The Right to Strike, a Lawyer's View

By John Hendy QC

The role of rights in Marxist discourse has been the subject of debate. For the purposes of the following article we can regard discussion of the role of rights or of the law in a communist society as a little premature.

The issue I address is developments in relation to the right to strike in the present and immediate future.

There was a period after the Conservatives reduced trade union rights and freedoms in the 1980s during which it was argued that the exercise of industrial strength was what was required to regain the legal space in which trade unions and working people in which to operate effectively again. There was no need to pursue trade union rights as legal rights. It is now generally recognised that, conversely, in order to effectively exercise industrial strength unions and workers (in most cases) need the legal space to do so and that can only be achieved by rolling back the restrictive laws and securing the legal space for trade union action by underpinning it by reference to fundamental human rights.

The expression of the demand for the right to strike as a fundamental human right has another utility. The international recognition of such trade union rights as fundamental human rights, as a species of law rather than merely moral, industrial or political claims is important. It provides a particular authority, a legitimacy, a respectability, and, indeed, a degree of indisputability for at least some of the claims of labour.

That the right to strike for the advancement or protection of the economic and social interests of workers is a fundamental human right is not in doubt, particularly the right to strike as an essential element of the right to bargain collectively. This is not an expression of academic opinion; it is a statement of international law expressed in international treaties widely ratified. The right to strike is expressed in Article 8(1)(d) of the International Covenant on Economic, Social and Cultural Rights 1966 and in regional Treaties such as Article 45(c), Charter of the Organization of American States, 1948; Article 6(4), European Social Charter 1961 (and 1996); Article 28, Charter of Fundamental Rights of the European Union 2000.

Though not express, the right to strike is held to be implicit in the broader statement of trade union rights in Convention 87 of the International Labour Organisation as the relevant quasi-judicial committees have made clear for sixty years. In recent years the employers challenged that interpretation but by an agreement dated 25 February 2015 effectively conceded the point by recognizing that the right to strike flowed from the underlying 'freedom of association' and by accepting that the relevant committees had the authority to make the findings they made in relation to the existence of the right to strike.

By the same token the European Court of Human Rights has recently put beyond doubt that the right to strike is implicit in Article 11 of the European Convention on Human Rights 1951: RMT v UK[1]; Hrvatski Liječnički Sindikat v Croatia[2]; Tymoschenko v Ukraine[3].

Virtually every country in the world recognises that workers have the right to take strike action. Unlike the UK, some 90 countries have the right to strike not merely guaranteed by legislation but, more fundamentally, enshrined in their national constitutions.

Given the dominance today of neoliberalism and its drive to an unregulated free market in labour it might be thought curious that these international legal standards are still standing[4] After all, neoliberalism gives a central role to industrial relations and the labour market and how it is to be structured (or, rather, unstructured) and regards trade unions and collective bargaining as impediments to the free labour market[5]

With the collapse of the Soviet Union and the apparent hegemony of capitalist economics, the appeasement of working class aspiration after the Second World War (a primary motor in the implementation of the international laws referred to) lost its principal rationale. It was only to be expected that those laws would in due course be attacked.

And employers and governments have indeed sought to attack fundamental trade union rights in recent years. In the UK we are all aware of the restrictions on the rights to strike imposed (even before the collapse of the Soviet Union) by Conservative governments and continued by Labour: complex requirements for service of notice before holding a postal only industrial action ballot followed by a similarly complex notice to be served before industrial action can be taken, all forms of solidarity industrial action prohibited and only the most limited protection for the individual official striker (and none for the unofficial striker) – and these are only the most notable restrictions. Industrial action is for the most part only permissible (subject to the foregoing restrictions) in support of collective bargaining and collective bargaining at sectoral level[6] has been all but destroyed by government policy[7] and

[1] Application 31045/10, 08 April 2014.
[2] Application 36701/09, 27 November 2014.
[3] Application 48408/12, 2 January 2015.
[4] Especially when one considers how effective neoliberalism has been in rolling back that relatively brief phase in the 400 years or so of capitalism when a state-dominated, vaguely egalitarian post-war economic settlement took hold across western and northern Europe, as well as Australia, New Zealand and Canada. Even the great crash of 2008 has been harnessed to push further and faster the objectives of privatisation, deregulation and attacks on trade unionism under the banner of 'austerity.' In consequence, living standards have been intentionally driven down for the mass of the people, wealth has increased for the tiny minority, inequality has accelerated, and the achievements of a civilised society are being systematically destroyed.
[5] This is not new, of course; a similar view dominated courts and legislatures during the eighteenth and nineteenth centuries – and much of the twentieth century too.
[6] I.e. national collective bargaining across an industry.
[7] As the then government put it in a White Paper (People, Jobs and Opportunities) in 1992, collective bargaining was an "outdated personnel practice" which had become "increasingly inappropriate" so that the government "will continue to encourage employers to move away from traditional, centralised collective bargaining." The downward graph of collective bargaining was momentarily halted in 200 when the statutory

the prohibition of solidarity action. In consequence the coverage of amongst British workers of collective agreements has fallen from 82% in 1979 to less than 23% today[8]

