

Christian Tyler

Tebbit's Law: a Tory dream come true

The Tories' new trade union bill is, to put it mildly, ambitious. Its aim is to turn the legislative clock back to the beginning of the century.

Ever since the ignominious collapse of the 1971 Industrial Relations Act, a measure designed to work a wholesale transformation of the British industrial relations scene by means of the statute book, the Conservative Party has been obsessed by the need to 'do something about the unions'. It is therefore tempting to interpret Mr Norman Tebbit's Employment Bill, like that of Mr Prior before him, merely as an act of political exorcism to rid the party of an incubus.

There are indeed reasons for seeing the two measures as purely tactical, narrowly political, expedients which have no deeper ideological purpose. The first Bill, for example, tackled a number of specific issues like picketing which happened to be topical when the Conservative Opposition was writing its manifesto for the 1979 general election. It was not the considered result of any deep analysis of trade union power (Mr Prior's Green Paper was published *after* his Bill, not before it). The second Bill has been shaped largely by the gut feeling of certain vociferous Tory backbench MPs and backwoods industrialists.

There is something *ad hoc* about the whole business. Even ministerial arguments for the legislation have been confusing. Sometimes, we are told, it is a matter of principle (dealing with the closed shop); at other times it is not principle but the need to curb particular 'abuses' of their power by trade union leaders. Or again, we are told that the Bills are first steps towards some ultimate framework of a labour law that all sections of society will come to judge as fair and reasonable. What is this framework? The 1971 Act all over again, or something else? Or we are told that the real purpose is an economic one, to create more employment. It is by no means a simple matter to discern, by looking at the contents of the two Bills in isolation, just what is being attempted. Of course electoral popularity has something to do with it; so has the feeling among employers that the balance of power in industry has moved away from them and to the unions (although we have heard much less about that in the last 18 months of economic recession).

The picture is even more confused when we look at the reaction of the protagonists. The Tory Right is still apparently unsatisfied, the

SDP has largely backed the Tebbit Bill while complaining that it contains the wrong remedies. Employers, while publicly welcoming the proposals, are privately deeply divided about the wisdom of using the law at all.

Congress House and the general secretaries have had no such qualms. In their eyes, the Tebbit Bill — even more than the Prior Bill — is quite simply a direct assault on trade union organisation which if successful will permanently weaken their ability to represent people at work. The TUC's problem is not how to characterise the Bill, but how to fight it effectively.

Yet it is important to look at all the evidence in order to understand why the unions are engaged in more than a ritual dispute with the present government, to understand what the real battle is about. This article is an attempt to show that the Government has taken up the legislative hammer, not in order to knock sense into British industrial relations, but in order to take the shortest route to reasserting political control over a still formidable extra-parliamentary institution. It may be that Mrs Thatcher and Mr Tebbit do not themselves see this as a trial of strength over political terrain: but that is what it will be. What they *do* know is that they have a fair chance of winning.

The economic argument

The issue is not put so starkly, of course; that would be unacceptable even in contemporary British politics. Ministers hate the term 'union-bashing'. They talk instead about the economic purpose of the measures. They are designed, it is said, to ensure continuity of production by instilling greater discipline on the shopfloor and greater 'responsibility' in trade union head offices. They are designed to rid industry of restrictive practices and old-fashioned attitudes, and to ease the labour market by prising open the closed shop and its less formal equivalents. They are to correct a growing imbalance as between employer and employed, and they are to lift from the back of the employer some of the costs and penalties incurred in the hiring and firing of labour. All this, the argument

goes, will serve to create more jobs in the long term.

Such arguments, wielded it must be said with more conviction by Mr Prior than by his successor, tend to disappear once the drafting actually begins. Ambitious aims of this kind cannot, of course, be translated into suitable legal terminology. There are limits to what even the most sympathetic judiciary can do by remote control. The economic case is convincing probably only to those economists whose analysis begins with the concept of 'trade union monopoly power'. But the most cursory glance at the two Bills themselves and at the manner of their birth is enough to demonstrate that the economic justification is a frail one.

