The Legal Status of the British Trade Union

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1. Introduction

An effective and complete analysis and evaluation of the term „legal status" of British trade unions requires not only its current legal status as defined by statute but also its status through the formative years, namely from the time of the infancy of trade unionism and during the period of its development. Furthermore, it is important to go beyond the current and narrow statutory definition of the term „legal status" by analysing the expression „legal status" in its widest sense and thus by examining the broader statutory features of trade unions in the context of their legal status.

In order to achieve the fulfilment of those two aims, it is proposed in the first instance to examine the British trade union's legal status through its historical background. In the second instance the term „trade union" needs to be defined in accordance with its current statutory definition and analysed in the context of its legal status. Thirdly, for a better understanding of a trade union's legal status culminating in the current statutory definition of this concept, there will feature a historical note followed by a variety of legislative provisions which treat the legal status of trade unions. In the fourth instance, the listing of a trade union will be analysed in the context of its legal status where a historical survey will feature followed by the current statutory system of trade union listing. Fifthly, an evaluation will take place on the current scheme of a trade union achieving independence in the light of its legal status and the advantages that status gives to an independent trade union. Finally, some concluding thoughts will follow.

In this manner it is hoped that the reader will experience the breadth of the legal status of the British trade union, from its beginnings to its current

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status as defined by statute. It is also hoped that the legal status of the trade union in the United Kingdom will receive a multiple and near complete treatment.

2. Legal status of a trade union and its historical background

Although workers' organisations "operated in the early nineteenth century and (...) workers in every trade were becoming very much alive to the necessity of defending their standards"[2], nevertheless „The first twenty years of the nineteenth century witnessed a legal persecution of trade unionists as rebels and revolutionaries"[3]. Organisations of workers which were already widespread in the large cities such as London were subjected to severe repression until around 1824. Workplace militancy, supported by socialists such as Robert Owen and revolutionaries were prominent in various struggles[4]. The beginnings of British trade unionism may be traced to about 1850 when a number of craft unions, such as miners' and engineering unions, were successful in establishing themselves and slowly building up their financial resources and thus acquiring sufficient strength to enable them to bargain on almost equal terms with the employer[5]. The London Trades Council was founded in 1860 and the Trades Union Congress was established in 1868.

Thus, trade unions were considered as having the status of illegal bodies in the early 1800s for a variety of reasons. In the first instance because they were wage fixing when in theory it was the State[6] which agreed wages. Thus wages could not be bargained for in legal theory at the time. Secondly, statute made

[2] Source: *W. Milne-Bailey*, Trade Union Documents, London 1929, p. 4.

[3] Source: *S. Webb*, *B. Webb*, The History of Trade Unionism, London 1894, p. 63 of the 1920 Edition.

[4] For example, the general strike in Scotland in 1820 where 60,000 workers took part or the attempts made by Robert Owen to set up national trade unions such as the Grand National Consolidated Trades Union in 1834 which played an important part in the protests after the Tolpuddle Martyrs' case (of *Loveless and Others* (1834)172 ER 1380) but which was dissolved soon after. The Tolpuddle martyrs were farm workers in Tolpuddle, Dorset who tried to form a union called the Friendly Society of Agricultural Labourers to prevent wage cuts. They swore an oath and kept that oath secret contrary to the Unlawful Oaths Act 1797 which made it illegal to make an oath and to conceal that oath. They were convicted by judge *B. Williams* after the jury returned a verdict of guilty for taking oaths and further oaths taken not to disclose those oaths and the prisoners were deported to Australia. This case is symbolic of the repression of freedom of association in Britain which largely remained in place until the Trade Union Act 1871 and the Trade Disputes Act 1906 were enacted.

[5] Source: *S. Webb*, *B. Webb*, The History of Trade Unionism, London 1920, p. 61. See too *H.A. Clegg*, *A.F. Thompson*, *A. Fox*, A History of British Trade Unions since 1889, (1964) Vol. 1. 1889–1910; (1985) Vol. 2. 1911–1933; (1994) Vol. 3. 1934–1951, Oxford Clarendon Press.

[6] Namely Magistrates in Quarter Sessions.

combinations of workers illegal. That illegality lasted from the 14th century until 1800. Thirdly, the Master and Servant Acts[7] made it a criminal offence for employees to be in breach of their contracts of employment by not completing their workload. In the fourth instance the Combination Acts of 1799 and 1800[8] made it a criminal offence to enter into agreements or to hold meetings for the purpose of altering working hours, negotiating wages and certain other matters. Finally, where workers combined into some organisation, the courts considered the combinations to constitute criminal conspiracies. *J. Grose*, in 1796 posited[9] that an individual employee may insist that his wages be raised, "but if several meet for the same purpose, it is illegal and the parties may be indicted for a conspiracy".

