

# UK Minimum Service Levels Act and False International Comparisons

Or how the Act does not follow ILO or EU standards, but a Chilean  
neoliberal/Thatcherian version of labour law

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## Summary

- False Comparisons: Spain, Italy, France, and ILO standards
- Real Comparisons: Dictatorial Chile
  - UK influencing dictatorial Chile
  - Chile departing from UK influence
  - Chile influencing UK (or UK recalling recipes applied overseas)

## Literature on the UK Minimum Service Levels Act

- Tonia Novitz, Minimum Service Levels Legislation: In Conflict with Strikers and with Europe, UK in a Changing Europe.
- Keith Ewing, The Strikes (Minimum Service Levels) Bill is Authoritarian, Illiberal and Illegal, IER.
- Ruth Dukes, Blink and You'll Miss It: The Strikes (Minimum Service Levels) Bill Progresses Quickly through the Commons, University of Glasgow School of Law Blog.
- Ewan McGaughey, The Government's Anti-strike Bill Violates International Law, LSE Blog.
- Alan Bogg, The Right to Strike, Minimum Service Levels, and European Values, SSRN.
- Ioannis, Katsaroumpas, Crossing the Rubicon: The Strikes (Minimum Service Levels) Act 2023 as an Authoritarian Crucible.

## False comparisons

- Spain
- Italy
- France
  - Commonalities? Constitutional balance: strike v other fundamental rights.
  - Differences? Many (esp. Procedural differences)
- So what does the UK Minimum Service Levels Act (the Act) really look at?
- Chile and Pinochet's authoritarian *Plan Laboral*

## UK influencing Dictatorial Chile

- Chile and the right to strike in essential services
  - 1948 (Law of the Permanent Defence of the Democracy)
  - 1958 (Law of the Protection of Internal Security)
  - 1973 total suspension of collective labour rights (and systematic murder of at least 87 trade union leaders) and political rights in general
  - 1979 onwards: Pinochet embrace Thatcherism (“Friends of Chile”) and the “Chicago Boys”

## UK influencing Dictatorial Chile: Determining essential services

- 1979 (Decree) Plan Laboral Art 6 (precursor of current Art 362 Labour Code)
  - Strike prohibition in public utility undertakings concerning a grave danger to health, population supply, the economy, or national security
    - Public utility? Anyone declared so by law
    - The economy? Any monopolistic company (like Central Bank)
    - Is it to justify third party rights or companies?
  - A rule replicated in the Constitution (approved in 1980) + a total ban on strike of public servants
  - This general ban survived 3 democratic reforms
  - ILO constantly criticises this broad ban of strike in essential services

## UK influencing Dictatorial Chile: Determining essential services

- How to classify essential services?: Art 362 Labour Law Code
  - Companies request 3 Ministers (Work, National Defense, and Tourism). Why companies and not the bearers of the affected fundamental rights?
  - Ministers ask “the labouring counterparty”
  - Ministers resolve (no need to provide reasons to affect the fundamental right to strike)
  - Implications: The Transbank case (2021)
    - Manages almost all credit card transactions
    - Request to be qualified as essential service
    - Approved (grave danger to the economy) while collective bargaining
    - Led to *Dirección del Trabajo* to decide mandatory arbitration
    - Regular route to challenge a classification? Court of Appeals (long process)
  - The list of essential services depends on who governs
  - Appeal? Yes, Court of Appeals (lengthy)

## UK influencing Dictatorial Chile: Determining Minimum Services

- Minimum services were irrelevant because of the ample declaration of essential services and the temporary replacement of strikers
- The “Modern Labour Relations Law” (2016). Strike is a legal (not constitutional) right, and bans the temporary replacement of strikers
- There is no legal definition of minimum services, but interpreted by the *Dirección del Trabajo*
  - However, Article 359 of the Labour Code provides general guidance
    - Minimum Services of Security, Functioning, and Environment and Health
    - Proportionality principle from Constitutional balancing (adequacy, necessity, and proportionality) (helps!)
- For discrepancies *Dirección del Trabajo* listens both parties + technical reports
- Appeals? Only to the National *Dirección del Trabajo*

## UK influencing Dictatorial Chile: Determining Minimum Services

- What has been the direction of minimum services in practice?
  - The list of minimum services depends on who governs
  - E.g.,
    - Socialist government:
      - Reluctance to accept many industries
      - Shorter extension of minimum services
      - Justifications for minimum services (whether they meet the legal criteria of Art 359)
    - Conservative government:
      - More willing to accept industries within
      - Longer extension of minimum services
      - No justifications for minimum services (technically not required, but constitutionally dubious)

## Democratic Dictatorial Chile departing from UK influence: Human Rights at Work

- Article 5 Labour Law Code
  - Employers' power limits are workers' constitutional rights.
  - Labour laws are inalienable
  - No strike
- The Promolinks case (2014). Judge Cerda.
  - Chilean Supreme Court: The right to strike is an 'implicit' fundamental labour right (theory of the block of constitutionality) ('unified' twice in 2015)
    - Necessary for workers to obtain what they need
    - Improve their conditions
    - Work is a human right where humans become active members of the community

## Democratic Dictatorial Chile departing from UK influence: Human Rights at Work

- Practical potential implications for the right to strike?
  - Trade unions are not liable for damages (never happened)
  - Worst case, strike outside the rules: dissolution of the trade union (again, disputable with the now human right to strike)
  - Is it necessary to go on strike under excessive legal (and not fundamental) rules? E.g., balloting
  - Is it necessary to narrow essential services to match ILO labour standards?
  - Is it necessary to curb the power of the *Dirección del Trabajo* to match ILO labour standards?
  - Is it necessary to balance the right to strike with other rights on an equal footing?

## Chile influencing UK (or UK recalling recipes applied overseas)

- The UK Act: another brick in the wall
- Coercive dual unilateralism (Ioannis Katsaroumpas)
  - Executive unilateralism
    - No parliamentary discussion in Chile (difficulties to change it in democracy), almost no parliamentary discussion in the UK. No explanatory notes in both cases
    - Balancing justifications that aim to stifle the right to strike (e.g., to protect consumers, the economy, to avoid disruptions, to protect the non-striking 'silent majority')
    - No willingness to enable social dialogue between workers and employers on essential and minimum services nor independent bodies involved (maybe *Dirección del Trabajo*?). Mere consultation processes to trade unions
    - Wide-ranging scope of application (essential services in Chile, minimum services in the UK Act, and minimum services in Chile depending on the government)
    - Essential services in Chile (and to some extent minimum services) and UK Act 'skeletal bills': Ministers and *Dirección del Trabajo* lead.

## Chile influencing UK (or UK recalling recipes applied overseas)

- Employer unilateralism
  - Employers give work notices to trade unions in the UK and trade unions have no credible recourse to oppose. In Chile employers begin essential and minimum service processes. In essential services, trade unions also have no credible recourse. In minimum services (2016 reform), trade unions have limited voice (depend on *Dirección del Trabajo*). Reasonableness the key concept here?
- Severe coerción leading to chilling effects: Democratic Chile departed from it
  - Employees not complying with work notices in the UK: easy dismissal. In Chile (after 2016) employers can find replacements.
  - Trade unions obliged to ensure compliance by employees: workers against workers. No compliance? Severe sanctions. In Chile it does not exist.

## Chile influencing UK (or UK recalling recipes applied overseas)

- What happens when you silence peoples' voices for too long and in many different ways?

Source: University of Chile Radio <https://radio.uchile.cl/2020/02/18/a-cuatro-meses-del-estallido-social-la-herida-de-chile-aun-no-cicatriz/>