Written evidence from Professor K D Ewing[1] and John Hendy QC[2] (TUB0008)

Introduction

1 The Trade Union Bill contains proposals that will impose new restrictions on the right to organise, the right to workplace representation, and the right to bargain collectively. It also contains new restrictions on both the right to strike, and trade union political freedom, while exposing trade union administration to unjustified levels of State surveillance.

2 The provisions of the Trade Union Bill are to be seen in the context of a system in which trade unions are **already** very highly regulated, as a result of a number of restrictions on trade union freedom introduced by the Conservative governments from 1979 to 1997. The ILO Committee of Experts has already critically examined some of these restrictions, as has the European Committee of Social Rights.[3]

3 It is to be pointed out, however, that it is not only the Trade Union Bill that contains proposals for change. On the same day that the Bill was published, the government published draft regulations to amend law introduced in 2003 relating to the use of agency workers in a strike or industrial action. It will now be possible for agency workers to be used as strike-breakers.[4]

4 In our view, the Bill (with the important check off amendment introduced in Public Bill Committee) is incompatible with a wide range of human rights obligations established in a number of treaties to which the United Kingdom is a party. These include ILO Conventions 87, 98 and 151; the European Social Charter of 1961; and the European Convention on Human Rights.

ILO Conventions and Recommendations

5 The United Kingdom has ratified a number of ILO Conventions on freedom of association.. The United Kingdom has also signed the ILO Declaration on Fundamental Principles and Rights at Work (1998), as well as the Declaration on Social Justice for a Fair Globalisation (2008). Both of these instruments reaffirm our commitment to the ILO principle of freedom of association. So far as relevant the main treaties relevant to freedom of association are as follows:

- **ILO Convention 87**

---

[1] Professor of Public Law, King's College, London; President, Institute of Employment Rights.
[2] Barrister, Old Square Chambers; Honorary Professor, University College, London; Chair, Institute of Employment Rights.
[3] On the Social Charter, see most recently European Committee of Social Rights, Conclusions XX-3 (2014).
[4] Department for Business, Innovation and Skills, *Hiring Agency Staff During Strike Action*, 15 July 2015 (BIS/15/416).

6 Article 3 of ILO Convention 87 provides that

> (1) Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
>
> (2) The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

7 Art 3 has been read by the ILO supervisory bodies for seven decades now to include the right to strike, an understanding re-affirmed by the ITUC and the IOE in a historic understanding in February 2015. Also relevant is Article 11, which provides that 'Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise'.

8 In our view, the Trade Union Bill violates Article 3 of Convention 87 for the following reasons:

- It imposes ballot participation and support thresholds that must be met before industrial action may be taken regardless of the rules of the union, in violation of standards developed by the ILO supervisory bodies (clauses 2 and 3);
- It adds additional procedural burdens to the already disproportionate procedural obligations with which trade unions must comply before industrial action may be taken, so inhibiting exercise of the right to strike (clauses 4-8);
- It imposes disproportionate and discriminatory obligations on trade union in relation to picketing, and unacceptable levels of State supervision of picketing activity, including a requirement to furnish to the police the name and contact details of any trade union activist appointed as a 'picket supervisor' (clause 9);
- It includes an unjustified and discriminatory attack on trade union political freedom, reducing the ability of trade unions to campaign for new laws, such as the repeal of the Trade Union Bill or to support political parties (clauses 10 and 11);
- It proposes unacceptable levels of State supervision of trade unions, which seriously undermine the principle of trade union autonomy, by giving the State regulator extensive, unnecessary and disproportionate powers (clauses 15-18).

Box 1

ILO Convention 87 and Strike Thresholds

In assessing the compatibility of the 40% support threshold in the Bill with ILO Convention 87, it is to be noted that there is a long-running complaint against

Bulgaria, where it is understood that the law permits industrial action only if it has the support of a majority of those eligible to vote (that it is to say 50% plus 1). Trade unions in Bulgaria complained that these statutorily imposed ballot thresholds were inconsistent with ILO Convention 87 and the Committee of Experts agreed, rejecting the Bulgarian government's claim that its strike ballot threshold was 'liberal in character', and that 'any attempt to amend it may infringe its democratic approach'.[5]

The Committee pointed out that *'account should only be taken of the votes cast'*, while any *'required quorum and majority should be fixed at a reasonable level'*.[6] Consequently, the Bulgarian government was urged to change the law *'in order to bring it into closer conformity with the principles of freedom of association'*.[7] That request has been repeated on several occasions since.[8] Although the provisions of the Trade Union Bill differ from those of Bulgaria in several respects, the Bill nevertheless fails the test posed by the Committee of Experts that the '*required quorum and majority should be fixed at a reasonable level',* not least for reasons already considered in relation to the rigid balloting method required in the United Kingdom (on which see para 20 below).