In 1870 some white collar trade unions were formed[10] and by 1889 there existed organisations consisting of unskilled and women's workers. By 1900 there were 1,323 trade unions with a total membership of 2,022,000 workers. As the years progressed there was an increase in union membership but a decrease[11] in the number of trade unions by reason of amalgamations, dissolutions and transfers so that by 1930 there were 1,121 trade unions with a membership of 4,842,000, in 1940 1,004 trade unions with a membership of 6,613,000, in 1964 501 trade unions with a membership of 10,065,000[12]. Since the beginning of the last century trade union membership grew steadily to reach a peak in 1978 and 1980 when a membership of 12.1 million workers were recorded in TUC affiliated trade unions. By 1989, however, there was a fall in trade union membership to 8.6 million workers[13] with the number of trade unions totalling 335. Thus a serious decline in membership took place as from 1979 when Margaret Thatcher's Conservative government was returned to power. The Thatcher laws passed in the 1980s and early 1990s in direct response to the actions of trade unions during the 1970s[14] had the effect of weakening considerably trade unionism especially in the field of making the taking of industrial action legally more difficult in the United Kingdom[15], bringing along in its train a consider-

[7] Repealed in 1875.

[8] Repealed in 1824.

[9] In *R. v. Maubey* (1796) 6 TR. 619, p. 636.

[10] For example, the Amalgamated Society of Engineers.

[11] To be noted is the fact that in 1920 there were 1,384 trade unions with a membership of 8 340 000 workers.

[12] The source of those statistics are from the Ministry of Labour Gazette dated November 1965.

[13] Source: The Sunday Times 28.1.1990.

[14] With a succession of strikes and other industrial action such as work to rule, go slows, overtime bans, etc. which culminated in the „Winter of Discontent" as it became known at the time.

[15] For a more detailed evaluation on the Thatcher laws which weakened the trade union movement see the following publications: *J. Carby-Hall*, Le Délit d'Incitation a la Rupture du Contrat et l'Immunité des Syndicats en Grande Bretagne, Revue Internationale de Droit Comparé, Paris 1992, No. 4, p. 883–938; and *J. Carby-Hall*, Syndykalizm w Wielkiej Brytanii. Stan Aktualny i Perspek-

able decline in trade union membership[16]. Furthermore the reduction in the size of the then highly unionised traditional industries such as the docks, steel, printing and coal[17] also contributed to the decrease of trade union membership during the 1980s and early 1990s.

At the beginning of the last century, the unions affiliated to the TUC formed the political wing of the Labour movement known as the Labour Representation Committee which in 1906 gave birth to the Labour Party. Trade unions still have strong links with the Labour Party.

Talking of the foundation of the trade union movement in the early 19th century, Professor *Grunfeld* said that the movement became established „in the teeth of the hostility of the then established order (...) applying themselves to securing from employers and management the right to represent their members in joint negotiation, understanding by experience the importance of political power in obtaining emancipative, protective and redistributive legislation, the British trade unions won for themselves and their members, and indeed, for non-members too, a better share of the wealth they helped to produce, respect from management for the individual employee, a sense of self respect founded on their own exertions and above all perhaps „the recognition of the right of the common man to a say in the settlement in the affairs that affect his livelihood and his life"[18].

In order to succeed in the achievements outlined by Professor *Grunfeld*, the trade union movement had to struggle against obstacles put before it by both statute and the courts. During the first part of the nineteenth century both Parliament and the courts considered trade unions to be criminal combinations. As the workers' movement expanded, its demands were heard and Parliament began to relax the criminal liability of trade unions through a series of legislation passed in 1824 (which repealed the Combination Acts); in 1859 by the Molestation of Workmen Act (which gave some relief relating to the judicial interpretation of „Molestation", so that during strikes which related to wages and working hours workers were not to be liable for peacefully persuading others not to work so long as there was no inducement to break a contract of employment); in 1871 by the Trade Union Act (which though, not clear, excluded criminal lia-

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tywy, [in:] *H. Lewandowski*, *Z. Hajn* (ed.), Syndykalizm Współczesny i jego Przyszłość, Łódź 1996, p. 81–117.

[16] There was a very steep decline in trade union membership in the 1980s and early 1990s to 7.3 million form 13 million in 1979. Since 2000 the numbers have stabilised at 7.3 million but in 2012 trade union membership dropped even further to 6 million for the first time since 1940. Source: http://www.bbc.co.uk/news/business-19521535 (accessed 24.2.2013).

