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THE RIGHT TO STRIKE IN INTERNATIONAL HUMAN RIGHTS LAW

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Introduction

"Workers rights are human rights, yet the international human rights movement devotes little attention to the rights of workers. At the same time trade unions and labor leaders rarely enlist the support of human rights groups for the defense of workers' rights. A regrettable paradox: the human rights movement and the labor movement run on tracks that are sometimes parallel and rarely meet."[1]

Leary's words perceptively capture the relationship between human and labour rights. In 1996, she recognised that although "the catalogue of international human rights rights includes numerous rights relating to work",[2] in practice "we have narrowed the concept of human rights to exclude social rights, including workers' rights."[3] She reminds us that it was 1917 Bolshevik Revolution which led to "the establishment of the ILO in 1919… the Western response to the demands of the working class."[4] It is in this context that Leary warns us that what was perceived as important in the tumultuous period of the Bolshevik revolution should be reemphasized today…. human rights cannot exist without social justice."[5]

Two decades and one world war after the Bolshevik Revolution "social justice" inspired the construction of the Keynesian welfare state. The threat of revolution had led to "the inclusion of labour in the political economy [and] to the development of the welfare state".[6] 'Social justice' became 'subsumed' in the language of social rights. It was "trade unions and socialist parties [which] became the central agents… of welfare legislation which aimed at sufficiency and equality alike."[7] In Moyn's analysis, "sufficiency concerns how far an individual is from having nothing and how well she is doing in relation to some minimum of provision of the good things in life. Equality concerns how far individuals are from one another in the portion of those good things they get."

The "emphatic turn towards neoliberalism in political-economic practices"[8] in the 1970s, appears to have put an end to the Keynesian companionship of sufficiency and equality. Figures from the OECD and Oxfam point to a crisis of inequality, revealing that in 2018 wage growth remained "re-

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[1] Leary (1996: 22)

[2] *Ibid*

[3] *Ibid,* 42

[4] *Ibid,* 40

[5] Ibid, 43

[6] Hayter (2015: 101)

[7] Moyn (2018: 33)

[8] Harvey (2005: 2)

markably lower" than it was before the 2008 financial crash.[9] Yet, in 2017, 82% of the global wealth generated went to the wealthiest 1%.[10] It seems that Leary's observations are as pertinent today as they were before the turn of the millennia.

At the same time, labour rights have suffered. As one recent study observes, "the neoliberal paradigm in the early 1980s created an extremely negative environment for unions with the abandonment of full-employment policies. Since that time, labor laws across the world have become much less union friendly, and unionising new establishments has become harder."[11] Neoliberalism is sceptical of social solidarity which restrains capital accumulation, especially when it takes the form of trade unions and labour marker regulation.[12]

The relationship between the demise of workers' rights and the rise of inequality has been recognised in the human rights community. Philip Alston, in his position as UN Special Rapporteur on human rights and extreme poverty, pointed to the to the importance of the "protection of core labour rights, such as the rights to freedom of association and collective bargaining… [as being] essential for a more equal division of power and the reduction of economic inequalities."[13] However, there are those who wonder whether a human rights approach, which centres on individual liberties and has its origin in the liberal tradition, might in fact do more harm than good in the context of workers' struggles. These arguments will be analysed in Chapter 1 and it will be posited that an analysis of those labour rights which are today considered human rights, particularly the right to strike, can offer a valuable lens through which to assess the veracity of these criticisms.

Within the relationship between human rights and labour rights, the freedom of association is pivotal. It is the basis of the right of workers to form and join trade unions, a right which finds protection across a range of international human rights instruments.[14] As Tonia Novitz writes, "in this sense, 'freedom of association' has a particular potency. When linked to trade unions or other workers' organisations, collective bargaining and a right to strike, this apparent bare liberty has potentially disruptive effects regarding distribution of wealth and challenges to social hierarchies."[15] However, while the freedom of association is usually considered a civl right, the right to strike has civil, political and socioeconomic implications. Chapter 2 will introduce the work of T. H. Marshall and consider where the right to strike fits into the categorisation of rights as civil, political and social. It will be shown that the right to strike straddles the boundaries of Marshall's categorisation,

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[9] OECD (2018: 22)

[10] Oxfam (2018: 8)

[11] Ünal et. al (2014: 418)

[12] Harvey, (2005:75)

[13] Alston (2005: [22])

[14] Art. 23(4) UDHR; Art. 22(1) ICCPR; Art. 8 ICESCR; Art. 5 ESC; Art. 11(1) ECHR

[15] Novitz (2019: 231)

which manifests itself in the fact that the right to strike is protected in treaties which deal with civil and political rights and treaties which deal with social and economic rights.

With this in mind, Chapter 3 will identify where right to strike is recognised in international human rights law. The human rights instruments of the ILO, the UN and the Council of Europe as well as the jurisprudence of their supervisory bodies will be reviewed to show how the right to strike has come to be recognised in the relevant international legal systems.

Chapter 4 will analyse the extent to which international human rights law empowers workers to engage in political strikes and solidarity strikes. These two issues reveal the tensions between human rights discourse and the labour movement. It also an area where there is divergence among the ILO, ECHR and ESC and which provides a good space to consider whether a human rights approach to the right to strike adequately responds to the particularities of workers' struggle.

Finally, the concluding chapter will draw these analyses together and ask what the recognition of the right to strike in international human rights law, as well as the limitations which are placed on its legitimate exercise, can reveal about the the relationship between labour rights and human rights.

1. Chapter 1 - Perspectives on Human Rights and Labour Law

The human rights movement has not always paid close attention to the prevailing political economy. In its early days it was avowedly impartial when it came to such questions, as illustrated in Naomi Klein's analysis of Amnesty International's work in Pinochet's Argentina. Klein talks of the "blinders" of human rights, whereby human rights activists restricted themselves to "focusing purely on the crimes and not on the reasons behind them… [thereby helping] the Chicago School ideology to escape from its first bloody laboratory virtually unscathed."[16] However, the position today has changed.

The international human right movement has now significantly turned its attention to the issues which are bound up with politics and economics. This much is clear from the extent to which the human rights community engaged in the drafting process of the UN Sustainable Development Goals, Goal 10 of which is to reduce income inequality within and among countries. As Malcolm Langford observes, "the human rights community not only mobilised globally but employed permanent staff in New York to engage in lobbying." They began to demand goals related to economic inequality framed in a human rights perspective, a strategy which "represented a marked change from the cold shoulder that the human rights community had given to the MDGs when they were adopted."[17]

The international human rights community has recognised the importance of social rights, including workers rights, in formulating a proper response to economic inequality. However, there are also scholars who remain skeptical about the emancipatory potential of rights discourse in general, while others object to the convergence of labour law and human rights law. These perspectives will be set out and reviewed in this chapter.

1.1. Labour Rights are Human Rights

In 2015, Philip Alston reported on the relationship between human rights and inequality.[18] Alston recognised that while "economic inequalities have long been a focus of analysis within the United Nations human rights system… little has been done to follow up on any of the studies or recommendations."[19] Part of the problem was that the international community, despite "deeply expressed concerns", failed to make "the sort of deep changes that would be required" to bring about meaningful change.[20] Alston chastised nation states for their "determination… to keep the areas of international economics, finance and trade quarantined from human rights," a stance which reinforces the "artificial marginalisation of questions of resources and distribution from the main human

[16] Klein (2007: 118)

[17] Langford (2016: 171)

[18] Alston (2015)

[19] *Ibid,* [40]

[20] *Ibid,* [39]

rights debates."[21] For their part, NGOs must "overcome their deep reluctance to bring issues such as resources and the need for redistributive policies into their research and advocacy."[22]

For Alston, human rights both demanded and provided a response to inequality. The human rights community should focus more on socioeconomic rights, as "for all of the achievements that have been accomplished in this domain over the past two decades, the fact remains that economic, social and cultural rights continue to enjoy only second-rank status."[23] In this connection, Alston highlights the important of protecting "core labour rights, such as the rights to freedom of association… [which are] essential for a more equal division of power and the reduction of economic inequalities".[24]

The CESCR also points to the importance of labour rights "as a core component of poverty reduction and economic empowerment".[25] In a 2016 policy brief, they recognise that "strong labor unions with the power to bargain collectively are an important factor in ensuring more equal economic returns" and that "joining a trade union which is allowed to function freely is a core human right."[26] They conclude that "ensuring strong labor unions are able to operate freely… will be [among the] key interventions to reduce economic inequality and uphold human rights."[27] As Moyn observes, the labour rights which unions have prioritised are "the rights to associate, strike, and bargain collectively."[28] Of these three, "the collective right to strike…drew by far the most attention…"[29] Whereas "the era of classical bourgeois liberalism [had] actually cut down the right of corporate organisation and action… these rights… had to re-established and re-defined in terms of the nineteenth-century economy."[30] Moreover, for workers the right to strike "was far more than just another item on a list of entitlements; rather, its function was to empower unions to exact outcomes both of sufficient provision and beyond".[31]

The human rights community has also developed new moral theories which seek to displace Lockean 'liberty' as the justifying rationale for human rights, thereby making room for socioeconomic

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[21] *Ibid* [56]

[22] *Ibid*

[23] *Ibid* [50]

[24] *Ibid* [22]

[25] CESR (2016: 15)

[26] *Ibid*

[27] *Ibid,* 16

[28] Moyn (2018: 32)

[29] *Ibid*

[30] Hobsbawm (1984: 306)

[31] Moyn (2018:32)

rights.[32] In a review of these moral theories, Langford identifies, *inter alia,* Sen's conception of 'capabilities' and Griffin's conception of 'agency' as two examples of theories of human rights which, by "enlarging or displacing the freedom as the guiding norm" convincingly argue that socio-economic rights fall in the category of justifiable human rights.[33] These approaches suggest that it is the capability of individuals to make decisions free from coercion and exploit the resources around them that leads to human well-being, not 'freedom' alone. As Deakin has argued, to the extent that labour rights are social rights, they "provide an institutional foundation for individual capabilities"[34] the result of these approaches is to reveal that "social, civil and political rights, far from being in fundamental opposition to each other, are to be found at different points along a single continuum"[35] In Deakin's analysis, labour rights are instrumental in developing the 'capabilities' of individuals.

It seems clear that the human rights community considers labour rights to be human rights with an important role for to play rights in tackling economic inequality. However, there are those in the labour tradition that would encourage us to take pause before we label labour rights 'human rights'.