- **ILO Conventions 98 and 151**

9 Convention 87 is not the only cause for concern, with the important provisions of the Bill relating to public sector employment calling into question the compatibility of the Bill both ILO Convention 98, and Convention 151. So far as relevant, Convention 98 provides that:

> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

10 In view of the provisions of the Bill relating to public sector trade unionism in particular, the corresponding provisions of ILO Convention 151 are also engaged. So far as relevant, the provisions of the latter include –

> Article 6
>
> 1. Such facilities shall be afforded to the representatives of recognised public employees' organisations as may be appropriate in order to enable them to carry out their functions promptly and efficiently, both during and outside their hours of work.

---

[5] ILO Committee of Experts, *Observation Adopted 1998* (Bulgaria) (ILO, 1999).
[6] Ibid.
[7] Ibid.
[8] See most recently, ILO Committee of Experts, *Observation Adopted 2014* (Bulgaria) (ILO, 2015). For discussion of a recent case from El Salvador to similar effect, see A Bogg, 'Case No 2896 El Salvador CFA Complaint'. (2015) 1 *International Labor Rights Case-Law* (forthcoming).

2. The granting of such facilities shall not impair the efficient operation of the administration or service concerned.

3. The nature and scope of these facilities shall be determined in accordance with the methods referred to in Article 7 of this Convention, or by other appropriate means.

Article 7

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organisations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters.

Article 9

Public employees shall have, as other workers, the civil and political rights which are essential for the normal exercise of freedom of association, subject only to the obligations arising from their status and the nature of their functions.

11 Also relevant are ILO Convention 135 (the Workers' Representatives Convention, 1971), and the accompanying Workers' Representatives Recommendation 143. Together with Conventions 87, 98 and 151, these latter provisions are engaged by the provisions of the Bill dealing with trade union facilities (clauses 12-13) and the government's late amendment relating to the use of the check off (clause 14).[9] The Bill as amended violates Conventions 98 and 151 for the following reasons:

- It contains reserve powers to impose an arbitrary cap on collectively agreed (and, presumably, tribunal imposed) facility time, unrelated to the needs of the union representatives or their members, or indeed the interests of the employer (clause 13);

- It annuls and effectively prohibits collective bargaining on the use of the check off in the public sector (clause 14);

- It empowers ministers unilaterally to annul and rewrite collective agreements dealing with facilities (clause 13) and the check off (clause 14).

---

[9] It will be appreciated that check off arrangements are always established by a collective agreement negotiated between employer(s) and union(s). Arrangements for the paid release of employees from normal work in order for them to undertake trade union duties are almost invariably achieved by collective agreement. Where a dispute arises, however, the employer can refuse the time off and the employee can challenge the decision by application to the employment tribunal under the Trade Union and Labour Relations (Consolidation) Act 1992, s 168. The cap proposed by the Bill will presumably override both the collectively agreed and the tribunal imposed time off.

European Social Charter

12 The United Kingdom's historic record of non-compliance with this instrument (ratified by a Conservative government in 1962) is shocking, and the continuing indifference to the legal obligations it contains is alarming. The treaty contains a large number of social rights in 72 numbered paragraphs, of which the United Kingdom has accepted 60. The most recent report of the European Social Rights Committee was concerned with what the Committee referred to as 'Labour Rights' (principally articles 2-6). Of the 13 provisions accepted by the United Kingdom, the Committee made three conclusions of conformity, and 10 conclusions of non-conformity. That means that we are not complying with 10 of the 13 provisions examined, sometimes on multiple grounds.[10]

- **Trade Union Rights**

13 The 'labour rights' provisions of the Social Charter include articles 5 and 6, which deal respectively with the right to organise, the right to bargain collectively, and the right to strike, the Social Charter being the first international treaty to deal expressly with the right to strike. So far as relevant, articles 5 and 6 provide that

> **Article 5 –The right to organise**
>
> With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.
>
> **Article 6 –The right to bargain collectively**
>
> With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:
>
> 1) to promote joint consultation between workers and employers;
>
> 2) to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;
>
> 3) to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;
>
> and recognise:

[10] European Committee of Social Rights, Conclusions XX-3 (2014).

4) the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

14 So far as relevant for present purposes, the European Committee of Social Rights found the United Kingdom not to be complying with articles 5, 6(1) and 6(4). So far as the last of these provisions is concerned, the Committee concluded that

> 'The Committee concludes that the situation in the United Kingdom is not in conformity with Article 6{4) of the 1961 Charter on the grounds that
>
> - The possibilities for workers to defend their interests through lawful collective action are excessively limited;
> - The requirement to give notice to an employer of a ballot on industrial action is excessive;
> - The protection of workers against dismissal when taking industrial action is insufficient'.[11]

In light of the foregoing, it is implausible to believe that the provisions of the Bill will not add to the existing findings of non-conformity.

