THE ECLIPSE OF THE RULE OF LAW: TRADE UNION RIGHTS AND THE EU

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RESUMEN: El presente artículo examina el principio de legalidad (TEU, artículo 2) y su aplicación a los derechos sociales y económicos. El trabajo analiza qué se entiende por el concepto de "principio de legalidad" y afirma que, como mínimo, debe significar que las Instituciones de la UE y sus Estados Miembros tienen la obligación de actuar de acuerdo a la ley, incluidas las obligaciones legales internacionales. Asimismo, el artículo analiza la medida en la que los Estados Miembros de la UE acatan el derecho de asociación sindical, el derecho a la negociación colectiva y el derecho de huelga, conforme a los acuerdos 87 y 98 de la OIT y los artículos 5 y 6 de la Carta Social Europea. Mediante el examen de los informes de los órganos supervisores, se muestra que la gran mayoría de los Estados Miembros incumplen una o más obligaciones de entre estas disposiciones, y que muchos de ellos se ven obligados a vulnerar las mismas como resultado de las acciones y exigencias de las instituciones de la UE. A pesar de los intentos de la Comisión Europea de otorgar contenido al principio de legalidad, hemos alcanzado una posición en el plano social en la que el estado de derecho ha quedado eclipsado, con las profundas consecuencias que esta situación supone para la democracia y el futuro de la Unión.

ABSTRACT: This article examines the principle of the rule of law (TEU, article 2) and its application to social and economic rights. The paper considers what is meant by the rule of law, and contends that it as a minimum it must mean that EU institutions and member states must act in accordance with the law, including international legal obligations. The paper considers the extent to which EU member states comply with the right to organize, the right to bargain collectively and the right

to strike in accordance with ILO Conventions 87 and 98 and the European Social Charters Articles 5 and 6. It is shown from an examination of the reports of the supervisory bodies that the overwhelming majority of Member States are in breach of one or more of their obligations under these various provisions, and that many are pushed into non-compliance by the actions and demands of the EU institutions. Despite attempts by the Commission to give substance to the rule of law, we have moved in the social sphere to a position in which the rules of law has been eclipsed, with profound implications for democracy and the future of the Union.

PALABRAS CLAVE: Órganos Supervisores, Acuerdos de la OIT, Incumplimiento de Obligaciones, Estados Miembro.

KEYWORDS: Supervissory bodies, ILO conventions, breach obligations, Member States.

I

On 15 July 2015, the British government's Trade Union Bill was introduced to Parliament. The Bill contains a wide range of restrictions on trade union freedom, which appear to contravene a number of ILO Conventions ratified by the United Kingdom. The government's proposals (which will be enacted before this paper is published) will impose new restrictions on the right to organise, the right to workplace representation, and the right to bargain collectively. They will also impose new restrictions on both the right to strike, and trade union political activity, while exposing trade union administration to new and unjustified levels of State surveillance.[1]

The government's attack on trade unions is to be seen in the context of a system in which trade unions are **already** very highly regulated, as a result of a number of restrictions on trade union freedom introduced by the Conservative governments from 1979 to 1997. Although the Labour governments from 1997 to 2010 introduced a

[1] For a critique, see K D Ewing and John Hendy QC, *Protect the Right to Strike – Kill the Bill* (Institute of Employment Rights, 2015). For a more scholarly account, see M Ford and T Novitz, 'An Absence of Fairness … Restrictions on Industrial Action and Protest in the Trade Union Bill 2015' (2016) 45 ILJ (forthcoming).

number of reforming measures,[2] these latter restrictions were largely unaffected, the Blair-Brown governments apparently comfortable to live with Tony Blair's promise on the eve of his landslide election victory, to the effect that under a Labour government British 'even after the changes we do propose, Britain will still have the most restrictive laws on trade unions in the Western world'.[3]

Yet it is not only the Trade Union Bill that contains proposals for change. On the same day that the Bill was published, the government published draft regulations to amend a law introduced in 2003 relating to the use of agency workers in a strike or industrial action.[4] It will now be possible for agency workers to be used as strike-breakers.[5] In addition, on 6 August 2015, it was announced that the Trade Union Bill would be amended, it now being proposed to 'abolish the check off across all public sector organisations,' as part of 'curtailing the public cost of 'facility time' subsidies. These latter proposals did not expressly appear in the government's election manifesto in 2015.[6]

It is as clear as night follows day that these various provisions will violate not only a number of important ILO Conventions ratified by the United Kingdom, but a number of other international treaty obligations as well. It is also true, however, that although these are extreme measures, the United Kingdom is not an island of deregulation. An article we posted on an ITUC website about the Bill attracted commentary from Canada where we were told that:

> In Canada we are in the middle of a federal election. Recently, we have seen federal labour laws enacted that have contained some of the dampening aspects of the British Trade Union Bill. If the far-Right Conservatives get re-

[2] The ILO Committee of Experts has critically examined many of these restrictions, as has the European Committee of Social Rights Committee. On the former see K D Ewing, *Britain and the ILO* (Institute of Employment Rights, 2nd ed, 1994). On the Social Charter, see most recently Council of Europe, European Committee of Social Rights, Conclusions XX-3 (2014).

[3] *The Times*, 31 March 1997. This claim was repeated in *The Guardian*, 27 April 1997, in an extended interview with three prominent journalists.

[4] The Conduct of Employment Agencies and Employment Businesses Regulations 2003 prohibit employment businesses 'from providing agency workers to cover the duties normally performed by an employee of an organisation who is taking part in a strike or other industrial action, or to cover the work of an employee covering the duties of an employee taking part in a strike or other industrial action (SI 2003, No 3319, reg 7).

[5] Department for Business, Innovation and Skills, *Hiring Agency Staff During Strike Action*, 15 July 2015 (BIS/15/416).

[6] The Conservative Party manifesto said only that a Conservative government would 'legislate to ensure trade unions use a transparent opt-in process for union subscriptions' (p 19).

> elected in this country, we will most certainly see more of the same brought down with a hard fist. If the centre-Right Liberals are elected in a majority we can expect to see no change in what is there, and most probably similar restrictive legislation presented without the anti-labour rhetoric — Liberals like to appear as reasonable people.[7]

Canada is close to Wisconsin, which appears to be the laboratory for much of the right wing agenda now gathering pace throughout the English-speaking world.[8]

But to hear in these terms from Canada is of course especially poignant, in view of recent monumentally significant decisions on the Supreme Court of Canada upholding the core labour rights to bargain collectively and to strike derived from no more than the constitutional commitment to 'freedom of association'.[9] There was no echo heard in Wisconsin, where on the contrary, the Supreme Court held that 'no matter the limitations or 'burdens' a legislative enactment places on the collective bargaining process, collective bargaining remains a creation of legislative grace and not constitutional obligation'.[10] For the moment the significance of the Canadian intervention to the contrary is that it brings home the disjunction between law and reality and the power and purposes of the neo-liberal agenda. As such it reveals the apparent willingness of governments to operate beyond the law, and the apparent powerlessness of courts to change the political weather. In this paper our aim is to show that while this may be a practice of national law, it is increasingly also a feature of other sources of law, which promised to protect worker and trade union rights.

Our concern is that the developments in the United Kingdom are evidence not of particularly British weakness with legality, but with a global one – one in which respect by governments in particular (and corporations by extended license) reveal contempt (or disregard if contempt is too strong for weak stomachs) for human rights and the rule of law. Governments are willing to work for the erosion of the former and to violate the latter where it is expedient to do so. In our view this is now a fact of life wherever trade unions encounter the power of the State – in EU law, international

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[7] Andy Hanson, Replying to 'If the UK passes this draconian Trade Union Bill, your country might be next', *Equal Times*, 15 October 2015: http://www.equaltimes.org/if-the-uk-passes-this-draconian.

[8] For Wisconsin, see *New York Times*, 9 March 2011 (collective bargaining restraints), 22 February 2014 (impact of the legislation), and subsequently 9 March 2015 (right to work laws).

[9] See *Saskatchewan Federation of Labour v Saskatchewan* [2015] SCC 4, and *Mounted Police Association of Ontario v Canada (Attorney General)* 2015 SCC 1.

