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Regulating Prison Strikes and Industrial Conflict

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Black describes industrial relations in the UK prison service as the 'Jurassic Park' of public sector industrial relations.[1] Despite industrial relations being identified as an obstacle to good performance or a contributory factor to a crisis in numerous reports, an industrial relations problem persists. In fact, Black argues that many penal reforms, including prison market testing and privatisation, can be 'construed as aimed more at diversification in order to resolve the industrial relations crisis, than to enhance penal reform and identify levels of accountability'.[2]

The Prison Officers' Association (POA) lies at the heart of any industrial relations discussion. The union has been described as a 'narrow, outdated and militant relic'.[3] In response, the POA argues that the removal of their right to take lawful industrial action renders them unfairly limited in the face of new and increasing challenges for their members. The POA argues that the industrial action ban is symptomatic of a broader lack of understanding, respect and trust from their employer and more strongly, a determination by the government to oppress the union and their members.[4]

This article reviews the law and practice of managing social conflict between prison officers and their employer. It concludes by discussing the future of conflict management in light of recent estate restructuring and workforce changes.

Why is it unlawful for prison officers to take industrial action?

Unlike many continental legal systems, the law in England and Wales does not provide any workers with a right to take industrial action.[5] The law instead provides for a limited immunity for trade unions from liability in tort where their conduct is in contemplation or furtherance of a trade dispute (s. 219 Trade Union and Labour Relations (Consolidation) Act 1992 [TULR(C)A 1992]). Employees who are dismissed while participating in official industrial action which is protected within s. 219 (that is, industrial action which is in contemplation or furtherance of a trade dispute and which has been appropriately balloted for and notified to the employer) may also claim automatic unfair dismissal (s. 238A TULR(C)A 1992).

However, in England and Wales prison officers and the trade unions representing them may not take industrial action: they do not enjoy any immunity from liability. In *Home Office v. Evans* [1993] (unreported), the Court confirmed that since prison officers enjoy 'all the powers, authority, protection and privileges of a constable' under s. 8 Prison Act 1952, they share the same status as police officers and therefore may not take industrial action. The Criminal Justice and Public Order Act 1994 (CJPOA 1994) made this ban explicit in s. 127 by creating an actionable duty which was owed to the Secretary of State not to induce a prison officer (1) to withhold his services as such an officer or (2) commit a breach of discipline. For the purpose of this section, the definition of prison officer includes prison custody officers — prison officers who work in prisons which are managed by private companies.

In 2001, New Labour announced plans to repeal s. 127 CJPOA 1994 and replace it with a legally enforceable voluntary agreement with the trade unions (which retained the restriction on industrial action), coupled with an independent pay review body.[6] On the basis of trade union agreement, s. 127 was disapplied on 21st March 2005 by order under the Regulatory Reform Act 2001.[7] However, after the trade unions gave notice to terminate the agreement on 8th May 2007, and following the first ever national strike by prison officers on 29th August 2007, the government

1. Black, J. (1995) 'Industrial Relations in the UK Prison Service: The 'Jurassic Park' of public sector industrial relations', *Employee Relations*, Vol. 17, No. 2, pp. 64-88.
2. *Ibid.* p. 87.
3. Bennett, J. and Wahidin, A. (2008) 'Industrial Relations in Prisons' in U*nderstanding Prison Staff*, Bennett, J., Crewe, B, and Wahidin, A. (eds), Cullompton: Willan Publishing, p. 117.
4. See especially the former General Secretary of the POA, Brian Caton, speaking at the 2008 Trades Union Congress. For extracts, see Evans, D. and Cohen, S. T*he Everlasting Staircase: A History of the Prison Officers' Association 1939-2009*, London: Pluto Press, pp. 247-249.
5. For further on the distinction between immunities and positive rights, see Wedderburn, K.W. (1995) *Labour Law and Freedom*, London: Lawrence & Wishart.
6. For further see Home Office (2004) 'Further Consultation Document: The proposed amendment of section 127 of the Criminal Justice and Public Order Act 1994 by Order under the Regulatory Reform Act 2001', London: HMSO.
7. The constitutionality of using so-called 'Henry VII' clauses to amend the law in this way has been questioned. See further Barber, N.W. and Young, A.L. (2003) 'The rise of prospective Henry VIII clauses and their implications for sovereignty', Public Law, pp. 112-127.

reinstated the statutory ban in s. 127 via the Criminal Justice and Immigration Act 2008.[8]

Challenging the statutory ban

In August 2004, the POA, which has sole recognition rights for collective bargaining in respect of most prison staff, lodged a complaint before the Committee on Freedom of Association (CFA) of the International Labour Organisation (ILO), relying upon Conventions 87 and 98 on freedom of association and collective bargaining.[9] The POA argued first that prison services are not essential services demanding a prohibition of industrial action and secondly, that prison officers do not enjoy adequate compensatory guarantees to protect their interests in the absence of a right to strike. While the two limbs of their argument are closely related, the second limb is discussed instead below in reference to the Prison Service Pay Review Body.

