of questionable accuracy. The use of Evans' work, by others who have often not acknowledged the original source of the data, as a definitive survey of the incidence of legal proceedings, leading to an understanding of the impact of the law, could, therefore, be highly misleading[17]. It also excludes from consideration all those situations in which the requirement to ballot had an impact on negotiations, but legal proceedings were not invoked. Evans, found, for example, that injunction applications were concentrated among a small number of employers and sectors, notably printing, shipping and transport, and the public services (Evans 1987).

The current research sought both to update and broaden the nature of the enquiry. It included questions, which were asked of both trade union negotiators and employer respondents, about not only legal proceedings, but also threats made by employers to invoke the law. This was seen to be one way of seeking a truer measure of the 'use' of the law by employers.

6.5.2 Evidence from the research

The trade union negotiators' questionnaire showed that where industrial action had been seriously considered, just over a quarter of negotiators (28%[18]) in 23 of the 25 unions had received some form of threat by employers to use the law over actual or

[17]. See, for example, Metcalf 1990.

[18]. 203 respondents of 846 in total.

potential industrial action. See Table 6.4 below.

Table 6.4 Threats of legal action by employers in response to industrial action taken or seriously considered

	Number of respondents	Percentage of total responses
Threats of legal action by employers	203	28%
Total responses	737[a]	100%

Note:
1 737 respondents of the total 846 reported that industrial action had been seriously considered within the previous three years.

Steps by employers to start legal proceedings were experienced by negotiators in 18 unions, but in small numbers. Writs and/or solicitors' letters were reported by 50 negotiators. This was a quarter of those who had received threats of legal action, or less than 7% of those who had seriously considered industrial action. Negotiators in some unions, in particular one large general union and a public sector transport union, appeared to face employers who were more likely to invoke the law. A notably lower proportion of respondents referred to threats of legal action in a number of unions, including one large craft union and a union in the education sector. In two smaller, specialist unions, threats of legal proceedings were a one-off.

Overall, nearly two thirds (60%) of these threats related to ballots. See Table 6.5 below.

Table 6.5 Grounds for employers' threats of legal action[a]

Grounds	Number of respondents	Percentage of total responses
Ballots only	92	45%
Ballots and other law	30	15%
Other law only[b]	59	29%
Not known	22	11%
Total responses	203	100%

Notes:

a The table does not record the incidence of legal threats by employers. The figure of 203 reflects the number of negotiators with experience of an employer threatening to use the law. In each case, threats may have arisen in relation to more than one incident of industrial action.

b The reasons given were not always grounds on which legal action could be based, such as failure to observe procedures.

A significantly higher proportion related to balloting in four major unions: one large general union, an education union, a union representing professional and technical members and a public sector transport union. In just four of the 23 unions, negotiators did not report any employers threatening to use the law in relation to balloting. There were 30 examples of solicitors' letters or injunction applications relating to balloting. These were more highly concentrated than threats of legal action and 21 related to just three unions - all large unions representing manual workers. Balloting was, on occasion, one of a number of grounds for employers' action.

Where further information was given by respondents, the single most common basis for employers' challenges related to the wording on the ballot paper. Many

negotiators referred, however, to various aspects of balloting procedure, including notably balloting constituencies. This was a change from the Evans' findings based on the period 1984 to 1987 when most injunction applications were based on the absence of a ballot[19]. In some unions, however, challenges to unballoted action continued to be prominent, notably one large public sector union.

While in the experience of most union negotiators it was rare to get near to legal proceedings, therefore, it was not uncommon for employers to invoke the law in a general sense as a negotiating tactic. There is one important proviso. It is difficult to know how many employers' threats, including those relating to balloting, had a clear legal basis. As one respondent commented:

> I find that employers threaten to serve injunctions without knowing what for!

An analysis based on trade union officers reporting threats of legal action may, therefore overstate the influence of legal proceedings. On occasion, trade union officers were influenced by threats to make use of the law which did not have any real substance. In the words of the Legal Officer of one large, general union, this was one more area for 'myth-making' about the power of the law.

In addition to the threats of legal action, negotiators reported occasions when, while there was no formal threat of action, employers made it clear that they would monitor carefully everything done in connection with organising industrial action and would take legal action if this failed to comply with legal requirements. As the complexity of the legislation increased, so did the difficulties of complying with the detail of the law. The research found that trade union Legal Officers were often not prepared, for example, to give general advice to negotiators on the question of balloting constituencies. The interviews with employers suggested, however, that most

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[19]. See Evans 1987. Forty three injunction applications were said to relate to unballoted action, three more to the wording of ballot papers and one to balloting procedures.

employers were not keen to challenge the technical detail of ballots[20].

Where employers did threaten to invoke legal proceedings this did not necessarily lead to a positive outcome from their point of view. In the trade union negotiators' questionnaire no clear trend emerged from responses to questions on the impact of threats by employers to use the law. Significant minorities of negotiators said that they had not been influenced at all or that they had been influenced a lot. The majority said that they were influenced 'a little' or 'to some degree'. Where officers reported that they had been influenced by a threat of legal action, this had not always served to undermine the industrial action. Some respondents commented that it had greatly strengthened members' resolve.

A small number of respondents had actually experienced employers initiating legal proceedings on balloting grounds. Earlier research by Martin et al. used the withdrawal of industrial action as evidence of the impact of injunctions on bargaining outcomes (Martin et al. 1991, 204-5). The current research sought to go beyond this by asking separate questions about the impact of legal proceedings on industrial action and on bargaining outcomes. The overall number of cases were small, but negotiators tended to be more confident in reporting the impact of legal proceedings on industrial action. Where negotiators reported that they were unsure about the influence of solicitors' letters and writs, this usually related to the bargaining outcome. Responses did not fall into a clear pattern and negotiators were fairly evenly divided over whether employers' use of legal proceedings had affected either the industrial action or the bargaining outcome. There were some notable differences between unions, but with such small numbers it is difficult to draw conclusions from them. In one craft-based union, there were five legal proceedings relating to balloting. These had no impact on the industrial action or bargaining outcome. In one large general union there were ten legal proceedings relating to balloting. Eight affected either the industrial action or bargaining outcome.

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[20]. See in particular Elgar and Simpson 1993a. It should be noted that these were all federated employers.

While the number of responses here were too small to make the percentages statistically significant, the research showed that the threat of legal proceedings and, in particular, the actual use of legal proceedings by employers had a range of different results from union and employer negotiators' perspective. This broadly reflected findings from Evans' earlier surveys, which reported 'mixed success' for employers where they sought injunctions[21].

Interviews with 66 employer representatives in six sectors provided evidence of legal proceedings over balloting within the previous three years in just two disputes in the public transport sector. There were further examples of employers giving serious consideration to use of legal proceedings. These ranged across a spectrum from greater to lesser substance and formality. They were limited to three sectors: public sector transport, the Health Service and engineering.