[10] *Wisconsin Teachers Inc v Scott Walker*, 2014 WI 99, 31 July 2014: https://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=118669.

law, and international trade law. But it is especially poignant that this should now be a feature of life in the United Kingdom, given the hubris of British lawyers who – in the 800th anniversary of *Magna Carta* - claim to have bequeathed the rule of law to the world.[11]

II

We return to developments in the United Kingdom at a later stage in this paper. We turn here to EU law, which makes this contradiction very clear, the proud provisions of the EU Treaties a hymn to social democratic values and achievements. Singing loudly from the TEU, article 2 proclaims that the Union is 'founded on the values of respect for human dignity, freedom, democracy, equality, **the rule of law** and respect for human rights', in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail' (emphasis added). Similar values are rehearsed in article 3 which proclaims an obligation on the part of the Union to 'combat social exclusion and discrimination', and a duty to promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child' (emphasis added).[12]

Although unclear and imprecise, it is nevertheless presumed that these provisions are meaningful and enforceable. The rule of law in particular expresses something very basic, namely that government should be conducted in accordance with the law, and that government should have legal authority for whatever it does. In other words: government should not break the law; and government should act only within the law. There are of course those on the right and left who would argue that the rule of law must mean more than simply rule by law, and that the idea of the rule of law means that the law must have some basic content to meet the requirements of the principle.[13] This would suggest the rule by 'good' law, at which point the principle breaks down. It breaks down because of the inevitable disagreement as to what 'good' law means for this purpose: it is the role of democracy to resolve these conflicts between us.

[11] See American Bar Association, *Magna Carta and the Rule of Law* (2015). The irony that the year of the octo-centenary is the very year the UK government have announced they will remove the UK from the European Convention on Human Rights is un-missable.
[12] For further commitments to the rule of law, see Box 1.
[13] For a discussion, see J Goldsworthy, 'Legislative Supremacy and the Rule of Law', in T Campbell, K D Ewing and A Tomkins (eds), *Sceptical Essays on Human Rights* (2001), ch 4.

Paradoxically, the most vigorous proponents of this idea of the rule of law as the rule by 'good law' are those writing from the neo-liberal right, with one of the more explicit attempts to link the rule of law with substantive outcomes to be found in the work of Hayek, the Godfather of neo-liberalism.[14] In *The Road to Serfdom*, Hayek wrote that

> Nothing distinguishes more clearly conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee in given circumstances, and to plan one's individual affairs on the basis of this knowledge.[15]

So far, so uncontroversial. But while this emphasizes both the need to act within the law, and for laws that restrictions on individual freedom must be prescribed by law, Hayek was also to use these principles as a launch pad for an attack on the idea of a socialist planned economy, and subsequently on the role of trade unions.

Trade union rights in particular violated Hayek's idea that the rule of law 'excludes legislation either directly aimed at particular people, or at enabling anybody to use the coercive power of the State for the purpose of such discrimination'.[16] In the United Kingdom the nature of legal protection made it easy for Hayek, following constitutional scholars such as Dicey who wrote influentially about the rule of law in the late 19th and early 20th centuries.[17] For Hayek and his disciples, the question of trade union power was compounded by the legal protection of trade unions in the form of what was perceived to be 'immunity' from common law liability. British labour lawyers greatly under-estimated the rhetorical power (not to mention the ineffectiveness) of discarding rights as the clothes for the protection of freedoms.[18] Writing in *The Constitution of Liberty* in 1960, Hayek was to say that:

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[14] For an earlier attempt from a different perspective, see Lord Hewart, *The New Despotism* (1929).
[15] F A Hayek, *The Road to Serfdom* (1944), p 54.
[16] Ibid, p 62.
[17] A V Dicey, *An Introduction to the Study of the Law of the Constitution* (1885), a book that ran to 10 editions (the most recent in 1959). It is a book with a curiously powerful influence and long reach, being relied on by the Venice Commission, below. See also A V Dicey, *Law and Public Opinion in England* (2nd ed, 1924).
[18] See A Bogg, 'The Hero's Journey: Lord Wedderburn and the 'Political Constitution' of Labour Law' (2015) 44 ILJ 299.

> Public policy concerning labor unions has, in little more than a century, moved from one extreme to the other. From a state which little the unions could do was legal if they were not prohibited altogether, we have now reached a state where they have become uniquely privileged institutions to which the general rules of law do not apply.[19]

It is easy to see why those of us with a different political outlook might treat the rule of law with suspicion. It is easy to see too why the rule of law is viewed with hostility by the left, as being no more than the vindication of capitalism and the rule of coercive State power.[20] But on the left the rule of law had something of an habilitation, first as a result of the work of E P Thompson and other historians who having no illusions about the nature of law, nevertheless saw some virtue in a requirement that the State (even an oppressive State) must act in accordance with clear rules and formal authority. It is within such space that abuse can be exposed, that power can be held to account, and that small victories can be won.[21] If experience has shown that law is unlikely to have the transformative and liberating potential that pioneering social democrats of the late 19th and early 20th centuries expected, important struggles still need to be fought.

More recently, the habilitation of the rule of law on the left has been underpinned by the human rights movement, which has also adopted the latter principle as well for its own noble causes. It is easy to see the attraction of the rule of law in a neo-liberal world in which governments torture detained suspects, imprison people indefinitely without charge or trial, by various means deny access to the courts by citizens and others, bully judges who ought otherwise to be independent, and take increasingly unaccountable powers of surveillance which have no legal authority. If this not a remarkable ideological shift, it may be a reflection of the contentious nature of human rights principles, this being territory on which Hayek also seemed comfortable, though we have no confidence that his preferred human rights outcomes

[19] F A Hayek, *The Constitution of Liberty* (1960), p 267. This important book is free to download at http://www.libertarianismo.org/livros/tcolfh.pdf. It should be studied carefully to understand what is now happening in the EU. See also F A Hayek, *1980s Unemployment and the Unions* (2nd ed, 1984). See also on the significance of Hayek for labour law: Lord Wedderburn, Freedom of Association and Philosophies of Labour Law (1989) 18 ILJ 1. Wedderburn focuses on different writings by Hayek than the ones considered here.

[20] See M Horowitz, 'The Rule of Law: An Unqualified Human Good?' (1977) *Yale Law Journal* 561.

[21] E P Thompson, *Whigs and Hunters* (1975), p 266.

would be consistent with those of today's concerned activists. Nevertheless, Hayek was to write that:

> Whether, as in some countries, the main applications of the Rule of Law are laid down in a Bill of Rights or a Constitutional Code, or whether the principle is merely a firmly established tradition, matters comparatively little. But it will readily be see that whatever form it takes, any such recognized limitations of the powers of legislation imply the limitation of the inalienable right of the individual, inviolable rights of man.[22]

For our purposes, however, it is unnecessary to seek a reconciliation of right and left, perceptions, even if this were possible. We are content that when EU treaties refer to the 'rule of law', they do so by referring to a discrete principle, albeit one of many other principles which include dignity, freedom, equality, solidarity and democracy.[23] As a result it is unnecessary for the rule of law to be inflated to include these various principles, and enough that it evokes the fundamental need to ensure that governments have legal authority for their actions and that they do not break the law. This is not to deny that there is a difference between the rule of law and rule by law, the former suggesting certain content beyond legal authority itself. The same idea is reflected in the jurisprudence of the ECtHR in its decisions on Articles 8(2) – 11(2), which permit restrictions on Convention rights where these are 'in accordance with the law', and where a number of other conditions are met. For these purposes the Court has suggested the need for open, clear and predictable laws, without imposing any preconditions as to the substance of the law.[24]

That is enough for us for present purposes. In our view, the context within which the term 'the rule of law' is used in the EU treaties and the ECtHR is not one that invites deep metaphysical debate about the meaning of 'law', but the more straightforward consideration of whether the government has legal authority for what it does, and whether the government can be restrained when it acts unlawfully. One caveat, however, is that the rule of law in this sense knows no boundaries, and no artificial distinction between national and international law. This is reinforced by the TEU, article 21 where we are told that the European Union's 'action on the international scene shall be guided by the principles which have inspired its own creation', including democracy, the rule of law, and the universality and indivisibility of human rights. Not only that, but it is expressly provided that the EU is to define

[22] Hayek, *The Road to Serfdom*, above, p 63.
[23] On the importance of the rule of law as a discrete principle, see also J Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR 195.
[24] See *Malone v United Kingdom* (1984) 7 EHRR 14, para 67.

and pursue common policies and actions in order to 'consolidate and support democracy, the rule of law, human rights and the principles of international law'.