This is not to say that if the Employment Acts are systematically taken up and used by employers and if the trade unions, despite the TUC's strategy, fail utterly to mobilise against them then a permanent weakening of trade union organisation will not occur. And if British trade unionism were permanently weakened, how many of the present Cabinet would be distressed? Trade union leaders and the people with whom they negotiate are wont to say that trade

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unions are a fact of life: they are here to stay so we'd best get on with making the system work. But they forget that in the United States, for example, trade union membership has fallen dramatically over the years to around 25% of the working population. American trade unions have largely failed to keep up with the movement of US industry from the North-East to the boom areas of the South and West. In the 'right to work' States of the union, it is the employer's right not to tolerate trade unions. The 'right to work' philosophy is attractive to the present Conservative leadership.

In a small island like Britain that kind of geographical discrimination is probably impossible. But suppose trade unions could be regulated by statute to the point where they ceased to be able to represent the workers who now belong to them, then the workers would look elsewhere for answers to their grievances. Unofficial trade unions, working entirely outside the law, might begin to spring up as they do in the Latin American military regimes. Is there any answer to that kind of anarchy but further repression by the authorities? No British government sets consciously down that path, but then politicians do not necessarily consider the long term consequences of attractive short term solutions.

The Tebbit Bill

What do the proposed reforms themselves tell us about their purpose?

Mr Tebbit has concentrated his fire in two areas, ignoring a mass of other suggestions from employers about how industrial discipline could be tightened up. The chosen areas are the closed shop and trade union funds.

The Employment Bill, 1982, would raise to extraordinary levels the minimum compensation to which a worker will be entitled if he is unfairly dismissed from his job for refusing to join a union in a closed shop. Compensation would be measured in terms not of hundreds of pounds but in thousands or even tens of thousands. This measure immediately creates a two-tier system of awards for unfair dismissal. In crude terms, you get a lot of money if you are sacked for objecting to closed shops, and not very much if you are unfairly sacked for any other reason.

Claims of unfair dismissal will be automatically justified if the closed shop in question has not been tested by secret ballot within five years preceding the disgruntled worker's appeal to the industrial tribunal. And in order to pass the test, the closed shop will have had

to command the support of 80% of the workers covered by it, or 85% of those who took part in the ballot.

Mr Tebbit has built substantially on Mr Prior's Act, which extended the grounds on which a worker could object to being part of a closed shop. The Labour government, in repealing the 1971 Act, had made closed shops lawful again, but stipulated that workers with religious beliefs that forbade their membership of trade unions should be free to object. That is, an employer could not fairly sack a worker whose objection was on religious grounds. Mr Prior's Act widened the conscience clause to cover any 'deeply held personal conviction'. It also enabled workers to object to being members of a particular union as well as unions in general.

In addition, the 1980 Act gave existing non-members the right to stay out of the union after a closed shop agreement was signed. Non-members were covered if the closed shop agreement had not been preceded by a secret ballot in which 80% voted for it.

At the same time, Mr Tebbit is asking Parliament to let him pay retrospective compensation to an estimated 400 people who lost their jobs from closed shops during the 1974-79 Labour government when the narrower grounds for objection were in force. This quite exceptional measure (described by some trade union leaders as a 'publicity stunt') seeks to treat those people as if the 1980 Act had been the law of the land in the preceding six years.

A related measure is the outlawing of commercial contracts and tenders that specify that the work is to be handled by union labour. A crucial addition has been made. Clause 11 of the Bill makes it unlawful for trade unions to put pressure on employers to operate union-only contracts. Unions and workers would lose their immunity from civil court action if they blacked non-union work or refused to work alongside non-union labour. This part of the Bill has received little attention so far, but has immense implications for workers on construction and civil engineering sites.