- **Social Charter and Trade Union Bill**

15 In view of the United Kingdom's current status under the Social Charter, we believe that the European Committee of Social Rights is likely to conclude that the provisions the Trade Union Bill violate Articles 5 and 6(2) and (4) of the Charter, for reasons similar to those relating to ILO Conventions 87, 98 and 151. In our view, Article 5 is engaged by:

- The unjustified attack on trade union political freedom, reducing the ability of trade unions to campaign for new laws, such as the repeal of the Trade Union Bill (clauses 10 and 11);

- The unacceptable levels of State surveillance of trade unions, which seriously undermine the principle of trade union autonomy, by giving the State regulator extensive, unnecessary and disproportionate powers (clauses 15-18).

- The nature of the supervision, whereby complaints may be made to the Certification Officer by the Certification Officer himself to adjudicate on statutory and rule-book disputes (clause 15).

- The inappropriate introduction of what is in effect a trade union tax, to pay for the unacceptable levels of State surveillance of trade unions introduced by the Bill (clause 19)

[11] Council of Europe, Social Rights Committee, *Conclusions XX-3* (2014), p 24.

16 In our view the provisions the Trade Union Bill also violate Article 6(2) for the following reasons:

- They include a de facto annulment and ban on collective bargaining on the use of check off for the payment and collection of trade union membership subscriptions (clause 14);

- They include reserve powers to impose an arbitrary cap on the right to workplace facilities, including time off for lay officials engaged in collective bargaining (clause 13);

- They include a power to make regulations which will enable ministers to annul and rewrite the terms of collective agreements relating to both trade union facilities and the check off and (clauses 13 and 14).

In addition to the foregoing, we also believe that the provisions of the Bill violate article 6(4)

- They impose ballot thresholds that are inconsistent with the requirement that 'the ballot method, the quorum and the majority required are not such that the exercise of the right to strike is excessively limited' (clauses 2 and 3);[12]

- They add additional procedural burdens to the existing disproportionate procedural obligations which the ECSR has already found to be in non-conformity with the treaty (clauses 4-8);[13]

- They impose disproportionate and discriminatory obligations on trade union in relation to picketing, and unacceptable levels of State supervision of picketing activity (clause 9);

European Convention on Human Rights

17 The foregoing ILO and ESC obligations are important for two reasons: first because compliance with all human rights treaty obligations should be regarded as an end in itself;[14] and secondly because these obligations feed directly into the substance of the European Convention on Human Rights (ECHR). Thus, the European Court of Human Rights (ECtHR) has made it clear on several occasions that these latter

---

[12] European Committee of Social Rights, *Digest of the Case Law of the European Committee of Social Rights* (2008), p 57. See also ECR, Conclusions XIV – repeating criticism of the United Kingdom because 'strikes are only lawful if they have been approved by a majority of workers, through a secret ballot under very restrictive conditions' (p 805) – as reproduced in the Digest, above..

[13] European Committee of Social Rights, Conclusions XX-3 (2014).

[14] Lord Bingham, 'The Rule of Law' [2007] 66 *Cambridge Law Journal* 1, where referring to the Constitutional Reform Act 2005, s 1, Lord Bingham wrote that 'The existing principle of the rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations. I do not think this proposition is contentious'.

instruments are influential in determining the scope and content of the ECHR. The ECtHR has stressed that

> it is appropriate to remember that the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies. In other words, limitations to rights must be construed restrictively, in a manner which gives practical and effective protection to human right.[15]

The trade union rights read into ECHR, art 11 by the ECtHR in recent cases are set out in Box 3. Here we apply this developing jurisprudence to the provisions of the Bill.

Box 2

ECHR, Art 11

Article 11 provides that:
1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Box 3

Art 11 and Trade Union Rights

Recent jurisprudence of the ECtHR has established a number of rights of trade unions and trade union members under ECHR, art 11. So far as relevant, these include:

- The right to be a member of a trade union

- The right to be represented by a trade union in dealing with the employer
(*Wilson and Palmer v United Kingdom* [2002] ECHR 522)

[15] *Demir and Baycara v Turkey* [2008] ECHR 1345 at [146].

- The right of trade union officials to time off work for trade union functions (*Sanchez Navajas v Spain*, 21 June 2001)

- The right to bargain collectively (*Demir and Baycara v Turkey* [2008] ECHR 1345)

- The right to strike (*Hrvatski Liječnički Sindikat v. Croatia* [2014] ECHR 1417)

- The right to demonstrate and protest (*Ezelin v France* [1991] ECHR 29)

- **Ballot Thresholds**

18 The imposition of participation and support thresholds is a clear violation of article 11(1): it violates the autonomy of the trade union, and compromises the right to strike now unequivocally recognised by the ECtHR. (The hesitation on this latter point in *RMT v United Kingdom* cannot be explained; the *RMT* decision is an exception to an expanding body of jurisprudence in which the right to strike has been recognised by most sections of the ECtHR.) The impact of these thresholds is fully considered in an important recent academic study, which retrospectively applied the thresholds to 162 industrial action ballots involving 28 different trade unions from 1997 to 2015.[16] Darlington and Dobson found that while unions 'have generally been overwhelmingly successful in winning majority 'yes' votes in favour of strike action', many unions would fail to achieve the 'proposed 50 per cent participation threshold'.[17]