Box 1

The Rule of Law Reinforced

The commitment to the rule of law in the TEU is reinforced by the preamble to the EU Charter of Fundamental Rights, which states that 'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice'. The key commitment here again is the rule of law, which was acknowledged also in the preamble to the European Convention on Human Rights some fifty years earlier. The preamble of the latter refers to the 'Governments of European countries' as being 'like-minded and [having] a common heritage of political traditions, ideals, freedom and the rule of law'. We also encounter the rule of law in a number of national constitutions, as for example in Sweden where 'public power shall be exercised under the law', and in Spain where the preamble to the Constitution refers to the need to 'consolidate a state of law which insures the rule of law as the expression of the popular will'. Even the United Kingdom – famously without a written constitution – has recognized in legislation the 'existing constitutional principle of the rule of law' (Constitutional Reform Act 2015, s 1).

III

In light of the foregoing, it is clear that the EU legal order is built on a lie, or a series of up to 28 lies. The member states collectively may have committed themselves to the rule of law (using that term at its most basic and least controversial) but they do not observe the commitment, at least in relation to labour rights. How do we know that the violation of labour rights is systematic and systemic within the EU, and by what objective standard can we measure such things? We can start with the Council of Europe's Social Charters of 1961 and 1996, which not only have the virtue of including many labour rights (notably the right to organize, the right to bargain collectively and the right to strike), but are also subject to a fairly rigorous process of supervision by the respected European Social Rights Committee (succeeding the Committee of Independent Experts), now engaged in its 21st cycle of supervision.

The Social Charter also has the particular virtue for present purposes of being referred to on several occasions in the EU treaties. Apart from confirming their commitment to the principles of 'liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law', in the preamble to the TEU the member states also confirmed their attachment to 'fundamental social rights as defined by the European Social Charter…'. Similarly, the TFEU (article 25) provides that

> The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

The hat-trick is completed by the EU Charter of Fundamental Rights, which again makes clear the importance of the Social Charter as a source of inspiration, as well as a source of many of its substantive provisions.[25] Continuing with the soccer metaphor, the hat-trick might as well have been three own goals, for although all EU member states have ratified one or other of the Social Charters, many of these states have not accepted all of the provisions of whatever version they have ratified,[26] and most if not all are in breach of various provisions of the treaty in question. It is neither necessary nor possible here to give an account of the full extent of the violations of the Social Charter, though it is appropriate to give an account of the scale of the violations of articles 5 (right to organize), 6(2) (right to bargain collectively), and 6(4) (right to strike).[27]

On the right to organise, even a cursory examination of the Social Rights Committee's website reveals that 11 of the 27 EU member states that have accepted it

[25] Note also that the Community Charter of the Fundamental Social Rights of Workers of 1989 also claims to draw inspiration from the Council of Europe's Social Charter, as well as ILO Conventions.

[26] See for example European Social Charter 1961, article 20 – ratifying states required to accept a minimum of 5 of the 7 core articles, and a minimum number of articles or numbered paragraphs.

[27] The other two paragraphs of article 6 deal with joint consultation (art 6(1)) and dispute resolution (art 6 (3)).

are in 'non conformity' with this basic provision.[28] It is true that the 11 do not include any of the large member states (with the exception of Poland and the United Kingdom), and it is also true that in some cases the extent of the non-conformity is narrowly contained (as in the case of Denmark, where there are problems relating to seafarers, Ireland and Malta where there are problems in relation to police officers, and Portugal where there are problems in relation to the absence of clear criteria of representativeness to determine eligibility for membership of the Economic and Social Council (a governmental body)). In a number of other countries the concerns were more serious, including Bulgaria where there are insufficient remedies for workers dismissed because of trade union activities.[29]

On the right to bargain collectively, again we find that that 11 of the 27 member states that have accepted article 6(2) are not in conformity (Greece being the only country not to have accepted either articles 5 or all of 6). There is some overlap between the violations of articles 5 and 6(2) (Bulgaria, Denmark, Estonia, Ireland, Latvia, and the United Kingdom), and a number of countries in breach of the latter but not the former (Croatia, Hungary, Spain and Slovakia).[30] In the case of Denmark and Ireland the concerns about seafarers and police officers respectively in relation to article 5 spill over to article 6(2). The most common refrain in relation to article 6(2), however, is that the country in question does not do enough in practice to fulfill its obligation to promote collective bargaining. But in the case of Spain, the Committee found unlawful important austerity inspired legislation that permitted employers to suspend or dis-apply collective agreements:

> The legitimation of unilateral derogation from freely negotiated collective agreements is in violation of the obligation to promote negotiation procedures. Accordingly the Committee finds that the situation is in violation of Article 6(2) of the 1961 Charter on this point.[31]

[28] Here we are looking only at the 20th and most recent cycle of supervision, which was reported in January 2015. Greece is the only EU member state not to have accepted article 5.

[29] The other countries not in conformity with Article 5 are, Estonia, Latvia and Luxembourg.

[30] In relation to Croatia, the data relate to the 19th cycle of supervision, as there are no data for the 20th cycle.

[31] European Committee of Social Rights, Conclusions XX-3 (2014), p 25. The Spanish situation is important because it appears to be the first case to come before the Committee about austerity driven deregulation, Greece being exempt from such scrutiny (though not ILO scrutiny) because of its unique failure to accept article 6(2). The Spanish case is revealing for the Committee's acceptance that member states have a wide margin of appreciation in terms of bargaining structures, thereby allowing the radical decentralization

We return to the significance of EU inspired austerity measures as a cause of member states failure to comply with Social Charter obligations. An examination of Article 6(4) on the right to strike to reveal the full extent of the failure of member states to live up to their promise to the rule of law.[32] Article 6(4) has been accepted by 24 of the 28 EU member states (Austria, Greece, Luxembourg and Poland being the exceptions, despite the fact in two of these cases the right to strike is formally recognized in the national constitutions, and despite the unequivocal commitment to the Social Charter as a whole in the three EU treaties). In only four cases (Latvia, Lithuania, Netherlands and Slovenia) has it been found that the country in question is in 'conformity' with Article 6(4), a judgment which in the first two cases seems incredible given that both Latvia and Lithuania are in breach of Article 6(2) for not doing enough to promote collective bargaining, with low levels of collective bargaining density in the case of Lithuania in particular.[33]

The Social Rights Committee has concluded that 16 member states are in non-conformity with the right to strike. These include what were once celebrated as the great social democracies of western Europe (Germany, France, Italy, Sweden and Belgium), as well as some of the states in eastern Europe (Bulgaria, Czech Republic, Hungary, and Slovakia). The reasons for being in non-conformity are many and various, including (i) the restricted purposes for which industrial action may take place; (ii) the prohibited categories of workers who may take industrial action; (iii) the excessive procedures that must be followed before industrial action may lawfully be taken; and (iv) the sanctions that may be applied to those who organize or participate in industrial action. In some cases – most notably the United Kingdom (even before

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of bargaining activity that took place in response to the economic crisis. However, the Committee also made clear that the crisis itself was not sufficient justification for introducing changes to the collective bargaining regime without first consulting the trade unions. Having regard to a decision of the ILO Committee on Freedom of Association, as well as to other considerations, the Social Rights Committee rejected the government's claim that its conduct was justified by the urgency of the situation: 'The Committee recalls that the Contracting States undertook actively to promote the conclusion of collective agreements (Statement of Interpretation on Article 6(2), Conclusions I (1969)). It also recalls that Article 6(2) entails the obligation to arrange for the participation of those concerned, through the intermediary of their representatives, in the drafting of the regulations which are to apply to them (Conclusions III (1973), Germany)' (ibid, p 24).

[32] On the importance of article 6(4) for national jurisprudence, see *NV Dutch Railways v Transport Unions, FNV, FSV and CNV* (1986) 6 *International Labour Law Reports* 3.