As for the first limb of the POA's argument, that prison services are not essential services demanding a prohibition on industrial action, the CFA reiterated that '[t]he right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests'.[10] However, it followed previous decisions in recognising that the principle of freedom of association in the case of public servants does not necessarily imply the right to take industrial action.[11] Moreover, industrial action by public sector workers may be prohibited or restricted in services which are essential or in the civil service with respect to officials acting in their capacity as agents of the public authorities. Essential services are defined as 'services the interruption of which would endanger the life, personal safety or health of the whole or part of the population'.[12] The POA argued that service interruption merely causes discomfort and inconvenience. However, drawing upon a list of duties performed by prison officers, the CFA concluded that 'interruption of this service would endanger the life, personal safety or health of part of the population — primarily, the prisoners but also the wider public'.[13] Prison services are therefore essential and it follows that prohibitions or restrictions upon industrial action are permissible.

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While the CFA has accepted that industrial action by prison staff may be prohibited or restricted, it does not follow that the government has been given a carte blanche or that prison staff are now not entitled to have their grievances redressed. Given that the government has opted for a total ban on industrial action, rather than pursuing a minimum service delivery approach as is in place in most European states, the CFA made clear that it must work hard to demonstrate that prison staff are adequately protected. The CFA last met in early 2011. Despite the CFA having given its view of the case on the merits, the POA's complaint is not yet closed. The CFA will only do so once it is satisfied that its recommendations concerning worker protection in the absence of a right to take industrial action have been adequately responded to by the government. It seems clear then that as of early this year, the CFA was not sufficiently satisfied with the government's response (see further below for discussion of the Prison Service Pay Review Body).[14]

How is social conflict managed?

Despite not enjoying a right (or more accurately, immunity from liability) to take lawful industrial action, prison staff retain the right to organise themselves collectively, that is to form a trade union or other representative body.[15] Prison officers are represented for

8. For the statement to the House of Commons see Straw, J. (2008) 'Oral statement to the House of Commons — Prison Service: Industrial Relations'.
9. The UK ratified these conventions on 27.06.1949 and 30.06.1950 respectively.
10. ILO CFA *Digest of Decisions 2006*, para. 522.
11. ILO CFA *Digest of Decisions 2006*, para. 572.
12. LO CFA *Digest of Decisions 2006*, para. 576.
13. ILO CFA (2005), Vol. LXXXVIII, Series B, No. 1, Report 336, Case No. 2383, para. 767.
14. ILO CFA (2011), Vol. XCIV, Series B, No. 1, Report 359, Case No. 2383.
15. ILO CFA *Digest of Decisions 2006*, para. 232. See also Article 11 of the European Convention on Human Rights and Article 12 of the Charter of Fundamental Rights of the European Union.

collective bargaining purposes principally by the POA.[16] The POA's role is generally more limited however in the eleven privately managed prisons in England and Wales, where other trade unions or staff associations fulfil the staff representation function (such as the Prison Service Union or the Public and Commercial Services Union).[17]

Prior to 2007, prison officers enjoyed specific dispute resolution procedures which guaranteed their trade union representatives access to those with bargaining power and a process through which social conflicts could be redressed. Dispute resolution procedures were first provided for in the Cubbon Formula of 1987, then in the 1993 Industrial Relations Procedure Agreement (IRPA), thirdly in the Voluntary Agreement (VA) of 2001 and finally in the Joint Industrial Relations Procedure Agreement (JIRPA) of 2004. The VA and JIRPA provided for binding arbitration of disputes on a pendulum basis by arbitrators which were appointed by the Advisory, Conciliation and Arbitration Service (ACAS).[18] This encouraged early settlement since any gains made in the initial negotiation stage would be lost if the parties failed to agree and the dispute had to be escalated for final resolution. However, the agreements suffered from a lack of clarity in definition of their scope, which led to a constant tension about whether an issue was policy or terms and conditions and whether it fell inside or outside the procedure. In 2007 the POA gave notice that they would withdraw from the JIRPA. There has not been a formal national dispute resolution mechanism since the JIRPA although some local arrangements remain in place. Negotiations for a new national mechanism are currently on-going.