19 According to the foregoing study, only 85 of the 158 strike ballots covered by the research met the 50 per cent participation target, and the number of workers involved in cases which failed to reach the target was completely disproportionate to those that did. While 444,000 workers could have taken strike action because they had a turnout rate of over 50 per cent, 3.3 million workers would have been 'prevented from going on strike'. These findings led the authors to conclude that 'some major national strikes would have been deprived of legal protection under the proposed legislation, especially those relating to national bargaining in the public sector'. [18] But if the 50% participation threshold would have a dramatic impact, so would the 40% approval threshold in relation to workers engaged in important public services. Here Darlington and Dobson found that

> Even when unions have succeeded in reaching the 50 per cent turnout, some would still fail to obtain the 40 per cent majority threshold of those eligible to

---

[16] R Darlington and J Dobson, The Conservative Government's Proposed Strike Ballot Thresholds: The Challenge to the Trade Unions (August 2015). For a copy of the report see http://www.slideshare.net/salfordbizsch/trade-union-bill-analysis-professor-ralph-darlington-report. For a summary see http://www.salford.ac.uk/news/conservative-trade-union-would-reduce-unions-ability-to-strike,-says-salford-research.

[17] Ibid.

[18] Ibid.

vote. Out of 90 strike ballots in the 'important public services' covered by the database, 55 of them produced turnouts in which more than 40 per cent of the electorate voted 'yes', such that the proposed legislation would have reduced the number of strikes in these areas by nearly 40 per cent.[19]

20 Although trade unions will adapt their strategies to the new legislation, there can be no doubt from the Darlington and Dobson research that the thresholds will impair trade union Convention rights. The question then is whether they are proportionate restrictions, designed to protect the rights and freedoms of others. At this point there are several concerns:

- the right to strike is not only a trade union right but is also an individual right ('everyone has the right…'). If a significant number of workers seek to exercise their right to strike, it is hard to see the justification for denying them simply on the basis that fellow employees have failed to vote for or against.

- the new thresholds will place a premium on high levels of participation. This in turn will require a voting system that maximises rather than diminishes voter turnout. At the moment, trade unions are required to conduct expensive postal ballots, though we understand that there is evidence to suggest that workplace ballots would secure higher ballot participation levels.

In our view, the imposition of thresholds without a choice of voting method is a disproportionate restriction on the right to strike under ECHR, art 11. It is also an infringement of trade union autonomy by overriding union choice as to the means of making democratic decisions under their rules, a right equally protected by art 11.

21 Although pressed to do so, the government has failed to provide a convincing explanation of why trade unions are not permitted to exercise their right to choose, through their rules, the appropriate balloting mechanism such as secure and supervised workplace ballots for industrial action. The disproportionate nature of the government's obstinacy is reinforced by the fact that workplace balloting is permitted under the statutory procedure for trade union recognition.[20] There has been no suggestion that the integrity of the hundreds of externally supervised ballots under this procedure has ever been compromised, and we note that there are no proposals that these procedures should be changed to postal voting only. We note also that workplace balloting is provided for in a host of statutory procedures dealing with the consultation of worker representatives (for example in relation to collective redundancies).[21] It is not to be ignored that the mandate to call off industrial action is customarily exercised by workplace ballot without complaint or any proposal to change it.

---

[19] Ibid.
[20] Trade Union and Labour Relations (Consolidation) Act 1992, Sch A1.
[21] Ibid, ss 188, 188A.

- **Ballot Papers, Strike Notice and Ballot Mandate**

22 As pointed out above, the various new restrictions to be introduced by clauses 4 - 8 of the Bill are in addition to existing restrictions built up between 1980 and 1997. As Tony Blair pointed out on the eve of the General Election in 1997 this created what were the 'most restrictive laws on trade unions in the Western world',[22] restrictions that remained largely in place during the 13 years of Labour government. It is thus important that however benign any of the provisions in clauses 4 – 8 might otherwise appear, they are to be seen in this wider context of already tight, unrivalled and cumulative restriction.

23 These provisions are also to be seen in the context of their compatibility or conformity with other treaty provisions. So far as we are aware, the ILO supervisory bodies have yet to comment on the notice and ballot provisions in British law. However, the Social Rights Committee has already concluded that various aspects of the current law are 'excessive' (the obligation to give notice of intention to ballot – unjustifiable where there is also an existing obligation to give one week's notice of an intention to strike);[23] and the balloting conditions generally (criticised for being very restrictive).[24]

24 It is true that various notice and balloting provisions have been held by the Court of Appeal not to violate Convention rights.[25] But that was before the great developments in the art 11 jurisprudence post *Demir and Baycara* v Turkey,[26] the Court of Appeal decision in question having been decided shortly before the unequivocal acceptance of the right to strike by what is now almost all sections of the ECtHR. It is also true that the ECtHR has yet to rule on the compatibility of these provisions with art 11, the Court avoiding the need to do so in *RMT v United Kingdom*,[27] on the ground that the relevant part of the application was inadmissible.

