



Bogg, A. (2016). Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State. *Industrial Law Journal*, 45(3), 299-336. [dww023]. <https://doi.org/10.1093/indlaw/dww023>

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Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State

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I am extremely grateful to Ruth Dukes, Keith Ewing, Mark Freedland, and the editors of this special issue of the ILJ, for penetrating and critical insights. I have discussed the issues in public lectures at the Manchester Industrial Relations Society and to the REMARK LAB project in Stockholm, and I am grateful to Ralph Darlington and Niklas Bruun for the invitations to lecture. I am also indebted to Rachel Hunter for brilliant research assistance. Needless to say, all errors are my own.

ABSTRACT

The Trade Union Act 2016 marks a historically significant realignment in the ideological politics of trade union regulation. It represents a more authoritarian style of Conservative ideology and statecraft in the sphere of trade union regulation, and this is reflected in three main characteristics: (i) a repressive strategy of de-democratisation, undermining political resistance and stifling dissent in the democratic process; (ii) heavier reliance on direct State coercion, including the techniques of criminalisation, alongside the empowerment of employers to use civil law remedies against trade unions and workers in industrial action situations; (iii) the elevation of social order in the regulation of strike activity. The article then considers the likely prospects of the legislation, and the wider ideological significance of this turn towards authoritarianism for Conservative political thought ‘beyond neo-liberalism’.

1. INTRODUCTION

The task of assessing the significance of a single piece of legislation within months of its enactment is fraught with interpretive risks and difficulties. On any sensible view of the

matter, however, the Trade Union Act 2016 stands as one of the most radical and important pieces of trade union legislation to have been enacted in a generation. The article will examine the ideological significance of the Trade Union Act 2016, evaluating it against the historical context of the ‘neo-liberal’ reforms of labour law during the previous Conservative governments between 1979 and 1997. The principal argument developed here is that the new Conservative approach to industrial relations, as manifested in the legislative activity leading to the enactment of the Trade Union Act 2016, is to take labour law ‘beyond neo-liberalism’. In so doing, it reflects a highly authoritarian strand of Conservative ideology which, rather than being *neo*-liberal, is *anti*-liberal in its orientation.¹ This is reflected in the systematic undermining of political opposition both in the sphere of party politics and in wider civil society, the State’s increasing recourse to the direct use of coercion and criminal penalties to pacify workers and trade unions, and the elevation of unity and social order over agonistic expressions of industrial and political dissent. The social and political context of the legislation is then discussed, focusing in particular on the ways in which devolution, human rights, and trade union organisational strategies might influence the operation of the legislation. While the full significance of the Trade Union Act 2016 cannot be appreciated in advance of its social impact on the industrial relations system, the Act may prove to be a watershed moment in the history of labour legislation.

¹ On anti-liberalism in certain strands of Conservative political thought, see David Dyzenhaus (ed), *Law as Politics: Carl Schmitt’s Critique of Liberalism* (Duke UP 1998).

2. THE BACKGROUND TO THE ACT

The Conservative Manifesto proposals for trade union reform were tucked away in a compressed couple of paragraphs in the chapter on ‘Jobs for all’.² It proposed new turnout thresholds for strike ballots, and a ‘tougher threshold’ of 40% overall support for strike action in ‘essential public services’ identified as ‘health, education, fire and transport’.³ In addition, the manifesto proposed to repeal ‘nonsensical’ restrictions on the use of agency labour during strikes; limiting the mandate period for strike ballots; tackling the ‘intimidation’ of non-striking workers; ensuring an opt-in process for union subscriptions; tightening the rules on paid facility time in the public sector; and reforming the role of the Certification Officer (CO). In the later chapter, ‘Making government work better for you’, new measures to establish an ‘opt-in’ arrangement for trade union political funds were proposed, though this was set out *alongside* a commitment to seek a comprehensive agreement on party funding reform.⁴ This linkage in the manifesto undermines the argument that the regulation of political funds was a trade union reform measure, rather than a partisan attempt to restrict the funding of the Labour Party.

Many of these proposals seem to have originated in an obscure ‘research note’ produced for the right-wing think tank *Policy Exchange*, ‘Modernising Industrial Relations’.⁵ Students of labour legislation history, accustomed to the depth and rigour of Hayek’s magisterial oeuvre as a compass for Conservative policy, will be sorely

² See the Conservative Party Manifesto: Conservative Party, ‘Strong Leadership A Clear Economic Plan A Brighter, More Secure Future’ (2015) 18–19. Available at <https://www.conservatives.com/manifesto> accessed 6 June 2016.

³ Note that the Act now extends to ‘important’ public services, and the list of services has been extended to include decommissioning of nuclear installations and management of radioactive waste and spent fuel; and border security. One of the Government’s arguments in favour of a wide margin of appreciation under Article 11 is the existence of a clear manifesto commitment to legislate on trade unions (see letter from Sajid Javid to Harriet Harman, Chair of the Joint Committee on Human Rights (5 January 2016) 2. Available at http://www.parliament.uk/documents/joint-committees/human-rights/Letter_from_Sajid_Javid_050116.pdf) accessed 6 June 2016). The slippage from ‘essential’ to ‘important’ public services, from the manifesto to the Act, undermines that claim.

⁴ Conservative Party Manifesto (n 2) 49.

⁵ Ed Holmes, Andrew Lilico and Tom Flanagan, ‘Modernising Industrial Relations’ (*Policy Exchange*, September 2010) <http://www.policyexchange.org.uk/images/publications/modernising%20industrial%20relations%20-%20sep%2010.pdf> accessed 6 June 2016.

disappointed by the thinness of ‘Modernising Industrial Relations’. It is peppered with legal inaccuracies,⁶ and its use of economic arguments is selective.⁷ Whatever the note lacks in terms of its intellectual rigour, it more than makes up for in the boldness of its extensive proposals for legislative reform. Many of these proposals were contained in the original Trade Union Bill: (i) more detailed information to be contained on the strike ballot paper; (ii) a requirement of 50% turnout in strike ballots; (iii) a requirement of 40% voting in favour of strike action; (iv) permitting employers to use agency staff during strikes; (v) lengthening the standard notice period for strike action to 14 days; (vi) restricting ‘taxpayer funding’ of facility time; (vii) tightening the rules on union political funds favouring an opt-in scheme for members; and (viii) banning ‘check off’ arrangements in the public sector.

It is also worthwhile setting out those *Policy Exchange* proposals that did not make it into the Bill, for they may give a flavour of what is to come if the Trade Union Act turns out to be the first legislative step in a more ambitious programme of reform: (i) reducing unfair dismissal protection for strikers, so that they are protected from selective dismissal for the first eight weeks of the dispute only; (ii) banning strike action in contexts of ‘essential’ goods and services; (iii) requiring a secret ballot in all cases of statutory union recognition claims; (iv) requiring that a union meets a minimum membership threshold of 10% before a strike ballot can be called; (v) liberalising the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992), s 145B,

⁶ For example, at page 2, we are told that ‘industrial relations law, almost uniquely, provides extensive immunities from liability for tort and breach of contract’. I am unaware of any existing statutory ‘immunity’ against actions for breach of contract occurring during a strike, as cases like *National Coal Board v Galley* [1958] 1 WLR 16 (CA) demonstrate. At page 9, the authors offer the surprising revelation that ‘the election of a Labour Government marked a radical departure from its predecessor’, such that ‘statutory protection for trade unions against prosecution sharply increased’. Again, I am not aware of any statutory provisions that provided trade unions with immunity from criminal prosecution during the ‘New Labour’ era.

⁷ The ‘note’ is based upon the principal argument that collective bargaining is justified as a regulatory response to the monopsony power of employers. Since the monopsony power of employers is declining, labour laws need to be ‘modernised’ to reflect the new labour market context. For an alternative and powerful view of the economic arguments in favour of collective bargaining, see Lydia Hayes and Tonia Novitz, *Trade Unions and Economic Inequality* (Institute of Employment Rights 2014).

which currently restricts ‘offers’ where the employer’s ‘sole or main purpose’ is that workers’ terms will no longer be determined by a collective agreement, in order to expand the scope for individual negotiation; and (vi) using competition law to challenge the ‘monopoly’ position of trade unions in the provision of union services.⁸

During the Parliamentary process, the Bill underwent significant changes.⁹ The Government suffered important defeats in the House of Lords, on electronic balloting for strike ballots,¹⁰ limiting the ‘opt in’ to the political fund to new members,¹¹ and the imposition of safeguards limiting the scope for Ministers to restrict facility time by secondary legislation. The Government was also weakened politically by the impending EU Referendum, and the need to garner trade union support for the ‘remain’ campaign. This led to a more conciliatory tone in the later stages of the Bill, reflected perhaps in the volte-face on the proposed ban on the check off in the public sector.¹² In many ways, then, the final version of Trade Union Act 2016 is the tip of a much larger ideological iceberg. It is important to keep this context in mind in assessing the broader significance of the legislation, for the Act reflects what was politically achievable rather than what was politically desired by the Government.

The main provisions of the Act cover a wide range of trade union matters, although some of the provisions will require further specification through secondary legislation. In brief, the legislation addresses the following five matters: (i) restrictions on

⁸ Interestingly, the ‘research note’ did not address the matter of alleged intimidatory tactics on picket lines. This element of the Act’s reforms may be traced back to the review commissioned by the Government and led by Bruce Carr QC: ‘The Carr Report: The Report of the Independent Review of the Law Governing Industrial Disputes’ (October 2014). Available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/363806/Carr_Review_Report.pdf> accessed 6 June 2016 (Carr Report).

⁹ On the provisions in the Bill, see Michael Ford and Tonia Novitz, ‘An Absence of Fairness... Restrictions on Industrial Action and Protest in the Trade Union Bill 2015’ (2015) 44 ILJ 522. For an account that places recent reforms in historical context, see Paul Smith, ‘Labour under the law: a new law of combination, and master and servant, in 21st century Britain?’ (2016) 46 Industrial Relations Journal 345.

¹⁰ HL Deb 16 March 2016, vol 769, cols 1854–1868; HC Deb 27 April 2016, vol 608, cols 1471–1500.

¹¹ HL Deb 16 March 2016, vol 769, cols 1871–1895; HC Deb 27 April 2016, vol 608, cols 1505–1520.

¹² HL Deb 19 April 2016, vol 771, cols 583–585; HL Deb 25 April 2016, vol 771, cols 909–913; HC Deb 27 April 2016, vol 608, cols 1506–1520.

the right to strike, especially in relation to new ballot thresholds and notice requirements; (ii) tightening the law on picketing and protest; (iii) restricting the political voice of trade unions by switching to an ‘opt-in’ scheme for trade union political funds, applying to new members following a transitional period; (iv) new investigative powers for the CO, including the power to impose quasi-criminal penalties in certain circumstances; (v) curtailing the organisational supports for public sector trade unionism, by limiting the check off and facility time in the public sector. The legislation thus constitutes a bold, ambitious and comprehensive attack on trade union freedoms.