Trade union funds

But the central plank of the Bill is its removal of the historic immunity enjoyed by trade union funds. Once the Bill becomes law, sometime around July and subject to any amendments at committee stage, it will be open to employers to sue not only individual workers' or trade union officials for unlawful breaches of contract but also trade unions themselves. The scale of maximum damages that a court can award has been set at £10,000 for unions of less than 5,000 members, ranging up to £250,000 for unions of over 100,000 members.

The significance of this measure is obvious. Employers have rarely resorted to the courts to sort out their industrial relations problems — though the practice is more popular in some industries than others (the newspaper business, for example). It may be worth the employer's while to go for an injunction against named individuals in the hope of stopping the industrial action complained of: it has not hitherto been worth his while to see the case through to full trial because the damages he could extract from an individual are not worth having. But once trade union funds are exposed the game is worth the candle: and how many successful suits could even a rich union like the Transport and General Workers' withstand?

To put this measure into some perspective: unions lost their vulnerability to criminal prosecutions with the 1875 Conspiracy and Protection of Property Act, the measure which first introduced the so-called 'golden formula' that permits industrial action 'in contemplation or furtherance of a trade dispute'. The Taff Vale Railway case of 1901 demonstrated that the immunity was not as watertight as everybody assumed. The Amalgamated Society of Railway Servants found itself paying £42,000 in damages to the railway company. This incident prompted the Trade Disputes Act of 1906 which

explicitly conferred immunity on trade union funds. The situation remained virtually unaltered until the 1971 Act which repealed the 1906 Act but which re-enacted most of the immunities.

Mr Tebbit's Bill thus takes an historic step. At the same time, his Bill narrows still further the boundaries of lawful industrial action, and therefore increases the opportunities for successful litigation by employers.

The 1980 Act took several major steps down this road by creating the new legal concept of 'secondary' industrial action and 'secondary' picketing and making the two kinds of action unlawful. The 1982 Bill seeks to reinforce those limitations by redefining not only the type of *action* that you may lawfully take but also the type of *dispute* that you may legitimately pursue with industrial action. Once the Tebbit Bill becomes law, trade unionists (and now their unions too) will lose immunity from court action unless they can show that the dispute is not an inter-union one and can show that it is 'wholly or mainly' connected with terms and conditions of employment. It will become unlawful to stage sympathy action with work-

his Bill narrows still further the boundaries of lawful industrial action



ers abroad: trade union demonstrations against, for example, South African apartheid or boycotts mounted in solidarity with workers on strike in another country will not prevent a British employer taking unions to court.

These are the two main areas in which Mr Tebbit has taken action. His Bill, like Mr Prior's, also changes the rights of individual workers by limiting, for example, the eligibility of the individual to redundancy and maternity payments. But these are essentially administrative measures.

Prior and Tebbit

The first of this Government's legislative thrusts against the unions — apart from the Hadmor case¹, still largely untested in the courts — was a somewhat peripheral, ambivalent affair. Mr Prior was plainly acting under the political imperative of tackling 'the union problem' as promised in the Conservatives' general election manifesto. Indeed the manifesto was extraordinarily explicit in the commitments it made to act on picketing, the closed shop, and welfare payments to strikers' families. But the Secretary of State for Employment did not get on with his Prime Minister. Furthermore, his own experience as Mr Heath's confidant during the fraught years of the 1971 legislation told him that Mrs Thatcher and the hawks on her shoulder were liable to try and go too far. He therefore offered, essentially, the manifesto minimum but said the measures could be seen as the first step towards gradual transformation of the whole legal framework. In other words, he seemed to be saying the party could have its 1971 Act back, provided it was ready to go slowly about it.

The 1980 Act was advertised as the correction of a number of specific abuses of trade union power. The measures were chosen either because they were topical (picketing during the lorry drivers' strike had dominated the headlines) or because they were age-old issues of 'principle' (the closed shop) untiringly pursued by the Conservative Party grass roots activists.