25 In our view, however, it is only a matter of time before the ECtHR will be required to decide on the existing restrictions, which in the new era have generally been broadly construed by British courts to reflect the new Convention realities.[28] It seems to us, however, to be clear that the introduction of the additional procedural restrictions will take the United Kingdom into deeper violation of article 11, with little basis to justify these restrictions of the Bill on grounds of proportionality, when viewed with the existing legal framework as a whole. Indeed, the question of justification under art 11(2) seems almost insurmountable by the government in view of the analysis by the Office of National Statistics of days lost through industrial action:

---

[22] *The Times*, 31 March 1997. This assessment, with which we do not disagree, was repeated in *The Guardian*, 27 April 1997, in an extended interview with three prominent journalists.
[23] See para 14 above.
[24] See note 5 above.
[25] *Metrobus v Unite* [2009] IRLR 851, [2010] ICR 173.
[26] [2008] ECHR 1345.
[27] [2014] ECHR 366.
[28] Most notably in *RMT v Serco* [2011] EWCA Civ 226. See esp para 8 (Elias LJ) for the new mood music.

> *there has been a significant decline in the number of strikes since 1995 compared with the previous years. Though volatile, the number of working days lost has remained broadly the same over this period. … The strike rate in the last 10 years is generally lower than in previous decades*.[29]

The two week strike notice requirement (clause 7) and the need to renew the ballot mandate (clause 8) seem especially unsustainable.[30]

- **Picketing**

26 Clause 9 proposes to impose additional restrictions on the freedom to picket, requiring trade unions to notify the police of the identity of the picket supervisor; require the picket supervisor to wear an arm band or badge; and require the picket supervisor to show his or her letter of authorisation to the employer. These additional obligations raise a number of questions of compatibility with ECHR, art 11, with questions relating to both limbs of Art 11(1), that is to say the right to freedom of assembly and the right to freedom of association. It is possible also that ECHR, arts 8 (private life) and 14 (discrimination in the application of Convention rights) will be engaged.[31]

27 So far as the substance of the additional obligations is concerned, they clearly violate the terms of art 11(1) by imposing conditions and qualifications on the right to freedom of assembly (an individual as well as a collective right),[32] together with the right to freedom of association (which the ILO supervisory bodies regard as including the right to picket peacefully).[33] In our view, however, the foregoing obligations proposed by clause 9 are disproportionate and dangerous. At a time when there are concerns about police surveillance of trade unionists (see the Pitchford inquiry), trade unionists will be rightly concerned about an obligation on the part of their union to provide the police with the identity of trade union activists, particularly as there are no restrictions in the Bill about how that information may be recorded and used by the police.

28 A second concern relates to the fact that there are no corresponding obligations on any other organisations that engage in picketing. That strikes us as constituting discrimination against trade unionists in the application of Convention rights, which the government has singularly failed to justify.[34] It may well be that some of the provisions of clause 9 are already contained in the Code of Practice on Picketing, first introduced with statutory authority and parliamentary approval in 1980. There is, however, a big difference between a statement of guidance in a Code of Practice and

---

[29] ONS, *Labour Disputes Annual Article, 2014*, 16 July 2015, p 9.
[30] This is a point reinforced by the rigid postal balloting method and the high costs associated with it.
[31] See respectively *Gillan and Quinton v United Kingdom* [2009] ECHR 28, and *Danilenkov v Russia*, Application No 67336/01, 10 December 2009 (discriminatory treatment of trade unionists). For a rather different art 8 point, see Supplementary Memorandum to follow.
[32] *Adalı v Turkey*, Appn 38187/97, 31 March 2005 at [266].
[33] ILO, *General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice and a Fair Globalisation, 2008* (ILO, 2012), para 149.
[34] See *Danilenkov v Russia*, above.

the mandatory statutory obligation now proposed. In any event, the corresponding provisions of the Code are often drafted in much less mandatory terms,[35] while it is also the case that not all the provisions of clause 9 are to be found in the Code of Practice.[36]

29 A third concern relates to the disproportionate consequences of failing to comply with the duties proposed in the Bill. Failure to comply with any of the foregoing obligations will lead to the picketing losing legal protection, and to the possibility of both the union and individual pickets being restrained by an injunction for oversights on the part of others (the picket supervisor) that are beyond their control.[37] This strikes us as being contrary to the principle in *Ezelin v France*,[38] where the ECtHR said (in a case in which a lawyer had been disciplined for participating in a public protest against the judiciary, even though he himself had done nothing wrong):