[17] Source: http://news.bbc.co.ul/1/hi/business/3526917.stm#membership (accessed 20.2.2013).

[18] *C. Grunfeld*, Modern Trade Union Law, Sweet & Maxwell 1966, p. 1, with a quotation from *Caine*, Preface to *B.C. Roberts*, Labour in the Tropical Territories of the Commonwealth, 1917, London School of Economics and Political Science, London 1964.

bility in situations relating to „restraint of trade" in connection with the „purposes of any trade union"); and in 1875 by the Conspiracy and Protection of Property Act (which repealed the Master and Servant Acts and which consolidated crimes connected with picketing, intimidation and molestation, which created criminal liability for endangering life or property or for strikes in essential services[19] which were in breach of the contract of employment, and which gave workers the freedom to organise and take industrial action so long as they acted within the „golden formula"[20].

Thus trade unions stated to have a measure of legal status when they were first decriminalised as recommended by the Royal Commission in 1867. That Royal Commission also considered that the establishment of organisations of workers was to the advantage of both employers and employees.

The trade union movement was legalised in 1871[21] when it can be said to have received for the first time in its history a legal status. John Stuart Mill was moved to say in that very year[22] „If it were possible for the working classes, by combining among themselves, to raise or keep up the general rate of wages, it needs hardly be said that this would be a thing not to be punished, but to be welcomed and rejoiced at. Unfortunately the effect is quite beyond attainment by such means. The multitudes who compose the working class are too numerous and too widely scattered to combine at all, much more to combine effectively. If they could do so, they might doubtless succeed in diminishing the hours of labour, and obtaining the same wages for less work. They would also have a limited power of obtaining, by combination, an increase of general wages at the expense of profits".

Parliament was not the only body hostile to the trade union movement. At common law too, trade unions were thought of as illegal organisations be-

[19] Repealed by the Industrial Relations Act 1971.

[20] It is believed that the term „Golden Formula" was coined by Professor Lord Wedderburn of Charlton. That term as defined by the Trade Union and Labour Relations (Consolidation) Act 1992 grants immunity from liability for torts committed by a trade union which are in contemplation or furtherance of a trade dispute. S. 291(1) (a)–(b) of the 1992 Act provides that „An act done by a person in contemplation or furtherance of a trade dispute is not actionable in tort on the grounds only – (a) that it induces another person to break a contract or interferes or induces another person to interfere with its performance, or (b) that it consists in his threatening that a contract (whether one to which he is a party or not) will be broken or its performance interfered with, or that he will induce another person to break a contract or interfere with its performance". Subsection (2) provides that „An agreement or combination of two or more persons to do or procure the doing of an act in contemplation or furtherance of a trade dispute is not actionable in tort if the act is one which if done without such agreement or combination would not be actionable in tort". See too *J. Carby-Hall*, Grève et Action Collective en Grande Bretagne, Revue Internationale de Droit Comparé, Paris 1992, No. 3, p. 575–612.

[21] See Trade Union Act, 1871.

[22] Source: *John Stuart Mill* Principles of Political Economy (7th Edn.), On the influence of governments, Book V, chapter 10, London 1871.

cause the courts considered that their purposes were in restraint of trade. In *Hornby v. Close*[23] in 1864, a trade union wished to seek the help of the courts to prosecute a union official for embezzling union funds. *J. Blackburn* held that the union rules, being in restraint of trade, were illegal and therefore unenforceable. The Trade Union Act 1871 reversed that judgment by giving the trade union a legal status. That Act[24] provided that „the purposes of a trade union" were not to be unlawful because they were in restraint of trade and thus to render any agreement or trust void or voidable[25].

The courts also showed their hostility towards trade unions in cases such as *R v. Bunn*[26] where in 1872 the strike organisers were convicted of criminal conspiracy. The combination was held to be illegal because threats were made to call workers out in breach of their contracts of employment which was itself a crime. Furthermore, *J. Brett* found the combination *per se* illegal because there was „an unjustifiable annoyance and interference with the masters in the conduct of their business"[27]. The decision taken in *R v. Bunn* was reversed in 1875 but some years later, in 1901 the House of Lords in *Taff Vale Railways Co v. Amalgamated Society of Railway Servants*[28] found the trade union liable for the torts of inducing breaches of contract and civil conspiracy to injure[29]. The trade union's funds were consequently taken in damages. The House of Lords decision in the *Taff Vale* case was reversed by the Trade Disputes Act 1906 section 4 which provided that no action was to be allowed against a trade union „in respect of any tortious act alleged to have been committed by or on behalf of a trade union".