1.2. Labour Rights are not Human Right

Jay Youngdahl's essay, *Solidarity First: Labour Rights Are Not the Same as Human Rights,* neatly expresses many of the concerns of the labour movement over the convergence of labour rights and human rights.[36] Youngdahl writes that "while the motives of those advocating a human rights approach are laudable, the reliance on reframing labor struggles as first and foremost human rights struggles is misplaced… the replacement of solidarity and unity as the anchor for labor justice with "individual human rights" will mean the end of the union movement as we know it."[37] In his view, the elevation of individual rights over solidarity has "a normative component… [and] any reframing is not simply a pragmatic move; it controls how we think and how we fight."[38]
For Youngdahl, "thinking of rights as individual bundles that we carry with us leaves workers unprepared to deal with power."[39]

[32] Langford (2017)

[33] *Ibid, 267*

[34] Deakin (2005: 57)

[35] *Ibid,* 59

[36] Youngdahl (2009: 31)

[37] *Ibid*

[38] *Ibid,* 32

[39] *Ibid,* 34

Vidya Kumar agrees with Youngdahl that we have good reasons to question the convergence of human rights and labour rights.[40] She points to differences in the traditions, observing that "labour rights were conceived as a form of international solidarity well before the modern human rights movement"[41] and "recognised the problem that uneven bargaining power between labour and capital posed for labour relations, industrial peace and lasting world peace".[42] Rooted in the labour movements struggle against capital, international labour law's "primary normative mission was to assuage this asymmetry that cultivated worker exploitation by private power."[43] In contrast, "the normative aspiration or mission of international human rights sought to protect universal elements of what it means to be a human being from the exercise of abusive sovereign power."[44]

In Kumar's view, the fact that human rights discourse views the conflict between state and citizen "as central to - even definitive of - its normative mission" means that it is "not a discourse that reflects international labour law's central concern of 'social justice'."[45] Social justice, as understood in the international labour movement and enshrined in the 1919 ILO Constitution,[46] is based upon reducing the inequality in economic power between worker and employer. It therefore requires "state[s] to address the conflict of class subordination in the public and private sphere in society and globally."[47] Converging labour rights and human rights "displaces international labour law's starting point… the inequality of bargaining power, replacing it with the declaration that 'human beings are equal'."[48] In Kumar's analysis, "when human rights discourse displaces the centrality of worker and class subordination in international labour law discourse, it depoliticises international labour law".[49]

1.3. Rights and Depoliticisation; Critiques from the left

Kumar is cert
ainly not the first scholar to point to the depoliticising effects of rights discourse. Depoliticisation "involves the erasure, displacement or de-emphasis of a political consideration, claim or aim of a

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[40] Kumar (2014)

[41] *Ibid* 130

[42] *Ibid* 131

[43] *Ibid*

[44] *Ibid,* 132

[45] *Ibid*

[46] ILO Constitution 1919, Preamble

[47] Kumar (2014: 132)

[48] *Ibid*

[49] *Ibid,* 134

discourse."[50] It is a critique which can be found in Marx's writings on rights. In *On the Jewish Question,* Marx concerns himself with "the relation between political emancipation and human emancipation."[51] Famously, he declares the "so called rights of man" to be the rights of "egoistic man" separated from those around him and his society.[52] The liberal constitutions Marx is analysing removed status and property qualifications from citizenship, providing all individuals with an 'equal' right to participate in the political community., For Marx, the fiction of political emancipation obscured the material fact of class subordination and depoliticised the structural conditions which led to it. In this sense, "bourgeois or civil rights are symptomatic of a deeper social division, the division between civil society, with its rampant material inequality and egoistic self-assertion, and the political state in which citizens are formally free and equal."[53]

Wendy Brown offers a more contemporary version of the analysis. She writes that, "rights are rendered necessary by the depoliticised material conditions of unemancipated, inegalitarian civil society, conditions that rights themselves depoliticise rather than articulate or resolve."[54] The human rights movement is no exception. In "*The Most We Can Hope For….*".[55] Brown concerns herself with how human rights "presents itself as something of an antipolitics—a pure defense of the innocent and the powerless against power".[56] By claiming to occupy a space beyond politics, Brown tells us that human rights carry with them "implicitly anti-political aspirations…" and its subjects are cast as individuals "yearning to be free of politics and, indeed, of all collective determinations of ends."[57] As a result, "human rights take their shape as a moral discourse centred on pain and suffering rather than a political discourse of comprehensive justice."[58]

Brown does not readily accept the apolitical rhetoric of human rights, labelling them "a particular form of political power carrying a particular image of justice."[59] The particular image of justice human rights discourse encourages is one which depoliticises the social processes behind rights violations. For Brown, human rights are a politics which, "rather than offering analytically substantive accounts of the forces of injustice or injury… condemn the manifestation of these forces in particu-

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[50] *Ibid,*

[51] Marx (1978: 31)

[52] *Ibid*, 42

[53] Baynes (2000: 454)

[54] Brown (1995: 114)

[55] Brown (2004)

[56] *Ibid*, 453

[57] *Ibid,* 456

[58] *Ibid,* 453

[59] *Ibid*

lar events."[60] Just as Marx's 'bourgeois rights' created the fiction of political equality and depoliticised the reality of class subordination, Brown's 'human rights' create the fiction of human equality and condemn only the manifestations of structural forces which rights discourse depoliticises.

Furthermore, human rights do not "enhance the collective power of the citizenry to determine the contours and content of social, economic, and political justice… because power does not only come in sovereign or juridical form and because rights are not just defenses against social and political power but are, as an aspect of governmentality, a crucial aspect of power's aperture."[61] In an argument which Kumar follows, Brown is saying that because human rights centre on abuses of state power, they leave us unequipped to deal with, for example, economic power. The idea that rights are "an aspect of governmentality" is also expressed by Youngdahl above when he warns us that prioritising individual rights over solidarity "controls how we think and how we fight."[62]

Where Brown writes about civil and political rights, Marks concerns herself with socioeconomic rights, arguing that "the idea that human rights are themselves aspects of governmentality applies with equal, if not greater, force to the case of economic and social rights. Enhanced social protection is one side of a coin which has as its other face enhanced social control and defence of the arrangements that throw up (and keep throwing up) the need for protection."[63] For Marks, human rights "sweep the systemic basis of inequality under the carpet, and seek to wipe ills away"[64] and she encourages us to turn our attention to what "remains hidden in plain sight", the socioeconomic arrangements which produce rights violations.[65] For Brown, the human rights movement is one which "converges neatly with the requisites of liberal imperialism and global free trade, and legitimates both as well."[66] She urges us to consider what a "more substantive democratization of power" and cautions us that, if there is cause for hope in this regard, "we would do well to take the measure of whether and how the centrality of human rights discourse might render those other political possibilities more faint."[67]

1.4. Human Rights: Subverting the Logic of Capital?

[60] Brown (2001: 35)

[61] Brown (2004: 459)

[62] Youngdahl (2009: 32)

[63] Marks (2013: 228)

[64] *Ibid,* 235

[65] *Ibid*

[66] Brown (2004: 462)

[67] *Ibid*

There are those in the Marxist tradition that are not as skeptical as the commentators above when it comes to the emancipatory potential of human rights. Paul O'Connell thinks that those who seek to dismiss human rights entirely often make the mistake of presenting the "dominant, liberal narrative of human rights", pointing to the way it falls short of its own promises and conclude, "that rights are illusory, providing an ideological mask for the status quo, and, as such, should be dropped."[68] O'Connell encourages us to see "the centrality of social struggle in shaping the concrete meaning of rights in specific contexts.[69]" Brown gives too much autonomy to the language of rights, divorcing them from their roots in social and political struggle.[70] O'Connell points to social movements who employ rights language in a way which challenge the logic of capitalism and he asks us to see rights as part of a multifaceted discourse of emancipation.[71]

O'Connell sees utility in the struggle for civil, political and socioeconomic rights. The struggle for civil and political rights "provides space for subordinate and exploited groups to develop the political power to fundamentally challenge the order of things, and begin working to transcend the status quo."[72] The pursuit of socio-economic rights is of no less importance. He recognises that the pursuit profit, the motivating drive behind capitalism, results in "an effort to commodify the entire life course."[73] By making "claims that certain things (goods and services) are so fundamental to human flourishing that they should be exempted from market rationality, [socio-economic rights] can introduce a logic of decommodification, which poses a fundamental challenge to the existing order."[74] Viewed this way, as Patnaik writes, "the provision of welfare as a right to the people is fundamentally incompatible with capitalism" and, in claiming it as such, oppressed social groups can set about "unleashing a dialectics of subversion of the logic of capital".[75] This argument should not be limited to the provision of welfare. The decommodification of labour is a fundamental principle of international labour flaw. The ILO's 1944 Declaration of Philadelphia affirms as much, stating clearly that "labour is not a commodity".[76]

Moyn agrees with O'Connell that the traditional Marxist rejection of rights is overstated. He recognises that "today, human rights are often self-consciously presented… as a force that can or will

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[68] O'Connell (2018b: 982)

[69] *Ibid*, 983

[70] O'Connell (2018a: 19)

[71] *Ibid*

[72] O'Connell (2018b: 985)

[73] *Ibid,* 986

[74] *Ibid,* 987

[75] Patnaik (2010: 35)

[76] Declaration of Philadelphia 1944, Art. I(a)

moderate or even reverse the evils of the current form of global market relations."[77] In this way "human rights legal orders and mobilisation politics have lost their associations to the defense of freedom of contract and private property", making them distinct from the 'egoistic rights of man' of Marx's writings.[78] However, Moyn is skeptical that the human rights movement today is up to the task of challenging the extant social order. He writes that the post-war Keynesian economic order, with its commitment to social justice and social rights, "built a floor of protection and ceiling on inequality only in the presence of frightening internal and external threats —a prominent and well-organized labor movement and a communist menace, however magnified out of proportion."[79] In no small part, the political economy of the post-war years was a reformism of fear, intended to abate more disruptive social forces and stave off revolution. As Moyn pointedly reminds us "a threatening enemy, rather than a powerless companion, is what market fundamentalism demands.[80]" To this end, if the human rights movement is to disrupt neoliberalism it "will need to be frightening enough to prompt the social bargains that the welfare state supervised to the end of material fairness, while not incurring the tremendous costs of twentieth-century conflict."[81]

1.5. Conclusion

The discussion above has considered a variety of perspectives regarding the relationship between labour rights, human rights and the prevailing social order. Alston and others consider labour rights to be yet another weapon in the arsenal of human rights, albeit one with significant importance in the context of economic inequality. However, as Virginia Montouvalou demonstrates, deciding whether or not labour rights are human rights requires more than a positivistic account of the various provisions concerning labour rights in international law. We must consider how human rights bodies fair in implementing them before we reach such conclusions.[82]

Youngdahl and Kumar warn us that labour rights may lose out in their convergence with human rights, especially if they lose sight of the reality of unequal economic power and class subordination. Building on Marx's work, Brown and Marks remind us of the depoliticising effects of human rights discourse. However, O'Connell and Paitnaik hold out hope that the pursuit of rights can unleash a dialectics of subversion. especially where human rights towards decommodification.

The following chapters will analyse the protection of the right to strike as a human right in international law. It will be shown that although the right to strike is now recognised as a human right, its scope and limitations might shed light on claims that human rights depoliticise structural causes

[77] Moyn (2014: 151)

[78] *Ibid,* 154

[79] Moyn (2018: 219)

[80] Moyn (2014: 169)

[81] Moyn (2018: 219)

[82] Montouvalou (2012)

and have no space for solidarity. As Karl Klare states labour law is a "promising site for transformative projects - practices and discourses that challenge hierarchy and domination and seek to transform, or at least to nudge, existing institutions and power relationships in a more democratic, participatory and egalitarian direction."[83] It is an autonomous legal discipline which pre-dates international human rights law with a mainstream tradition that is progressive and attuned to ideas of social justice. It evolved, "in response to… worker resistance to injuries and injustices visited upon them by industrial capitalism.[84]" Human rights is often criticised for being individualistic and sceptical of collective projects, whereas labour law respects the values of worker solidarity and collective action[85]. In rubbing up against labour norms and practices, human rights might come to hold a more critical edge.