> the freedom to take part in a peaceful assembly - in this instance a demonstration that had not been prohibited - is of such importance that it cannot be restricted in any way ….. so long as the person concerned does not himself commit any reprehensible act on such an occasion.[39]

- **Political Freedom**

30 We note that the government does not address the human rights implications of clause 10 of the Bill in its ECHR Memorandum on the Bill.[40] We find this surprising, particularly in view of the importance that the ECtHR has paid to legal restrictions affecting political parties (to which clause 11 is clearly addressed), and in view also of the likely impact that this measure will have on trade union political voice and the ability of trade unions to secure parliamentary representation for the promotion of their interests. The right of trade unions to engage politically is recognised by the ILO Committee of Experts, and acknowledged by the ECtHR, which recognised in *ASLEF v United Kingdom* that

> Historically, trade unions in the United Kingdom, and elsewhere in Europe, were, and though perhaps to a lesser extent today are, commonly affiliated to political parties or movements, particularly those on the left. They are not bodies solely devoted to politically-neutral aspects of the well-being of their members, but are often ideological, with strongly held views on social and political issues.[41]

---

[35] As in the case of the letter of authorisation: compare the Code of Practice, para 54 ('should') with clause 9 ('must provide').
[36] The code does not include a duty on the part of the union or the picket supervisor to tell the police the picket supervisor's name.
[37] On the possible liability of individuals, see M Ford and T Novitz, 'An Absence of Fairness … Restrictions on Industrial Action and Protest in the Trade Union Bill 2015' (2016) 45 ILJ (forthcoming).
[38] [1991] ECHR 29.
[39] Ibid, para 53.
[40] BIS, *Trade Union Bill: European Convention on Human Rights Memorandum* (30 July 2015).
[41] [2007] IRLR 361, para 50. See M Ford and J Hendy QC, *ASLEF v UK, An IER Briefing*

31 There can be no doubt that the interference with trade union political freedom is a violation of ECHR, art 11(1). The question is whether for the purposes of art 11(2) the proposed changes are necessary to protect the rights and freedoms we presume of those trade union numbers who do not wish to support trade union political objects. At this point, we find it difficult to see on what ground such an interference could be said to be a proportionate restriction. It is already the case that trade unions are required by statute to conduct a ballot every ten years for approval to maintain their political objects. Even though members have voted in the ballot, they are not bound by the result in the sense that they have the right to opt out of paying the political levy. Many do so, with trade unions required by law to include in their rule-books details of the right to opt out.

32 Quite apart from the disproportionate nature of the change from opting out to opting in, the other issue relates to the micro-management of the opting in procedures, the disproportionate nature of the change being compounded by the highly prescriptive manner in which opt ins are to take effect. Thus, the individual may opt in only by sending by post or delivering personally an opt in notice in writing to a union office. It is not possible to opt in online, and it thus not possible to opt in at the time of membership, where the membership application is completed online. Moreover, the opt in must be renewed every five years. It is not clear why this is necessary in view of the fact that anyone who has opted in will be free to opt out at any time. There was no renewal requirement when a similar regime operated between 1927 and 1946, and there is no renewal requirement to opt in in Northern Ireland, where an opt in procedure has applied since 1927 because of unique political circumstances.

33 In our view it is the case that the Trade Union Bill, clause 11 is enveloped by the pungent smell of partisanship: it is designed to diminish the political voice of organized labour, and it is designed to give the Conservative Party a competitive funding advantage. In our view it is also highly relevant in determining the proportionality of this provision that it has been introduced in breach a well-established constitutional convention. This is the so-called Churchill convention, whereby: 'it has become a well established custom that matters affecting the interests of rival parties should not be settled by the imposition of the will of one side over the other'.[42] We do not claim that the Churchill convention should be regarded as giving one party a veto over all changes to party funding arrangements. But there would have to be a compelling reason to justify a partisan attack on the opposition, undertaken unilaterally by the party of government. This is emphasized by the fact that previous initiatives to reform party funding have attempted to proceed by consensus.

- **Check off and Facilities**

(2007): http://www.ier.org.uk/system/files/ASLEF+v+UK+final+for+website+corr+by+jh1.pdf.

[42] HC Debs, 16 February 1948, col 859.

34 Clause 14 clearly violates ECHR, art 11(1). This is because it effectively prohibits (by rendering unenforceable) any collective bargaining on the use of the check off. This prohibition is compounded by the powers in clause 13(9) and 14(6) to rewrite collective agreements. *Demir and Baycara v Turkey* makes it clear not only that the right to bargain collectively is protected by art 11(1), but also that art 11 does not permit the State to annul an existing collective agreement (which is not inherently unlawful in its terms) freely negotiated between an employer and a trade union – the very facts which arose in *Demir*.[43] Moreover, the ILO Committee of Experts has made clear that the right to bargain collectively about check off arrangements is protected by ILO Convention 98, art 4;[44] and that it is contrary to ILO Convention 98, art 4 for the State to take power to rewrite collective agreements.[45]