The courts continued to find other trade union activities to be illegal. One such activity related to the trade union's political purposes. In *Amalgamated Society of Railway Servants v. Osborne*[30] the House of Lords held that a trade

[23] (1867) L.R. 2 QB 153.

[24] Section 3.

[25] Under s. 4, the 1871 Act provided „Nothing in this Act shall enable any court to enforce directly" agreements between union and members or other unions (s. 4 was repealed by the Industrial Relations Act, 1971 and was not revived under the provisions of the Trade Union and Labour Relations Act 1974) s. 6 of the 1871 Act provided for the status of the trade union (but that section was repealed by the 1971 Act).

[26] (1872) 12 Cox 816.

[27] See the brief discussion on *R v. Bunn* in connection with trade disputes in *J. Carby-Hall*, Industrial Conflict: The Criminal Liability and Statutory Immunities of Trade Unions and their Officials, Managerial Law, MCB University Press 1987, vol. 29, No. 4, p. 3.

[28] [1901] A.C. 495 (H.L.) For a fuller discussion of this case see *J. Carby-Hall*, Industrial Conflict: The Civil Liability and Statutory Immunities of Trade Unions and their Officials, Managerial Law, MCB University Press 1987, vol. 29, No. 1/2, p. 1.

[29] Also heard in 1901 in *Quinn v. Leatham* [1901] AC.495 (HL) the doctrine of civil conspiracy against the unions was further developed by the House of Lords.

[30] [1910] AC 87 (HL).

union rule which purported a power to levy contributions from members for purposes of securing parliamentary representation was ultra vires and therefore illegal. This case was also reversed by Parliament. The Trade Union Act 1913 reversed the *Osborne case* decision[31].

In the case of *Rookes v. Barnard*[32] heard in 1964, the House of Lords held that since the Trade Disputes 1906 did not provide trade unions with immunity for the tort of intimidation, the respondent trade union was liable for having committed that tort. The appellant, through loss of employment, sustained damage because of lawful dismissal by the employer which occurred by reason of the unlawful threats made by the respondents to the employer. The courts seemed to have found an obscure judicial precedent for this tort which dates back to 1793[33]. Legislation intervened, namely the Trade Disputes Act 1965[34], which provided immunity to trade unions for the tort of intimidation committed by them.

The (now repealed) Industrial Relations Act 1971 had the effect of controlling numerous facets of trade union activities through its provisions on unfair industrial practices[35], cooling off periods[36], closed shops and agency shops[37], registration[38], the presumption of legal enforceability of collective agreements, unfair dismissal[39] and so on. This much criticised Act was eventually repealed by the Trade Union and Labour Relations Act, 1974 but under the provisions of that latter Act, the Court of Appeal, in a series of cases heard at the end of the 1970s, attempted to restrict trade union immunities granted under the „golden formula" as provided by s. 13 (2) of the 1974 Act. The Court of Appeal thus limited and restricted trade union immunities by creating the concepts of (i) remoteness from the original dispute, (ii) too lacking in effect, and (iii) too extraneous a motive,

[31] For a fuller discussion of this case see *J. Carby-Hall*, Trade Union Democracy, Managerial Law, MCB University Press 1984, vol. 26, No. 6, p. 8.

[32] [1964] AC 1129 (HL)

[33] In: *Tarleton v. McGawley* (1793) Peake 270 namely, intimidation through threats being made to use violence towards the plaintiff.

[34] Now the Trade Union and Labour Relations (Consolidation) Act, 1992 s. 219 (1) (a)–(b) and 2 and prior to that the Trade Union and Labour Relations Act, 1974 s. 13 (1) (b) and (2).

[35] For an explanation and evaluation of the „unfair industrial practice" see *J. Carby-Hall*, Solicitors' Journal 26.11.1971, vol. 115, No. 48, p. 883 and 884, and vol. 115, No. 45, p. 821–822.

[36] On „cooling off" see *J. Carby-Hall*, Solicitors' Journal 10.3.1972, vol. 116, No. 10, p. 191.

[37] See *J. Carby-Hall* for an analysis on the „closed shop and agency shop" concepts in Solicitors' Journal 1971, vol. 115, No. 45, p. 822.

[38] See *J. Carby-Hall* for an evaluation of the term „registration" in Solicitors' Journal 3.12.1971, vol. 115, No. 49, p. 902–904.