[83] Klare (2002: 2)

[84] *Ibid*

[85] *Ibid, 4*

2. Chapter 2 - The Right to Strike: Cvil, Political or Social Right?

This chapter will begin by introducing the work of T. H. Marshall, whose categorisation of rights as civil, political and social has exerted a lasting influence on international human rights law. It will then be asked as to which category the right to strike belongs. Finally, it will be suggested that insofar as theory frames law, classifying the right to strike as a civil, political or economic right has implications for the scope of its international protection.

2.1. T. H. Marshall and the Rights of the Citizen

The categorisation of rights as civil, political or socioeconomic will be familiar to lawyers. It is a categorisation which owes much to T. H. Marshall's influential essay, "*Social Citizenship".*[86] In 1950, writing in the context of the formative years of postwar welfarism, Marshall took the view that the concept of 'citizen' had evolved from recognising civil rights, to political rights and finally reached maturity in the age of social rights. In Marshall's analysis, it is possible to assign each category of right a formative century.

Civil rights developed in the eighteenth century and are those "rights necessary for individual freedom".[87] Civil rights were borne out of resistance to feudalism. It was the change from "servile to free labour" which created the basis for the status of citizen, civil rights giving "to each man, as part of his individual status, the power to engage as an independent unit in the economic struggle".[88] In light of this, Hobsbawm considers civil rights to be "one aspect of the system of beliefs about human nature and human society which finds another form of expression in the political economy of Adam Smith and his successors."[89] For workers' and their unions, the most important of these civil rights was the freedom of association, put to the purpose of forming trade unions.

Political rights developed in the nineteenth century and consist of "the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body."[90] Just as civil rights attached to the status of citizen by the end of the eighteenth century, political rights were won by expanding sections of the populous through the course of the nineteenth century. The development of political rights culminated in universal suffrage. The trade unions played an important role in agitating for the expansion of the franchise,[91] as the struggle for political rights "could not be possible, of course, without the civil liberty to asso-

[86] Marshall (1950)

[87] *Ibid*

[88] *Ibid* 33

[89] Hobsbawm (1984: 302)

[90] Marshall (1950: 11)

[91] Hobsbawm (1984: 304)

ciate, put to the dangerous purpose of challenging the social and economic status quo."[92] The centrality of political rights to early trade unionism is illustrated in the fact that the primary demand of the worker-dominated Chartist movement was the democratisation of elections.[93] As Marshall observed, "political rights of citizenship, unlike civil rights, were full of potential danger to the capitalist system"[94] and it was universal suffrage which paved the way for the arrival of social rights.

The twentieth century bore witness to the development of social rights. Marshall defined social rights as covering "the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society."[95] Judy Fudge, commenting on Marshall's work, observes that "a central feature of social rights is the decommodification of labour through the existence of a social safety net and labour standards that ameliorate the harshness of the market."[96] Social rights sought to resolve "the inherent contradiction in liberal democracies between the promise of citizenship equality and the harsh inequalities generated by the capitalist market."[97]

The categorisation of a right as civil, political or social has implications for their protection in international human rights law. Treaties which protect civil and political rights usually provide for enforcement mechanisms and are thought to be suitable for immediate implementation. Conversely, social rights are considered not to be justiciable and are subject to the doctrine of progressive realisation. Although there are certainly developments int his field, in particular in the justiciability of social rights in constitutional courts, the fact remains that social and economic rights receive less attention than their civil and political cousins.[98] Marshall himself acknowledged issues withe justiciability of social rights, writing that while "a modicum of legally enforceable rights may be granted… what matters to the citizen is the superstructure of legitimate expectations."[99]

The protection of the right to strike may be justified by reference to civil, political and socioeconomic entitlements. In her 2003 study of the right to strike, Novitz states "to the extent that diverse justifications are plausible… they may determine the appropriate scope of a right to strike."[100] Novitz's

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[92] Novitz, (2019: 235)

[93] Hobsbawm (1984 :304)

[94] Marshall (1950: 42)

[95] *Ibid,* 11

[96] Fudge (2007: 34)

[97] *Ibid*

[98] Fenwick and Novitz (2010: 11)

[99] Marshall (1950: 58)

[100] Novitz (2003: 49)

analysis reveals that the justificatory basis adopted for the right to strike (be it civil, politics, or social) has implications for the scope of its protection in international human rights law.

2.2. The Right to Strike as a Socioeconomic Right

As Eric Tucker points out "the most frequent and popular view of strikes is as an economic weapon that enables workers to enjoy some countervailing power and make collective bargaining meaningful."[101] Viewed this way, the right to strike is justified in relation to a socioeconomic character. It is relevant to the "maintenance of fair wages and reasonable working conditions, thereby improving the economic and social welfare of a significant proportion of the population."[102] There is unequal bargaining power between worker and employer and the right to strike is an essential means of equalising the relationship.[103]

As Novitz points out, there are many consequences to adopting this justification. First, it might mean that "workers should be able to strike only in pursuit of improved terms and conditions of employment" which could then be included in a collective agreement.[104] Ruth Ben-Israel suggests that this means it is a collective right, because for an individual worker to strike would be meaningless.[105] Novitz also identifies another issue, "how broadly the scope of legitimate 'socio-economic objectives of workers can be construed."[106] If workers can strike in pursuit of terms and conditions of employment, why not in protest at government policy which affects their lives at work? Finally, does a socioeconomic justification allow workers to engage in secondary action? Novitz state that arguments "sympathy action should be lawful stem from a broad view of the benefits of solidarity in achieving the socioeconomic goals of workers."[107]

2.3. The Right to Strike as a Political Right

Novitz identifies two important ways in which the right to strike can be viewed as a political entitlement. First, it can be seen as a "facet of industrial democracy…. [providing] workers with an opportunity to participate in decisions concerning management of the workplace and thereby… [influencing] policies which affect their daily lives."[108] Second, the right to strike may be a political entitlement where it is used by workers to challenge government policy. As Novitz recognises, "withdraw-

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[101] Tucker (2014: 456)

[102] Novtiz (2003: 49)

[103] Davies (2009: 220)

[104] Novtiz (2003: 54)

[105] Ben-Israel (1981: 214)

[106] Novitz (2003: 56)

[107] *Ibid*

[108] *Ibid,* 59

al of labour has a detrimental effect on the profits of businesses and the economy as a whole… It is a more effective form of protest than marching in the streets."[109]

Whether workers may strike in pursuit of political objectives is a controversial topic. On one view, "in a democratic society where decisions are based on the wishes of the majority of the population political strikes are unacceptable… a relatively small group of persons in key positions can force a democratic government into a policy not wanted by the majority."[110] However, advocates of participatory democracy question the value of centralised political power. Moreover, even in a democratic state, interest groups compete for influence and in a capitalist economy based on private ownership the power of capitalists is greater than any other class.[111] As Novitz observes "if there is to be some balance between capital and labour, there may be a case for legal recognition of strikes which seek to influence government policy."[112]

2.4. The Right to Strike as a Civil Right

The right to strike can also be justified as a civil right where it is viewed as an aspect of freedom of association.[113] As shall be shown in Chapter 3, this is the perhaps surprising basis of the right to strike in the ILO and ECHR. Those who advocate for the right to strike as a civil right argue that the freedom to associate, put to the cause of forming a trade union, takes on a particular character in the context of employment. It "allows workers to form trade unions… the means by which workers can overcome the limitations inherent in individual contracts of employment and participate in making those decisions which affect their lives and their society"[114] As the right to strike is the tool workers use to achieve this goal, it is a logical and necessary extension of freedom of association in the context of work.[115] Finally, to claim the right to strike as a civil right is also to claim the enhance protection afforded to civil rights.

2.5. Conclusion

This chapter has demonstrated that the right to strike is an entitlement which can be justified as a civil, political as well as a social right. The following Chapter reaffirms this by showing that the right to strike is recongised in treaties which deal with civil and political as well as a social and economic rights. In Chapter 4 it will be shown that protecting the right to strike as civil, political or social has implications for the scope of its legitimate exercise.

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[109] *Ibid,* 62

[110] Schermers (1989: 232)

[111] Laski (1950: 22-23)

[112] Novitz (2003: 63)

[113] Davies (2009: 221)

[114] Noivtz (2003, 69)

[115] *Ibid*

3. Recognition of the Right to Strike in International Law

This chapter will examine where the right to strike is recognised in international human rights law. It will cover the right to strike in the ILO, in the ICCPR and the ICESCR, as well as ESC and the ECHR.

3.1. The Right to Strike in the ILO

The ILO was established by the Treaty of Versailles in 1919. Part XIII of the treaty contains contains the Preamble to the Constitution and Articles 387-426 determine its functioning. The 1944 Declaration of Philadelphia was subsequently annexed to the Constitution[116] and reformulated the organisations objectives in light of the Second World War.[117]

Perhaps surprisingly, there is no ILO Convention or Recommendation which explicitly protects a right to strike.[118] However, this does not mean that the ILO "disregards the right to strike or abstains from providing a protective framework within which it may be exercised."[119] As shall be shown below, the right to strike in the ILO has primarily developed in the jurisprudence of the CFA based on the fact that "freedom of association" is declared to be fundamental principle of the ILO in its Constitution and on the basis of the provisions of Convention No. 87 on the Freedom of Association and Protection of the Right to Organise.

3.1.1.The CFA

In 1951, the CFA was established by the Governing Body of the ILO in order to consider complaints concerning infringements of the freedom of association.[120] The ILO had recently adopted Convention No 87 concerning the freedom of association and it became "apparent that the ILO needed a mechanism whereby it could respond quickly to complaints related to the suppression of trade union organisations and restrictions on industrial action."[121] The standard method of supervision by the CEACR was felt to be unfit for this purpose, as its mode of supervision relied upon states having ratified Convention No 87.[122] Also, neither Convention expressly included a right to strike, which was considered to by workers' representatives to be "the only effective weapon which

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[116] Replacing Section II of Part XIII, Treaty of Versailles

[117] Novitz (2003: 99)

[118] Gernigon et. al. (1998: 7)

[119] *Ibid*

[120] CFA (2018: Annex I, [1]-[6])

[121] Bellace (2014: 44)

[122] *Ibid,* 45

the workers had to defend their rights."[123] Moreover, the obligation to respect the freedom of association arose directly from the Constitution, not just from ratification of Convention No 87.[124] These considerations necessitated the establishment of a special machinery for complaints relating to the freedom of association.[125] As "the body which has been presented with specific cases that raise questions about the extent of the right to strike" it is unsurprising that the CFA has been "overwhelmingly responsible for the development of case law".[126] The section below will examine the development of the right to strike in the jurisprudence of the Committee.

3.1.2. The Right to Strike in the ILO Constitution

The Preamble to the ILO Constitution states that the "recognition of the principle of freedom of association" is essential to achieving the aim of "universal and lasting peace" based on "social justice". The Declaration of Philadelphia 1944 declares as a fundamental principle of the organisation that the "freedom of expression and of association are essential to sustained progress".[127]

The CFA takes the view that the "freedom of association implies not only the right of workers … to form freely organizations of their own choosing, but also the right for the organizations themselves to pursue lawful activities for the defence of their occupational interests."[128] According to the CFA, "the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests."[129] The CFA have therefore interpreted the "freedom of association" recognised in the ILO Constitution to include a right to strike.

