The right to strike under attack – legal counterstrategies

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The ILO case at the ICJ

by

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It is often said that the function of labour law is to establish a balance between the interests of employers and workers and to ensure the necessary protections of workers (as the weaker party), a task which, it is implied, can be objectively determined by the labour law community of scholars, lawyers, judges and sensible employers and trade unionists.

That is not, however, the view of any observant participant in the struggle of workers to improve or maintain the condition of their working lives.[1] The reality is that the contours of labour law are drawn at any particular time at the limits of the capacity of the working class to resist the depredations of capital.[2]

Resort to strike action is as old as the exploitation of the labour of one person by another. The first recorded strike was in the pyramids of Egypt.[3] Aggressive resistance against strikes is, obviously, precisely as old as strikes. No doubt economic and sometimes physical pressure was deployed.

But so was the law. In the UK the combination of workers merely to make demands to improve pay and conditions, let alone to strike in support of such demands, was met by the law, both criminal and civil, judge-made and legislative, from at least the 13th century.

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[1] I borrow from the definition of a trade union of Sydney and Beatrice Webb, *Industrial Democracy*, 1897, p1: a trade union is 'a continuous association of wage earners for the purpose of improving or maintaining the condition of their working lives'.

[2] Or as DN Pritt KC pointed out: law, and in particular, labour law, is determined by the results, varying from time to time as the struggle sways to and fro, of the conflict between the ruling class and the working class forces opposed to it; DN Pritt, *Law, Class and Society, book one: Employers, Workers and Trade Unions*, 1970, p.6.

[3] In Deir el Medina, Egypt in 1158 BCE. See Rosalie David, *The Pyramid Builders of Ancient Egypt, a modern investigation of Pharaoh's workforce*, 1996, at 73-75.

But ruthless suppression brought with it threats of anarchy. During the 19th century he expansion of the suffrage (likewise the result of struggle) and concessions thought necessary to preserve order, mitigated some of the worst excesses of gross exploitation.

In the UK it took until 1871 for the legalisation of trade unions and until 1906 for the legalisation of strikes.

The ending of the First World War and fear of the spread of Revolution led to the foundation of the ILO as part of the Treaty of Versailles in 1919. Though the ILO did not explicitly recognise the right to strike, the centrality of freedom of association and collective bargaining implied it.

The Second World War, the Nazi suppression of unions and use of slave labour , and the key role of the left in resistance movements and then governments reinvigorated the ILO and led to the *Declaration of Philadelphia* 1944, Convention 87 in 1948 and Convention 98 in 1949. The right to strike, though not explicit, was assumed. Since 1952 ILO Committees recognised the right to strike protected by C87.

There followed the UN *Universal Declaration on Human Rights* 1949 and *the European Convention on Human Rights* in 1950. A certain stability based on Keynesianism followed – notwithstanding the Cold War. The momentum of the post-war settlement led to the *European Social Charter* 1961, and the two International Covenants of 1966.

These instruments assume crucial importance when we consider the impact of the economic agenda which destroyed the post-war consensus. Neo-liberalism given an intellectually spurious mask of respectability festered for 30 years before coming to life in the 1970s: Pinochet 1973, Thatcher 1979 and Reagan 1980. Subsequently the doctrine infected the European Union and the Troika.

Austerity, cutting taxes for the rich and public services for the poor, privatisation, outsourcing, globalising production to cheap labour countries, banks bailed out, corruption and cronyism, all became commonplace. Profiteering drove up the cost of living (especially in energy, food and rents). Deregulation became stated government policy and defunding enforcement bodies was unstated policy.

The suppression of trade unions, collective bargaining and the right to strike were central to neoliberalism.

All these measures were reinvigorated after the collapse of the Soviet Union in 1991, the financial crisis of 2008, and the pandemic in 2022.

But neo-liberalism is not driven by ideology. Its motivation is a straightforward attempt to grab greater wealth - to increase the share of the economy going to profits and correspondingly to diminish wage-share. In this endeavour neoliberalism has been very successful.

Social democratic governments and parties were infected both by the neo-liberal justification for self-interest and by increasingly sophisticated and widespread corporate capture. Unsurprisingly, they failed to protect working class interests from the predations of neoliberalism. Consequently, we have seen the collapse of support for such parties - as shown in the German election last Sunday.[4]

It is in that context that the international instruments on human rights, and for our purposes, labour rights, assume such a critical importance. As lawyers acting for trade unions and workers we need to rely on what were proclaimed to be fundamental rights of universal application. That is why the defence of the right to strike under C87 is so vital.

The failure of the democratic parties to defend working class interests has impacted on those monumental post-war fundamental labour rights. It is not credible to believe that the success of right wing parties in Europe has not influenced the judges of the ECtHR and played a part in the recent adverse cases on the right to strike under Article 11: *Bariş*,[5] *Humpert*,[6] *Kaya*,[7] and *Almaz*[8]. We can only hope that the International Court of Justice is not similarly infected. What can be said is that the balance of argument there is beyond doubt in our favour.

Before I briefly turn to those arguments, let me say that the attack on the right to strike by the Employers' Group at the ILO in 2012 about which Jeff has spoken was without doubt driven by neoliberals, excited by the

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[4] It might be thought that the election in July 2024 in the UK bucked the trend. It is not so. Labour received its lowest vote in decades (500,000 fewer than Jeremy Corbyn in 2019) but such was the disgust at the Conservatives and a first past the post voting system, Labour obtained a majority of over 160 seats. Since then Labour has slid further down the polls with the right-wing Reform Party polling 26% to Labour's 23% (with the Conservatives at 22%). The Prime Minister now has one of the lowest levels of public support ever recorded for a Prime Minister at minus 33%.