Having discharged his obligations, to the extent that he judged legislatively prudent and politically necessary, Mr Prior was content to let it go at that. The TUC protested that his redrawing of the boundaries of lawful action — in particular his artificial distinction between primary and secondary industrial action — would serve merely to worsen the industrial relations climate while at the same time undermining the right of workers to withdraw their labour. Mr Prior's critics within the Conservative Party were very far from satisfied. They were quite unable to see how the 1980 Bill would restore the balance of power in British industry, and the *Daily Express* christened him 'Pussyfoot Prior'.

Mainly in order to stem this further pressure both inside and outside the Cabinet, Mr Prior then embarked on the promised review of trade union immunities. The purpose of this exercise was to map out the terrain of possible future legislation — legislation that Mr Prior himself had no intention of sponsoring unless his hand was forced by another 'winter of discontent' like that which had helped the Tories back into office. His green paper on immunities, published in January 1981, did due homage to the backbench hawks but was really an eloquent restatement of the case for leaving the subject alone.

The debate slipped out of the headlines while employer organisations set about canvassing their members' views on what, if anything, the Government should do next in the legislative field. To no one's surprise, the broad conclusion of British industry, with the usual predictable exceptions, was that there were a number of other

¹The House of Lords upheld the right of the ACTT to view the operations of a TV facility company as a threat to employees, and therefore as ground for a trade dispute.



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desirable reforms but that these should wait at least until the 1980 Act had been given time to prove itself.

Then came the reshuffle and Mr Prior was sent off to Northern Ireland to be replaced by the less amiable Mr Norman Tebbit, a former airline pilot and official of the British Air Line Pilots Association (BALPA). He was put into the Department of Employment to pacify the snipers on the Tory backbenches and — so it seems — to quench Mrs Thatcher's thirst for some radical initiative. He duly obliged with the attack on trade union funds.

Mr Tebbit's elevation was the signal for a furious burst of activity from a right wing organisation held in little regard by the more sober mainstream of British business — the Institute of Directors. The Institute, unashamedly political in its aims and assiduous in its

cultivation of the backbench dogmatists, set about stealing the CBI's act as the voice of British employers and providing some real industrial thrust for the second Bill that finally emerged two months ago.

The motives for Tebbit

The difference between Mr Tebbit's Bill and Mr Prior's lies not merely in the extent to which the former intrudes into the unions' historic immunities. The circumstances of its birth have been totally dissimilar, suggesting the motivation is much deeper. The Prior legislation came shortly after a general election victory and a campaign in which the (still undefined) question of trade union power had been a major — if not *the* major — issue. The strikes of 1978 and 1979 had gravely embarrassed Mr Callaghan's Government. Indeed there were unconfirmed rumours that unless the TUC issued new instructions to unions on how to behave (which it duly did in the so-called 'concordat') then the Labour Cabinet might itself have to consider legislating. It was clear enough to the Conservative Party strategists that Labour's failure to 'deal with the unions' in the eyes of the electorate meant they had to take positive, visible action. And that could only mean legislation.

But what was Mr Tebbit's mandate? His Bill comes at a time when economic recession, aided by the Government's own policies, has taken its own highly effective toll of trade union organisation, bargaining power and political influence. The strike figures had fallen dramatically over the previous 12 months from 12 million working days lost in 1980 to 4 million in 1981. And the loss of union membership because of the labour shake-out and company closures had bitten deep into trade union bank accounts. There have been few major strikes: the civil service dispute was long and unpopular but scarcely a manifestation of gross trade union power. The Aslef strikes over flexible rostering came too late to influence the climate ahead of the Bill — even if the Aslef dispute were at all relevant.

Mr Tebbit's own answer to the question of his mandate has been to point to the public opinion polls, which show that the unions are unpopular even, it would seem, among trade union members. But not even Mr Tebbit would argue that the unpopularity of trade unions is a sufficient explanation of his measures. His real case is that trade union leaders will be quite unable to convince their members that they are threatened by his Bill: and, indeed, the complicated legal issue of immunity is likely to pass over most heads. Not, perhaps, unless and until a union is threatened or bankrupted by damages will its members understand the force of Tebbit's law.