3. BEYOND NEO-LIBERALISM: THE RISE OF THE AUTHORITARIAN STATE

The first reflex of the labour lawyer is no doubt to assess the significance of the Trade Union Act 2016 in historical context of the legislative reforms to trade union law enacted between 1979 and 1997. This provides a useful starting point for analysis. In retrospect, two scholarly engagements with that period stand out. First, the work of Davies and Freedland on legislative history in *Labour Legislation and Public Policy* provides a rich and judicious account of the development of ‘neo-liberal’ labour market reforms during the period 1979-1990.¹³ The leitmotif of their work is that the restriction of trade union power was a central plank in a wider strategy of restructuring the economy and the achievement of a ‘free’ labour market.¹⁴ It blends a careful historical analysis of the legislative history of the period, analysed in its wider political and economic context. Secondly, the work of Lord Wedderburn in ‘Freedom of Association and Philosophies of

¹³ Paul Davies and Mark Freedland, *Labour Legislation and Public Policy: A Contemporary History* (Clarendon Press 1993).

¹⁴ *ibid* chs 9–10.

Labour Law' endures as a masterpiece of the period, subjecting the legislative reforms of the period to a searing ideological critique.¹⁵ In particular, Wedderburn was keen to emphasise the profound influence of Friedrich von Hayek's liberal political philosophy on the broad pattern of trade union reforms during the period. These two perspectives should be regarded as complementary. While Davies and Freedland are keen to emphasise the responsiveness of successive Governments to the incremental experience of legislative reforms, and Wedderburn is keen to emphasise the grand ideological architecture of the entire edifice, there is no significant conflict between the two enterprises. Indeed, the cautious incrementalism of Conservative reforms of trade union law traced in Davies and Freedland's work may itself be a reflection of Hayek's rejection of 'constructive rationalism', and his general suspicion of the powers of human reason to reorder society to a political blueprint.¹⁶

Davies and Freedland argued that three principal movements in the restriction of trade union power could be detected across the entire pattern of trade union legislation during that period. Refracting those movements through Wedderburn's work on legal ideology enables us to identify the neo-liberal underpinning to each element. First, Davies and Freedland identified the 'de-politicisation' of trade unions through the dismantling of corporatist arrangements and a negation of trade unions as public constitutional actors. This 'de-politicisation' may be understood as an attempt to 'constitutionalise' the 'free market' order, and to protect it from encroachment through the enactment of 'social legislation' brought about by the political pressure group activities of trade unions.

¹⁵ Lord Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18 ILJ 1.

¹⁶ On Hayek and 'evolutionary rationalism', see Andrew Gamble, *Hayek: The Iron Cage of Liberty* (Polity Press, 1996) 32 where he suggests of Hayek's 'evolutionary' approach to rationalism that, 'An evolutionary rationalist might propose a change to a particular rule, but the change would always be cautious, incremental, and experimental.'

Wedderburn's analysis is astute to this feature of Hayek's work, which was the framing of a 'constitution of liberty' to ensure that the law as a system of general rules of just conduct was immunised from interference by democratically elected political elites.¹⁷

The second movement was an underlying strategy of encouragement of employers to resist the demands of trade unions through the techniques of the civil law, rather than the direct deployment of coercion by the State to restrict trade union power. Although Davies and Freedland do not connect this strategy to an ideological base, in my view this movement reflects deeper themes in Hayek's work. For Hayek, liberty can only be achieved through what he described as 'nomos', or the law of liberty.¹⁸ This encompassed general and abstract rules of just conduct, embodied in the evolutionary wisdom of the common law, with its protection of freedom of contract and private property. Hayek decried the enactment of 'special legislation' favouring interest groups such as trade unions, and the growing tendencies of the bureaucratic state 'in conferring discretionary and essentially irresponsible powers on administrative authority.'¹⁹ While Hayek admitted that 'special legislation' might be 'the only practicable way of restoring the principles of freedom',²⁰ his fundamental commitment was to the restoration of common law rules as the basis for a free society. This favoured the private enforcement of common law rights, over the extension of arbitrary public coercive power. Since the complex statutory provisions regulating strike action simply provided a shrinking set of statutory immunities from existing common law liabilities, the use of injunctions by employers to challenge strike action provided a procedural mechanism enabling the

¹⁷ Wedderburn (n 15) 14.

¹⁸ FA Hayek, *Law, Legislation and Liberty* (Routledge, 1982) chapter 5.

¹⁹ FA Hayek, *The Constitution of Liberty* (Routledge, 1960) 279.

²⁰ *ibid* 279.

employer to vindicate its subsisting common law rights. The detailed statutory focus of much of the strike litigation during the 1980s tended to obscure this basic point, and its deeper linkage to Hayek's commitment to the primacy of private law as 'nomos'.

Finally, Davies and Freedland identified the theme of discouraging solidaristic practices amongst workers and trade unions. This was to be achieved through the introduction of legal mechanisms, such as secret ballots, which fostered individualistic behaviour within trade unions. Again, Hayek's work sheds light on this phenomenon. Hayek was troubled by the use of 'coercion' by trade unions against workers, and this was reflected in his hostility to closed shops and industrial picketing.²¹ 'Solidarity' represented an atavistic instinct that was incompatible with the only freedom that could be achieved in a modern society, through the enforcement of a market order.²² Solidaristic habits needed to be disrupted so that the acquisitive moral instincts upon which a market order depended could be inculcated afresh. In this way, the balloting measures were important in symbolising the separation of each sovereign individual and prioritising her own competitive will over the needs of her fellows.

It is tempting to read these ideological movements of 'neo-liberalism' into the new provisions of the Trade Union Act. On this view, the Act simply picks up the familiar neo-liberal story that was paused, or at least mollified, during the intervening period between 1997 and 2015. Such a reading would be complacent and mistaken. The new ideology represents a much more authoritarian form of Conservatism. Considering the

²¹ *ibid* 274-275.

²² Gamble (n 16) chapter 3.

Trade Union Act 2016 in its wider legal and political context, the new authoritarian Conservatism displays three main points of distinction: first, it moves from ‘de-politicisation’ to a more fundamental process of ‘de-democratisation’ of trade unions and other actors in civil society; secondly, there is a marked preference for *direct* State coercion, reflected in the progressive supplementation of civil law remedies administered by employers, to be flanked by criminal law measures administered and enforced directly by the State; finally, there is an important shift in justification for internal union democracy focused on an *external* concern to enforce the unity of the ‘social order’.

It is certainly true, as Wedderburn has emphasised, that neo-liberalism depended upon a ‘strong state’ to enforce the general rules of just conduct underpinning the spontaneous order of the market.²³ Nevertheless, Hayek was utterly opposed to totalitarianism. He was concerned to defend a constitution of *liberty*. Hayek’s objection to special legal ‘privileges’ for trade unions focused on the Trade Disputes Act 1906: he did not argue for a restoration of 19th century criminalisation of collective activities.²⁴ Legislation was needed to restore ‘the same general principles of law that apply to everybody else’.²⁵ Indeed, he was explicit on the limits of legislation as a technique for restoring the market order: ‘legal prohibition of unions would...not be justifiable. In a free society much that is undesirable has to be tolerated if it cannot be prevented without discriminatory legislation.’²⁶ Given this reasoning, it seems to me to be highly doubtful that he would have regarded the expansion of the CO’s administrative discretion and use of quasi-criminal penalties as anything other than the degradation of the Rule of Law through an

²³ Wedderburn (n 15) 15.

²⁴ Hayek (n 19) 268.

²⁵ *ibid* 279.

²⁶ *Ibid* 275.

expansion of arbitrary discretionary powers. In light of Hayek's commitment to federalism as a constitutional check on arbitrary central government,²⁷ the proposals to abolish check off and facility time would also seem to constitute the unjust application of coercion through special legislation. While it is certainly true that Hayek was explicit about the risks that mass democracy posed to the Rule of Law and human freedom,²⁸ this did not set him apart from many other liberal thinkers in the middle decades of the twentieth century.²⁹ The blatant partiality of some of the recent measures on party funding, 'special' social legislation in its own way, would be anathema to Hayek's account of the Rule of Law. In the conclusion, we return to the question of how best to make sense of the new authoritarianism represented by the Trade Union Act measures.

4. FROM 'DE-POLITICISATION' TO 'DE-DEMOCRATISATION'

Davies and Freedland identified the strategy of 'de-politicisation' of trade unions as a dominant element in the Conservative Government's wider strategy of restructuring the labour market. This involved the deconstruction of corporatist practices and institutions, as a way of marginalising the political voice of organised labour. As the Trade Union Act 1984 demonstrated, it extended further still to the regulation of trade union political funds. Following the discussions in the 1983 Green Paper *Democracy in Trade Unions*,³⁰ the 1984 Act tightened legal regulation on the political fund, through the statutory requirement of a periodic ballot procedure and an individual right to 'opt out' of the political fund. Significantly, and as reflected in the Green Paper, this was justified

²⁷ Ibid 184.

²⁸ Gamble (n 16) 91-97.

²⁹ Jan-Werner Muller, 'What, if anything, is wrong with Hayek's model constitution?', in David Dyzenhaus and Thomas Poole (eds), *Law, Liberty and State: Oakeshott, Hayek and Schmidt on the Rule of Law* (CUP, 2015) 261, 262.

³⁰ Department of Employment, *Democracy in Trade Unions* (Green Paper, Cmnd 8778, 1983) **ch 4**.

principally in terms of the internal democratisation of trade unions. This strategy of ‘de-politicisation’ would provide the foundations for a ‘constitution of liberty’,³¹ by preventing trade unions from deploying their political power to secure legislation that would otherwise interfere with the spontaneous order of a free labour market.

There may be a temptation to regard the new provisions on the political fund in the current Trade Union Act as a simple reprise of the debates in 1983 - 1984. After all, the possibility of a switch from ‘opt out’ to ‘opt in’ was canvassed explicitly in the 1983 Green Paper.³² This simple reading of continuity would be a mistake. The new provisions on the political fund in the Trade Union Act are far more intrusive than anything that would have been regarded as politically feasible or appropriate by the architects of the 1984 scheme. The Trade Union Act reforms must be viewed as a part of a wider political strategy to suppress political opposition and dissent in the political process and wider civil society, of which the Trade Union Act 2016 is only a part. While trade unions are the principal target in this strategy of suppression, charities and even opposition political parties are now experiencing its repressive effects. This reflects what might be described as a strategy of ‘de-democratisation’, which is altogether more repressive than the ‘de-politicisation’ detected by Davies and Freedland in the legislative activities of the previous Conservative governments.

The Trade Union Act now provides in section 11 that it is unlawful for a union member to be required to make a contribution to the political fund if the member has not given the trade union an ‘opt-in notice’ (or if the member has given notice of withdrawal from an ‘opt-in’ notice). The trade union is also subject to an obligation to notify its

³¹ On the constitutional foundations of ‘neo-liberalism’, see FA Hayek, *The Constitution of Liberty* (Routledge 1960); see also Andrew Gamble, *Hayek: The Iron Cage of Liberty* (Polity Press 1996) ch 6.