35 The issue then is whether the restrictions on freedom of association in article 11(1) can be justified under article 11(2). At this stage it is far from clear what or whose interests are being protected by these provisions, and, if such interests can be discovered, whether the restrictions can be shown to be proportionate. This is particularly true of the ban on the use of the check off, in relation to which the government has failed to provide a convincing justification for the measures proposed, either at the time the proposal was announced, or later when the amendment was debated in Committee and on Report. It must be recalled that where a Convention right is to be weighed against a competing interest, 'only indisputable imperatives can justify interference with enjoyment of the Convention right'.[46]

36 Even allowing the widest margin of appreciation, the government has formidable obstacles to overcome, having regard to the fact that the check off suits the convenience of employees,[47] as well as trade unions for the payment and collection of subscriptions; and to the fact that the check off can be and often is used without any expense to the employer who can and usually do insist on being reimbursed by the union for any resources expended. It is notable that the government rejected an amendment in Public Bill Committee effectively authorising the use of the check off where the costs were borne by the employer.[48]

37 Whilst the provisions relating to facilities are not as clear-cut as those relating to the check off, annulling the collectively agreed amount of time of work for trade unionists will plainly breach the *Demir* principle. Furthermore, the case that the imposition of arbitrary limits on facility time anticipated by clause 16 will violate ILO Recommendation 143, the importance of which was highlighted by the ECtHR in *Palomo Sanchez v Spain*.[49] Recommendation 143 provides that

---

[43] [2008] ECHR 1345 at [155]-[157].
[44] ILO Committee of Experts, *Observation Adopted 2010* (Congo) (ILO, 2011).
[45] ILO Committee of Experts, Right to Organise and Collective Bargaining Convention, 1949 – Croatia (2015): 'a legal provision which allows one party to modify unilaterally the content of signed collective agreements is contrary to the principles of collective bargaining'.
[46] *Chassagnou v France* (2000) 29 EHRR 615, at [112].
[47] See *Hickey and Hughes v Secretary of State for Communities and Local Government*, 3 September 2013. For a very valuable account, see Andrew James, *Check-Off Arrangements – The Law* (Thompsons Trade Union Law Service, 17 March 2014).
[48] HC Debs, 10 November 2015.
[49] [2011] ECHR 1319. This decision post-dates the decision in *Sanchez Navajas v Spain*, 21 June 2001, to which the government refers in its ECHR Memorandum: BIS, *Trade Union*

> Such facilities in the undertaking should be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently.

What is appropriate depends on need ('Workers' representatives …. should be afforded the necessary time off from work'), not arbitrarily imposed fiscal or temporal caps. Otherwise

- These powers not only impairs the right of the trade union and its lay officials, but also the right established in *Wilson and Palmer v United Kingdom* for employees to be represented by a trade union in their dealings with their employer, which is in large measure protected by TULRCA 1992, ss 168 and 170.[50]

- It is also striking that the Bill identifies as equally subject to restriction, the Employment Relations Act 1999, s 10 (right to be accompanied to a disciplinary or grievance hearing) ,and Health and Safety at Work Act 1974, s 2 (safety representatives). Such restrictions may have repercussions for other Convention rights.

- **Certification Officer**

38 Finally, the new provisions relating to the Certification Officer violate ECHR, art 11 in conjunction with art 6. The Certification Officer was established in 1975, with mainly administrative responsibilities, though also with limited powers to adjudicate on complaints (principally about trade union political fund rules – a jurisdiction performed for many years earlier by the Chief Registrar of Friendly Societies). The Trade Union Bill continues a process in which the role of the CO has gradually transformed from an administrative one to a regulatory one. The CO is now increasingly referred to as the trade union regulator.

39 In considering this changing role, it is important that any concerns are prefaced with the observation that the CO is a political appointee in the sense that he or she is

---

Bill: European Convention on Human Rights Memorandum, ibid. That case not only preceded the revolution in the article 11 jurisprudence, but in any event was about whether the applicant had the right to paid time off to study new legislation. That is not the same as arbitrary limits which will apply regardless of need, and potentially undermine the effectiveness of collective bargaining. The case is nevertheless helpful for drawing attention to the importance of the Revised Social Charter, art 28, which provides that workers' representatives are to be 'afforded such facilities as may be appropriate in order to enable them to carry out their functions promptly and efficiently, account being taken of the industrial relations system of the country and the needs, size and capabilities of the undertaking concerned'. Although the United Kingdom has not ratified the Revised Social Charter, *Demir and Baycara* above (paras 96 - 108) makes clear that it is nevertheless an important source of interpretation of Convention rights. In the *Demir and Baycara* case, the construction of art 11 was influenced by provisions of the ESC which Turkey had not accepted, and by another treaty (the EU Charter) which Turkey was not in a position to ratify.