Today the Conservative Party threatens yet further restrictions on the right to strike if elected in May 2015 (and the Labour Party offers no amelioration of the current restrictions).

The UK and other governments have dealt with the requirements of international law, not, by and large, by seeking their repeal but by ignoring the obligations they impose – whilst proclaiming their significance for under-developed countries.

Nowhere is this more evident than in the EU where the Court of Justice of the EU in 2007 in the Viking case[9] held that, though the right to strike was a general principle of EU law, exercise of the right is subject to stringent conditions[10] wherever it comes into contact with the four business freedoms that underpin the EU Treaties (the freedoms of business to provide services, establish business, move capital and move labour, from one member State to another). Thus, the right to strike is subservient to the business freedom to enjoy an undistorted labour market in which it can use workers from a low-wage EU State in a high-wage State, ignore collectively agreed terms there and pay instead wages at back-home levels.

This (and parallel CJEU cases) have been heavily criticised by academics, by the ILO and by the European Committee of Social Rights. Recent cases give no sign that the CJEU is prepared to relent, however[11].

However, the EU attack on trade union rights is more extensive than that since the Troika (the European Commission, the European Central Bank and the International Monetary Fund) insist on labour law reform (including alterations to strike law) as a condition of economic assistance, as seen, in particular, in Greece.

At the International Labour Organisation too the right to strike has been under attack, as noted above. In 2012 the Employers' Group walked out of a crucial committee critical to the ILO's continued operation on the basis that ILO Convention 87 did not protect the right to

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recognition machinery took effect. Thereafter the decline continued relentlessly and at the same gradient. The recognition machinery therefore had no significant effect.

[8] KD Ewing and J Hendy, A Manifesto for Collective Bargaining, IER, 2013. On average across the EU, 62% of workers continue to be covered by collective bargaining. There are 11 countries with collective bargaining coverage of 70% or more. The UK has the second worst coverage in the EU with only Lithuania on 15% with a worse record.

[9] International Transport Workers' Federation v Viking Line ABP (C-438/05) ECJ (Grand Chamber), 11 December 2007, [2007] E.C.R. I-10779; [2008] 1 C.M.L.R. 51; [2008] All E.R. (EC) 127; [2008] C.E.C. 332; [2008] I.C.R. 741; [2008] I.R.L.R. 143.

[10] Such as that the industrial action must be suitable for ensuring and did not go beyond what was necessary to attain the legitimate objective of protecting the rights of workers

[11] E.g. Alemo-Herron v Parkwood Leisure Ltd (C-426/11) ECJ, 18 July 2013, [2014] 1 C.M.L.R. 21; [2014] All E.R. (EC) 400; [2014] C.E.C. 575; [2013] I.C.R. 1116; [2013] I.R.L.R. 744 (right to run a business trumped right to collective bargain.

strike (after 60 years of acceptance). As mentioned above, the Employers' Group has now (25 February 2015) retreated and reached a compromise which, in effect, recognises the right to strike. In the preceding discussions any governments reiterated the existence of the right, including the government of the USA which stated (to the surprise of many): 'We concur that the right to organize activities under Convention 87 protects the right to strike, even though that right is not explicitly mentioned in the Convention.'

It may be that the decision of the European court of Human Rights in RMT v UK[12] is not so much an exemplar of the dirty fingers of neo-liberalism reaching into the international judiciary but a symptom of a particular political incident. The court there held that though the right to strike was protected by Article 11 of the European Convention (as noted above), it was nonetheless open to a State to limit the right in appropriate circumstances (under its 'margin of appreciation') even to the extent in the UK of completely outlawing solidarity action in every situation (notwithstanding the jurisprudence of the ILO and European Committee on Social Rights to the contrary). It is clear that the court was fearful of the threat of the UK government to attempt, if the Conservatives won the next election, to re-negotiate the European Convention and the powers of the European Court and, if they failed, to opt-out of the Convention. The case may be regarded as an attempt at appeasement[13] Certainly the later cases concerning the Ukraine and Croatia (both above) contain no support for such blanket restriction of the right to strike as was permitted in the RMT case.