In the public transport sector a number of respondents referred to injunctions sought by British Rail and London Underground Ltd on the grounds of balloting irregularities in the course of major national disputes in 1989. In the experience of BR managers in the survey there had been two further occasions on which threats to initiate legal action against unions had been made. These related to local disputes. London Buses had threatened legal action over a ballot in 1989. In the Health Service, management respondents reported no injunctions relating to balloting, but two Health Service managers said that they had been prepared to consider injunctions, and a third had had occasion to make trade union officials 'aware of the laws on balloting'. Just two management respondents in 17 engineering companies reported occasions on which a threat to invoke the laws on balloting had been used (Elgar and Simpson 1993a, 8). One other respondent said that the company would be prepared to do so. There had been no cases in which employers had seriously considered using the balloting laws to challenge industrial action in the education sector, printing or construction.

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[21]. See Evans 1987. There were 26 cases over the failure to hold pre-strike ballots in primary disputes. Fifteen led to a ballot and a vote in favour of industrial action, ten to industrial action being called off.

6.7 Explaining employers' limited use of legal proceedings

Whilst there is some, albeit limited, evidence from secondary sources and from this research that some employers have taken up the Government's challenge to them to 'use the law', a Legal Officer of one of Britain's largest unions commented that he was 'astonished' by how infrequently the union faced the threat of legal proceedings by employers.

There were significant differences between the approach of employers in different sectors. Employers in the public transport sector - British Rail, London Underground Ltd and London Buses - had had greater resort to legal proceedings in disputes than management respondents in any other organisations, private or public sector, covered by the survey (Elgar and Simpson 1994e). In BR and LUL this could be seen to reflect difficult relations between management and unions at a time of radical change. It also demonstrated a shift in management approach, following organisational changes in BR in 1982 and the division of London Transport into London Underground and London Buses in 1985. Managers found themselves operating in a very different cultural environment and as a result were less willing or able to reach a compromise with trade union negotiators in disputes.

A change in management approach was also evident in other sectors, but manifested itself in different ways. In the engineering sector, the survey of 17 companies found that actual or threatened industrial action only rarely gave rise to a management response which included a legal dimension. Where it did, this related to the laws on balloting or took the form of warnings to individual workers about the possible consequences of taking part in industrial action (Elgar and Simpson 1993a).

One of the key concerns of most managers covered by this research was to avoid an escalation of disputes. In the Health Service interviews with managers indicated that although the laws on balloting were generally seen to have been of assistance to managers, there were limits beyond which they were unlikely to go. While managers wanted union officers to be clear that they were 'aware' of the law, respondents

expressed the view that the actual use of the law would be counterproductive (Elgar and Simpson 1994d). In one case a general ballot of the workforce was held which was not restricted to the members of an individual union. In the event the vote was not in favour of strike action - although by a small majority in favour of action short of a strike - but if it had been, management would have been prepared to challenge the lawfulness of the ballot. This strategy was seen, though, to involve a risk for management of escalating the dispute. There were also cases where respondents agreed that they would not insist on the need for a ballot because the strength of feeling among a particular group of workers over the issue in question was beyond doubt. It appears that this was the policy of at least one region in relation to industrial action arising from the medical secretaries regrading claim in 1987. Local managers believed that to insist on a ballot in these circumstances would have been counterproductive. In the experience of union negotiators many managers did not want to run the risk of fuelling a dispute by invoking the law:

> Most employers take the view that industrial relations should be divorced from the law as much as possible. They obviously expect compliance (on ballots) but often to cover themselves from criticism for not threatening legal action. Most take the long term view that after any action we still have to live together.

Evidence from the trade union negotiators' questionnaire and other sources demonstrated how invoking the law could raise the stakes in a dispute:

> If [the employer] had not issued a writ against...representatives...it is unlikely that the membership would have gone on strike. If [the employer] had been prepared to negotiate, a solution would have been found to end the dispute. Had [the employer] not taken the decision to sack their employees involved in the strike, the dispute would have ended much sooner.

The responses are consistent with Miller and Woolfson's case study of the Timex, Dundee dispute, which showed how an employer's resort to legal action undermined the process of negotiations and led to the subsequent escalation of the dispute (Miller and Woolfson 1994).

The evidence from the employer interviews suggested that a complicating factor in the public sector was that managers were not necessarily in a position to make decisions independently about the handling of disputes because they were bound by more senior levels of management. The balloting laws were used in disputes, the conduct of which was not within the control of respondents. In these cases, managers' attitudes sometimes reflected a lack of whole-hearted support for the policies of more senior managers and national negotiating bodies. There was a widespread perception among respondents in British Rail that, in the 1989 dispute, the use of the law to challenge an NUR ballot, in which a clear majority had voted in favour of industrial action, had been ill-conceived and did little more than undermine management's position and galvanise NUR members' support for the industrial action (Elgar and Simpson 1994e).

Trade union negotiators confirmed that there could be a difference between the more pragmatic approach of local employers and national negotiating bodies. Negotiators reported that during the 1993 dispute in further education the Colleges Employers' Forum, the national negotiating body, was 'in the mood' to use the law. The employers took legal advice to ascertain whether there were grounds for challenging the ballot on administrative sanctions. This mood was not reflected in the attitude of local employers.

In the Health Service, managers' essentially pragmatic response to the use of the law appeared to reflect conflicting pressures - political, budgetary and to meet service targets - and the shifting balance between them (Elgar and Simpson 1994d, 14). In the public services, however, managers' reluctance to make use of the law would need to be balanced against the political pressure to do so. On occasion Government intervention has been quite explicit. In 1988 the Government announced that it would support any Health Authority taking legal action against a trade union for encouraging nurses to work to grade without a ballot[22] [check Public91 FN44]. There was evidence from the employer interviews that one authority had raised this issue with trade unions. Similarly, a distinction was drawn by the Local Authorities Conditions

[22]. See the Financial Times 21.11.88.

of Service Advisory Board (LACSAB - now Local Government Management Board) between politicians in local government who would make use of the law and managers who would recognise the longer term damaging implications for industrial relations.

Another factor limiting management's resort to the law was that where industrial action took the form of action short of strike action, managers were not necessarily sure when a ballot could be required. Interviews with managers in the public transport sector revealed some uncertainty over whether withdrawal of overtime and rest day working was in breach of workers' contracts[23] and needed to be preceded by a ballot. Interviews with engineering employers highlighted the use by unions of action short of strike action and subtle forms of non-cooperation, which did not fall within clearly defined boundaries of industrial action. In these circumstances the question of balloting often did not arise (Elgar and Simpson 1993a). Respondents in the Health Service also referred to occasions on which workers 'withdrew goodwill' as part of dispute strategies and unions argued that this did not constitute industrial action so a ballot was not required. Examples included ambulance control officers, who took industrial action which involved 'withdrawing goodwill' in 1987. Similar issues were raised when some nurses expressed their dissatisfaction by 'working to grade' during the clinical regrading exercise in 1988[24].

Finally, resort to the balloting legislation was limited by the range of responses to actual or threatened industrial action, which were available to managers. Management responses were as likely to involve requiring union officials to repudiate industrial action. This was often combined with warning those involved that sanctions might be taken against them as individuals. Whilst, therefore, injunction applications were rare,

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[23]. The leading case is still Secretary of State for Employment v ASLEF [1972] ICR 19, CA. See Napier 1972.