An even more convincing explanation for the 1982 Bill — and one that Mr Tebbit has hinted at — is that there will be no Labour government after the next election to repeal it. With the SDP apparently persuaded that legal reform is necessary, it would need a very startling electoral comeback by Labour to see the two Acts struck out as the 1971 Act was. Once over the hurdle of the next election, Tebbit's law will be well established. The longer it survives, the more acceptable it becomes. That is another reason why the TUC is so alarmed. Given the highly uncertain political situation, the unions' only hope of defeating the Act is to hit back so hard on the first occasion that an employer uses it that it is not used again, and to so dramatise its disruptive effect that repeal becomes the only way out. To get the reform off the statute book will probably entail not only breaking the law — which some union leaders have already told Parliament they will do — but boycotting the courts and bringing the law of the land into disrepute. If only in that sense, the battle will be deeply political, and its outcome highly uncertain.

Trade union power

At this point it is worth trying to get a little closer to the question of trade union power, whose misuse Mr Tebbit's Bill is supposed to be

tackling. Unfortunately, the 'cure' begs the diagnosis. If industrial action were typically initiated by or even under the direct control of, trade union officials and general secretaries, then to expose central trade union funds to damages might be an appropriate disincentive to the wielding of the strike weapon.

But as has been pointed out again and again, British trade unions do not work like that. Trade union officials are representatives (however imperfectly elected); they do not control their members in the way that the Tebbit Bill implies they do. Nor, as any personnel director will tell you, can that kind of disciplinary relationship be magically legislated into existence. Indeed, in so far as the Bill itself attempts to define the vicarious liability of trade unions for the actions of their members it recognises that the 'problem' is not the unions, but the workers themselves. The Green Paper rehearsed this point quite succinctly. One of the arguments against exposing trade union funds, it said, was that 'because of the way British trade unions are organised and disputes arise, the effect of putting union funds at risk, far from making unions more disciplined organisations would be to encourage internal dissension, to weaken their internal authority and therefore threaten an increase in unofficial action.'

Either Mr Tebbit has misunderstood the *locus* of union power and chosen the wrong weapon for his declared purpose — to make industrial relations more orderly — or he has deliberately chosen to hit another target. Unable to legislate for good behaviour, he is more concerned to weaken the unions as institutions than to secure the co-operation of trade union members in the smooth running of industry.

The employers' role

Another clue to the purpose of the Tebbit Bill can be found in a still under-reported argument between and inside employer organisations. There is a sharp conflict between large and small employers, for example — between those who have long experience of dealing with trade unions and those who have not or who are simply anti-union. There is conflict too between the public welcome accorded the measures and private doubts as to the wisdom of the whole exercise.

Company directors who applaud Mrs Thatcher's ideology have applauded Mr Tebbit's Bill. Many would like to have seen it go further. But company personnel directors, even in firms not noted for being soft on unions, are extremely worried. Theirs is a pragmatic, rather than political concern. They are afraid of the industrial relations consequences of a new surge in litigation. They fear the small 'cowboy' employer who decides to sue for substantial damages and they fear the disaffected trade union member who secures national fame and a large sum of money for dropping out of a closed shop agreement.

In short, there are company managers too who see the Tebbit Bill as purely political: and if they would like to secure some long term negotiating advantage over the trade unions, they are equally convinced that changing the law is not the way to do it. It is worth remembering, for example, that the Engineering Employers Federation has been advocating a purely disciplinary measure which has nothing whatever to do with trade union immunities or trade union funds. The EEF wanted for employers the right to lay off without pay workers not immediately involved in a dispute at their own workplace. The proposal was well supported in Fleet Street editorial columns. There is no doubt that it would be a tough answer to selective strikes, for example. There is considerable doubt about its equity in law which is probably why it is not being enacted.