Novtiz argues that this interpretation of the term 'freedom of association' in the ILO Constitution can be justified under the standard principles of treaty interpretation. Under the Vienna Convention, the CFA is obliges to interpret 'freedom of association' in good faith and in accordance with its ordinary meaning.[130] The CFA interprets the "freedom of association" in light of its specific context in the workplace. The CFA "recognises that combination in a trade union may be a function of individual liberty, but this liberty has little meaning if workers are unable to pursue their own interests within such organisations…. From this premise stems the CFA view that freedom of association implies not not only the right of workers and employers freely to form organisations of their own

[123] ILO (1949: 67)

[124] Declaration of Philadelphia 1944, Art I(b); Bellace (2014: 44)

[125] Bellace (2014*:* 46)

[126] *Ibid,* 48

[127] 1944 Declaration of Philadelphia, Art. I(b)

[128] CFA (2018: [716])

[129] *Ibid,* [753]

[130] Vienna Convention on the Law of Treaties 1969, Arts.31 and 32

choosing, but also the right to pursue collective activities for the defence of their occupational, social and economic interests."[131]

In interpreting the 'freedom of association' in this way the CFA have not disregarded it's ordinary meaning. Rather, they have recognised that the term is ambiguous and has particular connotations in its industrial context. Accordingly, the Vienna Convention permits the CFA to look at the context in which the term is used and the purpose of the international instruments in which it is contained.[132] As noted above, the aim of the ILO is "social justice". The CFA have stated that in interpreting the freedom of association to include a right to strike they have had reference to this constitutional goal.[133] The CFA recognises that social justice requires equality of bargaining power between worker and employer, which cannot be achieved in the absence of a right to strike.

3.1.3. The Right to Strike in Convention No.87

The CFA also states that "the right to strike is an intrinsic corollary to the right to organise protected by Convention No. 87."[134] Article 3 of Convention No. 87 establishes the right of workers' organisations to "organise their administration and activities and to formulate their programmes." Article 10 defines the aims of such organizations as "furthering and defending the interests of workers." Strike action is one of many "workers acitviites" protected under Article 3. The CFA has also stated that it is "one of the essential means through which workers and their organizations may promote and defend their economic and social interests" in accordance with Article 10.[135]

Convention No. 87 is considered to be a more developed expression of the "freedom of association" contained in the ILO Constitution. For this reason, ILO member states are obliged to respect its provisions even where they have not ratified it.[136] As Bellace observes, "at no point is there any indication that the [CFA] sees the guarantee of freedom of association in the ILO Constitution as being in some way different from the guarantee of freedom of association in Convention No. 87."

3.1.4. The CEACR and the Right to Strike

The CEACR is a supervisory body of the ILO composed of technical legal experts and tasked with examining the periodic reports submitted by states in accordance with article 22 of the Constitu-

[131] Novtiz (2003: 197)

[132] Vienna Convention on the Law of Treaties, Arts.31(2) and (3)

[133] CFA (1985: [23] and [53])

[134] CFA (2018: [754])

[135] *Ibid,* [753]

[136] Declaration on Fundamental Principles and Rights at Work 1998, Art.1(b)

tion.[137] The CEACR also produces a 'General Survey' under Article 19 of the ILO Constitution, a number of which deal with the freedom of association, in which it sets out "the law and practice in member States in terms of the practical application of ratified and non-ratified Conventions".[138]

There is a jurisdictional overlap between the CFA and CEACR, whereby both Committees interpret the freedom of association protected in Conventions No.87. There was thus "a risk that the principles developed by the [CEACR]… might clash with those formulated by the CFA…"[139] However, as shall be shown below, the CEACR has taken an approach which "coincide[s] in substance" with the CFA[140].

The most recent General Survey on freedom of association was published in 2012 and states that "strikes are essential means available to workers and their organisations to protect their interests… [and] strike action is a basic right."[141] The CEACR goes on to reiterate that this principle is derived from Article 3 and 10 of Convention No. 87, and adopted by the CEACR after taking into account the principles established by the CFA.[142]

3.2. The Right to Strike in the UN Human Rights Instruments

The right to strike is relatively well established outside the ILO in the human rights treaties of the UN. Although the UDHR does not mention a right to strike, it does recognise a general freedom of association,[143] as well as the specific right of an individual "to form and to join trade unions for the protection of his interest."[144] Following the adoption of the UDHR, preparatory works began on transforming it into a legally binding instrument. The initial aim was to draft a single universal covenant which would then be presented to States for ratification.[145] However, the UNGA eventually decided to implement the UDHR in two separate instruments,[146] one dealing with civil and political rights which would become the ICCPR and the other with social and economic rights, the ICESCR. The dual character of trade union rights, whereby they can be considered civil and political rights

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[137] ILO (1926: 429)

[138] CEACR, (2012, [3])

[139] Novitz (2003: 200)

[140] Gernigon et. al. (1998: 7)

[141] CEACR (2012: [117])

[142] *Ibid*

[143] UDHR, Art 20

[144] UDHR, Art 23(4)

[145] De Schutter (2014: 18)

[146] UNGA (1952)

as well as social and economic rights, manifests in the fact that both the ICCPR and the ICESCR contain provisions concerning trade union freedoms.[147]

3.2.1. The Right to Strike in the ICESCR

In the drafting process of the ICESCR, some States objected to the idea that trade union rights would enjoy special treatment over other associations.[148] Others felt that separate treatment necessary as trade union freedom had "very important economic and social consequences"[149] and there were worries that the ICCPR provision would be unduly restricted.[150] In the end, trade union rights were protected under Article 8 ICESCR.

Article 8(1)(a) protects the right of individuals to join a trade union "for the promotion and protection of his economic and social interests." It was thought by the drafters that "the right to strike was essential for the protection of the economic and social interests of workers… [and it was] meaningless to try to guarantee trade union rights without a right to strike."[151] Accordingly, Article 8(1)(d) explicitly protects "the right to strike, provided that it is exercised in conformity with the laws of the particular country."

The drafters of Article 8 were also aware of the earlier standard setting work of the ILO. This much is clear from Article 8(3) ICESCR which provides "nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention." As Patrick Macklem notes, "Article 8(3) comes close to effectively incorporating Convention No. 87 rights into the guarantee of freedom of association in the ICESCR".[152]

The CESCR "has persisted in interpreting the right to strike under the ICESCR in ways that are largely congruent with the ILO."[153] Although no General Comment has yet been issued with respect to Article 8, the approach of the CESCR can be ascertained from a review of its Concluding Observations. For example, when commenting on Germany's restriction of the right to strike of public sector employees, the CESCR was keen to express its concern that "the prohibition by the State party of strikes by public servants other than public officials who do not provide essential services… constitutes a restriction of the activities of trade unions that is beyond the scope of art-

[147] Saul et al (2014)

[148] Craven (1995: 250)

[149] UNGA (1957: 200)

[150] Craven (1995: 250).

[151] *Ibid,* 257-258

[152] Macklem (2005: 71)

[153] Frey (2016 :26)

icle 8 (2) of the Covenant."[154] The CESR justified its interpretation by reference to position maintained in the ILO in relation to Convention No.98 on the Right to Organise and Collective Bargaining.[155]

3.2.2. The Right to Strike in the ICCCPR

Article 22(1) ICCPR guarantees "the right to freedom of association with others, including the right to form and join trade unions for the protection of [one's] interests" but contains no explicit provision on the right to strike. Rather, trade union freedom is presented as one aspect of the more general freedom of association. In seeking to explain the special reference to trade unions, some commentators suggest that this is "indicative of the historical persecution of trade unions" as the "advocation and pursuance of labour rights often clashes with the interests of big business and governments."[156] Such a views suggests that the Article 22(1) protects a bare liberty to associate. However, the phrase "for the protection of his interests" suggests that the drafters were aware that the freedom of workers to associate in trade unions was put to a particular purpose in the employment context. If this is the case, then it would be logical that Article 22(1) protects collective action through which trade unions can protect the interests of their members, . Whether or not Article 22(1) guarantees more than a bare liberty to associate was considered by the HRC in its 1986 case of *JB et. al. v Canada.*[157]

JB et. al. was a case bought by the Alberta Union of Provincial Employees against Canada. The applicants claimed that legislation in Alberta which prohibited public sector employees from striking amounted to a violation of Article 22(1) ICCPR.[158] At the admissibility stage, the HRC sought to determine "whether the right to strike is guaranteed by article 22 of the [ICCPR]."[159] The HRC observe that the right to strike is not "*expressis verbis* included in article 22" and it falls to the HRC to "interpret whether the right to freedom of association necessarily implies the right to strike."[160] In interpreting Article 22, the HRC notes that it has been guided by Articles 31 and 32 of the Vienna Convention, which required the Committee to apply the 'ordinary meaning' of terms in light of their context and in light of the object and purpose of the instrument in which they are contained, with recourse to supplementary means of interpretation.[161]

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[154] CESCR (2001: [22])

[155] *Ibid*

[156] Joseph (2013: [19.20])

[157] HRC (1986)

[158] *Ibid,* [1]

[159] *Ibid,* [6.2]

[160] *Ibid*

[161] *Ibid* [6.3]

The HRC reviews the *travaux preparatoires* of the ICCPR. In their view, it is significant that, in contrast to Article 8 ICCPR, at no point in the drafting processes was it suggested that Article 22 be amended to include a right to strike.[162] Consequently, the HRC "cannot deduce from the *travaux preparatoires* that the drafters of the [ICCPR] intended to guarantee the right to strike."[163] The HRC also states that the explicit protection of the right to strike in paragraph 1(d) of Article 8 ICESCR is additional and separate to the right to form and join trade unions for the protection of one's economic and social interests guaranteed in Article 8(1)(a). This leads them to conclude "that the right to strike cannot be considered as implicit component of the right to form and join trade unions", for if it was there would be no need to spell it out in the ICESCR.[164] The case was declared inadmissible *ratione materiae.*[165]

This decision of the HRC has attracted criticism from academics on the grounds that it is excessively conservative and outdated,[166] unpersuasive[167] and light on reasoning.[168] The Committee have opted for what Craig Scott terms "the ceiling effect" which "is created when an institution… refers to human rights commitments found in a legal instrument other than its own as a reason to *limit* the meaning… to a right in that institution's own instrument."[169] However, as Leary points out, "its credibility is lessened by the forceful individual dissenting opinion in the case signed by five of the most respected members of the Committee…"

In the individual opinion, the dissenting members of the HRC stated that the question they were required to answer was not whether Article 22 guaranteed the right to strike, but whether "Article 22 alone or in conjunction with other provisions of the Covenant necessarily excludes, in the relevant circumstances, an entitlement to strike."[170]

The individual opinion begins by stating that Article 22(1) protects the "the right to form and join trade unions for the protection of [one's] interests" as a specific element of the general right to freedom of association. It is observed "that there is no comma after 'trade unions', and as a matter of grammar 'for the protection of his interests' pertains to 'the right to form and join trade unions' and not to freedom of association as a whole." While it is "manifest that there is no mention of the

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162 *Ibid*

163 *Ibid*

164 *Ibid*

165 *Ibid* [7]