³² *Democracy in Trade Unions* (n 30) 24–28.

members of their right to withdraw from the political fund. The ‘opt-in’ regime is subject to a transitional arrangement, and it applies only to members who join at the end of a period not less than 12 months following the entry into force of the relevant provisions. This is coupled with cumbersome reporting obligations, set out in section 12, where, if the union spends more than £2000 per year in total from its political fund, details of political expenditure must be included in the annual return to the CO in a highly prescriptive form. While the final provisions in the Act are intrusive enough, these measures are significantly diluted from the original proposals in the Bill, which had countenanced a universal ‘opt-in’ scheme for all members, requiring renewal on a 5-year cycle. The proposals to regulate the political fund attracted fierce resistance in the House of Lords, and the measures in the Act no doubt reflect the Government’s sense of what was politically feasible rather than ideologically desirable. It is also important to evaluate these reforms within a wider political context.

There are four main grounds for regarding section 11 as one element in a broader repressive ‘de-democratisation’ strategy designed to stifle political opposition and dissent. First, the intervention and deliberations of the specially constituted House of Lords Select Committee on Trade Union Political Funds and Political Party Funding, coupled with the recent proposals to cut public funding of opposition parties, support the view that the political fund reforms are a partisan and one-sided attack on a political opposition party. Secondly, the restrictions on the political activities of civil society actors (including but not confined to trade unions) in Part II of the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 (TLA; the so-called ‘Gagging Act’) also seem to have a disproportionate silencing effect on political

challenges to an austerity agenda. Thirdly, the Government's hostility to 'leverage' activities between workers and consumers appears to be directed at limiting opportunities for civic solidarity between striking workers and consumers. Finally, the role of 'nudge' behavioural economics in the framing of 'opt-in' choice regimes provides further support that the political fund regime has been deliberately chosen because of its predictable dampening effects on political contributions to the Labour Party. We shall take each of these arguments in turn.

Let us begin with the House of Lords Select Committee, set up in response to widespread concern in the Lords about the political fund proposals. The Committee offered a powerful evidence-based critique of the Bill.³³ Significantly, Baroness Neville-Rolfe's view that the political fund proposals were concerned with trade union reform rather than party funding reform did not carry weight with the Committee.³⁴ That is also difficult to reconcile with the original positioning of the political fund proposals in the Conservative Manifesto.³⁵ The Committee considered that the switch to an opt-out system 'could have a sizeable negative effect on the number of union members participating in political funds',³⁶ translating into a significant drop in the funding for the Labour Party.³⁷ In the view of the Select Committee, 'If any government were to use its majority unilaterally to inflict significant damage on the finances of opposition parties, it would risk starting a tit-for-tat conflict which could harm parliamentary democracy'.³⁸ The suspicion that this is part of a longer game to undermine political opposition was given further support by the announcement in the Spending Review and Autumn

³³ Trade Union Political Funds and Political Party Funding Committee, *Report of Session 2015–16* (HL 2015–16, 106).

³⁴ HL Deb 20 January 2016, vol 769, cols 778–780.

³⁵ Conservative Party Manifesto (n 2) 49.

³⁶ Trade Union Political Funds and Political Party Funding Committee (n 33) para 74.

³⁷ *ibid* para 100.

³⁸ *ibid* para 115.

Statement 2015, published on 25 November 2015, which proposed the reduction of Short Money allocations to opposition parties by 19% and then freezing them for the remainder of the Parliament.³⁹ It is difficult to resist the conclusion, fortified by the reasoning of the Select Committee, that the political fund reforms constitute a partisan attempt to hobble the capacities of the Labour Party to act as a credible opposition.

Secondly, it is significant that these measures were proposed against the backdrop of the highly restrictive Part II of the ‘Gagging Act’. This legislation places strict financial limits on the use of funds for political campaigning by ‘non-party’ entities such as charities or trade unions. Its popular description as the ‘Gagging Act’ reflected widespread concern that this would have a chilling effect on the ability of civil society groups to engage as sources of grassroots opposition in the democratic process. There is now significant evidence that the effect of the legislation has been to stifle the political advocacy of charities, especially on social issues during the austerity crisis.⁴⁰ The latest step in the suppression of dissenting activities by civil society groups is the recent announcement by the Cabinet Office Minister, Matthew Hancock, that charities will no longer be able to use government grants for political lobbying.⁴¹ Given the pivotal role of politics in shaping the collective structures that determine the social and economic fates of citizens, these measures are particularly troubling. Engaging in politics will often be the most effective way for the charity to pursue its charitable objectives successfully, especially in contexts such as poverty, child welfare, and housing.

³⁹ Richard Kelly, ‘Short Money’ (Briefing Paper 01663, House of Commons Library 22 March 2016). Available at <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01663#fullreport>> accessed 6 June 2016.

⁴⁰ Commission on Civil Society and Democratic Engagement, *Non-Party Campaigning Ahead of Elections* (Report 4, September 2015). Available at <<http://civilsocietycommission.info/wp-content/uploads/2013/09/FINAL-Civil-Society-Commission-Report-no4-Sept-2015.pdf>> accessed 6 June 2016.

⁴¹ Christopher Hope and Victoria Ward, ‘Charities to be Banned from Using Public Funds to Lobby Ministers’ *The Telegraph* (London, 5 February 2016) <<http://www.telegraph.co.uk/news/politics/12143479/Charities-to-be-banned-from-using-public-funds-to-lobby-ministers.html>> accessed 6 June 2016.

Thirdly, many of the Government's objections to 'leverage' protest have coalesced on concerns about democratic engagement between striking workers and consumers.⁴² While 'leverage' protests undoubtedly reach beyond consumers, extending to other workers, families of managing executives, shareholders, and suppliers, the democratic relationship between producers and consumers is of particular significance to the Government. As we shall see, the principal justification for elevated thresholds for strike ballots is protection of the consumer interest in uninterrupted goods and services. Driving a civic wedge between consumption and production is an important element in the Government's wider political strategy of denigrating producers. Its effect is also to democratically disempower consumers by conceiving of consumption in narrowly economic rather than civic terms.

This stifling of protest activities, with the aim of suppressing the creation of coalitions of interest between workers and consumers, is thus an attack on transversal freedom of association across different groups. This transversal freedom of association underpins a vibrant pluralist democracy. As Kolben has argued, consumption can itself be configured as a form of civic participation, as 'a means of expressing ideas and engaging in action to change the world'.⁴³ This civic framing of consumption requires that 'consumer-citizens must feel obligations towards workers; power and influence over companies with whom they do business; and solidarity with like-minded consumer citizens'.⁴⁴ The insulation of consumers from industrial protest separates workers from consumer-citizens, and it undermines the pluralist basis of a democratic order.

⁴² Carr Report (n 8) 80–81, Theme 6.

⁴³ Kevin Kolben, 'Transnational Private Labour Regulation, Consumer-Citizenship and the Consumer Imaginary' in Adelle Blackett and Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar Publishing 2015).

⁴⁴ *ibid* 371.

Finally, it is untenable that the Government was unaware of the likely consequences of a switch from ‘opt out’ to ‘opt in’ in the political fund context. Government policy has famously been shaped by the influence of the ‘Nudge Unit’, also known as the ‘Behavioural Insights Team’.⁴⁵ This unit has deployed insights from ‘behavioural law and economics’ to reflect upon the ways in which regulatory frameworks can ‘nudge’ citizens to choose options favoured by policy makers. The setting of regulatory ‘defaults’ can have a profound shaping effect on civic preferences.⁴⁶ Defaults tend to be ‘sticky’, such that ‘opt-out’ regimes will generally favour much higher participation rates than ‘opt-in’ regimes.⁴⁷ Indeed, the ‘Nudge Unit’ recognised this very phenomenon in its research on how to improve the rate of charitable donations.⁴⁸ The setting of ‘defaults’ also performs important signalling effects in terms of the legitimacy of specific choice options.⁴⁹ This raises serious issues of political principle, where governments engage in the deliberate yet covert manipulation of citizens’ preferences through institutional design.⁵⁰ It also reveals the likely agenda of the Government in pressing for the adoption of an ‘opt-in’ framework for political contributions: to ensure that funding for the main opposition party was reduced.

Thus, the political fund reforms in the Trade Union Act must not be isolated from the wider regulatory context. They form part of a package of measures that, taken cumulatively, can be regarded as repressive of oppositional political activity, hence a

⁴⁵ See <<http://www.behaviouralinsights.co.uk/>> accessed 6 June 2016.

⁴⁶ Cass R Sunstein, ‘Human Behavior and the Law of Work’ (2001) 87 *Virginia Law Review* 205. Ewan McGaughey, ‘Can Behavioural Psychology Inform Labour Law?’, in Amy Ludlow and Alysia Blackham (eds), *New Frontiers in Empirical Labour Law Research* (Hart 2015) 75.

⁴⁷ Cass R Sunstein, ‘Switching the Default Rule’ (2002) 77 *New York University Law Review* 106.

⁴⁸ Behavioural Insights Team, ‘Applying Behavioural Insights to Charitable Giving’ (2013) 8–9. Available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/203286/BIT_Charitable_Giving_Paper.pdf> accessed 6 June 2016.

⁴⁹ Sunstein (n 47) 109.

⁵⁰ For discussion, see Cass R Sunstein and Richard H Thaler, ‘Libertarian Paternalism is not an Oxymoron’ (2003) 70 *The University of Chicago Law Review* 1159.

strategy of ‘de-democratisation’. The democratic implications of this shift in public policy radiate far beyond the confines of labour law.⁵¹

5. STATE AUTHORITARIANISM: FROM PRIVATE TO PUBLIC COERCION

A second characteristic strategy of the neo-liberal State during the Thatcher years was the empowerment of employers and trade union members to resist trade union demands through civil litigation.⁵² This aimed at the reduction of trade union power, albeit through the private enforcement of legal norms in ordinary civil litigation. While this certainly involved the use of State coercion, the State’s coercive role was deployed *indirectly* in the enforcement of private rights rather than *directly* through the techniques of the criminal law or direct governmental interference in trade union autonomy. This ‘privatisation’ of the task of reducing trade union power to private parties was a mixture of prudence and principle. Prudentially, it enabled the State to avoid damaging stand-offs with the trade union movement. It also reflected a principled neo-liberal concern to restrict *State* coercion in the regulation of civil society.

The recent legislative activities of the Conservative Government signal a step change in the coercive profile of the State, and exemplify a distinctive authoritarian turn. Undoubtedly, some of the newly enacted measures on industrial action, such as the new provisions on information to be included on the voting paper in industrial action ballots,⁵³ or the revised rules on strike notices,⁵⁴ are designed to multiply the opportunities for employers to challenge the applicability of the trade dispute defence in injunction

⁵¹ See KD Ewing, ‘The Importance of Trade Union Political Voice: Labour Law Meets Constitutional Law’ in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014).

⁵² Davies and Freedland (n 13) 427.

⁵³ Trade Union Act 2016, s 5.

⁵⁴ *ibid* s 8.

proceedings. In this respect, there are important continuities with the more familiar neo-liberal pattern of empowering employer resistance to trade union demands.