[50] [2002] ECHR 552.

appointed by the Secretary of State: there are no qualifications for appointment and no requirement that the individual in question should be free of political bias.[51] In our view the new powers of investigation to be conferred on the CO violate the right to freedom of association (ECHR, art 11(1)) in the sense that they violate the administrative freedom of trade unions as recognised by ILO Convention 87, art 2. In our view this violation cannot be redeemed under art 11(2) as being necessary for the protection of persons not easy to identify, though we presume trade union members.

40 So far as the proposed new powers of investigation are concerned, the problems relate to

- The low threshold for triggering the powers of the CO to demand documents ('If the CO thinks there is good reason to do so' – a fishing expedition);
- The power of inspectors (on a threshold of 'circumstances suggesting') to require the attendance of, and self-incrimination, by individuals;
- The power of inspectors appointed by the CO (on the latter threshold) to require the trade union to provide unspecified forms of co-operation;
- The power of the CO to make an order requiring the trade union or other specified person to comply with a CO instruction;
- The consequences of failing to comply with a CO instruction on the basis of these low thresholds for the initial intervention.

So far as the last bullet point is concerned, the consequences are extraordinary: 'An order made by the Certification Officer under this paragraph may be enforced by the Officer in the same way as an order of the High Court or the Court of Session'.

41 Apart from powers of investigation, the other obvious issue relates to the power of the CO to initiate a complaint against a trade union for breach of a wide range of obligations. This is in addition to the long-established right of members to initiate a complaint. What this means in effect is that the Certification Officer will:

- have the power to bring a complaint to the Certification Officer;
- call and examine his own witnesses;
- make a decision in favour of his own complaint; and
- impose an order (and by virtue of other new powers impose a financial penalty) on the trade union.

It needs hardly to be said that by violating trade union autonomy in this way, the Bill magnifies it so as to constitute a really egregious violation of ECHR, art 6, in what are disputes about statutory obligations and contractual terms. Art 6 imposes the requirement of a fair trial and (relevantly here) the requirement that the decision maker must be an 'independent and impartial tribunal established by law'.[52] That is a principle which is equally foremost in the rules of natural justice embedded in the common law,[53] and one which is a fundamental element in the doctrine of the Rule of Law. A tribunal in which the judge is also a party is the complete negation of this principle.[54] Remarkably, these extraordinary provisions are not referred to in the

[51] Trade Union and Labour Relations (Consolidation) Act 1992, s 254.
[52] *Ringeisen v Austria (No 1)* (1971) 1 EHRR 455, at [95].
[53] See for example *Lawal v Northern Spirit* [2003] ICR 856.

government's ECHR Memorandum on the Bill.[55]

Conclusion

42 In our view, the various provisions of the Trade Union Bill raise serious questions about the United Kingdom's compliance with a host of human rights treaty obligations. The foregoing of course does not exhaust the concerns that are likely to arise. For reasons of space, w have not commented on issues relating to the EU Charter of Fundamental Rights, though we are alive to claims that have been made in relation thereto. Nor have we commented on issues relating to either the International Covenant on Civil and Political Rights, arts 21 (assembly) and 22 (association), or the International Covenant on Economic, Social and Cultural Rights, art 8 (association).

43 The most immediate concern of course is the impact of the Bill on Convention rights. It is clear to us that almost all of the provisions of the Bill violate freedom of association in one way or another (intrusion into trade union autonomy; restrictions on the right to bargain collectively; violation of the right to strike; attack on trade union political freedom; excessive State surveillance and regulation). The issue is thus not whether ECHR article 11(1) is engaged but whether any restriction can be justified under article 11(2). The government, it seems, is content to rely on the defences of proportionality and the margin of appreciation, which at best are unpredictable defensive positions.

44 In preparing this submission, we are fully aware of the government's Memorandum on the European Convention on Human Rights, which appears to contradict our views and to suggest that the Trade Union Bill is fully compatible with Convention rights. The latter is not, however, a persuasive document. It appears to elide discussion of some of the key provisions of the Bill (to which we have referred above), and it fails to consider all the relevant case law on article 11. The government appears to be wholly disengaged from the dynamic and developing jurisprudence on article 11. Moreover the treatment of important issues is very cursory – clause 9 is dealt with in four short paragraphs without any citation of authority.

45 Apart from the fact the government does not provide a convincing account of Convention issues, it is a particularly troubling feature of the Bill that it imposes an obligation on public bodies to act in breach of their duties under the Human Rights Act 1998, which allows Convention rights to be enforced against public authorities. Most notably, public authorities are effectively to be prohibited from engaging in collective bargaining on check off arrangements in clear breach of the decision in *Demir and Baycara v Turkey* and the principles established in that case. Apart from the impact on public authorities, it is unclear how this will affect the duties of the Scottish Executive under the Scotland Act 1998, s 57(2).

---

[54] Cf *Sramek v Austria* (1984) 7 EHRR 351.

[55] BIS, *Trade Union Bill: European Convention on Human Rights Memorandum* (30 July 2015).

20 November 2015