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Trades Union Congress

Rt Hon Harriet Harman QC MP
Chair
Joint Committee on Human Rights
House of Commons
London
SW1A 0AA

date: 20 January 2016
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Dear Harriet

Trade Union Bill – Human Rights and International Obligations

I am writing following the publication of the Secretary of State's letter dated 5 January 2016 on the Trade Union Bill and its implications for human rights and other international obligations.

The letter refers to the TUC submissions to the Joint Committee on Human Rights and to the ILO Committee of Experts. There are a number of points made in Mr Javid's letter to which it would be appropriate for the TUC to respond.

European Convention on Human Rights (ECHR), Article 11

As the Committee will be aware, the right to strike has been recognised expressly by the European Court of Human Rights (ECtHR) as being protected by the freedom of association guarantees in article 11.

Since the landmark decision (on collective bargaining) in *Demir and Baycara v Turkey* [2008] ECHR 1345, the TUC is aware of an analysis which found seven cases where restrictions on industrial action, or penalties for going on strike, were challenged before the Court. The RMT case is the only one of the seven not to have succeeded. The TUC is aware of another two cases since the RMT case in which restrictions on strike action have been found to breach article 11.

'Margin of appreciation'

The foregoing is important because it reveals that the government is relying on a very exceptional decision on a very exceptional point (secondary action, which the Court decision in the RMT case considered not to be a core trade union activity).

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It also reinforces the important contribution of Baroness O'Neill in the Second Reading debate in the Lords, where she emphasised the need to ensure that 'great care and judgment' as well as a 'lot of work' will be required to determine whether 'each proposed condition set on the operation of trade unions' meets the requirements of the European Convention on Human Rights (ECHR), article 11(2), which permits restrictions only in very limited circumstances.

That said, the RMT case provides little support for the exaggerated claims made by the government in the Secretary of State's letter. The essence of the government's case seems to be that sufficient cover is provided for the Bill because some of the proposals were included in the Conservative Party election manifesto.

Even if the manifesto commitment is a 'relevant factor' as the government claims, it is hardly likely to be a 'conclusive factor'. Otherwise, it would be a total negation of the ECHR if governments were able successfully to claim that their violations of Convention rights are justified by manifesto commitments.

In the RMT case what was 'relevant' and perhaps 'persuasive' in 'considering the margin of appreciation to be afforded' was the political consensus around the restrictions in question (a consideration also seen to be persuasive in *Animal Defenders International v United Kingdom* [2013] ECHR 491, though not in other controversial cases). The point is expressed most clearly at para 99 of the Court's decision in RMT:

> *The ban on secondary action has remained intact for over twenty years, notwithstanding two changes of government during that time. This denotes a democratic consensus in support of it, and an acceptance of the reasons for it, which span a broad spectrum of political opinion in the United Kingdom.*

But there is self-evidently no such 'democratic consensus' on the Trade Union Bill, and no such consensus can be claimed to exist on the strength only of the election manifesto of the party of government.

Article 11 - other matters

So far as the governments' other points on Article 11 are concerned, we draw attention to the fact that existing provisions of the Trade Union and Relations (Consolidation) Act 1992 have already been found by the European Committee of Social Rights (ECSR) to be in breach of the European Social Charter 1961 (a treaty ratified by a Conservative government). The Trade Union Bill's further restrictions will compound these existing violations.

It is well known that the conclusions of ECSR will be relevant to the construction of article 11. The RMT case adds nothing in this context. The Court concluded on the facts of that particular case that the application relating to the procedural requirement to observe rules relating to strike notice and ballots was inadmissible because the union had been able to comply with these restrictions (albeit with great difficulty).

So far as the strike ballot thresholds are concerned, the TUC is concerned that the Bill does not determine to whom the 40 per cent threshold will apply. Only once the draft regulations are published will it be possible to assess the full discriminatory impact of the Bill proposals. This is crucial to any effective human rights scrutiny, because ECHR, Art 14 prohibits discrimination in the enjoyment of Convention rights.

The concern here is obviously that in sectors with a disproportionately large number of female employees, there will be a discriminatory effect on Article 11 in relation to both freedom of assembly (picketing) and freedom of association (on the right to strike).[1]

Finally, we do not agree with the government that the check-off provisions do not engage Convention rights. Article 11 is clearly engaged, for two reasons. First, because the powers provided for in clause 14 would effectively prohibit collective bargaining about check-off facilities, by rendering any agreements unenforceable and effectively void.

Article 11 is engaged secondly because clause 14 empowers the minister to make regulations conferring powers to amend or otherwise modify collective agreements. The essential point here of course is that collective bargaining and collective agreements are the principal (if not the only) way by which check-off arrangement are established in practice in this country.

International Labour Organisation

In view of the comments in paras 1 and 2 of the Annex to the Secretary of State's letter to the Committee, it is important to recall the status of ILO Conventions. The government points out that the latter are 'labour norms which have been specifically approved or adopted by the [ILO's] tripartite structure'. What the government fails then to say is that from a legal point of view, once ratified these Conventions are treaties under international law, giving rise to binding obligations as a result.[2]

This is important for the purposes of the ECHR. In *Demir and Baycara*, the ECtHR emphasised that it has never considered the provisions of the Convention as the sole framework of reference for the

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[1] The TUC notes that Article 14 is also relevant in relation to clause 9, in the sense that it discriminates against trade unionists contrary to Article 11, insofar as it imposes restrictions on trade unionists' freedom of assembly that apply to no one else.

[2] The United Kingdom has ratified 87 Conventions (of which 55 are in force), one of the most important of which on freedom of association (Convention 151) was ratified by the Thatcher government.

interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties (para 67).