[39] On the concept of „unfair dismissal" see *J. Carby-Hall*, Solicitors' Journal 12.11.1971, vol. 115, No. 46, p. 842–844, and vol. 115, No. 47, p. 863–865. See too, *J. Carby-Hall* (ed.), A Study in Three Termination Aspects of Modern Employment in Studies in Labour Law, MCB Books 1975, p. 202–280.

which the House of Lords rejected in the *Express Newspapers Ltd v. McShane*[40], *N.W.L. Ltd v. Nelson*[41] and *Duport Steels Ltd v. Sirs*[42] cases[43].

The Conservative government was quick to react and enacted the Employment Act 1980[44] which restricted considerably the s. 13 immunities in tort granted to trade unions in the 1974 Act by introducing the concept of unlawful secondary industrial action and restricting the closed shop by providing exemptions to employees. Further exceptions were provided for by the Employment Act 1982[45] and the Employment Act 1988 virtually neutralising the closed shop concept[46].

This part may be concluded by pointing out that although a legal status for trade unions was recommended by the Royal Commission on Trade Unions in 1867 and achieved in 1871 by the Trade Union Act of that year, throughout the history of their formation until the first quarter of the nineteenth century, they were considered to be criminal organisations in nature. It was not until the Combination Acts were repealed that it may be said, with some diffidence, that perhaps trade unions after 1824 were considered to enjoy quasi legal status. Trade unions to this very day had to battle for their existence. As shown briefly above, trade unions have had to battle against a legal and political „see-saw". Depending upon the political colour of the government in power – whether Conservative or Labour – labour legislation passed by those governments was either hostile towards trade unions[47] or directly or indirectly beneficial towards them[48].

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[40] [1980] All ER.65 (HL).

[41] [1979] ICR 867 (HL).

[42] [1980] ICR 161 (HL).

[43] See an analysis of these cases in *J. Carby-Hall*, Industrial Conflict: The Civil Liability and Statutory Immunities of Trade Unions and their Officials, Managerial Law, MCB University Press 1987, vol 29, No. 1/2, p. 19 and 20.

[44] See a commentary on the 1980 Act in *J. Carby-Hall*, The Employment Act 1980 – A Means of Redressing the Balance, Managerial Law, Barmarick Publications 1981, vol. 23, No. 1.

[45] See *J. Carby-Hall*, The Employment Act 1982 – An Updating Note, Managerial Law, MCB University Press, Bradford, 1982, vol. 24, No. 6 and The Employment Bill 1982 – A Commentary and an Analysis, Managerial Law, Barmarick Publications 1981, vol. 23, No. 6.

[46] The reader who wishes to pursue a study on the closed shop concept will find an analysis in *J. Carby-Hall*, Essor et Déclin du „Closed Shop" en Grande Bretagne, Revue Internationale de Droit Comparé, Paris 1991, No. 4, p. 775–827 and *J. Carby-Hall*, The Closed Shop in Britain – A Human Rights Issue, MCB Publications 1980. See too *J. Carby-Hall*, Trade Union Law, Managerial Law, MCB University Press 1990, vol. 31, No. 2, p. 10–15.

[47] Examples of hostile legislation included, *inter alia*, the Industrial Relations Act 1971; the Employment Acts 1980, 1982 and 1988 all passed by Conservative governments.

[48] Trade unions benefited from labour governments' legislation indirectly on unfair dismissal, redundancy, and a host of other rights, a great number of which emanated from the European Union laws. Trade unions benefited directly through the disclosure of information for collective bargaining purposes, recognition, trade disputes and so on.

The courts have at times pronounced harsh judgments on trade unions but these latter have also experienced favourable judgments.

From what has been stated above, the legal status of trade unions had been considerably affected by the „see-saw" between the common law which reversed important case law judgments and the legislation.

3. The definition of the expression „trade union" in the light of its legal status

Whereas the original definition of the term „trade union" was to be found in the combination of three statutes[49] the current definition[50] in the Trade Union and Labour Relations (Consolidation) Act, 1992 defines[51] a trade union as „an organisation (whether temporary or permanent) – which (a) consists wholly or mainly of workers[52] of one or more descriptions and whose principle purposes include the regulation of relations between workers of that description or those descriptions and employers or employers' associations or (b) which consist wholly or mainly of (i) constituent or affiliated organisations[53] which fulfil the conditions in paragraph (a) (or themselves consist wholly or mainly of constituent or affiliated organisations which fulfil those conditions), or (ii) representatives of such affiliated or constituent organisations, and whose principle purposes include the regulation of relations between workers and employers or between workers and employers' associations or the regulation of relations between its constituent or affiliated organisations"[54].