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In March 2001, a statutory pay review body, the Prison Service Pay Review Body (PSPRB) was established (The Prison Service (Pay Review Body) Regulations 2001 (SI 2001 No. 1161)). The Body's remit is to examine and report on matters relating to the rates of pay and allowances to be applied in the prison services of England and Wales and Northern Ireland. The PSPRB was established as part of the Voluntary Agreement package, in compensation for the industrial action prohibition. However, in 2002 and 2007, the Government staged implementation of the Body's recommended pay awards, arguing that the recommended pay rises were unaffordable. It was this 2002 pay award process and decision which led the POA to argue that the PSPRB lacks the necessary independence and power.

As was explained above, the 2002 pay award staging led the POA to make a complaint before the ILO CFA that the PSPRB is an inadequate compensatory guarantee of worker protection. The POA argued that the government's staging of pay awards was unjustified and that a concern for independence and impartiality was inadequately reflected in the qualities which are required for appointment to the PSPRB. Furthermore, they argued that the power of the Secretary of State (under Regulation 4 of the PSPRB Regulations) to give the PSPRB directions in the form of a remit letter as to considerations to which they must have regard, is an unwarranted fetter on the Body's discretion. Finally, they highlighted the position of prison custody officers working in the private sector, who do not fall within the PSPRB's remit and yet are in the same position as public sector prison officers in respect of the industrial action prohibition.

The POA's arguments have been relatively successful before the ILO CFA. For compensatory guarantees to be adequate there must be 'impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented'.[19] The Committee held that

16. For further on the history of prison officers obtaining the right to organise, see especially Evans, D. and Cohen, S. *The Everlasting Staircase: A History of the Prison Officers' Association 1939-2009*, London: Pluto Press and Bennett, J. and Wahidin, A. (2008) 'Industrial Relations in Prisons' in *Understanding Prison Staff*, Bennett, J., Crewe, B, and Wahidin, A. (eds), Cullompton: Willan Publishing.
17. The private management of prisons was enabled by the Criminal Justice Act 1991. The first private prison in England and Wales was HMP Wolds which opened in 1992 under the management of Group 4 (Remand Services) Limited.
18. ACAS is a non-departmental body which helps with employment relations by supplying information, independent advice and training, and working with employers and employees to resolve employment problems.
19. ILO CFA *Digest of Decisions* 2006, para. 596.

the following rules should apply: 'i) the awards of the Prison Service Pay Review Body are binding on the parties and may be departed from only in exceptional circumstances; and (ii) the members of the Prison Service Pay Review Body are independent and impartial, are appointed on the basis of specific guidance or criteria and have the confidence of all parties concerned'.[20] As yet, the CFA has not been persuaded that the PSPRB meet these criteria. The National Offender Management Service (NOMS) has agreed to suspend use of the remit letter unless specific reasons require it to be used and in such an event, has agreed to write to the POA to explain its reasons. However, in its most recent decision, the CFA 'notes with regret that the complainant has not been able to obtain representation on selection panel for the Board, despite the Government's previous declared intention to satisfactorily respond to the POA's request'.[21] The Committee also urges NOMS to reinitiate consultation about reforms to the PSPRB to ensure the Body's impartiality and requests information about the procurement provision made for compensatory guarantees in respect of private sector prison custody officers.[22]

It would therefore appear that further reform of the PSPRB is due. However, the government might be reticent to grant the Body greater independence and power at a time of public sector spending cuts and fiscal crisis. Moreover, if the government were minded to ignore the CFA's recommendations, the Committee does not have any enforcement powers upon which it might draw. While it might therefore be politically embarrassing for the UK to remain in disfavour with the CFA, it is possible for government to ignore the Committee's recommendations with little consequence.[23]

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Current sources of social conflict

Strikes by prison officers, in the sense of a total withdrawal of labour by staff, are rare in England and Wales. The first and only national strike by prison officers occurred on 29th August 2007 in response to a dispute over Contract Supplementary Hours (CSH) (a scheme whereby prison officers could voluntarily enter into contracts for additional working hours) and the Government's decision to stage implementation of the Prison Service Pay Review Body recommendation for the 2007 pay award. The government responded by obtaining an interim injunction. However, significant damage was incurred at some establishments, especially at YOI Lancaster Farms, and the cancellation of court appearances, prisoner transfers and the use of police cells caused disruption and expense.