[33] 15% collective bargaining coverage of the workforce compared to a 62% European average; L Fulton, *Worker Representation in Europe* (Labour Research Department and ETUI, 2013).

the Trade Union Act 2016) – there are multiple reasons for the violation of article 6(4).[34]

It is difficult to tell how far these violations of article 6(2) and (4) are a result autonomously of the domestic laws and policies of member states, and how much they are a result of the austerity policies of the EU imposed on member states. As we have seen, it is clear that the Spanish violations are a direct result of the latter, while a decision against Sweden under the Collective Complaints procedure is a direct result of the decision of the CJEU in the *Laval* case[35]. In that case the Social Rights Committee found restrictions on the right to strike in domestic legislation implementing the Posted Workers Directive in the light of *Laval* to be a breach of article 6(4), as well as article 19(4)(a) and (b) (dealing with the rights of migrant workers).[36] But whatever the reasons for the violation, it is clear that at least in relation to the Social Charter, the commitment to the rule of law by member states rings very hollow.

IV

It is not only the Social Charters. As referred to in note * above, one of the factors in the conclusions influencing the Social Rights Committee in relation to Spain were the similar conclusions of the ILO Freedom of Association Committee, which had considered the matter first.[37] Spain is not alone in recent years for having encountered difficulties before the CFA, with questions having been asked of both Ireland and Greece, the questions in the latter case being so serious as to lead to the appointment of an ILO High Level Mission, to which we return.[38] These concerns raise more general questions about the compliance by member states with their obligations under the various ILO Conventions they have ratified, alongside the questions about their obligations under the Social Charter.

[34] These relate to (i) the limited purposes for which action may lawfully be taken; (ii) the excessive procedures that must be followed in advance; and (iii) the sanctions against workers for taking part.
[35] Case C-341/05 *Laval v Svenska Byggnadsarbetareforbundet* (18 December 2007).
[36] *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden*, Complaint No 85/2012.
[37] ILO Committee on Freedom of Association, Case No 2947 (Spain), Report No 371 (2014).
[38] On the position in Ireland, see ILO Committee on Freedom of Association, Case No 2780 (Ireland), Report No 363 (2012).

It is true of course that ILO Conventions do not figure so visibly in the EU treaties as do the Social Charters; indeed there is not a single reference to these conventions specifically. Nevertheless, they are clearly covered by the overall commitment of member states to promote the rule of law peppered throughout the treaties, and they are clearly covered by the commitment made by TEU, article 21 (referred to above) to consolidate and support 'the rule of law, human rights and the principles of international law'. Convention 87 was also expressly recognized by the ECJ in the *Viking* case,[39] as contributing to the recognition of the right to strike 'as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures' (sic).[40] The reference was repeated a week later in the *Laval* decision.

But this too is empty, not just in relation to the United Kingdom, where some of the most egregious violations of ILO standards are to be found.[41] If we look at ILO Convention 87, we find that Germany, Portugal, Spain, and the UK are in breach for a number of reasons.[42] Although the process of identifying these breaches is not so straightforward or systematic as it is in the case of the Social Charter, nevertheless even a cursory examination of recent reports of the ILO Committee of Experts reveal multiple violations of ILO Convention 87, article 3 which embraces several of the core principles of the right to freedom of expression, that is to say the right to self-government ('the right to draw up their constitutions and rules, to elect their representatives in full freedom'), and the right to act together in pursuit of common

[39] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line*, Judgment 11 December 2007.

[40] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line*, above, para 44. But just as importantly, each Member State has periodically reaffirmed its commitment to the various ILO Conventions it has ratified. If we take the two core ILO Conventions on freedom of association (Conventions 87 and 98), we find that both have been ratified by all 28 EU member states. In each case the vow has been renewed in free trade agreements between the EU and Member states on the one hand, and third countries on the other, in which there is a firm commitment not only to respect the four ILO core principles, but also all ILO Conventions ratified by the Member State in question. So David Cameron as British Head of Government signed the EU-Korea FTA including a reaffirmation of 'the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the European Union have ratified respectively'. This agreement raises wider questions about the EU's commitment to the rule of law, given the situation in Korea relating to ILO Conventions. This is an agreement that smells of commitments that no one ever expects to meet.

[41] See Ewing, *Britain and the ILO*, above. The violations cover a wide range of matters, but relate mainly to the right to strike, notably the ban on all forms of secondary action.

[42] The account in this and the next three paragraphs is based mainly on the Observations of the ILO Committee of Experts. These may be found on the ILO website.

aims and objectives ('to organise their administration and activities and to formulate their programmes').[43]

However, it is in relation to the right to strike that the most serious concerns have been raised. Indeed in the two most recent years there are clear concerns about the violation of ILO standards on the right to strike by eight member states (Belgium, Bulgaria, Croatia, Czech Republic, Germany, Hungary, Luxembourg and Malta), while there continue to be unresolved longstanding concerns from other countries (such as the United Kingdom), which were not revisited in 2014 or 2015. The only sweet spots are Estonia and Lithuania where progress is noted. As might be predicted, the concerns are of various kinds, ranging from ballot thresholds (Bulgaria and Czech Republic); public sector restrictions (Croatia, Germany and Hungary); the use of compulsory arbitration or injunctions to prohibit strikes (Malta and Belgium respectively); and the rights of minority unions (Luxembourg).

Yet, it is not only Convention 87 that presents problems. So does Convention 98 on the Right to Organise and Collective Bargaining. Concerns have been expressed about Bulgaria in relation to the remedies for anti-union discrimination, the lack of effective legislation to prevent employer domination of trade unions, and the collective bargaining rights of civil service trade unionists (with restrictions extending beyond those involved in the administration of the state). Concerns about remedies for anti-union discrimination were also raised about Croatia, where there have also been concerns about the exclusion of some local government workers from collective bargaining, as well as more general concerns about the power of government to rewrite collective agreements, contrary to the principle that 'a legal provision which allows one

[43] EU member states in breach of the former include Croatia (in relation to longstanding concerns about the distribution of trade union assets, presumably an unresolved question of the capitalist counter-revolution and the disintegration of Yugoslavia), and Portugal (in relation to legislation and judicial practice interfering with trade union internal affairs in breach of the principle that 'national legislation should only lay down formal requirements respecting trade union constitutions, except with regard to the need to follow a democratic process and to ensure a right of appeal for the members'. As a result, the Government was called upon 'to initiate discussions with the representative workers' and employers' organizations in order to examine the legislative provisions in question and their application in the light of the abovementioned principle': ILO Committee of Experts, Freedom of Association and Protection of the Right to Organise Convention, 1948 – Portugal (2014): http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3147225.

party to modify unilaterally the content of signed collective agreements is contrary to the principles of collective bargaining'.[44]

The Committee of Experts raised the foregoing themes in connection with another six EU Member States in 2014 and 2015 (in addition to major concerns in 2013 in relation to Romania). Thus, the importance of legislation to deal with anti-union discrimination has been identified as an issue in relation to Hungary and the Netherlands, as in the former case has been the absence of legislation protecting trade unions from employer interference or domination. The exclusion of selected groups of workers from bargaining rights continues to be identified in Denmark (seafarers) and Germany (civil servants not exercising authority in the name of the State),[45] while the Committee continues to be vexed by legislation in Malta empowering the government to rewrite collective agreements:

> The Committee recalls that it had previously requested the Government to indicate the measures taken or contemplated with a view to amending section 6 of the National Holidays and Other Public Holidays Act, so as to ensure that this provision: (i) does not render automatically null and void any provisions in existing collective agreements which grant workers the right to recover public holidays falling on a Saturday or Sunday; and (ii) does not preclude voluntary negotiations in the future over the issue of granting workers the right to recover national or public holidays which fall on a Saturday or Sunday on the basis of a collective agreement (see 342nd Report of the Committee on Freedom of Association, Case No. 2447, paragraph 752). ***The Committee once again requests the Government to indicate the measures taken or contemplated with a view to amending section 6 of the National Holidays and Other Public Holidays Act.***[46]

[44] ILO Committee of Experts, Right to Organise and Collective Bargaining Convention, 1949 – Croatia (2015): http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3187855.