In the light of the legal status of the expression „trade union" as defined by the 1992 Act, four matters should be noted. Firstly, the principal purpose must include the „regulation of relations" between workers and employers. This means that although the trade union may have other purposes, as for example, the un-

[49] Namely the Trade Union Act 1871, s. 23, The Trade Union Act Amendment Act 1876, s.16 and the Trade Union Act 1913, s. 1 (2) and 2 (1).

[50] As well as definitions in previous Acts of Parliament such as the Trade Union and Labour Relations Act 1974, s. 28 (1) (a).

[51] Section 1 (a) (b) (i)–(ii).

[52] See *Carter v. Law Society* [1973] ICR 113.

[53] Which covers trade union federations such as the International Transport Workers' Federation. See *Camellia Tanker Ltd SA v. International Transport Workers' Federation* [1976] IRLR 190 (CA).

[54] A similar definition will be found in the expression „employers' Association". This consists wholly or mainly of employers or individual proprietors (whether permanent or temporary) and is an organisation whose principal object is the regulation of relations between employers and workers or trade unions. See Craig v. Insole [1978] 3 All. ER 449. Federations of employers are also included. Trade Union and Labour Relations (Consolidation) Act 1992, s. 122 (1) (a)–(b) and (2).

ion's political objects or the political fund or may institute provident funds for the benefit of its members, the principal object must be the „regulation of relations" this constituting primarily the carrying on of collective bargaining and industrial relations[55] negotiations.

In the second instance, it will be recalled, that a trade union may be an organisation which consists of „constituent or affiliated organisations" as, for example a federation of trade unions or a body which represents trade unions whose principle object includes the regulation of relations between its constituent or affiliated organisations. This signifies that the constituent or affiliated organisation need not (though it may) enter into collective bargaining or carry on industrial relations. The Trades Union Congress (TUC) would qualify as a trade union within the meaning of the Act[56].

Thirdly, the organisation must consist „wholly or mainly" of workers. The word „worker" is defined as „an individual (…) who works or normally works or seeks to work – (a) under a contract of employment or (b) under any other contract (…) whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his". A self-employed person comes within the definition of „worker" if he is to give personal service to the employer[57]. Also included as „workers" are Crown employees, excluding the Royal Navy, army and Royal Air Force and the police service[58] and national health employees as, for example, general medical, pharmaceutical, dental and ophthalmic services[59].

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[55] See *Midland Cold Storage v. Turner* [1972] ICR 230 (a joint committee of shop stewards was held not to satisfy the requirement of industrial relations with employers as it was not negotiating with the employers. It was merely lobbying to influence dock workers to take industrial action) cf. *British Association of Advisers and Lecturers in Physical Education v. National Union of Teachers* [1986] IRLR 497 (CA) (where it was held that the Association constituted under its rules, a trade union within the meaning of the definition under the Act).

[56] Under the old definition the TUC would possibly not have been considered as a trade union. See *C. Grunfeld*, Modern Trade Union Law, Sweet & Maxwell 1966, p. 217 who said „Whether the TUC is itself a trade union within the meaning of the Trade Union Acts 1897–1913 is not certain" since the old statutory definition required that the association, should under its constitution, have the principle object of regulating relations. Rule 2 of the TUC constitution, inter alia, says „To do anything to promote the interests of (…) its affiliated organisations (…)". The fact that the 1992 Act provides (and previously the 1974 legislation provided) „or include the regulation of relations between its constituent or affiliated organisations" means that the TUC qualifies as a trade union. See *NWL Ltd v. Nelson and Laughton* [1979] IRLR 478 (HL) and *Camilla Tankers Ltd. SA v. International Transport Workers' Federation* [1976] ICR 274 (CA).

[57] See *Broadbent v. Crisp* [1974] All. ER 1052 (NIRC) (The National Industrial Relations Court set up under the provisions of the Industrial Relations Act, 1971 was abolished along with that Act).

[58] Trade Union and Labour Relations (Consolidation) Act 1992, s. 296 (1).

[59] *Ibidem*, s. 280.

Finally the trade union has to be an organised and properly structured body[60] which can be of a permanent or temporary nature. The organisation is required to have a formal structure and should not consist of a casual grouping of individual workers[61]. The word „temporary" is not defined, but by parity of reasoning with the „old" definition which also used that word, it could arguably be said that „temporary" relates to an organisation existing for the achievement of a particular adventure whose principal purpose is the regulation of relations and which would cease as soon as the adventure has been completed, or it may mean an organisation having statutory objects and in existence for a specified period of time or upon the occurrence of a specified event[62].