166 Scheinin and Langford (2009: 102)

167 Leary (1996: 34)

168 Macklem (2005: 72)

169 Scott (1999: 638-639 *)*

170 HRC (1986: Individual Opinion, [2])

right to strike in article 22" there is also "no mention of the various other activities… that a trade-unionist may engage in to protect his interests." The dissenting members "do not find that surprising, because it is the broad right of freedom of association which is guaranteed by article 22." In the dissenting members view, "the exercise of this right requires that some measure of concerted activities be allowed; otherwise it could not serve its purposes… [and] this is an inherent aspect of the right". Moreover, "activities are essential to the exercise of this right cannot be listed a priori and must be examined in their social context".[171]

For the dissenting members, "the *travaux preparatoires* are not determinative of the issue before the Committee."[172] In their view, the fact that a provision concerning the right to strike did not make its way into the ICCPR is due to the fact Article 22 ICCPR deals with the freedom of association generally, and "mentioning particular activities such as strike action would have been inappropriate."[173] They also recall Article 31 of the Vienna Convention, which provides that the HRC should interpret the provisions of Article 22(1) in light of the "object and purpose" of the treaty. This is considered to be "especially important in a treaty for the promotion of human rights, where limitation of the exercise of rights… are not readily to be presumed."[174]

The dissenting members do not agree that the express protection of the right to strike in Article 8(1)(d) ICESCR indicates that it cannot be considered an inherent element of the freedom of association. In their view, the construction of Article 8 ICESCR indicates that the freedom of association "does not necessarily exclude the right to strike in all circumstances". The HRC concludes that there is "no reason for interpreting this common matter differently in the two Covenants."[175]

In common with Article 8(3) ICESCR, Article 22(3) provides "nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention." The dissenting members in *JB et. al.* point to this provision to support their opinion, as the CFA "has held that the general prohibition of strikes for public employees contained in the Alberta Public Service Employees Relations Act was not in harmony with article 10 of ILO Convention No. 87" and they ""see no reason to interpret article 22 in a manner different from ILO when, addressing a comparable consideration."[176]

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[171] *Ibid*, [3]

[172] *Ibid,* [5]

[173] Ibid, [4]

[174] *Ibid*, [5]

[175] *Ibid,* [6]

[176] *Ibid,* [7]

As the right to strike is protected in "certain leading and widely ratified international instruments" the dissenting members do not agree that the right to strike should be excluded from the ICCPR.[177] In their opinion, "whether the right to strike is a necessary element in the protection of the interests of the authors, and if so whether it has been unduly restricted, is a question on the merits, that is to say, whether the restrictions imposed in Canada are or are not justifiable under article 22, paragraph 2."[178] After briefly considering the other grounds of inadmissibility, the dissenting members find the communication admissible.[179]

The HRC appears to have occasional adopted the approach of the dissenting members in its Concluding Observations post-*JB et. al*. In its 1999 Concluding Observations concerning Chile, the HRC states that "the general prohibition imposed on the right of civil servants to organise a trade union… as well as their right to strike, raises serious concerns, under article 22 of the Covenant".[180] In 2004, the HRC stated that Lithuanian labour legislation "is too restrictive in providing, *inter alia,* for the prohibition of strikes… which may amount to a violation of article 22."[181] However, as Sarah Joseph stresses, statements recognising the right to strike in Article 22 "have been sporadic; it cannot confidently be asserted that the HRC has departed from the *JB* precedent."[182]

3.3. The Right to Strike in the CoE

The system for the protection of human rights in the CoE consists of two treaties, the ECHR which deals with civil and political rights and the ESC which deals with social and economic rights. When the CoE was established in 1949, the creation of a human rights treaty enforced by an independent court was high on its agenda.[183] However, there was no clear indication "that a stark division would be made between the treatment of civil and political rights on the one hand and socio-economic entitlements on the other."[184] It was strong opposition to the inclusion of social rights in any future European instrument raised by the UK which was to lead to the adoption of two instruments. The UK thought that the inclusion of social rights in a legally binding and enforceable instrument would be "too controversial and difficult of enforcement" and might even "jeopardise the acceptance of the Convention."[185] As any treaty would need to be adopted unanimously, "if the UK warned that inclusion of social rights would jeopardise the Convention's adoption, this could be

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[177] *Ibid,* [8]

[178] *Ibid,* [10]

[179] *Ibid,* [11]-[13]

[180] HRC (1999: [25])

[181] HRC (2004: [18])

[182] Joseph (2010: 350)

[183] Weil (1963: 22-24)

[184] Novitz (2003: 128)

[185] CoE (1975: 116)

read as an implicit threat. The matter was off the agenda."[186] Consequently, the ECHR was adopted in 1952 and supervised by an independent court[187] which issued binding and enforceable judgments.[188] In contrast, the ESC was adopted in 1961 and contained a system for supervision whereby State reports were submitted to the ECSR,[189] who then made comments on conformity of State practice with the provisions of the ESC.[190] A collective complaints procedure was introduced in 1995 which allows certain international and national organisations of workers, as well as certain NGOs, the right to submit complaints concerning unsatisfactory application of the ESC to the ECSR.[191]

3.3.1. The Right to Strike in the ESC

The ESC was the first international human rights treaty to explicitly recognise a right to strike. While some commentators point to the "particular importance" of the ESC as "it was the first instance of the right to strike being expressly recognised in an international treaty",[192] others suggest that "its importance should not be over-rated… [as] the right set out in Article 6(4) of the ESC was strictly circumscribed."[193]

Article 6 ESC deals with the right to bargain collectively. Its Preamble provides "with a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake.. and recognise", in paragraph (4) "the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."

The text of Article 6 makes clear that the right to strike in the ESC is associated with collective bargaining. Article 6 "seems concerned only with protection of a limited conception of workers' socio-economic interests… [and] the reference to conflicts of interests suggests again a rationale for strike action associated only with collective bargaining."[194] This approach to the right to strike has implications for the legitimate objectives of strike action which are discussed further in Chapter 4.[195]

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[186] Novitz (2003: 134)

[187] ECHR, Art 19

[188] ECHR, Art 46

[189] ESC, Arts 21 and 22

[190] Rules of the European Committee of Social Rights, Rule 2(1)

[191] ESC 1995 Protocol, Article 1

[192] Kovacks (2005: 447)

[193] Novitz (2003: 125)

[194] Novitz (2003: 142-143)

[195] See below

3.3.2. The Right to Strike in the ECHR

The ECHR does not mention a right to strike. Rather, the right to strike is derived from Article 11(1), which guarantees the right of "freedom of association with others, including the right to form and to join trade unions for the protection of [one's] interests." Initially, the ECtHR appeared reluctant to equip Article 11(1) with an interpretation which protected specific trade union freedoms. However, a turning point came in the decision of the Grand Chamber in *Demir and Baykara v Turkey.*[196] The pages below will briefly set out the ECtHR's position pre-*Demir,* followed by an analysis of the decision in *Demir* and of the implications this has for the existence of a right to strike in Article 11(1).

a) The ECtHR's Old Approach

The Court's initial approach to the trade union freedoms contained in Article 11 was developed in two cases concerning Sweden in 1976, *Swedish Engine Drivers' Union v Sweden*[197] and *Schmidt and Dahlstrom v Sweden.*[198]

In *Swedish Engine Drivers' Union* a minority trade union complained that the National Collective Bargaining Office (the State body responsible for setting the terms and conditions of employment of State employees through conclusion of collective agreements) refused to conclude collective agreements with the applicant union. The applicant alleged that this amounted to a violations of Article 11(1).

The Court considers the meaning of the phrase "for the protection of [one's] interests." It is held to mean that "the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible." Accordingly, "the members of a trade union have a right, in order to protect their interests, that the trade union should be heard." However, "while the concluding of collective agreements is one of these means, there are others." The Convention merely requires that "trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members' interests."[199] However, "Article 11 (1) certainly leaves each State a free choice of the means to be used towards this end."As it was undisputed "that the applicant union can engage in various kinds of activity vis-à-vis the Government" in order to make its voice heard, the fact that it was refused the specific means of a collective agreement as held not to violate Article 11(1).[200]

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[196] ECtHR (2008)

[197] ECtHR (1976a)

[198] ECtHR (1976b)

[199] ECtHR (1976a: [40])

[200] *Ibid,* [41]

In *Schmidt and Dahlstrom,* the applicants were members of a union who took strike action following the break-down of collective negotiations. Following the eventual conclusion of the collective agreement, the members of the union which took strike action were denied retroactive benefits, as was the usual practice in Sweden.[201] The applicants complained that this violated their rights under Article 11(1),[202] submitting, *inter alia,* that the practice of denying retroactive benefits to striking workers violated their the right to strike, which they considered to be“an organic right” contained in Article 11(1).[203]

On this point the Court repeats its observation that “the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible…[Article 11(1)] nevertheless leaves each State a free choice of the means to be used towards this end.” While, “the grant of a right to strike represents without any doubt one of the most important of these means… there are others.” The applicant union was considered to have other means at their disposal through which they could protect the interests of their members.[204] Accordingly, there was found to be no violation of Article 11(1).

In *Swedish Engine Drivers' Union* and *Schidt and Dahlstrom,* the ECtHR is holding that Article 11(1), while guaranteeing the right of trade unions to protect their members' interests, does not guarantee any specific means of doing so, be it the conclusion of collective agreements or the right to strike. As long as States provide some means by which trade unions can protect their members interests they meet their obligations under the ECHR.

In both cases the ECtHR referred to the the provisions of the ESC as a reason to limit its interpretation iof Article 11. Under the ESC, States may opt not to be bound by the provisions of Article 6 when they ratify the treaty. The ECtHR held in *Swedish Engine Driver's Union* that if it were to to guarantee protection for specific instances of trade union activity under Article 11, which may not be opted out of, this would “would amount to admitting that the 1961 Charter took a retrograde step in this domain.”[205] In *Schmidt,* the fact that the right to strike in Article 6(4) is subject to regulation which may limit its exercise was referred to in order to support the ECtHR's conclusion that the right to strike may legitimately be restricted.[206]

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[201] ECtHR (1976b: [21]-[28])

[202] *Ibid,* [29]

[203] *Ibid,* [36]

[204] *Ibid*

[205] ECtHR (1976a: [39])

[206] ECtHR (1976b: [36])

There are a number of observations to be made at this point. The first is that the approach adopted by the ECtHR in both cases is at odds with the approach of the ILO concerning the relationship between freedom of association, collective bargaining and the right to strike.[207] Whereas the ECtHR held that the freedom of association did not guarantee any specific type of trade union activity, the CFA has described the right to bargain collectively as an "essential element"[208] of freedom of association and one which Convention No. 87 was clearly designed to permit.[209] Furthermore, the CFA considers the right to strike to be "an intrinsic corollary to the right to organize protected by Convention No. 87"[210] and "one of the essential means through which workers and their organizations may promote and defend their economic and social interests."[211] In searching for explanations to the varying approaches, one might point to the tripartite structure of the CFA, within which workers' organisations are better placed to voice their persepctives. Furthermore, the ILO system is built around the principle of "social justice" which requires an equalisation of arms between worker and employer which is primarily achieved through the practice of collective bargaining and strike action.