[45] The German case is interesting for highlighting the continuing close relationship between ILO Conventions and the ECHR. In this case involving teachers, the Committee refer to a decision of the Federal Administrative Court that the ban of teachers' strikes was incompatible with the ECHR following *Demir and Baycara v Turkey* [2008] ECHR 1345 - ILO Committee of Experts, Right to Organise and Collective Bargaining Convention, 1949 – Germany (2015): http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3187670

[46] ILO Committee of Experts, Right to Organise and Collective Bargaining Convention, 1949 – Malta (2015):

These findings in relation to Convention 98 are in addition to the CFA's findings relating to Spain referred to above, and the special case of Greece considered below. They are also in addition to direct requests to 5 other countries (Belgium, France, Ireland, Latvia and Lithuania), the Committee having been alerted about possible violations by the ITUC and national trade union federations. There are also the problems encountered by Sweden, as it fumbled to respond to the *Laval* decision of the ECJ.[47] For the present, however, we have

- 15 member states in breach of ILO Conventions 87 and/or 98, and another three the subject of direct requests;
- 19 member states in breach of the ESC, Arts 5, 6(2) or 6(4), with another three protected from scrutiny by not accepting one or more of these provisions.

There is obviously overlap between these two categories. But adding these two categories together, we find that concerns have been raised by the supervisory bodies under one or both of the ESC and ILO obligations about 22 EU member states in the last few years alone. The only exceptions are Austria, Cyprus, Finland, Lithuania, Poland and Slovenia, and in two of these cases – Austria and Poland – there is no acceptance of ESC, Article 6(4). In the case of Finland there is new legislation in the pipeline, which will change that country's clean bill of health, interfering as it does with free collective bargaining on working time. And in the case of Lithuania the very low levels of collective bargaining coverage suggest that the absence of censure may be fortuitous.[48]

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Make whatever excuses you like: the foregoing represents an impoverished idea of a Union built on the rule of law. Here we have three core treaties binding member states - on what is supposed to be a core activity of the Union – in which a maximum of only 6 member states have an unblemished record of compliance. Much of this is of

http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3187260

[47] ILO Committee of Experts, Right to Organise and Collective Bargaining Convention, 1949 – Sweden (2013): http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3085282

[48] Lithuania is the only EU member state with collective bargaining density levels lower than the United Kingdom.

course the direct result of policy agendas being pursued at national level (as in the treatment of the public sector), and some of it is influenced by constitutional ideas in need of greater flexibility in their application (as in the treatment of civil servants (*Beamte*) in Germany).[49] But one of the undercurrents in the discussion so far has been the possibility that some of the violations are to be found in measures introduced to deal with austerity, which both the European Social Rights Committee and the ILO CFA conclude did not justify the measures in question.

The spectre of austerity haunting Europe raises another concern. Twenty two EU member states are unable to demonstrate compliance with core labour rights. In most cases that is a matter of choice. In some cases, however, it is clear that the violations are a direct breach of austerity measures imposed by the EU's political institutions. This of course compounds rule of law concerns, for here we have violations by member states, but also violations by member states imposed by the EU institutions in apparent breach of their own treaty obligations set out in TEU, Article 2. If we were mathematicians we might say that this was the violation of the rule of law squared. There is certainly a whiff of this in the case of Spain referred to above, while it is the demands of the European Commission, the European Central Bank and the IMF that took Greece into violation.[50]

It was not possible of course for the Greek trade unions to challenge the austerity packages their governments agreed to, as violating the ESC, Articles 5 and 6 (though a number of successful challenges based on other articles of the treaty were successful).[51] But it was possible to claim that these imposed changes violated ILO Conventions on freedom of association (as well as a raft of other ILO Conventions relating to equality and discrimination, which are not considered here). Informed by the exhaustive findings of an ILO High Level Mission,[52] the ILO Committee of Experts was clearly concerned by a number of changes to the way that collective bargaining was to be conducted, the Troika's demands having included the decentralisation of collective bargaining and in particular the procedures permitting derogation from sectoral agreements by non union associations of workers at enterprise level.

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[49] Thus, in the case of Germany referred to above, the Committee understood the constitutional problems in Germany but reiterated that 'negotiations need not necessarily lead to legally binding instruments so long as account is taken in good faith of the results of the negotiations in question'.

[50] International Labour Office, *Report on the High Level Mission to Greece (Athens, 19-23 September 2011)* (2011).

[51] See eg *Pensioners' Union of the Athens-Piraeus Electric Railways (ISAP) v Greece*, *Complaint No 78/2012* (violation of article 12)3).

[52] International Labour Office, *Report on the High Level Mission to Greece,* above.

These latter provisions led the Committee of Experts to express '***deep concern'*** that the changes – 'aimed at permitting deviations from higher level agreements through 'negotiations' with non-unionized structures' - are 'likely to have a significant – and potentially devastating – impact on the industrial relations system in the country'.[53] Although the Committee understood that the Greek Government 'was given little choice in the current discussions with the lending institutions but to adopt these changes in response to calls for greater flexibility and improved competitiveness of the labour market', the Committee said nevertheless that it '***deeply regret[ted]'*** that 'such far-reaching changes were made without full and thorough discussions with all the social partners concerned with a view to determining the appropriate flexibility to be afforded without wholly risking to undermining the long-established industrial relations in the country'.[54] This, however, was only the start.

So, the Committee expressed the fear 'that the entire foundation of collective bargaining in the country may be vulnerable to collapse under this new framework'. This was because 90% of the (private sector) workforce was employed in small enterprises, in a system where trade unions cannot legally be formed in enterprises with less than 20 employees. In these circumstances,

> granting collective bargaining rights to other types of workers' representation which are not afforded the guarantees of independence that apply to the structure and formation of trade unions and the protection of its officers and members is likely to seriously undermine the position of trade unions as the representative voice of the workers in the collective bargaining process.[55]

The 'risk' that 'the entire foundation of collective bargaining in the country may be vulnerable to collapse', was said to have been reinforced by the abolition of the favourability principle set out [in legislation of 2010 and 2011]. According to the Committee of Experts, this had the effect of nullifying the binding nature of collective agreements.

The Committee of Experts has returned to this matter every year since 2012, repeating the view in 2014 that the prevalence of small enterprises in the Greek labour market meant that the facilitation of association of persons combined with the

[53] ILO Committee of Experts, Right to Organise and Collective Bargaining Convention, 1949 – Greece (2012): http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2698934.
[54] Ibid.
[55] Ibid.

abolition of the favourability principle 'would have a severely detrimental impact upon the foundation of collective bargaining in the country'.[56] The dramatic effect of the former was revealed when it was explained that according to government statistics -

> national occupational collective agreements have gone down from 43 in 2008 to seven in 2012 whereas firm-level collective agreements have increased from 215 in 2008 to 975 in 2012 (706 signed by associations of persons and 269 signed by trade unions). Moreover, 701 of those agreements signed by associations of persons and 76 signed with trade unions have provided for wage cuts. Similarly, 313 enterprise level collective agreements have been signed in 2013 of which 178 have been signed by associations of persons (156 providing for wage cuts) and 135 signed by trade unions (42 providing for wage cuts).[57]

The Committee's request that the government takes steps 'to ensure that trade union sections could be formed in small enterprises in order to guarantee the possibility of collective bargaining through trade union organizations' continues to fall on deaf ears.[58]

This is crucially important because it would tend to suggest that the Troika (the IMF, the European Commission and the European Central Bank) were imposing conditions on Greece, which were in breach of Greece's obligations under international law. Indeed, it seems that these institutions were wholly indifferent to some if not all of these obligations, the HLM being 'struck by reports' in relation to obligations under ILO Convention 122 (Employment Policy Convention, 1964) 'that in discussions with the Troika employment objectives rarely figure'.[59] Although it cannot be presumed that the Troika were equally unimpressed by ILO Conventions 87 and 98 (or any other international legal obligation applying to Greece), there is little in the foregoing to suggest that the European Commission and its partners felt in

[56] ILO Committee of Experts, Right to Organise and Collective Bargaining Convention, 1949 –Greece (2014): http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3149782.

[57] Ibid.

[58] See ILO Committee of Experts, Right to Organise and Collective Bargaining Convention, 1949 – Greece (2015): http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3190159

[59] International Labour Office, *Report on the High Level Mission to Greece*, above, para 331.

any way constrained by these obligations, even if they were known to the negotiating team.