Another example of the tension between the Government's political purpose and the employers' pragmatism is the closed shop. Most employer bodies have dutifully declared their support for the Gov-

ernment's basic proposition — that the closed shop is a moral evil. But none will ask the Government to make it illegal because it suits them very well in practice. In this respect employers show a curious affinity with trade unionists. There are, even on the left of the trade union movement, those who find the concept of compulsory trade union membership repugnant, while encouraging their members to secure the 100% shop where they can. Indeed, for most unions the closed shop is as much a guarantee of subscription income as it is a bargaining weapon. In practice, closed shop agreements have tended to be liberal in their jurisdiction: determined 'nonners' are left alone until they actively agitate against the system.

Here is another example of management schizophrenia, or the Boardroom at odds with the personnel department. Closed shops may offend the libertarian principles of senior management; they suit the personnel department very well because they create stable bargaining units and incidentally reinforce the personnel function exercised by trade unionists in British industry.

In terms of hard cases, the evils of the closed shop do not amount to much. The number of occasions in which individuals suffer at the hands of the collective each year can be counted on the fingers of one hand. But politically the closed shop is, and is likely to remain, one of the burning issues. Therefore when Mr Tebbit comes forward with a Bill the bulk of whose clauses are concerned with the closed shop, and adds to that a proposal for retrospective compensation (an exceptional step in any context) it should be no surprise. But if the closed shop is so great an evil, why has it not simply been outlawed? That at least would be consistent.

The fact that many large employers do not like what Mr Tebbit has done may prove — as it did a decade ago — a weakness in the

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legislation. Because of new political circumstances it is unlikely to prove its undoing. The law has been designed in such a way as to encourage employers to use it: even if the CBI, the EEF or all the trade associations were privately to advise their members to leave well alone they could not conceivably prevent a *cause celebre* being staged in the High Court.

Conclusion

Whether or not the Government's existing and proposed legal reforms add up to a coherent strategy must remain an open question. The arguments deployed for the measures may be contradictory and the choice of instruments somewhat arbitrary. But if the measures survive and even more if they become an accepted part of the employers' negotiating armoury, then the Government will be able justly to claim that it has opened a new chapter in British trade union history.

Assuming for a moment that the laws do stick, how much of a threat will they be? The closed shop exemption clause and compensation scheme could disrupt some workplaces, but are unlikely to pose a serious threat to union organisation itself: few closed shop agreements are in any case as strict as the Government's remedy implies. The procedures for setting them up and for reviewing them could well be ignored by both sides of industry.

More problematical for the unions will be the statutory proscription of action to prevent sub-contractors using non-union labour. This could certainly put a barrier in the way of winning formal recognition for trade unions, but it will apply mainly to those industries — like construction — where the unions have rarely managed to secure a strong foothold.

Much more serious are the new definitions of what constitutes

lawful industrial action. For example, the borderline between 'primary' and 'secondary' action (except perhaps in the case of picketing) is legally difficult enough. Practically, it is even more obscure. But the courts will now be empowered to decide how far workers can go in applying economic sanctions against employers: the general supposition (based on the experience of Lord Dennings's judgments in the Court of Appeal) is that the line will be narrowly drawn indeed.

But the real crux of the legislation is the withdrawal of immunity for trade union funds. Unions will have a choice; either they give official support to their members in dispute (which enables them to exercise some control) and risk severe financial penalties; or they stand aside and cease to exercise their representative function for some members in order to save the rest of the members' money.


They are either weakened financially or weakened industrially.

The TUC has already laid out an eight-point strategy for 'neutering' the law. Union leaders have declared themselves ready to go to jail; they have warned that their retaliation will be political in the same sense that the legislation is 'political'. But there is a difference between rendering the law inoperable by frightening employers into not using it, and actually defeating it. There may be no Labour government to come to the rescue this time. And given that some employer, somewhere, will sooner or later take a union to court for damages, there is no dodging the issue. The first few cases — perhaps even the very first case — will be an historic confrontation. The unions will be fighting to preserve the legal status they have enjoyed for most of the century. The Conservative Party will be poised to collect the prize it has waited for so long.

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