[5] Appn.66828/16, 27 January 2022.

[6] Appn. 59433/18 etc, 14 December 2023.

[7] Appn. 51194/19, 12 December 2024.

[8] Appn. 55789/19, 12 December 2024.

fall of the Soviet Union, and the desire of capital especially after the financial crisis, to diminish wage-share and increase profit-share across the globe. There was also a consciousness which we, of course, share that the protection of the right to strike by a fundamental ILO Convention is a source of influence to courts around the world. The employers were right about that - as cases such as the *Saskatchewan Federation of Labour* case in the Canadian Supreme Court in 2015 shows.[9]

The question before the ICJ reads:

> Is the right to strike of workers and their organisations protected under the Freedom of Association and Protection of the Right to Organise Convention 1948 (N.87)?

It is an elegant and simple question which was diplomatically shorn of the complexities which might have arisen had it raised any issue about the nature of the right to strike or the conditions under which it might be exercised.

Turning to the *Freedom of Association and Protection of the Right to Organise Convention*, 1948, No.87, Article 2 provides that that workers and employers have the right to establish and to join organisations of their own choosing without previous authorisation.

The crucial provision is Article 3(1) which states that:

> Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

Article 10 defines an 'organisation' as 'any organisation of workers or of employers for furthering and defending the interests of workers or of employers.'

Article 8 provides that in exercising Convention rights, workers and employers and their respective organisations shall respect the law of the land but that the law of the land shall not impair or be applied to impair the guarantees in the Convention

[9] [2015] 1 SCR 245) and the Advisory Opinion of the Inter-American Commission on Human rights of 5 May 2021.

The preamble refers to the Constitution of the ILO which declares "recognition of the principle of freedom of association" as “a means of improving conditions of labour”.[10]

Since C87 is an international treaty the rules for its interpretation are found in the Vienna Convention on the Law of Treaties, Article 31(1) of which reads:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

As part of the team assisting the ITUC I cannot refer to the presently confidential papers before the court. But some points have been publicly expressed at the ILO and elsewhere and I think I can comment on some of those.

The principal argument of the employers has always been that C87 does not protect the right to strike because that right is not mentioned in the Convention. It is true, of course, that the right to strike is not expressly mentioned but the contention based on that fact is absurd. The word ‘*activities*’ plainly, in its ordinary meaning, includes strike activity (as well as all other relevant activities). The very breadth of the meaning of the words in the phrase ‘*to organise their activities*’ is incompatible with any interpretation which excludes strike activity.

Indeed, given that breadth of meaning and the absence of any limitation on it, the submission that a specific activity is excluded from its scope must be justified. There is no such justification in the ordinary meaning of the words, their context or the object and purpose of the Convention.

C87 is focussed on freedom of association and the right to organise, as its title states. The right to strike is inherent in both those two concepts. The interrelationship between the two elements and the right to strike was eloquently elucidated by the Supreme Court of Canada in *Saskatchewan Federation of Labour*.[11]

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[10] And to the *Declaration of Philadelphia* 1944 (annexed to the ILO Constitution) which affirms (amongst other things) that freedom of association is essential to sustained progress.

[11] “. . . freedom of association contains a sanction that can convince an employer to recognize the workers’ representatives and bargain effectively with them. That sanction is the freedom to strike. By the exercise of that freedom the workers, through their union, have the power to convince an employer to recognize the union and to bargain with it. . . . If that sanction is removed the freedom is

In any event, the preamble to C87 refers to the Constitution of the ILO recognising freedom of association as a 'means of improving conditions of labour.' By the same token, Article 10 of C87 applies the Convention to organisations 'for furthering and defending the interests of workers or of employers.' In consequence, the protections of Article 3(1) must be given a purposive construction in order to permit fulfilment of these objects. The conditions of labour cannot be improved, and workers' interests cannot be furthered or improved without collective action. That is the context and object of C87 against which the word 'activities' must be interpreted. The word cannot therefore be construed as not including strike activity.

We advocate in troubled times but we honour the millions of dead of two World Wars who secured the fundamental trade union rights by relying on them, giving life to them and insisting on their fundamental nature and continued relevance in courts and tribunals across Europe and the world.

Thanks for listening.

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valueless because there is no effective means to force an employer to recognize the workers' representatives and bargain with them. When that happens the *raison d'être* for workers to organize themselves into a union is gone. Thus I think that *the removal of the freedom to strike renders the freedom to organize a hollow thing*. [Emphasis added by the Supreme Court]." Galligan J in *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home* (1983), 4 D.L.R. (4th) 231 (Ont. H.C.J.) at 249, cited with approval by McLachlin CJ in *Saskatchewan Federation of Labour v Saskatchewan* 2015 SSC 4, [2015] SCR 245 at [52]. In fact the right to strike is broader than that for the CFA have held in many decisions that: "'Organizations responsible for defending workers' socio-economic and occupational interests should be able to use strike action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and standards of living." *Freedom of Association: Compilation of Decisions of the CFA*, ILO, 6th ed., 2018 at paragraph 759.