Significantly, however, other measures countenance a more direct role for State supervision, monitoring and coercive control of trade unions and their members. This constitutes a significant reconfiguration of the contours of State coercion in the sphere of industrial relations. It is certainly reflected in some of the enacted provisions in the Trade Union Act 2016, especially as regards the expanded role of the CO. It is reflected more strongly still in many of the ideas for legislative action that were dropped during the progress of the Trade Union Bill. It is nevertheless important to consider the whole pattern of legislative activity rather than focusing narrowly on the enacted provisions in the Act itself. This new pattern of direct State coercion is displayed in three main areas of governmental activity: the legislative proposals for regulation of picketing; the legislative proposals on restricting ‘check off’ and facility time in the public sector; and the enacted provisions concerning the role and functions of the CO.

A. Picketing, Protest and the Authoritarian State

The Government’s concern with picketing and protest had its origins in the ill-fated ‘Carr Review’, which focused on the alleged use of ‘extreme’ or ‘intimidatory’ ‘leverage’ tactics in industrial disputes.⁵⁵ The trigger for this review was the dispute between UNITE and INEOS at the Grangemouth Chemicals and Refinery Plant.⁵⁶ The final Report confined itself to summarising the submission of employer evidence on alleged

⁵⁵ Carr Report (n 8). See Rajeev Syal, ‘Union Law Review Frozen After Barrister Objects to Ministerial Statements’ *The Guardian* (London, 5 August 2014) <<http://www.theguardian.com/politics/2014/aug/05/union-law-review-barrister-bruce-carr-minister>> accessed 6 June 2016.

⁵⁶ Carr Report (n 8) 3.

‘extreme’ tactics in a number of industrial disputes, and it produced no proposals for legal reform. As its own author acknowledged, the report was of little evidential value given that it simply collated unsubstantiated employer allegations.⁵⁷

In July 2015, the Department for Business, Innovation and Skills (BIS) commenced a consultation on the reform of picketing and protest law in parallel with the introduction of the Trade Union Bill.⁵⁸ Ostensibly, this consultation was directed at considering new legal measures to prevent the ‘intimidation of non-striking workers’ during industrial disputes. An examination of the substantive scope of the Consultation indicated that the title of the consultation document was disingenuous. The BIS Consultation, like the Carr Review before it, conceptualised the social problem of ‘leverage’ in a much more expansive way, of which the alleged intimidation of non-striking workers was only part. The BIS Consultation extended its scope to the use of ‘leverage’ tactics against senior managers, and suppliers and customers of the primary employer in dispute with the trade union.⁵⁹ This might involve the use of vigorous public protest to embarrass senior managers attending black tie dinners through the use of props such as inflatable black rats,⁶⁰ or raising awareness of bad employment practices with customers of the employer.

The specific proposals for consideration in the BIS Consultation disclose an important shift in governmental strategy. Thus, the Consultation states that ‘[e]mployers

⁵⁷ *ibid* 1.

⁵⁸ Department for Business, Innovation and Skills, ‘Trade Union Bill: Consultation on Tackling Intimidation of Non-Striking Workers’ (BIS/15/415, July 2015). Available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445439/BIS-15-415-tackling-intimidation-of-non-striking-workers.pdf> accessed 6 June 2016. (BIS/15/415).

⁵⁹ *ibid* para 5. See also Carr Report (n 8) 80–81 and ch 5, Themes 2, 4, 5 and 6.

⁶⁰ Carr Report (n 8) para 4.115.

report that enforcing civil offences through the courts can be time-consuming and potentially expensive and slow'.⁶¹ In turn, this tentativeness in respect of civil enforcement provides a justification for ratcheting up more coercive measures to be deployed directly by the State. The Consultation contemplates contemplated use of criminal sanctions in the restriction of 'leverage' protest. It identifies as a 'key challenge' the need to 'promote effective policing and prosecution of intimidation and other offences arising in the context of industrial disputes',⁶² and suggests that the Government will work with the police and the CPS to ensure that the existing catalogue of criminal offences (including anti-social behaviour provisions) will be used more extensively and effectively against protesters using 'leverage' tactics.⁶³ Alongside the push for greater utilisation of existing criminal offences by the police and prosecuting authorities, the Consultation also raises the prospect of *further* criminalisation in the form of a new offence of 'intimidation on the picket line', targeted specifically at 'leverage' protest in industrial disputes.⁶⁴ This was linked to proposals for increased provision for the monitoring and scrutiny of public protest through State agencies. It was also envisaged that there might be tighter regulation of the use of online and social media in protest activity, and there will be a reformulation of the Code of Practice in due course to reflect this. These restrictive measures would be further facilitated by an expanded remit for the CO,⁶⁵ and the possibility that trade unions might be subject to a legal duty to provide

⁶¹ BIS/15/415 (n 58) para 8.

⁶² *ibid* para 37.

⁶³ *ibid* paras 37–38.

⁶⁴ *ibid* para 10.

⁶⁵ BIS/15/415 (n 58) para 17.

advance notice of the details of picketing and wider protest strategies ‘to employers, the police and the CO by publishing their plans’.⁶⁶

The responses to the BIS Consultation were overwhelmingly hostile to proposals for further expansion of criminalisation.⁶⁷ It is difficult to assess whether the Government was moved by these responses or by the ratcheting pressure of external political events, but whatever the explanation, the worst excesses of the authoritarian State were tempered in the final provisions of the Trade Union Act relevant to picketing and protest. The major changes are set out in section 10 and specify new preconditions of statutory immunity in relation to picket supervisors.

It should not be assumed, however, that the coercive teeth of these measures have been pulled. The collusion between the police and blacklisting organisations in the identification of trade union activists indicates the complex ways in which the coercive powers of the State and the coercive powers of employers can intersect and reinforce each other.⁶⁸ The obligations under section 10 are ripe for abuse without clear restrictions on the holding and sharing of police intelligence on trade unionists.⁶⁹ Moreover, refusals to comply with the new legal provisions —for example, refusing to give the employer sight of the approval letter as soon as reasonably practicable — create further possibilities

⁶⁶ *ibid* para 24.

⁶⁷ Department for Business, Innovation and Skills, ‘Trade Union Bill: Government Response to the Consultation on Tackling Intimidation of Non-Striking Workers’ (BIS/15/621, November 2015) paras 26–29. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/473515/BIS-15-621-government-response-document-to-tackling-intimidation-consultation.pdf accessed 6 June 2016.

⁶⁸ GMB, ‘Police Blacklisting Collusion Confirmed’ (14 October 2013) <<http://www.gmb.org.uk/newsroom/police-blacklisting-collusion-confirmed>> accessed 6 June 2016.

⁶⁹ See the evidence of Dave Smith in public committee: Trade Union Bill Deb 13 October 2015, cols 57–68. For further analysis, see Keith Ewing and John Hendy, ‘Picketing and the Trade Union Bill’ (Supplementary written evidence to the Joint Committee on Human Rights TUB0012, 22 November 2015). Available at <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/legislative-scrutiny-trade-unions-bill/written/24965.html>> accessed 6 June 2016.

for the prosecution of criminal offences and the use of powers of arrest for breaches of the peace. All of this should raise considerable alarm in its curtailment of civil liberties and the chilling effect on civic protest without any credible justification. We should also be vigilant lest the Government resurrects its more draconian proposals that were set out in the original BIS Consultation, if political circumstances change.

B. Check Off, Facility Time and the Authoritarian State

The crusade against facility time and the check off in the public sector had its origins in agitation from the Trade Union Reform Campaign and the Taxpayers' Alliance during the period of the Coalition Government.⁷⁰ In 2012, the Government announced plans to curtail facility time in the civil service,⁷¹ although it was envisaged that these restrictions would be rolled out across the public sector.⁷² These early initiatives envisaged an arbitrary set of restrictions on facility time, so that employer funding was required to be within 0.1% of the pay bill and no representative would normally be permitted to spend more than 50% of her time on union activities. These measures foreshadowed what was to come in the Trade Union Bill proposals.

Clause 14 in an early version of the Bill addressed 'check off' in the public sector. It was a prohibitive measure that simply provided that 'No relevant public sector employer may make trade union subscription deductions from wages payable to

⁷⁰ Alan Bogg and KD Ewing, *The Political Attack on Workplace Representation: A Legal Response* (Institute of Employment Rights 2013) 4–7.

⁷¹ Cabinet Office, 'Consultation on Reform to Trade Union Facility Time and Facilities in the Civil Service' (13 July 2012). Available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78929/Facility_Time_Consultation_Document_Final.pdf> accessed 7 June 2016.

⁷² See, eg, Department for Communities and Local Government, *Taxpayer Funding of Trade Unions: Delivering Sensible Savings in Local Government* (March 2013). Available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136079/Taxpayer_funding_of_Trade_Unions_-_Sensible_Savings.pdf> accessed 7 June 2016.

workers'. The scope of 'relevant public sector employer' was left to be defined by statutory instrument. Clauses 12 and 13 of the Bill addressed facility time in the public sector. The Government adopted a more complex approach, since a simple prohibition would have been incompatible with TULRCA 1992, s 168 which guarantees a right for a trade union official to be permitted reasonable paid time off to undertake specified union duties and industrial relations training. To this end, clause 12 specified a highly complex publication requirement for public sector employers to publish information on facility time. The detail of the reporting obligation was again to be filled by statutory instrument, with respect to the form and timing of information and the extension of the obligation to private bodies performing 'functions of a public nature'. Clause 13 conferred reserve powers on a Minister to impose constraints on facility time with the purpose of limiting the percentage of a representative's working time spent on facility time; and ensuring that the proportion of the pay bill expended on facility time did not exceed a specified percentage. There were further reserve powers to impose publication duties on public sector employers whose facility time was so limited.

The coercive reach of the relevant provisions in the Trade Union Act 2016 are significantly curtailed. In respect of 'check off', section 15 prefers a strategy of regulation and restriction over a strategy of prohibition. The statutory provision permits deductions from workers' wages in respect of trade union subscriptions where workers have the option to pay by other means, and arrangements have been made for the union 'to make reasonable payments to the employer in respect of the making of the deductions'. This provision remains limited to the 'public sector employer', to be defined by statutory instrument.

In respect of facility time, the publication requirements as set out in the Bill are replicated in section 13 of the Act. The ‘reserve powers’ are, however, tightened up from the original and highly permissive formulation in the Bill, in section 14 of the Act. Thus, the Minister may only exercise the reserve powers once three years have elapsed from the first regulations on publication under section 13 coming into force, and the Minister is required to have regard to ‘information published by employers in accordance with the publication requirements; the cost to public funds of facility time in relation to each of those employers; the nature of the various undertakings carried on by those employers; any particular features of those undertakings that are relevant to the reasonableness of the amount of facility time; any other matters that the Minister thinks relevant’. Furthermore, the Minister is required to give notice in writing to the employer ‘setting out the Minister’s concerns about the amount of facility time ... and informing the employer that the Minister is considering exercising the reserve powers in relation to that employer’. The employer must have a ‘reasonable opportunity’ to respond to the Minister’s notice and to take ‘any action that may be appropriate in view of the concerns’; further, the reserve powers may not be exercised for a 12 month period once the Minister has given written notice to the employer.