[24]. On whether such action amounts to a breach of contract see British Telecommunications plc v Ticehurst [1992] ICR 383 CA.

managers were increasingly 'having an eye to the law'[25]. In the case of unofficial action, as from 1991, the advice of the Engineering Employers' Federation to member companies was not to threaten litigation against the union, but to move quickly to call on the union to repudiate industrial action immediately.

6.7 Balloting and management negotiating strategies

As noted above, statistics on labour injunctions do not provide an accurate measure of either the use of the law or its influence. This section analyses the information from the employers' interviews and the trade union negotiators' questionnaire on the part played by the balloting requirement in management negotiating strategies[26].

The evidence from interviews with employers showed that there were significant sectoral variations in experience of disputes, industrial action and ballots held. Table 6.6 below is a summary of the results.

Seventeen engineering companies were interviewed. Eleven of these reported a total of 17 industrial action ballots held, a number of which were in the engineering hours campaign. Most of the industrial action that took place, however, was short-lived and unballoted. In the construction industry, just three of the 12 managers interviewed reported ballots in recent years, one of these was in a highly specialised area. Six had experience of unballoted action. In general printing, two of the seven companies reported that unions had balloted on industrial action.

Table 6.6 Employers' experience of industrial action ballots based on interviews in six sectors

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[25]. Elgar and Simpson 1993a. Cf. role of Engineering Employers Federation in advising Timex on the law in the Timex dispute Miller and Woolfson 1994, 215-6.

[26]. On the 'power resources' available to employers and unions in negotiations see Kelly and Heery 1994. Cf. Edwards and Scullion 1982, 243.

Sector	Number of respondents	Respondents with experience of industrial action ballots	Total number of ballots
Engineering	17	11	17
Construction	12	3	3
General printing	7	2	2
Public sector transport	11	11	several
Health Service	10	5	6+
Education	8	2	2
Total responses	65	34	-

In the public transport sector, all eleven respondents reported that unions held a number of ballots in the period from the mid 1980s into the early 1990s. Ballots were held in local as well as national disputes. Most respondents were also aware of unballoted action in local disputes, which had always taken place unofficially. In the Health Service five of the ten respondents reported ballots held in recent years, either in major, national disputes or over localised issues[27]. Industrial action balloting had occurred on more than one occasion in the experience of only one respondent; for others an industrial action ballot had been an exceptional occurrence. Four respondents were aware of unballoted action, three of whom also had experience of

[27]. Five respondents reported ballots in the previous five years; three in the previous three years.

balloted action. In the education sector employers did not report widespread experience of ballots in local disputes. Ballots held related to campaigns of national industrial action. There were two instances in which local ballots had been held, but employers reported that the two most significant cases of local industrial action were both unballoted.

The attitude of managers in construction companies was notably different from other respondents. Whilst in other sectors the use of ballots was seen by managers, on occasion, to give unions a negotiating advantage, this was not true in the construction industry. In the words of one management respondent the balloting laws had 'not impinged at all'. This in part reflected the absence of effective union organisation at site level, which meant that a union's threat to ballot would lack credibility with companies. Moreover, a number of respondents did not believe that unions could hold a lawful ballot, especially if this covered more than one site. While industrial action had sometimes been protracted, it was invariably unofficial and there was no tradition of balloting on sites[28]. The difficulties involved in holding a lawful ballot only encouraged union officials to stand back from disputes and encouraged industrial action to take place unofficially (Elgar and Simpson 1994b).

The employers' interviews included questions on monitoring ballots. By scrutinising the conduct and results of ballots it was evident that employers sought, on occasion, to gain negotiating advantage. All seven Health Service respondents at District or Unit level said that they would always monitor industrial action ballots. Just one said that this would involve taking legal advice. Another commented that the degree of detail required would depend upon the circumstances, but that management would want to see that the ballot was generally 'fair'. Six of the seven printing employers said that they would always monitor ballots. Similarly most engineering and construction

[28]. It should be noted, however, that during an interview one site manager received information that a ballot had been held which produced a majority in favour of industrial action. It was subsequently reported that this led to a negotiated settlement of the dispute. Site managers or industrial relations managers at head office level would not necessarily have been aware of all ballots held.

employers and nine managers in public sector transport said that ballots would be monitored. Managers in the education sector were something of an exception in this respect. A half of them said that they would monitor ballots held, but only in certain circumstances. This would depend on the seriousness of the threat of industrial action and would also be informed by their concern to maintain good relations with trade unions.

The information from the employers' interviews suggested, therefore, that the monitoring of ballots was a widespread practice among employers, with the notable exception of managers in the education sector. Whilst monitoring by no means always indicated a serious intention to mount a legal challenge to ballots held, the trade union negotiators' questionnaire highlighted situations in which, although managers did not threaten legal action, the balloting laws were nevertheless an ever-present influence on their negotiating strategies and the trade union response:

> The legislation is used obliquely by management in meetings and negotiations. It is far more of an unspoken veiled threat, rather than being used in times of acute industrial discontent, when the threatened use of the law would only inflame the situation.

The balloting requirement also provided opportunities for employers to influence the outcome of decisions. Information from secondary sources suggests that the openness or 'transparency' of union decision making by ballot was quickly exploited by some employers. In 1985 the Chairman of London Buses wrote to workers on the eve of an industrial action ballot over pay, saying that a vote in favour of industrial action could lead to job losses[29]. Evidence from the interviews with employers suggested that direct communication with employees during disputes was an increasingly common policy. In British Rail, for example, this was associated with the implementation of a number of restructuring packages for different grades of staff.

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[29]. See Financial Times 5.7.85.

Comments from the trade union negotiators' questionnaire illustrated how employers intervened to their advantage in the process of industrial action balloting. This could involve putting pressure on individuals to vote against industrial action. It should be noted in this respect that one of the intended effects of the 1993 changes in the law, introducing a number of notice requirements, was to encourage employers to intervene in this way. These changes included requirements for trade unions to inform employers of all those being balloted and all those being called on to take industrial action. This would be to underline a development which was already experienced by some negotiators:

> Management imposed new pay settlement in pay packets. This diffused the momentum. [There were] also direct management approach, letters and meetings prior to the ballot.

Ballots can, therefore, be seen to have strengthened the power resources available to employers in disputes. The nature of the balloting process and the time necessarily taken in holding a ballot provided ample scope for employers who wished to undermine trade union strategies. All employers welcomed the opportunity to put their case to employees. In local government, national employers believed that they needed to match improvements made by the unions in communications with members. This was described by LACSAB as making use of 'twentieth century public relations'. In this respect the requirement to ballot made the mid 1980s a watershed in the conduct of industrial relations in local government. Local government employers, nevertheless, miscalculated the support of NALGO members for industrial action in 1989, following votes against industrial action in 1986 and 1988. Once the ballot had been held, it was said that the information came too late to have an impact on the employers' dispute strategies which were already decided. Indeed a ballot in favour of industrial action only served to harden employers' attitudes because it was seen as a challenge to their political authority.

In a final section of the interview schedules and questionnaires, employers and trade union negotiators were asked for their views on some broad themes relating to industrial relations in general, and balloting in particular, in the 1980s. A comparative

summary of the responses is in Table 6.7.