A judgment of the Canadian Supreme Court on 28 January 2015 shows that the predations of neoliberalism can, on occasion, be judicially resisted in relation to fundamental trade union rights. An extensive quotation from the majority judgment in Saskatchewan v Attorney-General of Canada[14] is warranted. The British Labour Party (and others) could profitably learn this text:

[3] The conclusion that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations is supported by history, by jurisprudence, and by Canada's international obligations. As Otto Kahn-Freund and Bob Hepple [British academics] recognized:

The power to withdraw their labour is for the workers what for management is its power to shut down production, to switch it to different purposes, to transfer it to different places. A legal system which suppresses that freedom to strike puts the workers at the mercy of their employers. This — in all its simplicity — is the essence of the matter. (Laws Against Strikes (1972), at p. 8)

[12] Fn 1 above.
[13] Though it failed utterly since less than 6 months later, on 3 October 2014, the Conservative Minister of Justice published a paper reiterating precisely those threats if the Conservatives win the next election.
[14] 2015 SCC 4, 30 January 2015.

The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. It seems to me to be the time to give this conclusion constitutional benediction.

[53] In Health Services [a previous case], this Court recognized that the Charter [part of the Canadian Constitution] values of "[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy" supported protecting the right to a meaningful process of collective bargaining within the scope of s. 2(d) [of the Charter] (para. 81). And, most recently, drawing on these same values, in Mounted Police [another earlier case] it confirmed that protection for a meaningful process of collective bargaining requires that employees have the ability to pursue their goals and that, at its core, s. 2(d) aims to protect the individual from "state-enforced isolation in the pursuit of his or her ends". . . . The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society. [para. 58]

[54] The right to strike is essential to realizing these values and objectives through a collective bargaining process because it permits workers to withdraw their labour in concert when collective bargaining reaches an impasse. Through a strike, workers come together to participate directly in the process of determining their wages, working conditions and the rules that will govern their working lives (Fudge and Tucker, at p. 334). The ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions. This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives.

[55] Striking — the "powerhouse" of collective bargaining — also promotes equality in the

bargaining process: England, at p. 188. This Court has long recognized the deep inequalities that structure the relationship between employers and employees, and the vulnerability of employees in this context. In the Alberta Reference [case], Dickson C.J. observed that [t]he role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. [p. 368]

And this Court affirmed in Mounted Police that

[Section] 2(d) functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of s. 2(d) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective

bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.

The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way. . . [the] process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. (at paras. 70-71)

Judy Fudge and Eric Tucker [Canadian academics] point out that it is "the possibility of the strike which enables workers to negotiate with their employers on terms of approximate equality" (p. 333). Without it, "bargaining risks being inconsequential — a dead letter" (Prof. Michael Lynk, "Expert Opinion on Essential Services", at par. 20; A.R., vol. III, at p. 145).

Of course it would be a serious mistake to think that the very recent reaffirmations of the right to strike in the ILO, the European Court of Human Rights, the European Committee on Social Rights and the Canadian Supreme Court puts the right to strike beyond challenge. Without doubt there will be further attacks – and watch carefully how the membership of the Courts and committees will be manipulated by governments, like our own, sympathetic to business.

Meanwhile we have to fight the threat posed by the Comprehensive Economic Trade Agreement (CETA, between Canada and the EU), the Transatlantic Trade and Investment Partnership (TTIP, between the USA and the EU) and a myriad other international agreements. Though much focus has been on the damage these will do to the NHS and food and environmental standards, the undermining of the right to strike and to collectively bargain is clearly an aspect of these Trojan horses[15].

What the recent developments mean is that trade unions should use the Courts and Committees, in appropriate cases, to defend workers interests, not in the belief that lawyers and courts will win the emancipation of the working class – far from it. Instead the very pragmatic object should be to use these tools to gain a little more legal space in which the real struggle can take place. Needless to say the choice of cases to defend in these fora should be carefully and strategically selected.

The left and trade unions are also presented with an opportunity to employ the language of fundamental rights to present their demands for the restoration of the capacity of trade unions to fight on behalf of the working class. Such language has traction amongst the social democratic parties who so far have been the willing tools of neoliberalism.

[15] See KD Ewing and J Hendy, Evidence to the BIS Committee on TTIP: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/business-innovation-and-skills-committee/transatlantic-trade-and-investment-partnership-ttip/written/17670.html