

Trade Union Rights within A British Bill of Rights

DRAFT TULO Submission to the Joint Committee on Human Rights

Background

1. The Trade Union and Labour Party Liaison Organisation (TULO) welcomes this opportunity to contribute to the debate about a British Bill of Rights. TULO is the organisation that represents the 16 trade unions currently affiliated to the Labour Party, with a combined affiliated membership of 2.4 million. In this submission TULO wishes to add its voice to the debate about a British Bill of Rights in the belief that if there is to be such a measure, it must make full provision for trade union rights.
2. Strong trade unionism is essential in an era of globalisation and the continuing growth of powerful trans-national corporations. Yet trade union rights are constantly undermined and are the subject of steady erosion. The British government is now regularly found to be in breach of ILO Conventions on fundamental trade union rights by the ILO Committee of Experts; as well as in breach of the European Social Charter of 1961 by the European Committee on Social Rights. Most recently, the United Kingdom was found to be in breach of article 11 of the European Convention on Human Rights in the landmark *ASLEF* case.
3. As a result, TULO believes that constitutional protection of trade union rights in a Bill of Rights - with ILO standards as a minimum - is necessary if working people are to be adequately protected from the misuse of governmental and corporate power.

Trade Union Rights in Britain

4. TULO welcomes the fact that a number of measures have been taken by the Labour government since 1997 to extend the rights of trade unions. The statutory recognition procedure was a particularly welcome initiative, though as we shall explain below there are concerns that the procedure is too narrowly drawn. TULO remains concerned, however, that many of the restrictions on trade union rights inherited from the

Thatcher/Major era remain in place, seriously circumscribing trade union freedom. Some of these restraints and the impact which they have on trade union freedom were outlined in evidence submitted to the JCHR in 2004 at the time of its inquiry into the International Covenant on Economic, Social and Cultural Rights. Submissions were made to the Committee by CWU, GMB, TGWU and UNISON, as well as the RMT which is no longer a member of TULO. Little has been done since then to rectify the shortcomings of British law, and indeed the government has emphasised its isolationist position in Europe by negotiating an opt out from the EU Charter of Fundamental Rights. This is a move greatly regretted by TULO.

5. Trade union rights are protected by a number of international human rights treaties to which the United Kingdom is a party. They include ILO Conventions 87 and 98 and the Council of Europe's Social Charter of 1961. So far as the ILO Conventions are concerned, these deal specifically with freedom of association, and the United Kingdom has been found in breach of these provisions consistently since 1989 by the ILO Committee of Experts.

➤ In its most recent report on Convention 87, the Committee repeated concerns about the statutory restrictions on trade union autonomy, taking strong exception to the inability of trade unions to exclude or expel individuals on the ground of their membership of political parties hostile to the interests of the union. These provisions – which have already been considered by the JCHR – were also held by the European Court of Human Rights to breach article 11 of the European Convention on Human Rights. Apart from these concerns about trade union autonomy, the Committee of Experts also renewed its concerns about the tight restrictions on the right of trade unions to defend the economic and social interests of their members by taking collective action in appropriate cases. In particular, it renewed its findings that the total ban on solidarity action in British law violated the requirements of Convention 87.

➤ In its most recent report on Convention 98, the Committee broke new ground by raising concerns for the first time about the new recognition procedure introduced by the Employment Relations Act 1999. Four questions in particular were raised, three of these relating to the exclusion of small businesses from

the procedure; the fact that an application for recognition under the procedure can be blocked by an employer voluntarily 'recognising' a non – independent trade union; and the failure to provide adequate protection for workers from anti – union conduct by employers. The other concern raised by the Committee was that recognition can only be granted where the union can show majority support, whereas under ILO jurisprudence a trade union should be entitled to bargain on behalf of its members, even where the union does not have support from a majority of the workforce.

6. So far as the Social Charter is concerned, compliance with obligations under this treaty is reviewed by a rolling programme of scrutiny undertaken by the Social Rights Committee of the Council of Europe. In its last report published in 2005, the Committee examined British compliance with 7 articles of the treaty, including the trade union rights provisions of article 5 (on the right to organise) and 6 (on the right to bargain and the right to strike). These 7 articles contain 23 separate obligations, with which the United Kingdom was found to be in conformity with only 13. The cases of non conformity were said to include articles 5 and 6, in each case for several reasons.