Table 6.7 General picture of the 1980s: employer and trade union responses compared

	Manager respondents	Trade union respondents
The law has been the most important factor affecting industrial action[a]	25%	63%
Employers are more hardline in negotiations[b]	78%	93%
Ballots are a good thing for trade unions	75%	68%

Notes:

a Management respondents in the Health Service were least likely to attribute influence to the law and those in public sector transport most likely to do so.

b Fewest management respondents agreed in the construction sector.

Employer and trade union respondents expressed the greatest differences of opinion when asked whether the law had been the most important factor affecting industrial action. Almost two thirds of trade union respondents believed the law to have been the most important factor, compared to a quarter of employers. It should be noted that these were respondents' perceptions of the influence of the law in general.

There were also notable differences when respondents were asked about the influence of the law in their own experience. More than half (52%) of trade union negotiators believed that the law had been an important weapon for employers in their negotiations. For their part, managers provided a range of responses on the importance of the law as a factor favouring them in their negotiations with trade unions. Overall, 30% said that the law had been an important or very important factor. It is notable that in the Health Service, a half of respondents said that the law

had been important and two of these specifically mentioned balloting. Others, especially in the education sector, made clear that the influence of the law included the changing statutory framework for the service, which had been a greater influence than changes in industrial conflict legislation.

There was a greater measure of agreement that ballots were a good thing for trade unions. Three quarters of employer respondents and more than two thirds of trade union negotiators agreed with this statement. Overall, while the information suggested that employers were well aware of the balloting requirement and that it had influenced their negotiating strategies, the research found no evidence that the balloting laws had brought about a quantum change in employers' approach to industrial relations. The balloting laws had been incorporated into more traditional management strategies, although these were, in themselves, in the process of transformation in all areas. An Incomes Data Services survey in the early 1990s (Incomes Data Services 1992) found greater awareness among employers of industrial conflict law, in particular balloting, than had previously existed. The conclusions confirmed the findings of this research that if employer attitudes had shifted, this was a pragmatic response to the wider availability of legal sanctions rather than the development of a legalistic approach. In broader terms the balloting legislation may have acted as a catalyst for improving employers' communications with the workforce, but this was a small part of a much wider process of change which was identified by all respondents, both trade union negotiators and employers.

6.8 Sanctions against individuals

One area in which there was evidence that, over the 1980s, management's response to disputes had changed was in relation to the threat and use of sanctions against individuals who took part in industrial action. This was of some significance to the current research for two reasons. Firstly, it was a development facilitated by the balloting requirement. This was accentuated after 1993 with the introduction of the notice requirements, but was already apparent at the time of the research. The Court

of Appeal confirmed in the case of Blackpool and the Fylde College v NATFHE that employers must be given the names of individuals balloted, or information which would enable them to ascertain the names[30]. Secondly, the threat of disciplinary action or dismissal could undermine industrial action even following a successful ballot.

The experience of more than a third of trade union negotiators was that dismissals had been threatened, where industrial action had been seriously considered or taken[31]. In just over a quarter (27%) of cases the threat was carried out. Employers' rights were not, by and large, dependent on changes to the law in the 1980s[32]. The trade union negotiators' questionnaire highlighted, however, the importance in the 1980s of the realisation among some employers that the threat of sanctions against individual workers taking part in industrial action could be very effective[33]. In the context of balloting this could mean, for example, that rather than challenge the details of a ballot in favour of industrial action, employers would threaten dismissal if the industrial action went ahead.

In the Health Service and education sector, there was little evidence of threats of dismissal, but pay deductions became an increasingly contentious issue in disputes

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[30]. Blackpool and the Fylde College v NATFHE [1994] ICR 648. In this balloting case a list of names of individuals being balloted was not given to the college.

[31]. 255 respondents.

[32]. As a general rule workers dismissed while taking part in industrial action cannot seek any redress for unfair dismissal. This is, however, subject to a now extremely complex exception in some cases where the employer has not treated all those taking part in industrial action in the same way. For example some workers are dismissed and others are not. Or all are dismissed, but only some are offered their jobs back at the end of the dispute. The uncertain application of the exception has generated extensive case law. See, in particular, K. Ewing The Right to Strike (Oxford: Clarendon Press) 1991, chapter 4.

[33]. See, for example, British Rail in which managers' threats to dismiss workers were seen as a significant departure from previous practice. See Elgar and Simpson 1994e, 13.

throughout the 1980s[34]. The enthusiasm of Health and Education Authorities for making use of the developments in case law on pay deductions may be contrasted to their relative lack of interest in exploring the possibilities of any sort of challenge to trade unions using the industrial action balloting legislation. In 1991, LACSAB issued a strongly worded requirement for Local Education Authorities to respond to the NUT's proposed boycott of testing with pay deductions. If full pay were to be continued when there was a clear breach of contract, this:

> ..may well be regarded as 'wilful misconduct' under section 20 of the Local Government Finance Act 1982..It is therefore essential that LEAs have clear policies on how they will deal with breaches of contract whether they take the form of strikes or action short of a strike[35].

Local Authorities could in turn be subject to penalties if they were found to be committing an act of wilful misconduct. In two education sector unions, almost a half of negotiators reported that pay deductions had been made from members' pay during industrial action.

It is a persuasive argument that threats against individual workers would be much more within the understanding of most employers than seeking injunctions against the organisers of industrial action. They were also much more likely to be directly effective with the union's members - in deterring or ending industrial action, or influencing the vote in a ballot - thus undermining trade union dispute strategies. As one respondent commented:

> On one occasion the membership support evaporated under threat of

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[34]. These developments were not dependent on changes to statue law, but decisions in the courts which broadened employers powers. For the case law, see Royle v.Trafford MBC [1984] IRLR 184, Sim v. Rotherham [1986] ICR 897, House of Lords decision in Miles v. Wakefield MBC [1987] ICR 368, Wiluszynski v Tower Hamlets LBC [1989] ICR 493.

[35]. Local Authorities Conditions of Service Advisory Board Education Employers' Bulletin No.139. April 1991. Para 4.

dismissal.

Threats of dismissal were, of course, intended to have their effect at a collective level. This was given a new legal dimension by the Employment Act 1990, after which unofficial strikers who were dismissed were denied redress against unfair dismissal in any circumstances.

6.9 Conclusions

There was evidence from the trade union negotiators' questionnaire that overall ballots had assisted trade unions in negotiations. This was reflected in the high proportion of ballots won and the fact that trade union negotiators widely reported that, following a ballot, disputes had been settled in negotiation without the need for industrial action to go ahead. Whilst it was not possible in each case to know how the terms of the settlement were improved from a trade union point of view, the balance of negotiators' comments clearly indicated that positive ballot results were seen to have strengthened their bargaining position. Trade unions faced employers whose strategies were changing in ways which, notably in the public sector, undermined traditionally co-operative industrial relations. In this climate ballots were seen to 'secure' industrial action. Trade union negotiators were not hostile to the need to carefully plan and prepare members for involvement in disputes. However, the complexity of the provisions, the time and resources devoted to balloting arrangements and the opportunities ballots provided for employers to influence members' decisions were seen to have a potentially negative effect on trade unions in negotiations.