The coercive imprint of sections 13–15 is much lighter than had been contemplated in the original Bill. As with the picketing provisions, however, these shifts likely reflect the unusual political circumstances of the current time rather than a Damascene turn away from authoritarianism. One of the truly remarkable features of the Bill was the highly centralised and coercive nature of these proposed measures. In effect, voluntary negotiated arrangements on check off and facility time across local government

and the wider public sector, some of which might be contractually binding in individual contracts of employment, were to be abolished or restricted in accordance with governmental fiat. This was a remarkable display of coercive power by the State, and it is one that does not find obvious parallels in the neo-liberal paradigm during the Thatcher years. It is not surprising that this centralised deployment of State coercion was challenged by key constituencies during the Parliamentary process.

Three sets of countervailing pressures may underpin the compromises in the Act on check off and facility time. First, the disruption and prohibition of collectively agreed arrangements cut across negotiated arrangements in local government. There was significant evidence that some local authorities were hostile to central governmental intervention of this nature,⁷³ which undermined the Government's own professed support for devolved power in the regions. The more restricted formulation of the reserve powers in section 14 creates a wider regulatory space for local arrangements to be negotiated autonomously by employers and trade unions, free from central government interference. Secondly, the devolved administrations in Scotland and Wales registered their own serious reservations about the impact of these measures on public service provision. According to the representatives from the devolved administrations, such interference was incompatible with the ethos of public services in the devolved administrations.⁷⁴ It also undermined the distinctive approach to public sector industrial relations in Scotland and Wales, which involved constructive engagement with representative trade unions.⁷⁵ Finally, the proposed measures in the Bill constituted a *direct* interference with the

⁷³ See, eg, written evidence of Tony Newman, Leader of Croydon Council (TUB47, 28 October 2015) <<http://www.publications.parliament.uk/pa/cm201516/cmpublic/tradeunion/memo/tub47.htm>> accessed 7 June 2016; written evidence of Doug Taylor, Leader of Enfield Council (TUB51, 28 October 2015) <<http://www.publications.parliament.uk/pa/cm201516/cmpublic/tradeunion/memo/tub51.htm>> accessed 7 June 2016.

⁷⁴ Trade Union Bill Deb 13 October 2015, cols 78–88.

⁷⁵ *ibid.*

contractual freedom of trade unions, employers and workers to negotiate their own arrangements.⁷⁶ The ideological significance of this should not be underestimated. In some libertarian versions of conservative political thought, the coercive interference with a freely negotiated contract breaks a taboo, so totemic is the shibboleth of contractual freedom.⁷⁷ This may be a context where friction between libertarian and authoritarian elements of conservative ideology led to a dilution of the Act's direct coercive interference with freedom of contract.

C. The CO and the Authoritarian State

The CO performs a practically vital role in regulating trade union administrative affairs. The CO is appointed by the Secretary of State, who is subject to a duty to consult with ACAS on the appointment. It performs a range of administrative and adjudicative functions in relation to trade unions and employers' association. These functions include: maintaining the list of trade unions and employers' associations and determining the independence of trade unions; dealing with certain complaints from union members that the union has failed to maintain an accurate membership register, and exercising oversight of the its accounting records; dealing with complaints from members that the union has failed to comply with its statutory obligations in respect of certain internal elections; and exercising oversight over the maintenance and operation of the political fund.⁷⁸

⁷⁶ See *Cavanagh v Secretary of State for Work and Pensions* [2016] EWHC 1136 (QB), where the High Court determined that a check off arrangement was a binding term in the employees' contracts of employment, and enforceable by the trade union under the Contracts (Rights of Third Parties) Act 1999.

⁷⁷ Richard A Epstein, 'In Defense of the Contract at Will' (1984) 51 *The University of Chicago Law Review* 947. See also Lord Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18 *ILJ* 1, 23, where he notes that closed shop arrangements were rendered unenforceable rather than unlawful, thereby preserving formal freedom of contract.

⁷⁸ See Certification Office for Trade Unions and Employers' Associations, 'Annual Report of the Certification Officer 2014–2015' (2015) 1–4. Available at

As such the CO occupies an important albeit understated position in the institutional structure of British labour law. This should not obscure the political magnitude of the Trade Union Act's overhaul of the CO's functions. The institutional reforms of the CO are of major political importance. These changes have the potential to transform the CO from a neutral independent officer discharging largely administrative functions into a coercive and interventionist instrument of the State. This was described euphemistically by the BIS Consultation on Intimidation of Non-Striking Workers as a 'strengthened enforcement function' for the CO.⁷⁹ Speaking less euphemistically, the Trade Union Act confers new coercive powers on the CO that create the risk of arbitrary political interference in the internal affairs of trade unions. It is a chilling manifestation of the authoritarian State. In the House of Lords' debate on the Bill, Lord Monks, who is not prone to dramatic hyperbole, described the reforms of the CO in stark terms:

[T]he certification officer ... will have the power to initiate investigations without the need for anybody to complain. The investigations can be outsourced—no doubt to expensive law firms and consultants ... This is a big step towards state supervision of trade unions. It offends the principle of autonomy and is a distant echo—I emphasise 'distant'—of a totalitarian and certainly an arrogant approach. Where is the justification for it? The certification officer deals perfectly adequately with complaints now and has not been seeking new powers.⁸⁰

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/449387/CO_Annual_Report_2014-2015_.pdf> accessed 7 June 2016.

⁷⁹ BIS/15/415 (n 58) para 17.

⁸⁰ HL Deb 11 January 2016, vol 768, col 29.

The political transformation of the CO did not start with the Trade Union Act. It began with the expansion of the CO's powers in the TLA ('Gagging Act') framework. This conferred new investigative powers on the CO, capable of being exercised at its own behest, to scrutinise the trade union's compliance with requirements to maintain an accurate register of members' names and addresses.⁸¹ The Trade Union Act builds upon this in four main ways. First, the content of the annual return has been expanded. Section 7 provides that the annual return must now include detailed information on industrial action, and section 12 requires the inclusion of details of political expenditure where that expenditure exceeds £2000 in total in a calendar year, with the form and content of that information subject to highly prescriptive requirements. Secondly, Schedule 2 sets out the CO's powers to initiate investigations at its own behest where it 'is satisfied' that relevant statutory duties have not been complied with, rather than being triggered by an individual member's complaint. Thirdly, once an investigation has been undertaken by the CO (which may be triggered at its own initiative), it is provided with a significant range of investigatory powers under Schedule 1. Finally, Schedule 3 gives the CO new draconian powers to impose financial penalties on the trade union, in addition to its existing enforcement powers. In effect, this gives the CO a power to impose quasi-criminal penalties on the trade union in what are properly regarded as civil matters. This quiet elision of the civil and criminal law is a perfect encapsulation of the authoritarian State.

It is significant that section 16 of the Act specifies that the CO 'is not subject to directions of any kind from any Minister of the Crown as to the manner in which he is to exercise his functions'. Furthermore, the Government has now provided that the Commissioner for Public Appointments will henceforth regulate the appointment of the

⁸¹ TULRCA 1992, ss 24ZH - 24ZK, 24B.

CO.⁸² As Kahn-Freund's reflections on the system of compulsory arbitration remind us, the exposure of arbitrators to binding Ministerial decree is the hallmark of a totalitarian State.⁸³ Nevertheless, it is remarkable that the CO has undergone such a radical transformation, beginning with the TLA and now extended still further by the Trade Union Act, and for that to have occurred with scarcely a stir in mainstream political debate. Behind the mundane and extensive detail of the statutory reforms of the CO, we may be witnessing a set of changes that exemplify a tilt to the authoritarian right.

6. FROM UNION DEMOCRACY TO THE MAINTENANCE OF SOCIAL ORDER

The provisions in the Trade Union Act that have perhaps attracted the most sustained attention are the revised thresholds for pre-strike ballots. Section 2 stipulates a requirement that 50% of those entitled to vote did so, in order for the ballot to constitute a valid authorisation of the industrial action. This applies to all ballots under TULRCA 1992, s 226. Section 3 stipulates a further requirement where 'the majority of those who were entitled to vote in the ballot are at the relevant time normally engaged in the provision of important public services', that 'at least 40% of those who were entitled to vote in the ballot' supported industrial action. The meaning of 'important public services' will be confined to services falling within the categories of health services; education of those aged under 17; fire services; transport services; decommissioning of nuclear installations and management of radioactive waste and spent fuel; and border security. Section 4 of the Act requires that the Secretary of State commission an independent review of electronic balloting in respect of strike ballots within a period of six months

⁸² HL Deb 25 April 2016, vol 771, cols 913–914.

⁸³ For discussion, see O Kahn-Freund, 'Collective Agreements Under War Legislation' (1943) 6 MLR 112.

from the passing of the Act. The legislation further permits the use of pilot schemes to inform the design and implementation of electronic balloting for strikes.

As with the political fund, it is perhaps tempting again to interpret these provisions through the lens of earlier debates under the Trade Union Act 1984, when strike ballots were first introduced by legislation into British labour law. In a valuable assessment of that period, Simon Auerbach drew attention to the balance between ‘internal’ and ‘external’ justifications for the imposition of balloting requirements on trade unions.⁸⁴ ‘External’ justifications were especially concerned with the minimisation of the effects of strike action on external constituencies, such as employers, service users and customers, or the wider ‘public’. Strict balloting requirements would tend to disinhibit precipitate strike action, so that the weapon was only deployed by trade unions as a last resort. ‘Internal’ justifications were especially concerned with the relations between the trade union leadership and its members. This often rested on a perception that a militant leadership might be subjected to internal democratic constraint by a more moderate ‘rank and file’ membership.⁸⁵ During the debates that preceded the enactment of the Trade Union Act 1984, both types of justification had currency in the development of Conservative Party policy. While the ‘internal’ set of justifications was dominant at the level of political rhetoric in the enactment of the 1984 Act,⁸⁶ Auerbach is surely correct to argue that the reality of the Government’s motivation was rather more complex.

Do the new provisions in section 2 and section 3 simply reflect a continuing mix of ‘internal’ and ‘external’ justifications for the revised ballot thresholds? To begin with, there are certain interpretive difficulties given the poor quality of the Government’s

⁸⁴ Simon Auerbach, *Legislating for Conflict* (Clarendon Press 1990) 118.

⁸⁵ Davies and Freedland (n 13) 486.

⁸⁶ Auerbach (n 84) 153.

documentary material explaining and justifying the ballot thresholds. The contrast in fluency between the flimflam of the BIS *Consultation on Ballot Thresholds in Important Public Services* and the 1983 Green Paper *Democracy in Trade Unions*⁸⁷ is like the difference between water and wine. Nevertheless, it is possible to detect a shift in justificatory emphasis between then and now. Reading the BIS consultation on ballot thresholds, the standard 50% turnout threshold is justified principally on the basis of ‘internal’ democratic arguments. According to the Consultation:

Disruptive industrial action should not take place on the basis of low ballot turnouts. Such action does not always represent the views of all the union members and is undemocratic ... A simple majority (i.e. over 50% of votes cast) must be in favour in order for action to go ahead. This ensures that strikes can only take place on the basis of clear support from union members.⁸⁸

Once we turn to the ‘important public service’ threshold, the Consultation switches to an ‘external’ justification. According to the Consultation, such industrial action ‘can have far reaching effects on significant numbers of ordinary people who have no association with the dispute. People have the right to expect that services on which they and their families rely are not going to be disrupted at short notice by strikes that have the support of only a small proportion of union members’.⁸⁹ This appeal to an

⁸⁷ *Democracy in Trade Unions* (n 30).