- In the case of article 5 (on the right to organize), three grounds of non – conformity were given. These related to (i) section 15 of the Trade Union and Labour Relations (Consolidation) Act 1992 which makes it unlawful for a trade union to indemnify an individual union member for a penalty imposed for an offence or contempt of court (ii) section 65 of the 1992 Act which severely restricts the grounds on which a trade union might lawfully discipline members represent unjustified incursions into the autonomy of trade unions; and (iii) section 174 of the 1992 Act (as amended by the Employment Relations Act 2004) which entitles a trade union to exclude members for reasons linked exclusively or mainly to the fact that they have taken part in the activities of a political party and not because they were affiliated to the party. These measures were said to constitute 'an excessive interference by the law with trade union membership conditions'.
- In the case of article 6(4) (on the right to strike), the non – conformity related to (i) the scope for workers to defend their interests through lawful collective

action, which was said to be ‘excessively circumscribed’; (ii) the requirement to give notice to an employer of a ballot on industrial action, which was said to be ‘excessive’ in light of all the other procedural hurdles on trade unions, such as the duty to issue a fresh notice before commencing strike action; and (iii) the protection of workers against dismissal when taking industrial action was said to ‘insufficient’, apparently notwithstanding the changes to unfair dismissal introduced in 2004. In the case of the first of these grounds of non conformity, the right to strike was said to be excessively circumscribed for a number of reasons, in the case of the second the conclusion was reached notwithstanding the simplification of the procedures introduced in 2004, and in the case of the third concern was expressed that the protection against dismissal applied only where the strike was lawful, and that specific forms of legitimate industrial action were not lawful in British law.

Trade Union Rights and Bills of Rights

7. These continuing violations of fundamental trade union rights form part of the background to TULO’s concern that any future British Bill of Rights should include core trade union rights. That is to say the right to organise, the right to bargain and the right to strike. There is no reason why trade unions in Britain should have rights which are inferior to those of their counterparts in Europe; there is no reason why trade unions in Britain should have rights that fall short of minimum international standards; and there is no reason why trade unions in Britain should not have access to a domestic legal forum to uphold these rights. It is now standard practice in modern constitutions for trade unions to be expressly included, and it is increasingly important that they should be included, in light of the growing power of trans-national corporations.

8. Trade union rights are included in national constitutions the world over, from South America to South Africa to Japan. In terms of the European Union, the express inclusion of trade union rights is to be found in various forms in the national constitutions in all but a few of the original 15 member states.

In **Ireland**, the scope of trade union rights hardly extends beyond the protection currently provided in article 11 of the ECHR, that is to say a right to form and join trade unions. **Luxembourg** guarantees a right to trade union freedom;

In **Greece, Italy, Portugal, Spain** and **Sweden**, in contrast, there is express recognition of the right to freedom of association generally, as well the right to strike in particular, albeit expressed differently in each case;

In **Finland** and **Germany** there is express recognition of the right to freedom of association generally, a right which has then been implied by the courts to include the right to strike in particular;

In **France** and **Portugal** there is express recognition not only of the right to freedom of association but also the right to collective bargaining and the right to strike;

In the **Netherlands**, the courts have directly applied the right to strike guarantees in the European Social Charter as a result of a constitutional guarantee that international treaties are to be enforced in domestic law.

9. It is thus clear that of the first 15 EU member states trade union rights are excluded from only a small minority of national constitutions. These include **Belgium** and **Denmark**, constitutions which survived the Second World War. In constitutions crafted since the end of the war, there has been a tendency to include social rights generally and trade union rights specifically. Apart from questions of national characteristics, prevailing political philosophy and the need for constitutional consensus, it would be reasonable to speculate that these constitutional arrangements reflect a changing awareness about the functions of Bills of Rights and that modern Bills of Rights must embrace a wider range of values than those to be found reflected in the US Constitution drafted at the end of the 18th century. Modern thinking about Bills of Rights is most visible in the constitutional arrangements of the 12 new EU accession states where we find a commitment to the protection of trade union rights in the constitutions of **Bulgaria, Cyprus, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia** and **Slovenia**. The only exceptions are **Malta**

and the **Czech Republic**, though the former is a much older constitution and belongs to an earlier generation of documents, and in the case of the latter it is expressly provided that international human rights treaties which have been duly ratified are 'immediately binding and are superior to law'.