The employers and managers interviewed were generally aware of the balloting requirement and increasingly, from a management perspective, disputes were conducted with 'an eye to' this aspect of the law. It is notable that employers were much less familiar with other aspects of changes made to industrial conflict legislation in the 1980s. There were a number of instances of injunction applications. The interviews with employers and evidence in the trade union negotiators' questionnaire

demonstrated, however, the limitations of trying to assess the influence of the law solely by reference to the number of occasions on which legal proceedings were actually started or threatened. The majority of employers interviewed would be careful to monitor industrial action ballots and now saw this as an integral part of the conduct of disputes. In practice, balloting was the one change in industrial conflict law whose significance had been felt across different sectors of the economy, with the notable exception of construction. Overall, however, while the industrial action balloting requirement was seen to have been influential on employers' negotiating strategies it had not, inter alia, radically changed them.

CHAPTER 7 CONCLUSIONS

7.1 Introduction

The balloting laws were given a high profile in several well-publicised major disputes in the second half of the 1980s and early 1990s, including public sector transport disputes in 1989 1995 and 1996. It is clear, though, that focusing either on such high profile cases or on the incidence of applications for injunctions[1] based on alleged non-compliance with the balloting laws can provide only a partial understanding of the impact of the law. It is equally clear that it is not possible to draw conclusions about the effectiveness of the balloting legislation by reference to a correlation with changes in strike statistics[2]. This is not least because with this approach it is particularly difficult to separate the impact of industrial conflict legislation from broader legislative, political, social and economic changes[3]. Drawing on the experience of trade union negotiators, in the context of a wider research project encompassing trade union National Officers and employers, this chapter seeks to provide an overview of the findings and to draw some conclusions about the impact of strike ballots on (i) trade union practice, (ii) the processes and outcomes of negotiations and (iii) the incidence of industrial action.

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[1]. For an approach based on compiling details of injunction applications see McKay 1996, especially 16-18.

[2]. See McCarthy 'The Changing Limits of Legal Intervention' in McCarthy (ed) 1992 on the general problems of correlating strike statistics and changes in the law.

[3]. See Edwards 'Strikes and Industrial Conflict' Edwards (ed) 1995.

7.2 Overview of findings

Chapters five and six provide a considerable amount of new information on the experience of trade union negotiators, relating to disputes, industrial action and the balloting requirement. It is apparent that in the 1989-91 period, consideration of industrial action was a live issue for a large majority of negotiators in the unions covered by the survey (Elgar and Simpson 1993b). Industrial action balloting was widespread: 82% of respondents reported ballots held in the previous three years.

The wider research project illustrated that there were two legal issues which were of greatest concern to respondents. One, arising from changes in the law in the 1980s, was balloting. This stands out as the most important change in industrial conflict law in the 1980s. The other was the threat of dismissal - or other sanctions - against individual workers, which did not depend on changes made to the law in the 1980s, although changes to the law of unfair dismissal may have helped to heighten employers' awareness of their rights.

There was considerable emphasis within unions on conducting disputes in accordance with the balloting laws. The extent that this required changes in trade union practices depended largely on the traditional nature of trade union organisation and the workgroups concerned. By the late 1980s and early 1990s trade unions had by and large adapted their practices to the balloting requirement. The key conclusions from the research are that this was based on:

(i) traditional practices which included balloting, if not specifically industrial action balloting, in a significant minority of unions before 1984;

(ii) an acceptance among negotiators that balloting would endure;

(iii) an ability to incorporate ballots into trade union practice alongside other methods of consultation;

(iv) a widespread belief that ballots assisted in the settlement of disputes.

The picture that emerged from responses to the questionnaire, therefore, was that unions in general sought to conduct disputes and industrial action lawfully. This was particularly true in major disputes. One illustration was the 1989-1991 engineering hours dispute in which the unions' strategy was structured around the balloting requirement (Elgar and Simpson 1993a, 15). This is not to say that all industrial action was lawfully balloted - far from it. Evidence from the trade union negotiators' questionnaire and interviews with employers was that a substantial amount of industrial action was unballoted and that industrial action was generally too short-lived for the law on ballots to have any relevance.

Whether or not it was expressly invoked, however, the balloting law was generally a relevant factor in disputes. There was evidence that trade union negotiators had accommodated balloting within negotiating strategies. For their part, the research found that there was a widespread understanding among employers of the requirement imposed upon trade unions to hold a lawful ballot before authorising members to take part in industrial action. Employers were willing to consider threatening to invoke the law by making applications for labour injunctions, but were concerned to avoid escalating disputes. Just over a quarter of trade union negotiators (28%) in 23 unions had experienced threats of legal action by employers: 60% of these related to balloting. If, however, the evidence from the research was that balloting infused industrial relations with a new legal dimension, employers, like trade unions, accommodated balloting within existing industrial relations policies, which were themselves often in the process of transformation, rather than balloting per se leading to radical new departures.

7.3 Impact of the balloting requirement: implications for trade union practice

It can be argued that the balloting laws sought to fulfil two contradictory purposes. The first related to the concept of responsible trade unionism and aimed to facilitate the reversion of authority to 'responsible' trade union leaders. The second sought to place more power in the hands of individual trade union members to challenge the decisions of their representatives and established consultation procedures. The balloting laws, therefore, had the potential to centralise decision-making powers within trade unions, but also to undermine trade union leadership by creating divisions between different interest groups - including national leaders, local officials and members. There were few examples of national leaders using ballots to appeal directly to members to circumvent local officials and representative institutions, although in certain cases it proved to be a very effective tactic. If, however, the longer term effect of balloting was to be to formalise and centralise decision making within unions, over time this could lead to a modification of the substantive policies adopted by trade unions and could indeed be an effective way of reducing industrial action.

There was little evidence that the requirement to ballot took the organisation of industrial action out of the hands of negotiators: 88% said that they were responsible for organising ballots. This was in part because ballots were blended with existing mechanisms for consultation. Despite the persistent modification of the law, strike ballots became more an aspect of internal union procedures, than something imposed from outside: in a sense the law seemed to provide only a background to the organisation of ballots. The main reason for balloting was the law, but trade union policy and members expectations also featured prominently in the reasons given by trade union negotiators for balloting before industrial action. The extent of negotiators' freedom over the nature and timing of ballots varied. This was likely to reflect traditional practices relating to the authorisation of industrial action and the level at which, in practice, decisions were made.

Negotiators made widespread use of national advice in relation to industrial action ballots

and interviews with National Officers confirmed that there was an increasing demand for advice and guidance on all aspects of balloting. Many unions had also issued detailed circulars on balloting, often in response to particular disputes. An increased reliance on national procedures and guidance clearly had the potential to centralise power within trade unions, undermining the traditional autonomy of negotiators. The findings of the current research suggest, however, that as ballots became more widespread after 1984 and were incorporated into well-established consultation procedures, the traditional role of negotiators was largely preserved[4]. National advice and guidance took into account existing channels for consulting members and authorising industrial action. The research did not provide any evidence that the balloting legislation had encouraged trade unions to take decision-making authority away from negotiators. The requirements of the law were seen to demand this only in exceptional cases. Indeed in the Tanks and Drums case[5], the Court of Appeal acknowledged that the law allowed unions to leave the final decision about resort to industrial action to the negotiator involved. Moreover, other developments in the 1980s, such as the fragmentation of bargaining arrangements especially in the public services, placed more onus on local officials and limited the scope for centralisation within trade union organisation. Interviews with managers in the Health Service and Education Authorities provided a very clear illustration of this point (Elgar and Simpson 1994c, 1994d).