⁸⁸ Department for Business, Innovation and Skills, ‘Trade Union Reform: Consultation on Ballot Thresholds in Important Public Services’ (BIS/15/418, July 2015) 3. Available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445433/BIS-15-418-consultation-on-ballot-thresholds-in-important-public-services.pdf> accessed 7 June 2016. (BIS/15/418).

⁸⁹ *ibid*. The document does not identify the relevant international human rights treaty that guarantees a ‘right to expect that services ... are not going to be disrupted’.

‘external’ justification is also reflected in the observation that the balloting thresholds will ensure that industrial action is only used ‘as a last resort’.⁹⁰

What is especially interesting is the kaleidoscopic framing of the relevant conflicts between striking workers and other constituencies in the current political discourse. The Parliamentary debates reveal a range of shifting configurations. Sometimes the conflict is framed as one between public sector workers and private sector workers, as evident in the following display of mutual admiration:

Richard Fuller (Bedford) (Con): My right hon. Friend was absolutely right to have a consultation on the additional 40% hurdle. He has talked about it in reference to the emergency services and other important services, but does he not agree that there is another issue: if we compare changes in strike action in the public and private sectors since the end of the last century, we see that over that 15-year period the number of strike days in the private sector has halved, but in the public sector the number has doubled? **Sajid Javid:** My hon. Friend, as usual, makes an excellent point. That goes to the heart of the Bill and why we need these changes.⁹¹

Sometimes the conflict between public and private sector workers is framed as a conflict between well-paid professional workers and those engaged in poorly paid and insecure employment in the private sector:

⁹⁰ *ibid* 4, though there is no explanation as to how the revised ballot thresholds will have this desired effect.

⁹¹ HC Deb 14 September 2015, vol 599, cols 764–765.

Robert Jenrick: Let me continue. Today the majority of those in trade unions are not the working poor—53% of members are in professional, associate professional or managerial occupations. Only a minority are in lower skilled, invariably lower-paid occupations, such as caring, leisure, processing, plant and machine work. Today’s trade unions predominantly serve middle-income workers. The figures show that those earning less than £250 a week—roughly the equivalent of a full-time job on the minimum wage—are the least likely to join a trade union. Just 13% of those workers are members, which is a smaller figure than the proportion of those earning more than £1,000 a week, who make up 22% of trade union members ... most working people in lower-skilled, lower-paid roles are not part of trade unions, and it is they who are most deeply impacted by the disruption of strikes, particularly in key public services, including education and transport.⁹²

The characterisation of the strike as involving a war between ‘worker as producer’ against ‘worker as consumer’,⁹³ or as distributive conflicts between different groups of workers, is not new. It also invites uncomfortable questions of the Government, not least why private sector workers are working for low pay and in conditions of such rank insecurity. This state of affairs reflects the political and economic choices of a Government zealously committed to austerity and labour market deregulation. While distributive conflicts between different groups of workers are an important aspect of

⁹² *ibid* col 790.

⁹³ See Otto Kahn-Freund, *Labour Relations: Heritage and Adjustment* (OUP 1979); Lord Wedderburn, ‘Otto Kahn-Freund and British Labour Law’ in Lord Wedderburn, Roy Lewis and Jon Clark (eds), *Labour Law and Industrial Relations: Building on Kahn-Freund* (Clarendon Press 1983) 64.

labour law's normative concerns,⁹⁴ it is important not to lose sight of the agency of employers and/or the State in shaping, intensifying or even creating those conflicts in the first place. That seems especially pertinent here. What is significant about this mode of discourse is its underlying axiom that industrial conflict is a pathological disruption of the civic unity that should obtain in a political order. At its base, it is an anti-liberal doctrine that rejects the existence of pluralism in civil society, including pluralism *between* workers, and the fact that conflict is a healthy and legitimate manifestation of a liberal and democratic pluralism. The underlying justification for strike laws is the maintenance of the unity of the social order.

Taken on their own, the balloting threshold modifications and their underlying justifications might be vulnerable to trenchant criticism,⁹⁵ but are not in themselves politically sinister. When considered in the wider context of the other authoritarian strands in the Trade Union Act, and the fact of their cumulative addition to an existing body of restrictive norms, the underlying repudiation of pluralism is very troubling. It is also important to anticipate the ways in which future governments might build upon these restrictions further. The concept of 'important public services' floats freely from the entirely distinct concept of 'essential public services' in international labour law.⁹⁶ At various points, the Consultation seems to equate an 'important public service' as one where a strike would cause 'serious disruption' to consumers and service users.⁹⁷ Since it is intrinsic to striking that it involves the infliction of 'serious disruption' on third parties, does this presage the expansion of the 40% support threshold to a much wider range of

⁹⁴ ACL Davies, 'Identifying "Exploitative Compromises": The Role of Labour Law in Resolving Disputes Between Workers' (2012) 65 *Current Legal Problems* 269.

⁹⁵ Certainly, there are significant problems from the perspective of ILO standards. See Ford and Novitz (n 9) 528–535.

⁹⁶ *Ibid.*

⁹⁷ See, for example, the discussion of schools and transport at BIS/15/418 (n 88) 7.

‘important public services’? The idea of a universal 40% threshold is certainly countenanced by the authors of the Policy Exchange report.⁹⁸ Might we see the transition from union coordinated ballots of their own members, towards the Conservative Manifesto’s commitment to ballots *of the entire workforce*, crossing the line into a system of ballots controlled and administered by the State? Presently, of course, it is true that strike ballots are a statutory requirement, but strike ballots are still properly regarded as instruments of union democracy applying to trade union members. The idea of *workforce* ballots, by contrast, would seem to contemplate a more statist model of mandatory ballots applying to every affected worker in the bargaining unit. The logical endpoint of the 2010 Policy Exchange document ‘Modernising Industrial Relations’ is of course that strike action should only be permitted as an exceptional matter.⁹⁹ The road to prohibition is unlikely to be traversed in a single step, and the prohibition of strikes can be achieved through legal techniques that are formally permissive but practically insurmountable. Repressive governments rarely advertise their authoritarianism in explicit terms.

7. FUTURE PROSPECTS

It is impossible to assess the full significance of the Trade Union Act 2016 on its words alone. The story of the Act remains to be told, and how it ends will depend upon the practical operation of the legislation, and the ways in which trade unions, employers and other actors adjust to the new regulatory landscape. There are three main dimensions to be considered as the story of the Act unfolds: the impact of devolution as a frictional constraint on Westminster government’s authoritarian agenda; the role of human rights as

⁹⁸ Holmes, Lilico and Flanagan (n 5) 5.

⁹⁹ *ibid* 7.

a source of restraint on the legislation; and the strategic responses of trade unions and employers to the new legislative terrain.

A. Devolution and Countervailing Power

The Supreme Court judgment in *Re Agricultural Sector (Wales) Bill; A-G for England and Wales v Counsel General for Wales* was a watershed moment for labour law in the new constitutional order of devolved governance.¹⁰⁰ In 2013, the system of Agricultural Wages Boards for England and Wales was abolished by section 72 of the Enterprise and Regulatory Reform Act 2013. Following abolition, the Welsh Assembly passed legislation to establish a system of wages regulation for the Welsh agricultural sector. The Attorney General challenged this on the basis that the Welsh Assembly did not have the legislative competence to enact such a measure under the system of conferred powers established by the Government of Wales Act 2006 (GWA). According to the Attorney General, the legislation concerned the regulation of employment and industrial relations, which were not devolved matters. The Supreme Court rejected the challenge, and concluded that the enactment of the legislation was within the scope of the Assembly's devolved powers since its purpose and effect was 'related to' agriculture, which was a conferred power under Schedule 7 of the GWA. While the Bill simultaneously concerned employment and industrial relations, this did not remove the Bill from the Assembly's legislative competence. Schedule 7 sets out a list of exceptions to the conferral of agriculture to the Assembly, which included 'occupational pensions', but did not extend to other employment matters. For this reason, the fact that the Bill 'related to' terms and

¹⁰⁰ [2014] UKSC 43, [2014] 1 WLR 2622.

conditions of employment in agriculture did not lead to the forfeiture of legislative competence.

During the passage of the Trade Union Act 2016, the devolution context (including the Supreme Court decision in the *Agricultural Sector (Wages) Bill* case) proved to be an important feature in political manoeuvring around the Trade Union Bill. For example, in the Second Reading debate in the House of Commons, opposition MPs from Wales and Scotland made specific criticisms of the Trade Union Bill on the basis of its impact on devolved public services in the Wales and Scotland; much of the criticism was concerned specifically with the issue of ‘facility time’ and ‘check off’ in the public sector.¹⁰¹ During the Public Committee hearings in the House of Commons, Leighton Andrews AM, Minister for Public Services, Welsh Government and Roseanna Cunningham, Cabinet Secretary for Fair Work, Skills and Training, Scottish Government were critical of the Bill’s disruption of devolution arrangements.¹⁰² These criticisms focused particularly on the 40% threshold in strike ballots in important public services. Referring to the Supreme Court decision, Leighton Andrews stated that

What it confirmed in that case was that where an Assembly Bill fairly and realistically satisfies the test set out in section 108 of the Government of Wales Act 2006 and is not within an exception, it does not matter whether it might also be capable of being classified as relating to a subject that has not been devolved, such as employment rights and industrial relations. The Trade Union Bill very clearly relates to devolved public services—that is the three obvious ones: fire and rescue, health

¹⁰¹ See, eg, HC Deb 14 September 2015, vol 599, cols 771, 787–789, 823, 840, 866.

¹⁰² Trade Union Bill Deb 13 October 2015, cols 78–88.

and, of course, education under 17, but potentially others as well. This clearly cuts across the devolution settlement, and we have very strong issues that we will be raising in that regard.¹⁰³

The political manoeuvring around the legislation is unlikely to be finished. The Welsh Assembly may yet introduce legislation on strike ballots in public services, raising the prospect of further litigation in the Supreme Court.¹⁰⁴ In a leaked letter from Nick Boles to Oliver Letwin and Chris Grayling, Boles indicated that the Government's legal advice was that its position was especially weak in relation to the Welsh devolution settlement.¹⁰⁵ Whatever the fate of any further litigation under the GWA, devolution has created new sites of countervailing power, federal rather than functional in nature, operating as a pluralist constraint on the escalating authoritarianism in Conservative ideology. This may lead to an emerging body of jurisprudence on 'federal' labour law, providing new opportunities for the devolved administrations, trade unions and workers to use litigation to challenge the new legislative agenda. This may be of some practical importance if the judicial screw tightens on trade union claims against the United Kingdom under Article 11 of the European Convention on Human Rights (ECHR).