Second, the reasoning of the ECtHR in these cases is another example of a judicial organ referring to other provisions found in other international instruments as a reason to restrict its interpretation of its own instrument. In the discussion above concerning the ICCPR, it was mentioned that Craig Scott has labelled this the "ceiling effect".[212]

Finally, it has been observed that the low level of protection offered to trade union rights in the judgments of the ECtHR are a manifestation of the traditional skepticism of social and labour rights, which are considered to be non-justiciable and in need of only minimal protection.[213]

A sign that the tide was beginning to turn came in *Wilson and Palmer v The United Kingdom.*[214] The applicants complained that their employer was de-recognising their union for collective bargaining purposes and that offers of more favourable employeemnt conditions were made to employees agreeing to surrender union representation.[215] This was submitted to be a violation of Art-

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207 Novitz, (2003: 227)

208 CFA (2018: [1232])

209 *Ibid* [1233]

210 *Ibid* [754]

211 *Ibid* [753]

212 Scott (1999)

213 Montouvalou (2010: 441)

214 ECtHR (2002)

215 *Ibid,* [9]-[19]

icle 11(1).[216] The Court held that the practice of the State party, in allowing the employer to offer more favourable conditions to those who surrendered their union representation, amounted to a violation of Article 11(1).[217]

The Court still held that Article 11(1), guaranteed the "freedom to protect the occupational interests of trade union members by trade union action… [but does not] secure any particular treatment of trade unions or their members and leaves each State a free choice of the means to be used to secure the right to be heard."[218] However, in *Wilson and Palmer*, the Court held ILO and ESC materials to be relevant in constructing the content of Article 11(1).[219] The Court considered the fact that the the UK had been subject to criticism in the supervisory bodies of the ILO and ESC in relation to the issue which formed the basis of the case.[220] In a substantial departure from its previous case law, the Court now appeared willing to take account of other international materials "in order to maximise rather than limit the coverage of the Convention."[221] The ILO and ESC instruments were influential, but not determinative. The Court still refused to recognise the right to strike as an essential element of the freedom of association,[222] in contrast to ILO standards.[223]

In *Wilson and Palmer*, we see the first signs of what scholars have come to term the 'integrated approach' to interpretation,[224] whereby the Court refers to other international instruments as a means of widening the scope of the rights protected under the ECHR. Furthermore, *Wilson* illustrates a means by which, through influencing the interpretation of legally enforceable rights, social rights can have indirect legal effect.[225] The full effect of the integrated approach was finally demonstrated in the landmark judgment in *Demir and Baykara.*

b) The Decision in *Demir and Baykara v Turkey*

In *Demir and Baykara* the applicants were members of a trade union which had concluded a collective agreement with their employer, the Turkish state, which was subsequently annulled without

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[216] *Ibid,* [40]

[217] *Ibid,* [48]

[218] *Ibid,* [42]

[219] *Ibid* [30]-[37]; Ewing (2003; 16)

[220] *Ibid* [48]

[221] Montouvalou (2010: 443); Ewing (2003: 16)

[222] ECtHR (2002: [45])

[223] CFA (2018: [753]-[754])

[224] Montouvalou, (2010: 442); Scheinin (2002: 32)

[225] Collins (2003: 235)

consultation.[226] Following a lengthy but unsuccessful litigation in the Turkish courts,[227] the applicants complained on the grounds that the State practice violated their Article 11(1) rights.[228] The Court held that there had been a violation of Article 11 on two grounds, "on account of the interference with the right of the applicants, as municipal civil servants, to form a trade union" and "on account of the annulment *ex tunc* of the collective agreement entered into by the trade union… following collective bargaining with the employing authority."[229]

As Ewing and Hendy write, "these narrow findings conceal a rich seam of jurisprudence in which the ECtHR (i) repudiated its earlier decisions on the question of trade union rights, (ii) embraced collective bargaining as an essential right protected by Article 11, and in doing so (iii) introduced a body of reasoning that should apply with equal force to other forms of trade union activity, notably the right to take collective action."[230]

This reversal of the Court's previous jurisprudence was based upon a review of, *inter alia,* ILO and ESC standards concerning the right to bargain collectively. The Court refers to ILO Convention No. 89 and 98, which protect the right of workers to organise and the right to bargain collectively, respectively.[231] The ECtHR also refers to the ESC.[232]

Taking account of the protections afforded to the right to bargain collectively in international law, the Court "considers that its case-law to the effect that the right to bargain collectively and to enter into collective agreements does not constitute an inherent element of Article 11… should be reconsidered, so as to take account of the perceptible evolution in such matters". This is not a decision taken lightly, and the Court observes that "while it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents established in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement."[233]

The Court holds, in a substantial departure from its previous case law, that, "having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become

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[226] ECtHR (2008: [15]-[16])

[227] *Ibid,* [17]-[33]

[228] *Ibid,* [59]

[229] *Ibid,* [183]

[230] Ewing and Hendy QC (2010: 4)

[231] ECtHR (2008: [37]-[44])

[232] *Ibid,* [45]-[46]

[233] *Ibid*, [153]

one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 of the Convention".[234]

The Court's decision in *Demir* was well received by trade unionists and their lawyers. Ewing and Hendy QC described it as "epoch-making…, a decision in which human rights have established their superiority over economic irrationalism and 'competitiveness' in the battle for the soul of labour law".[235] The integrated approach to interpretation secures the relevance of ILO and ESC jurisprudence in determining the content and scope of Article 11, so that"no longer is this material a barrier to reading up Article 11, it is now a reason for doing so."[236]

The line of reasoning adopted in *Demir* has implications for other trade union activities, notably the right to strike.[237] In *Swedish Engine Drivers' Union* and *Schmidt and Dahlstrom,* Article 11 was held to guarantee no specific treatment of trade unions. However, in *Wilson* the Court was prepared to recognise that is is "the essence of a voluntary system of collective bargaining" that a trade union be able to "take steps including, if necessary, organising industrial action" in order to persuade an employer to enter into a collective agreement.[238] Given that in the absence of a right to strike collective bargaining amounts to little more than collective begging,[239] as confirmed by the supervisory bodies of the ILO and the provisions of Article 6(4) ESC,[240] the Court's previous jurisprudence on the issue required reexamination in light of *Demi.* Fortunately, it was not long before the ECtHR was given the opportunity to do so.

c) The Right to Strike post-*Demir*

*Enerji Yapi-Yol Sen v Turk*ey[241] was the first post-*Demir* case in which the Court had an opportunity to consider the right to strike. The case concerned a circular distributed to public sector employees from their employer prohibiting them from taking part in a strike organised by their trade union which sought to secure for public sector employees the right to a collective agreement. The applicants took part in the strike and were disciplined for their participation. They complained to the ECtHR that their Article 11 rights had been infringed.[242]

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[234] *Ibid,* [154]

[235] Ewing and Hendy QC (2010:47-48)

[236] *Ibid,* 7

[237] *Ibid*, 10

[238] ECtHR (2002: para 46)

[239] Ewing and Hendy QC (2010: 13); Tucker (2014: 456)

[240] CFA (2018: [753] and [754]); ESC, Article 6(4)

[241] ECtHR (2009)

[242] *Ibid,* [6]-[15]

In its judgment, the Court stated that "the terms of the Convention require that the law should allow trade unions, in any manner not contrary to Article 11, to act in defence of their members' interests… Strike action, which enables a trade union to make its voice heard, constitutes an important aspect in the protection of trade union members' interests…" Moreover, the Court observed "that the right to strike is recognised by the [ILO] supervisory bodies as an indissociable corollary of the right of trade union association that is protected by ILO Convention C87 on trade union freedom and the protection of trade union rights… It recall[ed] that the European Social Charter also recognises the right to strike as a means of ensuring the effective exercise of the right to collective bargaining."[243] The Court supported its reasoning by referring to its decision in *Demir and Baykara*,[244] strongly suggesting that insofar as collective bargaining constitutes an essential element of Article 11, "the right to strike, insofar as it is exercised in furtherance of collective bargaining, is equally 'essential'."[245] The Court held that the restrictions on strike action amounted to a violation of Article 11(1), without feeling it necessary to consider whether the union had other means at its disposal to make its voice heard.[246] Thus, in *Enerji* the ECtHR accepted that Article 11(1) includes the right to strike and adduced ILO and ESC materials to support this conclusion. As the restrictions on the right to strike could not be justified under Article 11(2),[247] there was held to be a violation of Article 11(1).[248]

3.4. Conclusions

This Chapter has shown that the right to strike is protected in a variety of international instruments. As a social right, it finds explicit protection in the ICESCR and the ESC. In the ICCPR and ECHR, the right to strike is developed in the jurisprudence of supervisory bodies as an element of the freedom of association. The ILO takes a similar approach, although it does not distinguish between civil, political or social rights. However, the right to strike is not an unrestricted freedom to take strike action. The following Chapter will examine the permissible objectives of the right to strike.

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[243] *Ibid,* [24]

[244] *Ibid,* [16]

[245] Ewing and Hendy QC (2010: 14)

[246] ECtHR (2009: [19]-[24])

[247] *Ibid,* [21]-[33]

[248] *Ibid*, [34]

4. Political Strikes and Solidarity Strikes: Permissible Objectives of the Right to Strike

Chapter 2 explained that the right to strike can be classified as a civil, political or social right. Chapter 3 confirmed this, showing that the right is protected across a variety of international human rights instruments. However, it was also suggested that the categorisation adopted for the right to strike has implications for the extent of its legitimate exercise. This Chapter will examine the permissible objectives of the right to strike in the ILO, where no distinction is drawn, in the ESC, where the right to strike is a social and economic right and in the ECHR, where it is civil and political. It will be shown that there is divergence on the question of legitimate objectives.

There is consensus in international law that the legitimate exercise of the right to strike should be limited to defending or protecting the socioeconomic interests of workers. To this end, 'purely' political strikes are not permitted in any of the international legal systems discussed herein. However, the question which remains is what are the socioeconomic interests of workers? Are they limited to the terms and conditions of their contract of employment, or are they broader, extending to the

policies and decisions of political authorities? As shall be shown below, there is divergence on this issue in international human rights law.

In Chapter 1, it was shown that that human rights as a discourse might be unsuited to deal with the problems which employees face in their struggles at work. Human rights are said to depoliticise structural issues and obscure the inequality in economic power at the core of the employment relationship. Moreover, by individualising workers' struggle, human rights are said to undermine solidarity, a value which has been central to the development of the labour movement. With these criticisms in mind, this Chapter will examine the extent to which international human rights law empowers workers to engage in protest strikes against government policy and to strike in solidarity with other workers. The discussion will focus on the ILO, ESC and ECHR as the supervisory bodies of the ICCPR and ICESCR are yet to produce any substantial jurisprudence on these issue. Given its centrality to the international protection of the right to strike, the jurisprudence of the ILO supervisory organs constitutes the "most important source of definition in this aspect".[249] The discussion below will set out the ILO position first before comparing it with that found in the ESC and ECHR.