The conduct of the European Commission and the European Central Bank is not consistent with TEU, article 2. Yet Greece is not alone, there being evidence of Troika interference with attempts in Romania to bring domestic law into line with treaty obligations, demanding amendments to new legislation on freedom of association.[60] Thus, seeking to persuade the Romanian authorities 'to limit any amendments to Law 62/2011 to revisions necessary to bring the law into compliance with core ILO conventions', IMF and European Commission representatives strongly urged the authorities to 'ensure that national collective agreements do not contain elements related to wages and/or reverse the progress achieved with the Labor Code adopted in May 2011 (e.g. on working time regulation)'.[61] The exclusion of pay from collective bargaining would not be compatible with ILO Convention 98.[62]

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[60] ILO Committee of Experts, Right to Organise and Collective Bargaining Convention, 1949 – Romania (2013): http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3085310.

[61] http://www.ituc-csi.org/IMG/pdf/romania.pdf. It is known too that an agreement between employers, government and unions that (amongst other things) the Irish Competition Act (a replication of Art. 101TFEU) would be amended so as to overcome a provision which had the effect of barring unions from negotiating or enforcing collective agreements in respect of self-employed workers, was overruled by the direct intervention of the Troika, leaving such workers denied their right to collective bargaining. The agreement was '*Towards 2016: Review and Transitional Agreement 2008-9*.'The ILO Committee of Experts reported: 'The Committee had noted the Government's indication that, during the course of the social partnership talks in 2008, it committed itself to introducing legislation amending section 4 of the Competition Act to the effect that certain categories of vulnerable workers, formerly or currently covered by collective agreements, when engaging in collective bargaining, would be excluded from the section 4 prohibition. According to the Government, this commitment took into account that there would be negligible negative impacts on the economy or on the level of competition and gave consideration to the specific attributes and nature of the work involved, subject to consistency with European Union (EU) competition rules. Three categories of workers were proposed to be covered by the exclusion: freelance journalists, session musicians and voice-over actors. The Government indicates that since the social partnership talks took place, the EU/International Monetary Fund (IMF) Programme of Financial Support for Ireland has been agreed and the authorities have committed themselves to ensuring that no further exemptions to the competition law framework will be granted unless they are entirely consistent with the goals of the EU/IMF Programme and the needs of the economy. The Government indicates that this commitment requires further consideration in the context of the EU/IMF Programme.' See ILO Committee of Experts, Right to Organise and Collective Bargaining Convention, 1949 –Ireland (2013):

VI

By virtue of the austerity packages imposed in Member States – notably Greece – the EU has embarked on a course of action at odds with its own treaty commitment to the rule of law. For two reasons – by failing to comply with its own obligations to respect the rule of law; and by doing so placing member states in a position where they must break the law. In this endeavour the Commission and the Bank have been given an extraordinary licence by the CJEU in the *Pringle* case,[63] which created a legal space in which the law does not operate. So while English lawyers are familiar with Lord Justice Scrutton's famous aphorism that 'there must be no Alsatia in England where the King's Writ does not run',[64] European lawyers must familiarize themselves with the new idea that there may now be an Alsace in France where the EU's Writ does not run.

But not only does the CJEU stand condemned for its weakness in giving legal space to treaty violations, it is also directly responsible for some of the most important violations of international legal obligations on the part of member states. Indeed it is the CJEU that has taken the lead in undermining the rule of law at EU level, assuming of course that the rule of law is not the same as what the CJEU does, or that what the CJEU does **is** the rule of law. We are surely beyond such conceit. For this discussion the starting points are the *Viking* and *Laval* decisions, which are so well known as not now to need repeating. But the effect of these decisions was to violate international standards and to put the EU itself and its member states well beyond the scope of international law, in a manner not easily consistent with the duty of the Union to pursue common policies and actions in order to 'consolidate and support democracy, the rule of law, human rights and the principles of international law' (TFEU, article 21).

The impact of the *Viking* decision acknowledging a right to strike subordinate to the employers' economic freedoms, and highly qualified by tight proportionality conditions was to be seen very quickly in the BALPA case, which led to a complaint to the ILO Committee of Experts from the United Kingdom.[65] In that case, British

http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3082151. This was repeated in 2015.

[62] Ibid.

[63] *Case C-370/12. Pringle v Ireland*, 27 November 2012.

[64] *Czarnikow v Roth* [1922] 2 KB 478, at p 488.

[65] For a discussion of this case which is otherwise unreported, see K D Ewing and J Hendy QC, *The New Spectre Haunting Europe* (Institute of Employment Rights, 2009), at pp 68-72.

Airways' pilots were worried about their employer's decision to base part of its operations in France, and the implications this might have for their terms and conditions of employment. The union (BALPA) sought various assurances from the company, and when negotiations failed the union conducted a strike ballot in accordance with the detailed procedures of British law, and otherwise acted in accordance with British legislation (which itself has been found to breach ILO and Council of Europe standards,[66] and which has been the subject of several complaints to the ECtHR).

The employer threatened BALPA with legal action not because the union had acted in breach of domestic law, but because its proposed action would constitute a breach of the employer's right under the EC Treaty, article 43 (now TFEU, article 49) following the decision in *Viking*. BALPA then took the unusual step of seeking a declaration in the High Court that its action was lawful, while the employer counterclaimed seeking 'unlimited damages, including damages in respect of damage alleged to have been sustained by it by the mere fact that BALPA had served notice to ballot for strike action'.[67] The union's action for a declaration was discontinued only three days after it commenced, and the industrial action was discontinued for fear that it might be unlawful, with the risk that the legal proceedings would drag on indefinitely and that the union might be liable for unlimited damages for all the losses allegedly suffered by the employer as a result of the dispute.

Having discontinued the domestic litigation, BALPA made a complaint to the ILO Freedom of Association Committee. A complaint that was referred in turn to the ILO Committee of Experts. The latter has now reported twice on the complaint, making it clear in uncompromising terms that the effect of *Viking* as reflected in *BALPA* was to take the United Kingdom even deeper in breach of Convention 87. In 2010, the Committee of Experts challenged the very basis of the decision in *Viking* by reporting that 'when elaborating its position in relation to the permissible restrictions that may be placed upon the right to strike, it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services'.[68] In the same report, the Committee also observed 'with

[66] See http://www.ilo.org/ilolex/cgi-lex/countrylist.pl?country=(United+Kingdom).

[67] K D Ewing and J Hendy QC, 'The Dramatic Implications of *Demir and Baycara*' (2010) 39 ILJ 2.

[68] ILO Committee of Experts, Freedom of Association and Protection of the Right to Organise Convention, 1948 –United Kingdom (2010): http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2314990. The Committee has only suggested that 'in certain cases, the notion of a negotiated minimum service in order to avoid damages which are irreversible or out of all

serious concern', the practical limitations on the effective exercise of the right to strike of the BALPA [members] in this case'. According to the Committee,

> the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of the *Viking* and *Laval* judgments, creates a situation where the rights under the Convention cannot be exercised.[69]

When it revisited this matter in 2011, the Committee again expressed concern that 'the doctrine that is being articulated in these ECJ judgments is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to [Convention 87]'.[70] The British government had responded to the Committee's 2010 observations by contending that the problems in the *BALPA* case arose as a result of its obligations derived from EU treaties, which it was powerless unilaterally to address by domestic legislation. In once again recalling its 'serious concern', the Committee responded by observing that

> protection of industrial action in the country within the context of the unknown impact of the ECJ judgments referred to by the Government (which gave rise to significant legal uncertainty in the *BALPA* case), could indeed be bolstered by ensuring effective limitations on actions for damages so that unions are not faced with threats of bankruptcy for carrying out legitimate industrial action. The Committee further considers that a full review of the issues at hand with the social partners to determine possible action to address the concerns raised would assist in demonstrating the importance attached to ensuring respect for this fundamental right. The

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proportion to third parties, may be considered and if agreement is not possible the issue should be referred to an independent body (see 1994 General Survey on Freedom of Association and Collective Bargaining, para 160). The Committee is of the opinion that there is no basis for revising its position in this regard'.