B. Human Rights and Countervailing Power

The human rights context is in tremendous flux, and the extent to which human rights might be used to reshape or even challenge the operation of the Trade Union Act is

¹⁰³ *ibid* cols 81–82.

¹⁰⁴ 'Carwyn Jones Threatens to Defy Trade Union Bill' (BBC, 19 January 2016) <<http://www.bbc.co.uk/news/uk-wales-politics-35354024>> accessed 7 June 2016.

¹⁰⁵ Charlie Kimber, 'Exclusive—Leaked Minister's Letter Shows Tory Panic Over Trade Union Bill' *Socialist Worker* (London, 7 February 2016) <<https://socialistworker.co.uk/art/42121/EXCLUSIVE+-+leaked+ministers+letter+shows+Tory+panic+over+Trade+Union+Bill>> accessed 7 June 2016.

unusually opaque at the current time. How things unfold will depend upon the strategic choices of key actors: the judiciary in the European Court of Human Rights (ECtHR); the role of human rights arguments in Parliamentary processes; and the attitude of the Government to human rights concerns. Each of these factors will be considered briefly.

As regards the ECtHR, the forward march of Article 11 to develop trade union rights was halted in *National Union of Rail, Maritime and Transport Workers v UK (RMT)*.¹⁰⁶ The Court determined that the elaborate and burdensome procedural requirements for notice in UK strike law did not constitute an ‘interference’ with Article 11; and the ban on secondary industrial action, interfering with an ‘accessory’ rather than a ‘core’ trade union freedom under Article 11, was within the State’s wide margin of appreciation under Article 11(2). The decision is doctrinally odd, and may be explicable as a ‘political’ rather than a ‘legal’ decision, given the stated preference of some Government Ministers to withdraw from the ECHR.¹⁰⁷ The renewed concern for ‘subsidiarity’ in the lexicon of European human rights law no doubt reflects a political judgement by the Court as to how much external judicial intervention laggard states will tolerate before those states activate the nuclear option of withdrawal. The recent admissibility decision under Article 11, determining that the complaint concerning the abolition of the Agricultural Wages Board was inadmissible, is likely to fortify the suspicions of trade unionists that the ECtHR is no longer an independent bulwark against oppressive governments.¹⁰⁸ It is also likely to fortify the boldness of those same states in fostering a culture of international impunity, at least as far as labour rights are concerned.

¹⁰⁶ (2015) 60 EHRR 10. See also Alan Bogg and KD Ewing, ‘The Implications of the RMT Case’ (2014) 43 ILJ 221.

¹⁰⁷ Charlie Cooper, ‘Theresa May Faces Huge Backlash Over Call to Leave European Human Rights Convention’ *Independent* (London, 25 April 2016) <<http://www.independent.co.uk/news/uk/home-news/theresa-may-calls-to-withdraw-from-eu-human-rights-convention-a7000231.html>> accessed 7 June 2016.

¹⁰⁸ *Unite the Union v UK* App no 65397/13 (ECtHR (First Section), 26 May 2016).

Until now, Article 11 has been a pivotal norm in galvanising a progressive agenda in collective labour law reform, and that may change now that the judicial ground has started to shift as in *Unite the Union v UK* and *RMT*.

Even if the judicial tide is turning, it is important not to underestimate the role of human rights arguments in the Parliamentary process. The extensive reliance on human rights arguments in the Parliamentary debates on the Trade Union Bill was especially striking. Sometimes this involved a moral appeal to the rhetorical ideal of human rights at work.¹⁰⁹ Often, contributions to debates referred more precisely to specific provisions in international law, such as Article 11 of the ECHR,¹¹⁰ Article 5 of the European Social Charter,¹¹¹ and relevant ILO instruments.¹¹² Human rights concerns were also articulated and considered at the Public Committee stage in the House of Commons.¹¹³ The Joint Committee on Human Rights (JCHR) issued a report on the pre-legislative scrutiny of the Bill.¹¹⁴ Some of the Committee's reflections on the human rights compatibility of the check off and facility time provisions are less pertinent to the final provisions in the Act, given political compromises during the late stages of the legislative process. This leaves the outstanding matter as the ballot threshold in 'important public services'. Since the meaning of 'important public services' awaits clarification in a statutory instrument, the controversial measures on the 40% ballot thresholds will be subjected to post-legislative scrutiny by the JCHR, and it seems likely that the international law concept of 'essential services' may inform the Committee's assessment of the ballot threshold.¹¹⁵ The Committee also noted the TUC's submissions concerning the multiple ways in which the

¹⁰⁹ HC Deb 14 September 2015, vol 599, col 847 (Liz McInnes MP).

¹¹⁰ *ibid* col 844 (Angela Crawley MP).

¹¹¹ *ibid* col 820 (Andy McDonald MP).

¹¹² *ibid* col 798 (Alan Johnson MP).

¹¹³ See, eg, Trade Union Bill Deb 13 October 2015, cols 30–33, 57–60; Trade Union Bill Deb 15 October 2015, cols 125–131.

¹¹⁴ Joint Committee on Human Rights, *Legislative Scrutiny: Trade Union Bill (first report)* (2015–16, HL 92, HC 630).

¹¹⁵ *ibid* para 30.

Trade Union Bill violated standards in ILO instruments. The post-legislative scrutiny of the Act by the JCHR, once the relevant secondary legislation has been enacted, may yet prove to be decisive. This demonstrates the increasingly important role of Parliament and its committees in the protection of citizens' fundamental human rights.¹¹⁶ It also counsels the need to evaluate the utility of human rights discourse beyond the narrow metric of success in litigation.

Finally, the Government's approach to human rights has been informed by an ideological agenda that is fundamentally antithetical to the judicial protection of human rights. The sources of this antipathy are complex. It may reflect an alignment with ideologies of Conservatism that repudiates the very concept of human rights.¹¹⁷ It may also reflect constitutional concerns to limit 'excessive' judicial power, and to limit external interferences with national sovereignty through the binding requirements of international law. Both of these preoccupations are surely reflected in the activities of Policy Exchange's 'Judicial Power Project',¹¹⁸ and in the recent changes to paragraph 1.2 of the Ministerial Code where the reference to 'international law and treaty obligations' was excised from the definition of the Minister's overarching obligation to comply with the law.¹¹⁹

This contempt for human rights law was displayed most starkly in Sajid Javid's letter to the JCHR of 5th January 2016.¹²⁰ The letter sets out a rebuttal of the potential human rights concerns raised by the Bill. In terms of its wider significance, two points should be emphasised. First, the Government is now placing heavy emphasis on the

¹¹⁶ See, generally, Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015).

¹¹⁷ See, for example, Roger Scruton, *The Meaning of Conservatism* (Macmillan 3rd ed 2001) 41-42.

¹¹⁸ See <<http://judicialpowerproject.org.uk/>> accessed 8 June 2016.

¹¹⁹ For insightful discussion, see Mark Elliott, 'The Ministerial Code and International Law' (*Public Law for Everyone*, 26 October 2015) <<https://publiclawforeveryone.com/2015/10/26/the-ministerial-code-and-international-law/>> accessed 8 June 2016.

¹²⁰ Letter from Sajid Javid (n 3).

decision in *RMT v UK*, and the strong notion of subsidiarity reflected in a very wide margin of appreciation for states. As the trenchant criticisms set out in Frances O’Grady’s letter to the JCHR of 20th January 2016 make clear, *RMT* cannot bear the argumentative weight that is being placed upon it by the Government.¹²¹ The attempts to invoke the margin of appreciation in order to insulate the Act from *any* form of Article 11 challenge is unsustainable, since *RMT* is relevant only to ‘accessory’ freedoms under Article 11(1).¹²² Secondly, the Annex to the Minister’s letter contains a most extraordinary repudiation of the system of binding treaties under the ILO framework. According to the Annex, ILO Conventions ‘are not documents which are subject to judicial enforcement in an international court’; the Committee of Experts and the Committee on Freedom of Association ‘fulfil an informal advisory role, and are not recognised under the ILO Constitution’; and the Government ‘does not therefore accept that the UK’s trade union legislation to date, nor the provisions in the Bill, are contrary to the ILO Conventions’.¹²³ While all of these propositions are false as a matter of positive international law, they reveal a Governmental mind-set that is chilling in its cursory disregard for human rights and international law. Indeed, it is tantamount to a wholesale rejection of the very idea of international labour law as establishing binding norms for signatory states. With the prospect of repeal of the Human Rights Act 1998 now a clear political possibility, the future of human rights as a legal strategy for workers’ emancipation is now very finely poised.

¹²¹ Letter from Frances O’Grady to Harriet Harman, Chair of the Joint Committee on Human Rights (20 January 2016). Available at <http://www.parliament.uk/documents/joint-committees/human-rights/Letter_from_Frances_O’Grady_200116.pdf> accessed 8 June 2016. It is rather troubling that the reflections on margin of appreciation in *UNITE v UK* do tend to support Mr Javid’s assessment.

¹²² *RMT v UK* (n 106) [77].

¹²³ Letter from Sajid Javid (n 3) 6.

C. The Trade Union Act in Practice: Trade Union and Employer Responses

Any assessment of the legislation must await an assessment of how trade unions and employers respond to its provisions. As the experience of the 1980s with statutory balloting requirements demonstrates, the impact of legislation may be very different from that which is anticipated by its authors.¹²⁴ Trade unions may adjust their behaviour to the new requirements of the legislation, even turning it to their advantage.¹²⁵ Employers may not be willing partners with the Government in the use of legal sanctions to resist solidaristic practices in the workplace. It may be that the legislation has intervened in trade union affairs to such a grave extent that it prompts a backlash by trade unions and workers, leading to an escalation in various forms of official and unofficial industrial action.

Although it is inevitably speculative to predict the use of the Act by employers, there is little sign of strong employer appetite for a new era of confrontation using the expanded armoury of legal countermeasures in the Act. For example, the Government proposals to lift the ban on using agency workers in strike disputes were not welcomed by the trade organisation representing recruitment agencies, the Recruitment and Employment Confederation.¹²⁶ While the CBI and the British Chambers of Commerce supported the measures on the strike ballot thresholds at the Public Committee stage, both organisations were criticised by some members of the Committee for failing to produce objective evidence for their organisations' respective positions on the 'problem' of

¹²⁴ Roderick Martin and others, 'The Decollectivisation of Trade Unions? Ballots and Collective Bargaining in the 1980s' (1991) 22 *Industrial Relations Journal* 197.

¹²⁵ J Elgar and R Simpson, 'Union Negotiators, Industrial Action and the Law: Report of a Survey of Negotiators in Twenty Five Unions 1991–1992' (CEPDP 171, Centre for Economic Performance London School of Economics and Political Science October 1993). Available at <http://eprints.lse.ac.uk/20931/1/Union_Negotiators.pdf> accessed 8 June 2016. In this research, Elgar and Simpson referred to the ways in which union negotiators used positive outcomes in strike ballots to strengthen their negotiating position vis-à-vis employers.