It appears that there was a high level of membership participation in ballots[6]. Negotiators

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[4]. For a contrary view see Undy et al.1996, chapters 5 and 6.

[5]. Tanks and Drums v TGWU [1992] ICR 1.

[6]. Since the research was carried out the law has changed to require all industrial action ballots to be postal [TULRCA]. The early experience was that postal ballots on industrial action attracted high turnouts, contrary to expectations in many unions. Information from Electoral Reform Balloting Services on 120 postal ballots between September 1993 and February 1994 showed that there was a 73% turnout. See Industrial Relations Services Employment Trends 553, February 1994.

believed that they were popular with members. The preponderance of ballots reported by negotiators were workplace, which enabled negotiators to maintain the essential elements of collective decision making, that is meetings and discussion. It is perhaps more surprising that a substantial minority of negotiators (45%) referred to the use of postal ballots, but this reflected the fact that industrial action ballots were used alongside other methods of consultation, including members' meetings. Overall, 74% of negotiators reported that in their experience a majority of ballots produced votes in favour of industrial action; a half of negotiators reported that all ballots held had produced votes in favour of industrial action. This suggests that balloting had not promoted an individualistic concept of trade union membership, at the expense of a sense of collective responsibility.

7.4 Impact of the balloting requirement: implications for the processes and outcomes of negotiations

The belief that ballots could strengthen their position in negotiations was widely held among negotiators. They did not report insurmountable difficulties in meeting the requirements of the legislation. Where particular difficulties did arise these fell into three categories, which were the dispersal of members across different workplaces, the administration of balloting and membership records, and co-ordination in a multi-union situation. There was little evidence that ballots were used tactically by negotiators where there was no intention of taking industrial action. Indeed some negotiators expressed concern that, on occasion, members refused to take part in industrial action after a positive ballot result. There was a strong correlation, however, between a successful ballot and negotiated outcome of a dispute. Negotiators' comments confirmed that a convincing yes vote in a ballot strengthened their bargaining position.

The research did not provide information which made it possible to explore in detail the effect of ballots on the terms of settlements and whether disputes settled after ballots

produced outcomes more favourable to the trade union side than would have been on offer without a ballot, or more favourable than in cases where a ballot was not held. The evidence from the negotiators' questionnaire was that ballots were widely held in disputes. A clear majority produced votes in favour of industrial action, although there were occasions when factors, other than a negotiator's judgement that a ballot would assist in the negotiations, required a ballot to be held which did not result in a strong yes vote for industrial action. These factors included members' expectations that they would be balloted before being called upon to take part in industrial action[7]. A high proportion of negotiators had experience of disputes being settled following a ballot without the need for industrial action to take place. These factors all suggested that ballots could add to the power resources available to trade union negotiators.

The employers' interviews presented a varied picture of the influence of ballots in negotiations. The construction sector stood out as the only one of those covered in which ballots were generally not a relevant factor in disputes (Elgar and Simpson 1994b). Overall the evidence from the research suggests that, whilst trade union negotiators recognised the positive benefits of ballots, managers also believed that the balloting requirement offered them additional power resources in dispute situations, although not all employers chose to take advantage of them. In a minority of cases this included the opportunity to mount legal challenges to ballots, sometimes on highly technical issues. More often, employers carefully scrutinised the conduct and results of ballots to see if they could gain negotiating advantage. In five of the six sectors covered by the research a majority of managers said that they would always monitor ballots. The main changes in the law in 1993 were designed to facilitate this process[8]. The research also showed,

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[7]. There were also a number of occasions, especially in the public transport sector, on which trade unions appeared to misjudge the feelings of members. See Elgar and Simpson 1992, 46-47.

[8]. See above chapter 3 on the notice requirements introduced by the 1993 Act.

however, that finding fault on technical grounds did not necessarily lead to a positive outcome from an employer's perspective (Elgar and Simpson 1994e).

Trade union negotiators believed that the balloting requirement provided greater opportunities for employers to intervene in trade union decision-making and influence the outcome of decisions. This could involve putting pressure on individuals to vote against industrial action. Where there was some doubt about the strength of membership support for industrial action, this could help to tip the balance in the employer's favour. Negotiators found that in some disputes employers had intervened effectively, either before ballots were held or following a positive ballot result, to deter workers from taking part in industrial action. The ability of employers to take this action was the combined effect of the law on balloting and employers' rights to impose - and, therefore, to threaten to impose - sanctions on individual workers who took industrial action.

However the main conclusions are that responses to the trade union negotiators' questionnaire disclosed a widespread perception among negotiators, firstly that ballots could avoid the need for costly industrial action by demonstrating the strength of membership feeling to the employers' side. Secondly, where industrial action did take place, holding a ballot was seen to consolidate membership support.

7.5 Impact of the balloting requirement: incidence of industrial action

Throughout the research the emphasis has been on how the legislation took effect in different trade unions and within different sectors of the economy[9], focusing on processes and how these might be expected to have an influence on outcomes. Whilst it is difficult to make a final assessment of the link between industrial action ballots and the incidence of industrial action, the research offers the following conclusions.

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[9]. Elgar and Simpson 1992, 44-46.

There was little evidence that trade union decision-making bodies were reluctant to hold industrial action ballots for fear of members voting against industrial action. There was also little evidence that if ballots do have the effect of reducing the incidence of industrial action, this was as a result of a large number of ballots leading to 'no' votes in situations where previously industrial action would have taken place. A minority of negotiators did report occasions, however, on which industrial action did not take place because the members voted in the ballot against industrial action, or the majority in favour was not sufficiently convincing, or there was a low turnout.

Far more common in the experience of trade union negotiators was the situation in which a vote in favour of industrial action led to the settlement of the dispute without industrial action taking place[10]. In some cases, therefore, balloting may have replaced industrial action as a means of demonstrating members' support for the negotiators' position. It would be overstating the case, however, to suggest that ballots routinely provided information which was not otherwise available to the parties to negotiations, thus avoiding industrial action which would otherwise have taken place. The responses of trade union negotiators to the questionnaire confirmed the importance of seeing industrial action ballots as one mechanism, in a wider process of consulting members, which complemented rather than replaced other methods of consultation. Conversely, there was evidence to suggest that, on occasion, once a ballot had been held a settlement became more difficult to achieve because workers' expectations were raised.