4.1. ILO Standards

a) The Prohibition of "Purely Political" Strikes

The CFA is clear that "strikes of a purely political nature… do not fall within the scope of the principles of freedom of association".[250] Furthermore, "it is only in so far as trade union organizations do not allow their occupational demands to assume a clearly political aspect that they can legitimately claim that there should be no interference in their activities." However, "it is difficult to draw a clear distinction between what is political and what is, properly speaking, trade union in character".[251]

In some respects all strikes are political as they challenge the balance of power between labour and capital. Novitz observes that political connotations of this sort are "common to all industrial action, for every strike challenges the traditional social order, within which an employee is subservient to an employer."[252] However, if this is what the CFA meant by a political strike, then no strikes would be protected at all. Political strikes in the usage of the CFA primarily refer to strikes which aim to affect the operation of government by seeking to influence the policies and decisions of political authorities.[253] The CFA has broadly interpreted the socioeconomic interests of workers so as to protect, in some instances, strikes with political objectives

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[249] Garcia (2017: 795)

[250] CFA (2018: [760])

[251] *Ibid,* [730]

[252] Novtiz (2003: 294)

[253] *Ibid,* 57; Garcia (2016: 796)

b) The Legitimacy of Protest Strikes

The CFA considers the right to strike to be "an intrinsic corollary to the right to organise protected by Convention No. 87."[254] Article 10 of Convention No.87 provides that the purpose of a workers' organisation is "furthering and defending the interests of workers." Accordingly, "it was logical that the CFA would see the right to strike as a means by which organisations could further such interests."[255]

The CFA recognises "the right to strike by workers and their organizations as a legitimate means of defending their *economic and social interests.*"[256] In fact, it is among the "essential" means which workers and their organisations employ."[257] The CFA states "while purely political strikes do not fall within the scope of the principles of freedom of association, trade unions should be able to have recourse to protest strikes, in particular where aimed at criticising a government's economic and social policies."[258] This is because "the occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to economic and social policy questions".[259] Accordingly, workers and their organisations "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."[260] Similarly, "the right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement… [and] workers and their organizations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their members' interests."[261] With these principles in mind, the CFA has confirmed that "a declaration of the illegality of a national strike protesting against the social and labour consequences of the government's economic policy and the banning of the strike constitute a serious violation of freedom of association."[262]

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[254] CFA (2018: [754])

[255] Novitz (2003: 290)

[256] CFA (2018: [520]) (emphasis added)

[257] *Ibid,* [522]

[258] *Ibid,* [763]

[259] *Ibid,* [758]

[260] *Ibid,* [759]

[261] *Ibid,* [766]

[262] *Ibid,* [780]

These principles are illustrated in a CFA case concerning Argentina.[263] The complainant trade union had called a strike with the following demands, "the preparation of a national employment policy; the restructuring of the domestic market and the regional economies; job stability and protection; freely concluded collective agreements; free education at all levels; a national public health system, etc."[264] The strike was declared illegal by the Argentinian government and the complainants referred their case to the CFA shortly thereafter.[265] The respondent government defended itself on the basis that the strike "in question was a strike of a clearly political nature, since it did not involve the defence of the particular or specific interests of workers in a given activity, but was the expression of pure and simple opposition to the social policy of the Government which the convening organizations said they could not accept."[266] The CFA held, negating the government's submissions, that "trade union organizations should have the opportunity to call for protest strikes particularly with a view to exercising criticism of the social and economic policy of governments".[267] The Argentinian government was requested to "ensure that in future protest strikes against the social and economic policy of the Government are not declared illegal."[268] This case indicates that the CFA is willing to take a generous view of what objectives may be legitimately pursued through protest strikes.

The position of the CFA is also adopted in the CEARC.[269] The ILO supervisory bodies appear willing to adopt a substantive interpretation of the right to strike, which is connected to workers' entitlement to democratic participation,[270] so "that industrial action aimed at influencing government policy does, in certain circumstances, merit protection."[271]

c) Solidarity Strikes

Youngdahl writes, "support for the common concerns of all workers… is the keystone of labor solidarity."[272] It is a value which has underpinned and nourished the labour movement, because "every struggle faced by workers anywhere has a direct and immediate bearing upon the interests of workers everywhere, given that they are members of the same economic class in the same global

[263] CFA (1995)

[264] *Ibid,* [62]

[265] *Ibid,* [58]

[266] *Ibid,* [65]

[267] *Ibid,* [71]

[268] *Ibid,*

[269] CEACR (2012: 117-122)

[270] Novitz (2003: 290)

[271] *Ibid,* 293

[272] Youngdahl (2009: 32)

economic system."[273] Moreover, secondary action assumes particular importance "in the context of globalisation characterised by increasing interdependence and the internationalisation of production".[274]

The position of the ILO supervisory bodies on solidarity action appears to be quite clear. Both the CFA and the CEACR take the view that a "general prohibition of sympathy strikes could lead to abuse and workers should be able to take such action provided the initial strike they are supporting is itself lawful."[275] On a first reading, the principle "while awkwardly formulated, appears to accord protection to solidarity action: an outright ban is not acceptable, and the sole condition consists of a requirement that the primary action being supported is lawful".[276]

However, on closer inspection, "what has been enunciated as a single standard in fact consists of two principles with separate and contradictory meanings."[277] The first, that "a general prohibition on sympathy strikes could lead to abuse", implies that an outright ban in unacceptable but that restrictions short of an outright ban might be permitted. The second, that "workers should be able to take such action provided the initial strike they are supporting is itself lawful", indicates that solidarity strikes should be protected subject only to the condition that the strike which they support is lawful. Germanotta takes the view that the "contradictory formulation of this standard finds expression in the one-sided way the [supervisory bodies] have supervised its application by national governments".

Rather than develop a substantial jurisprudence which clarifies the scope and protection of solidarity action, the CFA and CEACR appear to have unduly restricted their focus to cases where there have been bans or prohibitions on solidarity action.[278] For example, the CEACR have been critical of the position in the UK where workers are prohibited from taking solidarity action. In their most recent Individual Observations on this point, the CEACR affirmed "the need to protect the right of workers to take industrial action in relation to matters which affect them even though, in certain cases, the direct employer may not be party to the dispute, and to participate in sympathy strikes provided the initial strike they are supporting is itself lawful."[279] However, there is little focus on the "many governments that have adopted laws, policies or practices which do not generally prohibit action but nevertheless impose restrictions" which leads Germanotta to conclude that the approach

[273] Germanotta (2002: v)

[274] *Ibid*

[275] CFA (2018: para. 770); CEACR (2012: para. 124)

[276] Germanotta (2002: 10)

[277] *Ibid*

[278] *Ibid*, 13

[279] CEACR (2009)

of the supervisory organs "can reasonably be seen as amounting to a form of doctrinal acceptance of those restrictions."[280]

4.2. ESC Standards

a) Political Strikes

Article 6(4) ESC explicitly protects a right to strike. However, it only does so in the specific context of the right to bargain collectively. The article is titled "the right to bargain collectively" and its preamble states "with a view to ensuring the effective exercise of the right to bargain collectively". The first three subparagraphs contain obligations to "promote" activities associated with collective bargaining. Contracting Parties are then required to "recognise… the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."[281] The title and sequencing of Article 6 indicate that its provisions are directed towards the right to bargain collectively and that the legitimate exercise of the right to strike contained in Article 6 is restricted to objectives associated with collective bargaining. Ewing and Hendy QC take the view that the construction of Article 6 "means that political strikes are not covered".[282] Their position is supported in the ECSR jurisprudence, where the Committee has held that "political strikes are not covered by Article 6, which is designed to protect "the right to bargain collectively", such strikes being obviously quite outside the purview of collective bargaining."[283] The approach of the ECSR reflects the fact that the right to strike in the ESC is a strictly socioeconomic right and, as such, intimately associated with collective bargaining.

b) Political Strikes Related to Collective Bargaining

However, there is an exception to the general prohibition on political strikes in the ESC pertaining to "groups of workers who could show their participation was for the purpose of collective bargaining".[284] In the ECSR's view, "any bargaining between one or more employers and a body of employees… *aimed at solving a problem of common interest, whatever its nature may be*, should be regarded as "collective bargaining" within the meaning of Article 6."[285] According to Novitz, the ECSR takes the view "that strike action may be taken to challenge any decision which could be the subject of collective negotiation, including entrepreneurial decisions… and the demand for co-determination."[286] This has implications for the legitimacy of political strikes when one considers the

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[280] Germanotta (2002: 14-15)

[281] Article 6(4), ESC

[282] Ewing and Hendy QC (2011: 13)

[283] ECSR (1971: Statement of Interpretation on Article 6(4))

[284] Ewing and Hendy QC (2011: 13)

[285] *Ibid* (emphasis added)

[286] Novitz (2003: 288)

position of public sector employees. Where the state seeks to enact legislation affecting matters which could be the subject of collective negotiation, such as laws concerning the terms and conditions of employment of public servants or the structuring and provision of public services, it may be permissible under Article 6(4) for public sector employees to take strike action which aims to influence those policies. Such a scenario has not been considered by the ECSR, however it has stated that the right to strike should extend to public servants.[287]

Although Article 6 offers no protection, Ewing and Hendy QC suggest that workers and their organisations might find some protection in the provisions of Article 5 should they wish to call political strikes. Article 5 is titled "the right to organise" and it protects "the freedom of workers… to form local, national or international organisations for the protection of their economic and social interests." As they observe, "this is the application of the principle of freedom of association to trade unions. To the extent that the right to strike is inherent in freedom of association, the scope of the right to strike is plainly not confined to strikes in furtherance of collective bargaining."[288] Their analysis adopts the reasoning of the CFA, who have held that "the right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87."[289]

Ewing and Hendy QC also rely on the Conclusions of the ECSR, who have held, notwithstanding the express protection in Article 6, that "intervention… by the public authorities in the conduct and organisation of a lawful strike could constitute a restriction on the rights and freedoms guaranteed by Article 5, particularly in cases where unionised civil servants were required to replace employees or manual workers belonging to the same trade union."[290] This judgment suggests that, in some circumstances, interference with a strike might constitute a violation of Article 5. However, the particular argument that Article 5 protects a right to strike for political objectives remains untested in the ECSR.

c) Solidarity Strikes

In its 2014 Conclusions the ECSR confirmed "the right to strike… includes the right to participate in secondary action."[291] Accordingly, the ECSR has also criticised the the position in the UK, holding "that the maintenance of such restriction is not proportionate to the aim of protecting the rights and freedoms of others or the public interest in a democratic society."[292] This finding affirmed Kahn-Freud's view, expressed prior to any comment on the issue by the ECSR, that "a strike may be designed to improve the future collective bargaining position of the strikers even though its purpose is

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[287] ECSR (1971: Statement of Interpretation on Article 6(4))

[288] Ewing and Hendy QC (2011:14)

[289] CFA (2018: [754])

[290] ECSR (1992: Germany (Art 5))

[291] ECSR (2014: United Kingdom (Article 6(4))

[292] *Ibid*

to secure an advantage from an individual employer who is not himself a bargaining party."[293] It is to be stressed that the comments of the ECSR and of Kahn-Freud mentioned here relate to the right to strike as an aspect of collective bargaining, so that secondary action is only permissible where the initial strike pursues an objective associated with the right to bargain collectively.

The ECSR's comments to the UK suggest that secondary action may be legitimately subject to restrictions where they are "proportionate to the aim of protecting the rights and freedoms of others or the public interest in a democratic society." So much follows from the provisions of Article 31 ESC, which provides that rights contained in the ESC "shall not be subject to any restrictions or limitations… except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals." This formulation of permissible restrictions poses a problem for the protection of secondary action which is not unique to the ESC.