[69] Ibid. Although there was no decision of the domestic courts in the *BALPA* case, the Committee considered that there was nevertheless 'a real threat to the union's existence and that the request for the injunction and the delays that would necessarily ensue throughout the legal process would likely render the action irrelevant and meaningless'. The Committee was also concerned that 'in the current context of globalization, such cases are likely to be ever more common, particularly with respect to certain sectors of employment, like the airline sector, and thus the impact upon the possibility of the workers in these sectors of being able to meaningfully negotiate with their employers on matters affecting the terms and conditions of employment may indeed be devastating' (ibid).

[70] ILO Committee of Experts, Freedom of Association and Protection of the Right to Organise Convention, 1948 –United Kingdom (2011): http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2322470.

> Committee therefore once again requests the Government to review the [domestic legislation], in full consultation with the workers' and employers' organizations concerned, with a view to ensuring that the protection of the right of workers to exercise legitimate industrial action in practice is fully effective, and to indicate any further measures taken in this regard.[71]

Whether or not the British government could or would want to do anything in response to the *Viking* decision, are of course contested questions. It remains the case nevertheless that the United Kingdom was placed in a position where it was bound to break its legal obligations by a decision which the ILO Committee of Experts made clear is not consistent with international law, which incidentally applies to all EU member states. In taking this step in clear breach of treaty obligations, and in placing member states in this invidious position, the approach of the CJEU in *Viking* is all the more lamentable for the fact that it was wholly unnecessary and easily avoidable, particularly in light of the court's full recognition of the importance of the right to strike in international instruments such as the European Social Charter and ILO Convention 87, as well as EU instruments such as the Community Charter of the Fundamental Rights of Workers and the EU Charter of Rights.

Several ways forward that would have respected the EU's obligation to the rule of law (an obligation that applies to the Court as it does to other institutions) were presented to the Court in the course of the proceedings by the Danish and Swedish governments as interveners and by the respondent parties themselves.[72] These would have allowed the court to have carved out a principled exception to protect international legal obligations based on (i) the competence of the EU, (ii) the role of fundamental rights as taking priority over fundamental freedoms, and/or (iii) the application by analogy of the *Albany* principle to the fundamental freedoms.[73] With the benefit of hindsight the ILO Committee of Experts has shown just what a grave misjudgment it was not to embrace one or more of these options, the Court seeking to reconcile the irreconcilable in an ultimately unconvincing way, repeating the performance a week later in the *Laval* case, to similar effect.

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[71] Ibid.

[72] C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line*, above, paras 39 – 48.

[73] Case C-67/96, Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie [1999] ECR I-05751. See now *FNV Kunsten Informatie en Media v Staat der Nederlanden*, 4 December 2014.

Box 2

The CJEU and the Rule of Law

In *Alemo-Herron,*[74] the CJEU held that workers in a privatised enterprise were to be denied the benefits of a national collective agreement to which they were contractually entitled. This was on the basis that the Acquired Rights Directive EC 23/2001 had to be read consistently with the EU Charter of Fundamental Rights, article 16 which guarantees the right to conduct a business. Consequently, the CJEU held that the new owner had to have the freedom:

> *'to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activities. Because the private owner could not participate in the continuing collective bargaining machinery (which was confined to public employers and unions), the Court held*[75] *that its 'contractual freedom is seriously reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business'.*[76]

The employer was thus held to be entitled to disregard the term tying the workers' wages to the increases set under the collective bargaining arrangements by which they had contracted to be bound. The use of article 16 (the right to conduct a business) so as to permit an employer to renege on its contractual obligations is extraordinary enough, while the Court's use of article 16 to abrogate employees' rights appears to be contrary to previous CJEU case-law.[77] But most strikingly, the right of the workers to the benefit of collective bargaining protected by article 28 of the Charter, in article 11 of the European Convention on Human Rights (in consequence of *Demir and Baykara v Turkey*), in article 6 of the European Social Charter, and in ILO Convention 87 were apparently not worthy of even a mention. It is assumed that the point was argued.

[74] Case C-426/11, *Alemo-Herron v Parkwood Leisure Ltd*, 18 July 2013.
[75] Ibid, para 35.
[76] Ibid, para 33.
[77] J Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law', (2013) 42 ILJ 434 at 441-443.

VII

In light of the foregoing it is perhaps timely that in 2014 the European Commission should issue a *Communication on A New Framework to Strengthen the Rule of Law*.[78] However, the reason for this Communication was not the shameful role of the Commission (or the Court) in undermining the rule of law, to which the authors of the Communication were evidently indifferent. According to a paper posted by the Robert Schuman Foundation, the concern appears rather to have been backsliding on rule of law commitments by new accession states, some of which were highlighted in a speech by Viviene Reding in 2013, which was said to refer to

> (i) The French government's attempt in summer 2010 to secretly implement a collective deportation policy aimed at EU citizens of Romani ethnicity despite contrary assurances given to the Commission that Roma people were not being singled out;
>
> (ii) The Hungarian government's attempt in 2011 to undermine the independence of the judiciary by implementing an early mandatory retirement policy; and
>
> (iii) The Romanian government's failure to comply with key judgments of the national constitutional court in 2012.[79]

No reference here of course to labour rights or – as already pointed out – the Commission's own role in undermining the rule of law, the very idea being no doubt implausible for a behemoth that claims to the 'the guardian of the Treaties and has responsibility for ensuring the respect of the values on which the EU is founded and of protecting the general interest of the Union'.[80] Assuming a responsibility to play an 'active role' for this purpose, the Commission's *Communication on A New Framework to Strengthen the Rule of Law* is about building on a Barroso proposal in his 'state of the union' speech to the European Parliament in 2012, where he referred to the need

[78] European Commission, COM(2014) 158 final/2.

[79] Robert Schuman Foundation, 'Upholding the Rule of Law in the EU: On the Commission's Pre-Article 7 Procedure as a Timid Step in the Right Direction', *European Issue No 356* (2015): http://www.robert-schuman.eu/en/european-issues/0356-upholding-the-rule-of-law-in-the-eu-on-the-commission-s-pre-article-7-procedure-as-a-timid-step.

[80] European Commission, *Communication on A New Framework to Strengthen the Rule of Law*, above, p 2.

for a 'better developed set of instruments' for promoting the rule of law'.[81] These would apply, however, only in the case of threats of a systemic nature, defined to mean

> The political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened – for example as a result of the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress. The Framework will be activated when national 'rule of law safeguards' do not seem capable of effectively addressing these threats.[82]

Where there are systemic violations of the rule of law of the kind referred to, it is nevertheless proposed that these will lead to interventions by the Commission, of a kind which itself might be thought to raise eyebrows on rule of law grounds.[83] There seems to be a pattern emerging within EU law whereby wide and meaningful powers of an administrative nature are conferred on the Commission, these powers being largely beyond any form of effective legal supervision. So far as the proposed rule of law procedure is concerned, it is to begin with a dialogue between the State in question and the Commission, culminating in 'rule of law recommendations.'[84] The latter would identify the Commission's concerns and propose ways by which they could be addressed, designed to fill the gap between the current choice of ineffective political persuasion, and the 'nuclear option' of TEU, article 7 leading to the possible suspension of EU membership rights, about which there is obvious reluctance.

It is clear that although this is a procedure designed for systemic problems within States, it is not designed for systemic problems involving all states, or systemic problems within the Commission itself. There is thus no one to guard the guardian, the guardian apparently not in need of being guarded. Nevertheless the weaknesses of the Commission's proposals also reveal how they could be strengthened, at least in the case of the systemic problems involving all states. There is no reason why the procedure could not be extended to such cases, though the potentially fatal weakness of such an initiative is the requirement that the procedure would have to be invoked by the Commission. That is unlikely to be credible if the Commission is indifferent to the rights being violated, or if the Commission is itself demanding policy changes that

[81] Ibid.
[82] Ibid, p 6.
[83] See the not unrelated concerns of the House of Commons European Scrutiny Committee, above.
[84] European Commission, *Communication on a New Framework to Strengthen the Rule of Law*, above, p 8.

lead inevitably to violations, or if the violations arise as a result of the decisions of the Court.