¹²⁶ John Moylan, 'Trade Union Bill: Recruiters Warn on Strike Law Reforms' (BBC, 14 September 2015) <<http://www.bbc.co.uk/news/business-34252307>> accessed 8 June 2016.

disruptive and unrepresentative strike action.¹²⁷ The new provisions on notice periods, ballot mandate periods, and the content of the balloting paper all expand the opportunities for employers to seek injunctions. Nevertheless, if employers are unwilling to exploit these new opportunities, the legislation empowers the State itself to use coercion directly, for example through the penal measures administered by the CO. In this way, the enforcement pressures on employers may be less pronounced than under the statutory reforms during the 1980s.

For trade unions, the strategic calculations are rather more complex. Trade unions will continue to use their organisational ingenuity to make the best of a bad set of laws. If electronic balloting is eventually introduced for strike ballots, for example, this could provide a way of promoting the participation of the membership in collective action. Where the ballot thresholds prove difficult for some unions to meet,¹²⁸ we may see new forms of civil disobedience in the industrial sphere deployed by trade unions in open defiance of what are regarded as oppressive laws. Some trade unions such as UNITE seem to be preparing for civil disobedience to defy the legislation.¹²⁹ The setting of the time frame of the ballot mandate to 6 months could lead to a sharp escalation in industrial conflict as trade unions seek to maximise their industrial advantage before the ballot mandate elapses.¹³⁰ The detailed crystallisation of the matters in dispute on the ballot paper may lead to an entrenched bargaining stance by the trade union, for fear that any compromise can be used by the employer to cast doubt on the original ballot mandate and

¹²⁷ Trade Union Bill Deb 13 October 2015, cols 12–18.

¹²⁸ See Ralph Darlington and John Dobson, *The Conservative Government's Proposed Strike Ballot Thresholds: The Challenge to Trade Unions* (Institute of Employment Rights 2015), where the authors identify the significant difficulties posed by 50% threshold applied retrospectively to 162 successful industrial action ballots between 1997 and 2015.

¹²⁹ Len McCluskey, 'Can Unions Stay Within the Law Any Longer?' (2015) 44 ILJ 439.

¹³⁰ See the critical discussion in Bruce Carr, 'Will the Trade Union Bill Help or Hinder Industrial Relations?' (Devereux Chambers, 12 February 2016) <http://www.devereuxchambers.co.uk/assets/docs/news/trade_union_bill_bc_1222016.pdf> accessed 8 June 2016.

so seek an injunction against the trade union.¹³¹ In short, the effect of the legislation may be to precipitate the escalation of strike action, rather than the pacification of trade unions. Finally, trade unions may themselves seek to challenge the legislation in the ECtHR or use human rights arguments in domestic courts. That will depend upon the attitudes of trade unions to the use of international human rights norms, and whether the growing disdain for law amongst trade unionists extends to the legal concept of human rights. Decisions such as *Unite the Union v UK*¹³² are unlikely to raise the general prestige of human rights litigation in the trade union movement at the current time.

It must not be assumed that escalating levels of unofficial strike action and leverage protest, and bitter discord in civil society, will be adjudged a mark of failure by the architects of the Trade Union Act 2016. The social problem of ‘intimidation’ by striking workers, or the need to preserve ‘social order’, provides populist cover for a new and decisive round of repressive and directly coercive measures, especially through criminalisation. Historically, State authoritarianism and the discourse of crisis have been strongly aligned. These are the tragic dilemmas of disobedience now faced by the trade union movement and other actors in civil society.

8. CONCLUSION: NEW MAPS AND UNCHARTED TERRITORY

‘There is a greater risk of authoritarianism in our society today than in 1912. Britain today may be a more “equal” society than in 1912; but it is markedly less equal than in 1952. “An unequal society”, Laski justly wrote, “always lives in fear, with a sense of impending disaster in its heart”. The policies of restriction,

¹³¹ Ibid.

¹³² See n 108.

fashioned fearfully as the reserve arm for the market economy, already contains the seeds of decreasing liberalism.’¹³³

These words were written by Lord Wedderburn in 1982. Looked at from the vantage point of 2016, those words are remarkably prophetic. Indeed, it might be argued that Wedderburn’s chilling assessment of labour law *circa* 1982 directly undermines the thesis defended here, that we are now moving beyond neo-liberalism into the realm of *anti*-liberal labour law. For, if Wedderburn’s view is correct, State authoritarianism was an indelible feature of the ‘New Right’ reforms during the period 1979-1997.

The dawn of this new political order means that labour lawyers must reappraise their use of ideological categories in understanding legislative developments. Perhaps we were all so dazzled by the brilliance of Wedderburn’s Hayekian analysis of the legal ideology of modern Conservatism that Hayek was left imprinted on our retinas.¹³⁴ Now we labour lawyers are apt to see his influence everywhere. At times, this may have undermined our ability to understand what was in front of our eyes. Sometimes it has led to ‘neo-liberalism’ being understood in such catholic terms that it risked becoming vacuous as an analytical tool. If the Employment Act 1982, the Employment Relations Act 1999 and the Trade Union Act 2016 could all be described as ‘neo-liberal’, the meaning of ‘neo-liberal’ being deployed probably risks collapsing the term into banality. The ‘Hayek’ critique also missed the internally complex and contested character of Conservative

¹³³ Lord Wedderburn, ‘Introduction: A 1912 Overture’ in Lord Wedderburn and WT Murphy (eds), *Labour Law and the Community: Perspectives for the 1980’s* (Institute of Advanced Legal Studies 1982) 9.

¹³⁴ See, generally, Alan Bogg, ‘The Hero’s Journey: Lord Wedderburn and the “Political Constitution” of Labour Law’ (2015) 44 ILJ 299.

political thought throughout the 20th century.¹³⁵ According to the historian of Conservative political thought, E.H.H. Green,

‘Scholars of Socialism and Liberalism in Britain and continental Europe have shown that the political ideologies of the Left and Centre are very complex structures in terms of both theory and practice, and that it is in many respects more accurate to speak about Socialisms and Liberalisms rather than to use the singular. The same thing is true of Conservatism.’¹³⁶

This sets itself against reductive tendencies in ideological characterisations of legislative programmes.

Wedderburn was surely correct, therefore, in identifying an encroaching authoritarianism in 1982, and an anti-liberal repudiation of freedom as the structuring principle of political intervention. That would not be an especially Hayekian characteristic of legal ideology, although Hayek was certainly committed to the ‘strong state’ as the basis for liberal freedom.¹³⁷ Nevertheless, Conservative political thought throughout that period would have been structurally rather complex, with authoritarian elements of Conservative ideology overlapping and intersecting with the more liberal concerns of thinkers such as Hayek. This authoritarian strand owes more to Conservative thinkers who repudiated liberalism, such as the German jurist Carl Schmitt, than it does

¹³⁵ Wedderburn was conscious of the multiple strands of Conservative thought, though he regarded the influence of Hayek as uniquely important during that period: Wedderburn (n 15) 8-9.

¹³⁶ EHH Green, *Ideologies of Conservatism: Conservative Political Ideas in the Twentieth Century* (OUP 2002) 280.

¹³⁷ For discussion, see Andrew Gamble, *The Free Economy and the Strong State: The Politics of Thatcherism* (2nd rev edn, Palgrave 1994).

to the liberal patterns of thought on display in Friedrich von Hayek's work.¹³⁸ In short, Conservative thought in the post-war period is simply not reducible to a parsimonious set of intellectual influences, even if Hayek was the dominant influence shaping labour legislation during the 1980s. As Scruton has observed, 'in politics, the conservative attitude seeks above all for government, and regards no citizen as possessed of a natural right that transcends his obligation to be ruled.'¹³⁹ This account of the 'conservative attitude' suggests that Conservative political thought has always been highly permeable to authoritarian modes of governance, alongside more liberal influences.

In my view, we are nevertheless witnessing a critical shift in that complex mosaic of influences. The Trade Union Act 2016 represents the growing ascendancy of a more authoritarian style of Conservative governmental practice and political thought: it is *beyond* neo-liberalism, because it is not a liberal doctrine at all. According to Dyzenhaus, Schmitt's political thought postulates politics as the urgent quest to 'create a normal situation out of the chaos of pluralism by making a genuinely political, sovereign decision. Such a decision must distinguish clearly between friend and enemy; it attempts to establish a society only of friends, of those who fit the criteria of substantive homogeneity.'¹⁴⁰ This demanded nothing less than the destruction of parliamentary democracy and the elimination of pluralism. It required the leader of the political community to identify the 'friend' in the pluralist divide and to repel the 'enemy', and the maintenance of a stable social order in the political community. There is little space in this conception of politics for those who dissent. The constitutional constraints of

¹³⁸ For an excellent recent engagement with these different elements of conservative political thought, see David Dyzenhaus and Thomas Poole (eds), *Law, Liberty and State: Oakeshott, Hayek and Schmitt on the Rule of Law* (CUP 2015).

¹³⁹ Roger Scruton, *The Meaning of Conservatism* (Palgrave Macmillan, 2001) 5.

¹⁴⁰ Dyzenhaus (n 1) 2.

democratic deliberation, liberal rights, and the checks and balances of parliamentary government, suffocate the practice of authentic politics, where the primacy of the sovereign's will comes to the fore.¹⁴¹ Economic and political crises of the kind that we are currently experiencing provide the moments through which this 'authentic' politics is able to break through the constitutional surface.

History teaches us that trade unions are often the first casualty in the coercive enforcement of political unity. We see signs of it also in the growing hostility towards irregular migrants, and the increasing use of criminalisation to stigmatise irregular migrants.¹⁴² In the Schmittian politics of friend and enemy, the battle lines are increasingly clear to see. What liberals see as the coarsening decline and violence of political discourse in the recent EU Referendum debates, particularly the rhetoric around migration and nationalism, anti-liberals would regard as the redemption of authentic politics. Across Europe the political centre of gravity has tilted to the right in countries like Poland, Austria, Hungary and the United Kingdom. Alongside the rise of far right groups, the mainstream political right in Europe and the United States is now being reconfigured in more strongly authoritarian terms. It would be foolish to suggest that we have reached the end of liberal politics. It would be equally foolish to wilfully ignore what is before us. For Kahn-Freund, the link between industrial freedom and political freedom was always fundamental to his theory of labour law. As we face the Trade Union Act 2016, it is now time to reclaim that liberal vision as our own. There is still

¹⁴¹ Thomas Poole, *Reason of State: Law, Prerogative and Empire* (CUP, 2015) 222-223.

¹⁴² See, e.g., Immigration Act 2016 s. 34 and s. 35. For a powerful discussion of the political potency and misuse of the concept of 'migrant', see Bridget Anderson, 'Precarious Pasts, Precarious Futures', in Cathryn Costello and Mark Freedland (eds), *Migrants at Work* (OUP 2014) 29.

everything to play for, and play we must, because everything is now at stake. Liberal democracy is a fragile achievement. If we lose in the battles to come, the existential crisis of labour law may prove to be an existential crisis of the liberal democratic order itself.