4. The legal status of a trade union as defined by the legislation

Whereas under the now repealed Industrial Relations Act 1971 trade unions enjoyed the status of a *legal persona* over the short period of some three years, trade unions have never, in the British history of trade unionism, been bodies corporate. The trade union is an unincorporated body. It thus does not enjoy the status of corporate personality[63]. A trade union is not a distinct or separate legal entity from those individuals who are trade union members from time to time.

Although an unincorporated body, the trade union nevertheless does possess, as provided for by the Trade Union and Labour Relations (Consolidation) Act 1992, some of the more important attributes of corporate personality[64].

4.1. A historical note

It was stated above that (apart from a very short period) British trade unions have never had the status of a body corporate. Prior to treating the 1992 legislative provisions which give trade unions some „important attributes of corporate personality", and treat other matters relating to the legal status of trade unions, it is proposed to give a brief historical survey by way of background to the current position.

[60] See *Midland Coal Storage Ltd. v. Turner* [1972] ICR 230 (NIRC).

[61] See *Frost v. Clarke and Smith Manufacturing Co. Ltd.* [1973] IRLR 216 and the *Midland Cold Storage case* (above).

[62] But note that in the Midland Cold Storage case (above) a striking group which did not take part in collective bargaining did not qualify as a trade union.

[63] A British trade union does not have a fictitious personality distinct from that of its members. See *Sutton's Hospital case* (1612) 15 Co. Rep. 32b and *Salomon v. Salomon* [1897] AC 22.

[64] Trade Union and Labour Relations Consolidation) Act 1992, s. 10 (1) (a) (b) (c) and (2).

Before the short-lived Industrial Relations Act 1971 which gave registered trade unions the status of corporate personality, the legal status of a trade union was not entirely clear. A registered trade union under the Trade Union Act 1871[65] had at times been judicially described as a „quasi-corporation" at other times as „a near corporation" or as a „tertium quid". In the 1901 case of *Taff Vale Railway v. Amalgamated Society of Railway Servants*[66], the House of Lords held that the trade union could be sued in its own name in tort. Consequently the trade union's funds were answerable for the damages awarded and the individual members' assets could not be touched. *Lord Brampton* said[67] „I think a legal entity was created under the Trade Union Act 1871 by the registration of the Society in its present name in the manner prescribed, and that the legal entity so created though not perhaps in the strictest sense a corporation, is nevertheless a newly created body created by statute"[68].

Similarly, in *Bonsor v. Musicians Union*[69] (a case relating to a trade union being sued in contract in its registered name) decided some half century after the Taff Vale case, their Lordships' ultimate decision was identical, but the way in which they arrived at their judgments was different. *Lord Morton* and *Lord Porter* thought that the union was able to enter into contracts and could be sued as a legal entity distinct from its members. *Lord Mc Dermott*, *Lord Somervell* and *Lord Keith*, thought that the trade union was not a separate legal persona, but that it could be sued in its own name, because the Trade Union Act 1871 had sanctioned such a course.

Under the 1871 Act trade unions were not compelled to register though most of the more important ones did. Whether or not they registered the trade unions were in both cases unincorporated bodies. Thus similar difficulties arose with unregistered trade unions and the probability was that such associations could sue and be sued by a representative action. The only case which was ever to come before the courts and which treated this issue was *Lawlor v. Union of Post Office Workers*[70] where an injunction was sought and where the union was mis-

[65] The Act which first recognised trade unions in law and made them into legal bodies.

[66] [1901] AC 426 (HL).

[67] *Ibidem*, p. 442.

[68] Other cases where judges found that trade unions were quasi-legal entities and therefore separate and distinct from its members were *Cotter v. National Union of Seamen* [1929] 2 Ch. 58 (CA) where the Court of Appeal was unanimous on this issue; *N.U.G.W.M v. Gillian* [1946] K.B. 81 (CA) per *L.J. Scott* at p. 86 (Trade union sued under its own name for the tort of defamation against it). See also *K.W. Wedderburn* (1965) 28 MLR 62 (more bodies treated as quasi-corporations by the courts, these latter being influenced by trade union cases). See also *K.W. Wedderburn*, The Worker and the Law, Pelican 1986, 3rd edition, p. 524 *et seq*.

[69] [1956] AC 104 (HL).

[70] [1965] 1 All.ER 353.

takenly[71] described as a registered union when in fact it was not. The irregularity of the action not having been challenged, the position relating to unregistered unions was also vague.

From the case law, it is difficult to know whether prior to 1971 the courts regarded trade unions as corporate bodies per se, or whether they regarded them as unincorporated bodies against whom a legal action could be brought as though they were legal entities[72]. That latter is the better view[73].