Union officers were not averse to carefully planning and preparing for industrial action, where they believed this to be appropriate. Some respondents expressed concern, however, about what they described as an increasingly cautious approach among senior

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[10]. This is consistent with the findings of a small survey sample by Electoral Reform Balloting Services. Of 120 postal ballots between September 1993 and February 1994, 78% led to a vote in favour of industrial action, out of which four actually led on to industrial action. See Employment Trends Industrial Relations Services 553 (February 1994).

officers engendered by the balloting laws. There was a perception that ballots imposed a barrier to industrial action where there was a need to take action quickly. The balance of evidence suggested, however, that in many cases unofficial industrial action would go ahead unballoted in such circumstances. This represented no change from established practices[11]. Employers did not appear to take a hard line in this respect, often preferring to use established disputes procedures and relationships with trade union officials to resolve the industrial action quickly, rather than resort to legal rights under the balloting laws. The priority, especially in more protracted unofficial disputes, was to channel the dispute into recognised procedures where it could be dealt with effectively. On occasion, the balloting laws - combined with the law on trade union vicarious liability - could make this more difficult to achieve. The research revealed only a small number of cases in which this had occurred, but they included one or two high profile disputes[12].

7.6 Concluding observations

The 1984 Trade Union Act, and its subsequent amendments, led to the wider use of industrial action balloting. From the Government's perspective, this had unpredictable consequences. While industrial action balloting brought about significant changes in the processes of organising industrial action in some unions, it did not lead either to a marked centralisation in power, or to fundamental changes in the role of trade union negotiators. There was evidence from the trade union negotiators' questionnaire that ballots helped to

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[11]. See on this point Edwards in 'Strikes and Industrial Conflict' Edwards (ed) 1995. He argues that the most important questions are whether more industrial action ballots are now held and whether as a result a greater percentage of disputes are settled without recourse to industrial action.

[12]. This was the case in the 1989 dispute on London Underground. See also Hougham 'Law and the Working Environment: the Ford Experience' in McCarthy (ed) 1992, 231, where he argues that recourse to the law is usually not an appropriate response in cases of unofficial action.

resolve disputes without the need for industrial action going ahead. In this sense it could be argued that ballots contributed to a reduction in the incidence of industrial action and that, in this respect, ballots were successful.

It is arguable, however, that for the Government the costs of achieving this policy objective had been high. There was evidence from both sides of the research that ballots assisted trade unions in collective bargaining and strengthened their negotiating position. What is more difficult to determine is whether this had a significant impact on the outcomes of negotiations. It is at least arguable that in the later 1980s and early 1990s the increasingly restrictive terms of the legislation succeeded un shifting the balance of power in favour of employers[13]. Moreover industrial action ballots need to be seen within the context of broader changes in 1980s industrial relations. Ballots alone were not seen by either trade union negotiators or employers to be responsible for bringing about the major changes which had occurred in workplace relations.

It is generally acknowledged that some form of legal obligation to hold ballots on industrial action will endure. Ballots are widely accepted by trade union negotiators as key elements, both in carrying out consultation with members and in negotiating strategies. They are broadly welcomed by employers. The experience of trade union negotiators demonstrated the complex balance of forces which determine bargaining relationships and suggested a significant, though far from dominating, profile for balloting laws in disputes. Overall, the research showed that the use of industrial action ballots was incorporated into existing relationships, which were themselves often in the process of transformation, without ballots in themselves being a cause of that change. At the time of the research the balance of advantage brought about by the introduction of industrial action balloting legislation was generally seen - by both trade unions and employers - to be with trade unions. Following the 1993 Act initial opinion within the trade union

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[13]. There is evidence that trade union negotiators saw the 1993 Act as a watershed. See Elgar and Simpson 1996.

movement suggested that the balance of advantage derived from the industrial action balloting laws shifted significantly towards employers, but whether or not this has happened is a matter that requires further research.

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ANNEX A

CONFIDENTIAL QUESTIONNAIRE

TRADE UNION FULL TIME OFFICERS/NEGOTIATORS

There are 4 sections. Please try to complete the questions in all sections and return the completed questionnaire in the envelope provided by 1 December 1991. Thank you for your co-operation.

SECTION A INFORMATION ABOUT YOU

1. JOB TITLE:

2. UNION:

3. AREA OR DISTRICT (if appropriate):

4. How long have you held your current position?

5. Approximately how many members do you represent?

6. What is the approximate percentage of those who are:

a) manual

b) non manual

7. In approximately how many different companies or organisations are these members employed? ☐

And in approximately how many different workplaces? ☐

8. Is your membership mainly in workplaces with:

a) less than 50 members? ☐

b) between 50 and 250 members? ☐

c) more than 250 members? ☐

Please continue with Section B

SECTION B NEGOTIATIONS/INDUSTRIAL ACTION IN THE LAST THREE YEARS

9. In the last 3 years did you at any time seriously **consider** industrial action whether this was strike action or action short of a strike? YES ☐ NO ☐

If yes, please continue with questions 10-21 in Section B.

If no, please go straight to section C.

10. If **yes** how many times did you seriously consider taking industrial action?

☐ In how many workplaces? ☐

And how many times was this: strike action? ☐

action short of a strike? ☐

11. What were the issues in dispute:

	Pay	Other conditions	Job losses/ redundancies	Changes in working practices	Other	
a) when strike considered?	☐	☐	☐	☐	☐	action was
b) when action was considered?	☐	☐	☐	☐	☐	short of a strike

If **other**, please specify:

☐

12. At this point, **before** industrial action took place, did any employer threaten legal proceedings against you or the union over the industrial action?

YES ☐ NO ☐ Don't know ☐

If **yes** how many times did this happen? ☐

On how many occasions was/were the threat(s) made over:

the possibility of strike action? ☐

the possibility of action short of a strike? ☐

both? ☐

don't know ☐

Do you know on what legal grounds the employer was threatening court proceedings?

YES ☐ NO ☐

If yes, please give details:

13. If legal proceedings were threatened against you or the union were you influenced by this?

Yes, a lot	Yes, to some degree	Yes, a little	No, not at all
☐	☐	☐	☐

14. Were there occasions on which industrial action was threatened, but did not take place?

YES ☐ NO ☐

If yes, had you balloted members on taking industrial action?

YES ☐ NO ☐

If the threatened industrial action **didn't** take place was this because:

a) the dispute was settled in negotiations? ☐

b) for other reasons? ☐

Please give brief details:

Section B continues

The next questions are about situations where industrial action took place.

15. In the last 3 years have your members **taken** industrial action?

YES ☐ NO ☐

If yes, how many times? ☐

And in how many workplaces? ☐

16. Once industrial action had started did any employer threaten legal proceedings against you or the union?

YES ☐ NO ☐ Don't know ☐

If **yes** how many times has this happened? ☐

17. If an employer threatened legal proceedings was this based on:

a) the law on ballots? ☐

b) because it was secondary action? ☐

c) some other law? ☐

d) don't know ☐

If you answered **yes** to a), b) or c) please give details if you can:

18. Has any employer **taken steps to start** legal proceedings over industrial action?

YES ☐ NO ☐ Don't know ☐

If yes, was this:

a) a solicitor's letter ☐

b) a writ ☐

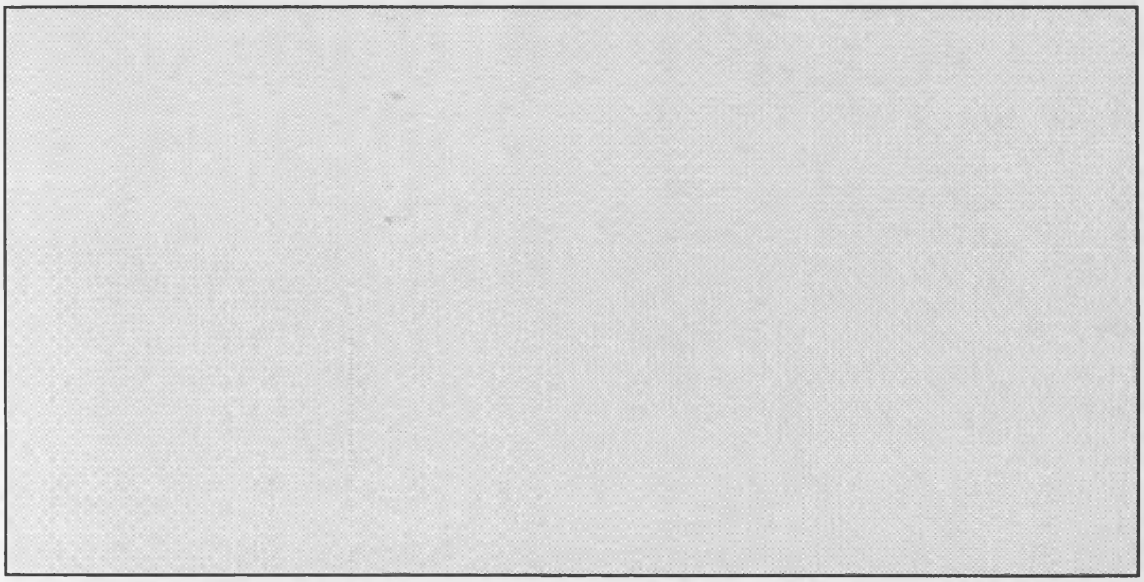
c) don't know ☐

19. If legal proceedings were started did this have any effect on:

a) the industrial action? YES ☐ NO ☐ Don't know ☐

b) the bargaining outcome? YES ☐ NO ☐ Don't know ☐

Please give brief details:



Section B cont.../

20. Has any employer **threatened** to dismiss any of your members for taking industrial action:

a) Before the action started?

YES ☐ NO ☐ Don't know ☐

b) while industrial action was in progress?

YES ☐ NO ☐ Don't know ☐

If yes, have any of your members been dismissed for taking industrial action?

YES ☐ NO ☐ Don't know ☐

21. If the industrial action was action short of a strike, did the employer deduct money from members' pay?

YES ☐ NO ☐ Don't know ☐

Please continue with Section C

SECTION C TRADE UNION PROCEDURES

22. Are members consulted about accepting or rejecting a pay offer?

YES ☐ NO ☐

If **yes** how do you consult them?

a) members meeting show of hands ☐

b) secret ballot (postal) ☐

c) delegate conference ☐

d) secret ballot (workplace) ☐

e) stewards' committees ☐

f) feedback from activists ☐

f) different methods in different circumstances ☐

23. Have there been any changes in the way you consult members over pay offers in recent years?

YES ☐ NO ☐

If yes, please give brief details:

24. How do you normally consult members about taking industrial action?

a) members meeting show of hands ☐

b) secret ballot (postal or semi-postal) ☐

c) secret ballot (workplace) ☐

25. In the last 3 years have your members taken any industrial action without a ballot being held?

YES ☐ NO ☐

26. In the last 3 years how many ballots have been held on taking industrial action (even if no action actually took place)? ☐

How many were:

in favour of industrial action? ☐

against industrial action? ☐

27. If you have used ballots to consult members about taking industrial action, please give your reasons for choosing a ballot, rather than other methods, below. Please list your reasons in order of importance from 1-7 with the most important as number 1.

Members expect to be balloted ☐

Required by employer ☐

Strengthen hand of negotiator ☐

Requirement of law ☐

Provide information about the views of members ☐

Give a breathing space in negotiations ☐

Union policy ☐

28. Are you responsible for **organising** ballots on industrial action?

YES ☐ NO ☐

If **yes**, who, if anyone, provides you with advice/assistance most frequently?

Trade union legal officer ☐

Full Time Officer (Head Office) ☐

Outside solicitors ☐

Other ☐

No one ☐

If other please specify:

Have you made use of this advice:

Never	Seldom	Sometimes	Often	Always
☐	☐	☐	☐	☐

Please continue with section D

SECTION D PICTURE OF THE 1980s

29. Would you agree or disagree with the following statements about how things have changed in the 1980s:

	Strongly agree	Agree	Disagree	Strongly disagree	Don't know
in negotiations with trade unions, employers are more hardline	☐	☐	☐	☐	☐
members are more reluctant to take industrial action	☐	☐	☐	☐	☐
the most important factor affecting industrial action has been the law	☐	☐	☐	☐	☐
more industrial action is now unofficial	☐	☐	☐	☐	☐
industrial action ballots have been a good thing for trade unions	☐	☐	☐	☐	☐
union officials are now more accountable to their members than they used to be	☐	☐	☐	☐	☐

30. In your experience has the law been an important weapon for employers in the negotiations you conduct?

Not at all important	Fairly important	Important	Very important	Don't know
☐	☐	☐	☐	☐

Please make any further comments that you may have on the following page.

Thank you for your help.

ANNEX B

UNIONS WITH RULE BOOK PROVISION FOR BALLOTS ON INDUSTRIAL ACTION

Source: Undy and Martin Ballots and Trade Union Democracy (1984)

Summary

25 unions out of 103 surveyed specified the procedure to be followed before undertaking national industrial action, in most cases involving some form of ballot. A further 41 expressly permitted the discretionary use of ballots.

In the case of local industrial action 17 rule books required members to be consulted. A further 43 made specific provision for discretionary consultation.

Mandatory ballots

BIFU - since 1980

FDA - since 1982. For all disputes lasting longer than 24 hours.

TGWU - in national disputes involving more than one trade group

Textiles: NUTGW, Felt Hatters, Power Loom Carpet Weavers and Card Setting Machine Tenters

Coal mining: NUM, NACODS, BACM

Transport: TGWU, NUS, URTU, Radio, Electronic and Officers Union

Engineering and metal working: Boilermakers, AUEW(F), AUEW (TASS), Associated Metalworkers Union, National Union of Scalemakers, EMA, National Union of Gold and Silver and Allied Trades.

NATFHE

Communications: NATTKE, ACTT

GMWU - in a dispute involving more than 300 members

Just two of these - BIFU and NUS - require full postal ballots.

Discretionary ballots

Unions with provision for discretionary ballots in the rules include:

Postal ballots - BALPA, AUEW(E), EETPU, HVA, Equity

Semi postal ballots - AUT, Bakers, NACO, NALHM, NALGO, Rossendale Union of Boot, Shoe and Slipper Operatives.

NB. AUEW(E) - is a provision for a ballot where a dispute involves a whole district.

De facto practices

BIFU, NALGO, NGA '82, NUS, SOGAT '82 routinely balloted members over industrial action [NOTE conversely those mentioned as not using ballots were CPSA, EETPU, Equity, NUR, POEU, UCATT].

POEU annual conference 1979 rejected a proposal that ballots should be held before strikes.