Apart from the proposal itself and its limitations, the other important feature of the Commission's *Communication on A New Framework to Strengthen the Rule of Law* is its attempt to define what is meant by the rule of law. As we explained above, the rule of law has been a highly contentious principle in the common law world, where it has been the subject of extensive discussion. It is clear, however, that the rule of law is not a single principle, but a series of contestable principles, each more expansive than the other, and each more contestable than the other. But the first principle (and perhaps the only principle, and one which we consider to be uncontroversial) is that those who make the law should obey the law. In too much of a rush to climb the ladder to the next principle, however, this is a principle to which the Commission pays insufficient attention, though it does acknowledge that the rule of law is important because it

> makes sure that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.[85]

This is very unconvincing. According to the Commission, the rule of law is necessary in order to ensure that the law is obeyed; not that obedience to the law is a necessary feature of the rule of law. This is a crucial distinction when it comes to the meaning of legal obligations such as those in TEU, article 2. While we insist that this means that member states and EU institutions must comply with legal obligations, the Commission is saying on the contrary that article 2 means that there must be institutional arrangements in place to enable this obligation to be met, but without acknowledging the obligation sustained by the infrastructure itself. Intentional or otherwise, this is a brilliant sleight of hand, which not only reveals too much of a hurry to get to the more contestable second and third rungs on the rule of law ladder, but also too much of a hurry to confuse and smother the rule of law with other principles such as equality, democracy and human rights, to which it may be related but from which it is distinct.[86]

> To say that the rule of law does not necessarily imply democracy or respect for fundamental rights, is not to deny the importance of the principle or that it is an essential feature of a democratic society. Given that the principle is operating alongside so many other complementary principles of equal value, however, it is not clear why it is necessary to inflate the rule of

[85] Ibid, pp 3-4.
[86] See also Raz, 'The Rule of Law and its Virtue', above.

law far beyond the first rung. We accept the view expressed in *Demir and Baycara* and elsewhere that the rule of law implies something about the quality of the law (certainty, predictability and foreseeability), as well as the need for an independent judiciary (how else can there be a rule of law?).[87] But to go much further up the ladder not only deflects attention from this core obligation, but threatens to enter irreconcilably contested territory such as that occupied by Hayek and others There is consequently much to be said for the view that in missing the main point about the rule of law, the European Commission's Communication has adopted a definition that is at best over-elaborate, and at worst intentionally obfuscatory.

Thus, according to the Commission the key elements of the rule of law are:

- Legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws;
- Legal certainty;
- Prohibition of arbitrariness of the executive powers;
- Independent and impartial courts;
- Effective judicial review including respect for fundamental rights;
- Equality before the law.[88]
- These elements are based largely on the work of the Council of Europe's Venice Commission in 2011,[89] which claimed that the foregoing now represented a consensus,[90] though on what empirical or scientific basis this was determined is unknown. It is certainly not uncontroversial, with the fifth bullet point casually eliding from the form of the law and its administration into the substance and content of the law.[91] There is, however, one redeeming feature of the Venice Commission's recommendations. Unlike the European Commission, the latter is quite clear that the element of legality (the first bullet point) 'implies that the law must be followed', and 'applies not only to individuals, but also to

[87] *Demir and Baycara v Turkey,* above, at para 153 (referring to 'legal certainty, foreseeability and equality before the law').
[88] European Commission, *Communication on A New Framework to Strengthen the Rule of Law*, above, p 4.
[89] Council of Europe, Report on the Rule of Law - Adopted by the Venice Commission at its 86th plenary session (25-26 March, 2011).
[90] Ibid, para 35.
[91] This was an issue also identified by the House of Commons European Scrutiny Committee: HC 83 – xliii (2013-14).

> authorities, public and private'.[92] As already suggested, for our purposes, that is all that is needed. No more, no less.

VIII

Returning to the United Kingdom, as already pointed out, the principle of the rule of law now has statutory recognition, with the Constitutional Reform Act 2005, section 1 including a provision inserted at the request of the judges. This provides that the provision of the Act (which makes provision for a new Supreme Court, the removal of the Lord Chancellor as head of the judiciary) and reformed the process of judicial appointment) did not 'adversely affect' the 'existing constitutional principle of the rule of law'. The 'rule of law' is not defined for these purposes, prompting a senior judge to deliver an important public lecture in 2006 to explore its meaning for the purposes of the 2005 Act.[93]

Lord Bingham's eight elements of the rule of law were very like the six elements subsequently expressed by both the Venice Commission and the European Commission respectively. This is perhaps unsurprising, given the apparent influence of Lord Bingham's work on the former,[94] and the influence of the former on the latter. But Bingham's list included one notable clarification, Bingham making clear that

> The existing principle of the rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations. I do not think this proposition is contentious. [95]

The British government clearly disagrees, it being reported that the *Ministerial Code* has been amended to remove specific references to the duty of ministers to comply with international law. Under previous governments the Code addressed the 'overarching duty on ministers to comply with the law including international law and treaty obligations and to uphold the administration of justice. Under the Cameron government, it addresses simply the duty to comply with 'the law'.[96]

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[92] Council of Europe, above, para 36.
[93] Lord Bingham, 'The Rule of Law' (2007) 66 CLJ 67.
[94] Venice Commission, above, para 36.
[95] Bingham, above. See also T Bingham, *The Rule of Law* (2011).
[96] Ministerial Code (October, 2015), para 1.2. The Ministerial Code sets out the standards of behaviour expected of ministers in the conduct of public affairs and in their private lives.

It is true that the 'law' for this purpose could include both domestic and international law. The removal of international law from the text and the political row that it provoked would suggest, however, that this is not what is intended.[97] So, apart from removing one small restraint from Prime Minister's wishing to engage in illegal warfare (albeit a restraint of uncertain legal obligation), the change also removes from other ministers any need to even go through the formality of considering whether legislative proposals are consistent with treaty obligations. As the British government is moving to loosen rule of law constraints on ministers, it is little wonder that it should also be sceptical about even the modest (and flawed) *Communication on A New Framework to Strengthen the Rule of Law.* The British government has made it clear that it considers the latter to be unnecessary,[98] while the British Parliament's European Scrutiny Committee has also expressed reservations.[99]

It is in this context that the Trade Union Bill was introduced by the British government, containing provisions which not only violate ILO Conventions 87, 98, and 151, as well as the European Social Charter, but probably also the provisions of the European Convention on Human Rights (on multiple grounds), the substance of which these various other treaties inform. This seems to be particularly true of the provisions of the Act which prohibit in the public sector the implementation of collective agreements about the use of the check off to collect trade union subscriptions; as well as provisions allowing ministers to rewrite collective agreements (and contracts of employment) dealing with facilities for workplace representation, again in the public sector. These are provisions clearly designed to undermine the financial and organizational security of public sector trade unionism, in what is a partial copy-cat of the Wisconsin initiative.

The Bill does not of course attack only the financial and organizational security of public sector trade unions. Mimicking developments elsewhere in the United States, a change to the default rules on trade union political activity will require members willing to support this activity to opt in, thereby replacing a system where members opposed to this activity had to opt out. The purpose is clearly to diminish the political voice of resistance to government policy, just as the new rules on support thresholds (40% of those eligible to vote) in strike ballots in the 'important public services' is designed to diminish the industrial voice of resistance to government policy. Although these latter changes will affect all unions (as will other changes on strike notice and picketing), the principal target appears to be the public sector where

[97] See *The Guardian*, 26 October 2015, where the government is accused of having contempt for international law.
[98] HC 83 – xliii (2013-14).
[99] Ibid.

trade unionism is strongest and where tight fiscal discipline has already pre-determined a 1% increase in the public sector pay bill over the next five years.

What is being played out here, however, is a severe tension at the heart of the neo-liberal project. There is a compelling ideological desire to redesign the function of trade unions (as service rather than regulatory bodies), and a compelling desire to reduce the size of the State (and with it the points of resistance to this ambition). But as we saw above, one of the underlying principles identified by one of the architects of modern neo-liberalism is the rule of law, which at its most basic means that governments should only act within the law. The impatience of modern governments, however, is such that they are willing to move without legal authority and in the process to shatter one of the most sacred icons on which their project was based. In the end, the experience of the United Kingdom and elsewhere in the EU reveals the rule of law to be no more than a rhetorical device, the core element of which is simply ignored by a Europe in which power has displaced law.

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