The Industrial Relations Act 1971 put an end to the uncertainty created by the common law since the beginning of the last century. The register established under the 1871 legislation was abolished and a new one was created under the 1971 Act[74]. Trade unions were not compelled to register under the 1971 Act, but if they did register they had the legal status of corporate personality[75] and in addition enjoyed certain important benefits under that Act. The political climate at that time was such that trade unions refused to register and those which did, were the relatively unimportant ones. When the 1971 Act was repealed by the Trade Union and Labour Relations Act, 1974, the register of trade unions under the 1971 Act was closed.

Trade unions have historically been antagonistic to enjoying the status of corporate entities, probably because of the *Taff Vale* case decision which made the trade union funds liable for damages and to subsequent judgments since Taff Vale, where trade unions saw judges as being anti-union. Another and more recent reason for union antagonism was the Industrial Relations Act 1971 considered as being anti-union and an instrument of the Conservative *Edward Heath* government.

4.2. The 1974 Act and subsequent legislation culminating in the 1992 Consolidation Act

When the Labour government was returned to power, the Trade Union and Labour Relations Act 1974 repealed the much criticised 1971 legislation and one

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[71] See Donovan Report (Cmnd. 3623 par. 775).

[72] See e.g. Lord Denning in *Willis v. Association of Universities of the British Commonwealth* [1965] 1 QB 140 (CA) where he uses the expression „bodies unincorporated" (p. 147).

[73] See *K.W. Wedderburn* (1957) 20 MLR 105 and *C. Grunfeld*, Modern Trade Union Law, Sweet & Maxwell 1966, p. 37 *et seq*. who says (p. 38) „The Trade Union is in the social, economic and political sense, a real thing a separate factual entity; but its reality as a separate entity is at present day half admitted in the world of English legal concepts". Cf. *L.C.B. Gower*, The Principles of Modern Company Law, Sweet & Maxwell 1969, 3rd edition, p. 231 who said „Whether or not one calls it a legal entity seems to be an argument about terminology rather than substance".

[74] Industrial Relations Act 1971 s. 68.

[75] *Ibidem*, s. 78.

of its measures was to give trade unions the status of unincorporated entities[76]. By this is meant that trade unions whether or not registered under the 1971 Act, reverted to the position in which registered trade unions were prior to the 1971 Act. This, of course, did not apply to „special register bodies". The 1974 Act provided that „A trade union which is not a special register body shall not be, or be treated as if it were, a body corporate"[77].

The expression „or to be treated as if" is of great significance, for the legislation is saying that although trade unions are not corporate bodies they must not be treated as though they are corporate bodies as they have been until 1971, unless they qualify under the provisions of the 1971 Act. In *EETPU v. Times Newspapers*[78] *J. O'Connor* held that by virtue of s. 2(1) of the 1974 legislation, trade unions having lost their status as quasi-corporate bodies, they no longer had a legal personality of their own which could be defamed, accordingly they could no longer bring an action for libel[79].

4.3. Legal status of a trade union as defined by the 1992 Act

What were the, now repealed, Trade Union and Labour Relations Act 1974 provisions and what are currently the Trade Union and Labour Relations (Consolidation) Act 1992 provisions relating to the legal status of a trade union? The brief answer is that a trade union enjoys quasi-corporate status *simpliciter*[80]. Although a trade union is not (a) a body corporate and although (b) it cannot be treated as if it were a body corporate[81], a trade union is capable of entering into contracts[82]. This means that a trade union is enabled to contract in its own name and be bound legally by that contract if the person who contracted on behalf of the trade union acted within his authority, whether actual, implied or ostensible. Should the union default on the contract, an action may be brought against a trade union under its own name and its property may be liable for damages. If the person did not have the trade union's authority to enter into contracts on its behalf, or if he did have its authority, but acted ultra vires the authority given to him, he would be personally liable. The trade union is also enabled to sue in its own name for breach of contract to which it is a party.

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[76] Trade Union and Labour Relations Act 1974, s. 2 (4).

[77] *Ibidem*, s. 2 (1).

[78] [1980] All. ER 1097.

[79] Cf. *National Union of General and Municipal Workers v. Gillian* [1946] KB 81 (CA) (Libel action by the union was successfully upheld).

[80] Trade Union and Labour Relations (Consolidation) Act 1992, s. 10.

[81] *Ibidem*, s. 10 (2).

[82] *Ibidem*, s. 10 (1) (a) [The equivalent and identical provision in the, now repealed, Trade Union and Labour Relations Act 1974 was s. 2 (1) (a)].