Committee of Experts and the CFA

The TUC is also concerned that the role and importance of the ILO supervisory bodies appear not to be fully appreciated by the government (Annex, para 2). It completely misrepresents the position to say that these bodies simply 'fulfil an informal advisory role'. The mandate of the Committee of Experts was most recently expressed as follows:

> *The Committee of Experts … is composed of legal experts charged with examining the application of ILO Conventions and Recommendations by ILO member States. …. The Committee's technical role and moral authority is well recognised, particularly as it has been engaged in its supervisory task for over 85 years, by virtue of its composition, independence and its working methods built on continuing dialogue with governments taking into account information provided by employers' and workers' organizations. This has been reflected in the incorporation of the Committee's opinions and recommendations in national legislation, international instruments and court decisions.*[3]

There are two points here which the TUC would like to draw to your attention. The first is the membership of the Committee, which according to the International Labour Office is 'composed of 20 eminent jurists'. In the past, these eminent jurists have included Earl Warren (later to become one of the greatest Chief Justice of the United States).[4] The importance of the Committee lies in the fact that it is the only body, which also according to the International Labour Office is able to provide 'an impartial and technical evaluation of the state of application of international labour standards'.

The other point relates to the significance attached to the jurisprudence of the Committee of Experts (and the CFA) by courts around the world. This is to be seen most persuasively in relation to the ECtHR in the ground – breaking Grand Chamber decision in *Demir and Baycara v Turkey* (esp. para 166, where the Court relies heavily on the Committee of Experts).

It is also to be seen in the recent decision of the Supreme Court of Canada (*Saskatchewan Federation of Labour v Saskatchewan* [2015] SCC 4), where the SCC unequivocally held that the right to strike was protected by the Canadian Charter of Rights. In doing so the Court referred freely to the ILO Committee of Experts and continued at para 69:

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[3] This statement by the Committee of Experts in its 2015 Report, was endorsed in a historic joint statement of the Workers' and Employers' Groups on 23 February 2015.

[4] According to the International Labour Office, 'The ILO Committee of Experts may not be widely known outside the world of work, but its role has been vital and its membership over the decades – including Roberto Ago, Prafullachandra Natvarlal Bhagwati, Boutros Boutros Ghali, Arnold McNair, William Rappard, José Maria Ruda, Georges Scelle, Max Sorensen, Grigory Tunkin and Earl Warren – reads like a who's who of international law and diplomacy'.

The decisions of the Committee on Freedom of Association have considerable persuasive weight and have been favourably cited and widely adopted by courts, tribunals and other adjudicative boards around the world, including our Court.

ILO - other matters

Much of the rest of the Government's Annex is in the form of assertion rather than argument and is generally unsupported by authority or detailed evidence. There are, however, two points to which the TUC feels obliged to respond.

The first relates to the claim in the Annex, para 9 that turnout and voting thresholds are a 'common feature of the laws or collective agreements of a number of countries', listed in footnote 9. What this does not tell us, however, is how many of these arrangements are included voluntarily in collective agreements or union rule-books, rather than imposed by the State. The distinction is fundamental.

But more importantly, in presenting this information in para 9, the Government singularly fails to address the Committee of Experts' persistent criticism of thresholds, relating to which it said in 1998, in Observations relating to Bulgaria:

In its previous comments, the Committee recalled the need to take steps to amend section 11(2) of the Act of March 1990 regarding the settlement of collective labour disputes, which provides that a decision to call a strike must be taken by a majority of all the workers in the respective enterprise or unit. While noting the Government's reply which states that the provisions of the Act are liberal in character and any attempt to amend it may infringe its democratic approach, the Committee recalls once again that it considers that account should only be taken of the votes cast and that the required quorum and majority should be fixed at a reasonable level (see 1994 General Survey on freedom of association and collective bargaining, paragraph 170). In this regard, the Committee requests the Government to take the necessary measures to amend section 11(2) of the Collective Labour Disputes Act of 1990 in order to bring it into closer conformity with the principles of freedom of association contained in the Convention.

Finally, the Annex, para 20 reveals a deep misunderstanding of freedom of association and the right to bargain collectively. It is of course the case that legislation passed by Parliament 'may affect collective agreements'. That is not the point. What Parliament cannot do consistently with ILO Convention 98 is pass legislation that gives to the government the power to rewrite collective agreements, as proposed by the Bill, clauses 13 and 14.

As the Committee of Experts very recently made clear in 2014 in Observations relating to Croatia:

> *The Committee … had requested the Government to provide a copy of the legislative provisions allowing the Government to modify the substance of collective agreements in the public service and information on their application in practice.* ***Recalling that, in general, a legal provision which allows one party to modify unilaterally the content of signed collective agreements is contrary to the principles of collective bargaining, the Committee once again requests the Government to provide, with its next report, a copy of the said legislative provisions, as well as information on their application in practice.*** *(Emphasis in original).*

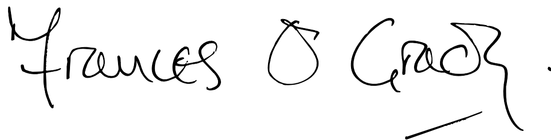
Conclusion

For these reasons, the TUC believes that the Government has failed to address the human rights concerns relating to the Trade Union Bill.

It is also our view that the government has failed to provide a convincing case that the Bill is consistent with the United Kingdom's obligations under ILO Conventions, which the UK has ratified. These include Conventions 87, 98, 135 and 151. For reasons outlined by the ECtHR in *Demir and Baycara*, above, the violation of ILO Conventions has clear implications for compliance with the ECHR.

We hope that this submission will assist the Committee in its on-going scrutiny of the Bill. Please do contact me directly if we can be of any further assistance to the Committee.

Yours sincerely



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