A common justification of restricting the right to engage in solidarity strikes is their potential to cause economic harm to others.[294] In the ECSR's comments, we see that a human rights approach necessitates the consideration of the "rights and freedoms of others". Of course, employers are human too and as such their right to economic freedom and enjoyment of their property is a relevant consideration when assessing the protection to be afforded to solidarity strikes. However, this perspective obscures the context of workers' struggle, in which collective action, and solidarity action in particular, is a vital means of equalising economic power between worker and employer.

4.3. ECHR Standards

a) Protest Strikes

In *Demir,* the ECtHR held that the "consensus emerging from specialised international instruments… may constitute a relevant consideration for the Court" in interpreting the meaning of the freedom of association in Article 11.[295] This led the Court to conclude, in light of ILO and ESC jurisprudence, that collective bargaining was "one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" contained in in Article 11.[296] In *Enerji,* the integrated approach to interpretation developed in *Demir* led the Court to hold that Article 11 protected a right to strike, once again relying on ILO and ESC standards.[297] However, although there is consensus among the ILO and ESC that the right to strike is an element of freedom of association, the analysis above reveals that the ILO and ESC diverge on the question of whether or not

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293 Kahn-Freud (1972)

294 Hepple (1972: 33)

295 ECtHR (2008: [85])

296 *Ibid,* [154]

297 *Ibid*, [24]

the legitimate exercise of the right to strike extends to protest strikes. This raises the question of which approach the ECtHR would follow regarding the permissible objectives of strike action.

The legitimacy of protest strikes came up for consideration in the case of *Kaya and Seyhan v Turkey.*[298] The applicants were teachers who participated in a strike as part of a national day of protest against a draft law which concerned the organisation of the civil service. Following their participation, they were disciplined by their employ, the Ministry of Education, in the form of a written warning.[299] The ECtHR held that such a warning amounted to an interference with the applicants' rights under Article 11(1),[300] which Turkey failed to justify under Article 11(2)[301] and therefore found a violation of Article 11. Similarly, in the case of *Karacay v Turkey,* the same conclusions were reached were the applicant was an electrician and the national day of protest was aimed at alerting public opinion to reforms concerning public servants.[302]

In neither of these cases did the ECtHR feel it necessary to consider whether the strike in question was linked to collective bargaining or part of a broader protest. Furthermore, in both cases the Court referred to Article 5 of the ESC as being the relevant international law, not the more restrictive Article 6.[303] This indicated that the right to strike derives from the principle of freedom of association contained in Article 11(1), in much the same way as the CFA has held right to strike to derive from the principles of freedom of association guaranteed in the ILO Constitution and developed in Convention No.87. It appears that the ECtHR does not limit the right to strike in Article 11(1) to objectives which may come under the heading of collective bargaining.

The ECtHR's decisions in *Kaya and Seyhan* and *Karacay* demonstrate that the ECtHR appears willing to take a broad view of what constitutes the socioeconomic interests of workers. As well as protecting strike which aim to to conclude a collective agreement, the ECtHR is willing to protect the right to strike where it is aimed at the social and economic policy of government. However, the progressive jurisprudence of the ECtHR in relation to the right to strike breaks step with the ILO and ESC when it comes to solidarity strikes.

b) Solidarity Strikes

[298] ECtHR (2009b)

[299] *Ibid*, [4]-[10]

[300] *Ibid*, [24]

[301] *Ibid*, [25]-[32]

[302] ECtHR (2007)

[303] ECtHR (2007: [17]); ECtHR (2009: [14])

In *RMT v United Kingdom* the ECtHR was presented with an opportunity to consider its position on solidarity strikes.[304] The applicant union complained, *inter alia,* that the general prohibition on secondary action in the UK amounted to a violation of Article 11(1).[305] The ECtHR noted the criticisms of the ILO and ESC in this regard (as discussed above) and turned it's attention to determining whether solidarity strikes fell within the scope of Article 11.[306] The Court recognised that "the question is a novel one, not having arisen directly in any previous case."[307] Noting that secondary action is protected in the ILO and ESC,[308] the Court held "the taking of secondary industrial action by a trade union, including strike action, against one employer in order to further a dispute in which the union's members are engaged with another employer must be regarded as part of trade-union activity covered by Article 11."[309] Accordingly, the general prohibition on solidarity strikes in the UK engaged Article 11(1) and fell for justification under Article 11(2).[310]

It was accepted by both parties that the interference was prescribed by law.[311] On the issue of whether or not the interference pursued a legitimate aim, the Court recognised that secondary action "has the potential to impinge upon the rights of persons not party to the industrial dispute, to cause broad disruption within the economy and to affect the delivery of services to the public."[312] These considerations led the Court to conclude that "in banning secondary action, Parliament pursued the legitimate aim of protecting the rights and freedoms of others, not limited to the employer side in an industrial dispute."[313] This section of the judgment reveals that, in a human rights approach to strike action, restrictions on the right to strike may be considered legitimate where they seek to protect the rights and freedoms of others, in this case employers not engaged in the primary dispute. The discourse of rights obscures the economic inequality of the employment relationship and replaces it with the fiction of formal equality before the law, which necessitates a balancing act between competing interests. However, this perspective denies the reality of class subordination. In the absence of solidarity, workers face "difficulty in mounting movements to confront the source of their oppression systematically, or to understand why "an injury to one is an injury to all.""[314]

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[304] ECtHR (2014)

[305] *Ibid,* [42]

[306] ECtHR (2014: [75])

[307] *Ibid*

[308] *Ibid,* [76]

[309] *Ibid,* [77]

[310] *Ibid,* [78]

[311] *Ibid,* [79]

[312] *Ibid,* [82]

[313] *Ibid*

[314] Youngdahl (2009: 32)

The final issue to be determined was whether the interference was necessary in a democratic society by responding to a pressing social need.[315] The Court observed that "secondary industrial action constitutes an accessory rather than a core aspect of trade-union freedom."[316] This is an odd interpretation of secondary action, and one which is not present in either the ILO or ESC systems. Furthermore, the Court stated that "since achieving a proper balance between the interests of labour and management involves sensitive social and political issues, the Contracting States must be afforded a margin of appreciation as to how trade-union freedom and protection of the occupational interests of union members may be secured."[317] On this point, the Court elaborated that "if a legislative restriction strikes at the core of trade-union activity, a lesser margin of appreciation is to be recognised…Conversely, if it is not the core but a secondary or accessory aspect of trade-union activity that is affected, the margin is wider…"[318] On this basis the Court was able to distinguish the present case from the decision in *Demir,* which concerned "a very far-reaching interference with freedom of association, one that intruded into its inner core, namely the dissolution of a trade union."[319] In light of these considerations, the Court held that "the respondent State enjoys a margin of appreciation broad enough to encompass the existing statutory ban on secondary action".[320] Accordingly, no violation of Article 11 was found.[321]The effect of this finding is that the legitimate objectives of right to strike under Article 11 ECHR may be limited so as to exclude secondary action. This puts the position under the ECHR at odds with the ILO and ESC.

As Ewing and Bogg point out, "given the important legal implications of characterising secondary industrial action as 'accessory', we might have expected a properly reasoned justification for this conclusion. Unfortunately, it is difficult to find one anywhere in the judgment."[322]They contend that "it would be difficult to formulate any coherent theory of trade unionism that in the abstract would marginalise secondary action" and they point to the fact that "a core role of trade unionism is mutual assistance".[323] Furthermore, even if the core-accessory distinction is maintained, it "provide[s] no support for the Court's controversial deployment of it to justify a blanket ban on all forms of secondary action."[324] Ewing and Bogg also recognise that the *RMT* judgment must be read in its the

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[315] *Ibid,* [83]

[316] *Ibid,* [77]

[317] *Ibid,* [86]

[318] *Ibid,* [87]

[319] *Ibid,* [86]

[320] *Ibid,* [104]

[321] *Ibid,* [106]

[322] Ewing and Bogg (2014: 236)

[323] *Ibid,* 237

[324] *Ibid,* 240

context of a "British-led political attack on the Court's jurisprudence in a number of areas, culminating in the Brighton Declaration of 2012 when the Council of Europe's political representatives took steps to rein in the Strasbourg judges." Set against this political backdrop, the *RMT* judgment might be taken as an example of "the re-orientation of the jurisprudence in the direction of the State through the lens of the margin of appreciation".[325]

5. Conclusion

This analysis has demonstrated that the right to strike is an international human right. However, in Chapter 1 it was shown that there are those who fear that rights discourse would do damage to labour rights by depoliticising the structural causes of workers' oppression and eroding the basis of solidarity on which the labour movement was built. What has this analysis revealed about these claims?

The right to strike has its roots in workers' struggle against the injustices of capitalism. It is premised on the imbalance of power between worker and employer. That the freedom of association has been interpreted to include a right to strike in the supervisory bodies of the ILO, ECHR and to a lesser extent the ICCPR, shows that the struggle between labour and capital has a role to play in shaping the meaning of human rights. To this end, O'Connell's claims that human rights should not dismissed as an "ideological mask for the status quo"[326] is correct, and human rights can be deployed in ways which challenge the logic of capital.

[325] *Ibid,* 223-224

[326] O'Connell (2018b: 983)

Moyn expressed his concern that human rights are a "powerless companion", rather than a "threatening enemy" which will prompt a new social bargain.[327] It is suggested here that the development of the human right to strike, especially the right to take political strike action discussed in Chapter 4, might contribute to assuaging this concern. As Novitz observes, the ability to inflict economic damage means that the right to strike "is a more effective form of protest than marching in the streets."[328] If international human rights law is able to provide a source of protection for such action, then workers will find themselves better equipped to seriously challenge the extant social order. Furthermore, it is a weapon which workers can deploy on their own, without reliance on lawyers and NGOs.

Youngdahl and Kumar expressed their concerns that the discourse of human rights would be unable to encompass the most important value of the labour movement, solidarity.[329] In order to evaluate this concern, Chapter 4 examined the extent to which solidarity strikes are permitted under international human rights law. It is in this area that human rights discourse is found wanting. The *RMT* judgment shows that courts steeped in the liberal tradition have not provided the right to strike with its fullest expression. Even in the ILO, where the representatives of workers' join those of States and employers, it is the principle relating to solidarity action that remain the most underdeveloped. Youngdahl and Kumar have good reasons to be concerned and, as the Germanotta recognises,[330] developing solidarity will be of fundamental importance in the struggle against globalised capital.

However, the convergence of labour law and human rights law remains a promising site for developing transformative practices which challenge the extant social order. Although we should be concerned with what labour law has to lose, we must also pay attention to what human rights stand to gain. The right to strike has at its core the demand for social justice, the reduction in disparities of economic power. If the convergence of labour rights and human rights impresses the importance of social justice on the later, then the human rights community would do well to pay close attention to developments in this area. If the convergence of labour law and human rights law is to teach us anything, it must be that "human rights cannot exist without social justice."[331]

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[327] Moyn (2014: 169)

[328] Novitz (2003: 62)

[329] Youngdahl (2009); Kumar (2014)

[330] Germanotta (2002: v)

[331] Leary (1996: 43)

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