Lower level industrial action by prison officers, such as overtime bans and working to rule is more common although such action is mostly still unlawful as it is either a breach of contract or interferes with contractual performance and therefore falls within s. 219 TULR(C)A 1992. Disputes have generally concerned staffing levels, pay and overtime and more recently, the market testing and privatisation of prisons. Working conditions for prison officers have been subject to much recent change. In 2008, the government came close to agreement with the trade unions on a package of change called 'Workforce Modernisation'. The Government provided a £50 million funding incentive but the package was rejected by unions in 2009 in the final stages of negotiations.[24]

Since 2009 many of the reforms to prison working conditions which were proposed in the Workforce Modernisation package have in any event been implemented. These changes include the introduction of a two-tier prison officer workforce, with a new pay structure and terms and conditions and the closure of the Principal Officer grade, which was the most senior uniformed prison staff grade. A Job Evaluation Scheme has commenced and in March 2011, the Government accepted Lord Hutton's proposals in relation to the reform of public sector

20. ILO CFA (2005), Vol. LXXXVIII, Series B, No. 1, Report 336, Case No. 2383, para. 773.
21. ILO CFA (2011), Vol. XCIV, Series B, No. 1, Report 359, Case No. 2383, para. 182.
22. ILO CFA (2011), Vol. XCIV, Series B, No. 1, Report 359, Case No. 2383, paras. 183-184.
23. See further Gravel, E., Duplessis, I. and Gernigon, B. (2001), *The Committee on Freedom of Association: Its impact over 50 years*, Geneva: International Labour Office.
24. For a brief summary of Workforce Modernisation see http://www.pcs.org.uk/en/prison_service_group/workforce-reform-and-restructuring/achive/workforce-modernisation-wfm.cfm.

worker pensions.[25] These changes have of course caused tension although industrial action has remained isolated and low-level. Highly significantly, one outcome of union rejection of Workforce Modernisation has been the further market testing of public sector prisons with the consequence that in March 2011, it was announced that HMP Birmingham would be transferred to private sector management under G4S from October 2011. This will be the first transfer of an operational public prison to the private sector. It is noteworthy however that the POA's recent ballot for industrial action in the wake of this decision produced a negative result.[26] It may be that the recent change in POA leadership on the National Executive Committee and the shockwaves sent by the decision to privatise HMP Birmingham, are heralding in a new phase in prison industrial relations.

Discussion

Prison officers and the unions which represent them currently find themselves in the middle of a huge amount of change. Prison privatisation was introduced in the 1990's in part to break the power of the POA, which has been seen as a powerful obstacle to change. It might be overstating the case to describe the POA as broken, but privatisation, and particularly the recent decision to transfer HMP Birmingham to the private sector, appears to have weakened the union. The market testing and privatisation agenda has proved divisive between national union policy and local union branches. While national union policy remains one of total opposition and disengagement, local establishments have had to engage with the process or else forfeit the right to bid to retain public sector management of their prison. This has tended to undermine the union's relevance in the eyes of its membership at establishments which are subject to market testing. Moreover, the POA's inability to have prevented a public sector establishment being taken over by the private sector, might serve to undermine perceptions of the union's credibility and power. This may be compounded by the on-going renegotiation of facilities' agreements between NOMS and all relevant trade unions. These agreements define the number of union hours and extent of establishment facilities which are paid for by NOMS. A reduction in the POA's facility seems likely. This may redistribute power between the different unions in the prison sector and, coupled with the private sector's recognition of unions other than the POA, challenge the POA's dominance among unions and power vis-à-vis management.

Privatisation and the broader employment changes which have been described above have combined to create huge occupational and industrial uncertainty. The POA is struggling to find a meaningful voice in the midst of this change and this may have been exacerbated by the absence of any formalised dispute resolution process. With hindsight, their withdrawal from the JIRPA is perhaps regrettable. While the formal legal position with respect to industrial action remained the same under the JIRPA (prohibited on a contractual basis) as s. 127 CJPOA 1994 (prohibited on a statutory basis), the voluntariness of the contractual model set a less combative and conflictive tone for industrial relations. Furthermore, continuation of the JIRPA may have staved off or softened the privatisation and market testing programme.

The absence of recourse to industrial action is an important symbol of the balance of power between employer and employee and will inevitably influence a trade union's bargaining strategy. However, given the vulnerable state of many prisoners, some limitation upon industrial action to ensure that prisoners' basic needs are met appears both morally and legally justified. In any event, since prison officers are such a highly unionised workforce, the impact of the statutory ban in practice appears limited. Moreover, progress is still possible through negotiation, compromise and dialogue, even in the absence of industrial action as the ultimate threat. The ILO CFA's approach to the POA's complaint is encouraging. The Committee has taken a robust and searching attitude and some progress, particularly in respect of the use of remit letters in the PSPRB, has been made. However, the length of time the case has taken, coupled with the CFA's lack of enforcement powers, means that the ILO process is unlikely to significantly alter the management of prison staff social conflict in England and Wales. There are limits to what law can achieve. It is perhaps now time for the POA to leave behind its traditional baggage and move beyond law and industrial action towards a more professional, conciliatory and realistic future.

25. For further on pensions see http://www.hm-treasury.gov.uk/indreview_johnhutton_pensions.htm.
26. 8,312 voted against and 4,078 in favour of industrial action. See POA circular 94, 16.06.2011.