Trade Union Rights and a British Bill of Rights

10. In the light of the foregoing, it would thus be eccentric to contemplate a modern Bill of Rights which did not fully include trade union rights. Not only would we be going against the grain of current practice, but we would do so in a way that placed among a very small minority of states within the EU, with many of the countries which include trade union rights being much less fully developed economically than the United Kingdom. It would also place us in a minority position in the G8 countries, with **Canada** (following a recent Supreme Court decision introducing constitutional protection for the right to collective bargaining) joining **France, Germany, Italy, Japan** and **Russia** as countries with formal constitutional protection of trade union rights, leaving the United Kingdom and the United States isolated. As already indicated in paragraphs 4 to 7 above, in the case of the United Kingdom the exclusion of trade union rights from a future Bill of Rights cannot be justified on the ground that these rights are adequately protected in British law without the need for constitutional protection. Constitutional protection of trade union rights would ensure that these rights stopped being the political playthings of political parties.

11. Questions arise about the content of any provision in a Bill of Rights dealing with trade union rights. TULO believes that this should cover the three core trade union rights recognised by a collection of international human rights treaties, namely –

I. The right to organise

- I.i) The right of trade unions to draw up their own constitutions and rules and to elect their representatives in full freedom
- I.ii) The right of trade unions to organise their administration and activities and to formulate their programmes, including political activity
- I.iii) The right of trade unions to organise on a trans-national basis without impediment in national law

II. The right to bargain

- II.i) The right of trade unions to engage in collective bargaining on behalf of their members and others
- II.ii) The right of trade unions to engage in collective bargaining to apply to all workplaces, **regardless of size**
- II.iii) The right of trade unions to engage in collective bargaining to include the right to bargain **on all matters relating to employment**

III. The right to strike

- III.i) The right of trade unions to organise industrial action in defence of their social and economic interests
- III.ii) The right of trade unions to organise industrial action in solidarity with other workers at home or overseas
- III.iii) The right of trade unions to organise co-ordinated trans-national action against trans-national corporations

12. TULO recognises that rights of this kind are unlikely to be unlimited, even when entrenched in a constitution. Indeed the ILO allows a range of qualifications to fundamental trade union rights, while the European Social Charter states expressly that limits may be imposed on trade union and other rights where this is ‘necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals’. There is thus a concern that any trade union rights in a Bill of Rights could easily be trumped by other rights or interests. In order to avoid this risk, TULO believes that any trade union rights provision in a British Bill of Rights should follow the example of the International Covenant on Economic, Social and Cultural Rights. In article 8, this too purports to provide international protection for trade union (and other) rights, and in doing so anticipates the possibility that there will be limits on these rights. It is also provided, however, that

“Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.”

A similar provision in a British Bill of Rights would ensure that any statutory restrictions on fundamental trade union rights would at least have to satisfy ILO Conventions, and that the ILO standard would be the minimum below which British law could not fall.

Conclusion

13. TULO believes strongly that any future British Bill of Rights must include trade union rights. This should not be confined to a provision that simply mimics the weak provisions of the European Convention on Human Rights, article 11, already part of our law as a result of the Human Rights Act 1998. This provides simply that as part of the general right to freedom of association, everyone has the right to form and join trade unions for the protection of their interests. It is true that this provision has been fairly widely interpreted by the European Court of Human Rights in two cases brought from the United Kingdom in recent years, one by the NUJ and the RMT, and the other by ASLEF. In the latter case it was established that:-

“trade unions enjoy the freedom to set up their own rules concerning conditions of membership, including administrative formalities and payment of fees, as well as other more substantive criteria, such as the profession or trade exercised by the would-be member.”

Yet despite these developments, the article 11 right remains primitive and poorly developed and falls a long way short of the full protection of trade union rights to be found in the Council of Europe’s Social Charter and ILO Conventions 87 and 98 as construed by the supervisory bodies.

14. These limitations of article 11 of the ECHR were recently revealed in a case brought by UNISON where the Strasbourg court refused to give full recognition to the right to strike as an incident of the right to freedom of association. In the human rights era, it is no longer acceptable that the fundamental rights of trade unions should be compromised by law to the extent that they are in the United Kingdom. The British government is increasingly being pulled up by international agencies supervising treaties that the United Kingdom voluntarily agreed to be bound by. This is a process that is likely to continue as trade

unions develop new strategies to reclaim the rights that were lost during the Thatcher and Major years. It is time that this was brought to an end and time that internationally recognised trade union rights were entrenched in domestic law, so that British trade unions could seek a remedy in the British courts when their rights were violated rather than be compelled to take their grievances to various international forums. Human rights should be protected from - and entrenched against - political interference: this applies as much to the human rights of trade unions and trade unionists as it does to any other human rights. TULO welcomes the Bill of Rights debate and the opportunity for the constitutional entrenchment of trade union rights, following the example of other modern democracies.