THE RIGHT TO STRIKE IN AN INTERNATIONAL CONTEXT

Bob Hepple∗

The Supreme Court of Canada made it clear in the Health Services and Support case that Charter rights are intended to provide at least as good a level of protection as is to be found in international labour and human rights instruments that Canada has ratified..¹

Although ILO Convention No.87 (1948) on Freedom of Association, which Canada has ratified, does not explicitly refer to the right to strike, the ILO’s Freedom of Association Committee and Committee of Experts have consistently held that the right to strike ‘is one of the essential means available to workers and their organizations for the promotion and protection of their economic and social interests.’ ² Jean-Michel Servais will be able to enlighten you in detail about this important jurisprudence

I want to focus on two broader questions. The first is the underlying values which have led to international recognition of the right to strike. The second is whether, in the modern world of globalization and free trade, there is any comparative institutional advantage in constitutionalising the right to strike.

∗ Emeritus Master of Clare College and Emeritus Professor of Law, University of Cambridge; First Vice-President of the United Nations Administrative Tribunal.


Economic or political values?

The right to strike is capable of a variety of interpretations, which have tended to change over time. One of the main lessons to be drawn from international experience is that no two countries are alike when it comes to regulating strikes. There is no systematic and clear international code on the right to strike. The international standards are flexible and open-ended and provide rich justifications for restrictions on the right to strike. The use that each country makes of these standards and the restrictions adopted are the outcome of the particular political, social and economic struggles that have led to demands for a right to strike.

As a generalization, one might say that the constitutionalisation of the right to strike is most likely to occur when the political or legal power of workers exceeds their economic power. So, in Britain in the 19th century the unions made extensive use of their social and economic power to strike without the need for legal guarantees until the courts – in the Taff Vale and other cases- imposed common law doctrines to repress strikes. Negative immunities from the common law doctrines were granted by Parliament from 1871 onwards, but (apart from the brief period of the Industrial Relations Act 1971-74) there has never been a positive right to strike in Britain. On the other hand, the explicit constitutionalisation of the right to strike in 1946 in France, in 1948 in Italy, in 1976 in Portugal, in 1978 in Spain, , and in 1994 in South Africa, was a recognition and reward for the role that labour organizations played in the struggle against authoritarian

---

governments which repressed the right to strike, and for democracy. This resulted in broad definitions of the right to strike including a wide range of economic and social and, in some cases, even political objectives. In Germany, on the other hand, where workers’ power was weak in the immediate post-War period, the Constitution of 1949 (art.9, para.3) made no reference to industrial action but only to the protection of freedom of association. The Federal Labour Court in 1955 placed a restrictive interpretation on this. The Court decided that the action had to be complementary to collective bargaining – it is protected only insofar as its purpose is the achievement of a collective agreement, and the action has to be ‘socially adequate’ or proportionate.4.

For me, the most fascinating aspect about the debate you are having in Canada, is that this arises from restrictions on collective bargaining and strikes imposed by democratically elected legislatures in a period of globalization and declining trade union strength, when in most countries strikes are relatively rare and short-lived. It is in this period, that there is, in Judy Fudge’s words, a ‘shift from legislative politics to rights litigation [that] mirrors a broader transformation of the justificatory discourse for labour’s collective rights from social democracy and industrial pluralism to human rights’.5 A parallel discourse is now taking place in respect of Article 11 of the European Convention on Human Rights, which like section 2 of the Charter, guarantees freedom of association but does not explicitly refer to the right to strike. This, too, reflects decline in the industrial strength of unions and the ascendancy of the liberal culture of individual

---

5 Judy Fudge, ‘The Supreme Court of Canada and the right to Bargain Collectively. The Implications of the Health Services and Support case and Beyond’ (2008) ILJ 25 at 27
human rights. That is a question on which Keith Ewing\textsuperscript{6} and John Hendy QC will address you.

The international and regional instruments each have their own history and are locked into particular political and institutional frameworks. There are two main reasons for the important differences between these instruments. The first is the lasting legacy of the separation of economic and social rights from civil and political rights. In the atmosphere of the Cold War in 1947 and 1948, when the ILO Conventions No.87 and 98 were being debated, western governments were not enamoured of the idea of enforceable economic and social rights, a sphere in which the communist countries claimed superiority. The Anglo-American tradition, which was dominant in the ILO at the time, saw freedom of association as a civil or political right, while the right to strike was viewed as being socio-economic.

A second reason for the failure to elaborate an explicit right to strike in the ILO instruments was the fear of the majority of workers’ delegates that entrenching the right to strike within the ILO Conventions would inevitably require setting limitations on this right. As Tonia Novits has pointed out,: 

\begin{quote}
\text{“By the end of World War II, worker organizations had consolidated their \textit{de facto} position and strength in most ILO Member States. Trade unions, use of industrial action, and the political wing of the labour movements had secured workers unprecedented rights (or immunities). Owing to the tripartite structure of the ILO, worker delegates were often forced to compromise in order to secure the vote of employer and government representatives. If a detailed right to strike were to be incorporated into any Convention, the necessity of compromise meant that this right would be more limited than that already recognized in many States.”}
\end{quote}

Therefore workers’ reluctance to see a lesser right guaranteed in the international sphere may account for the failure to incorporate a right to strike into Conventions 87 and 98.”

It was left to the tripartite ILO Governing Body Committee on Freedom of Association (CFA), which examines complaints of breach of the Conventions 87 and 98, to interpret ‘freedom of association’. The CFA is a tripartite body (3 representatives each of management, governments and unions under independent chairmanship). The workers’ delegates have been the dynamic element gradually persuading the ILO, on a case by case basis, to recognize the right to strike as ‘one of the essential means through which workers and their organizations may promote and defend their economic and social interests.’ The CFA’s interpretations were later accepted by other ILO supervisory bodies, and endorsed by the Governing Body and International Labour Conference. The CFA was able to do this by recognizing that the ordinary meaning of ‘freedom of association’ is ambiguous. This entitled the CFA to look at the context in which the term was used and the purpose of the relevant international instruments. The significance of participation by workers’ representatives in the interpretative process is demonstrated by a comparison with the European Committee on Social Rights (ECSR) which monitors the European Social Charter (1961), but has no workers’ representatives. For example, the ILO’s supervisory bodies recognize that workers are entitled to strike in ‘their economic and social interests’ so as to challenge economic and social policy. However, the European Committee on Social Rights (ECSR) requires the industrial action to be linked to some kind of ‘collective bargaining.’

---

8 Novitz, op.cit, p.196.
9 See note 2, above..
10 Novitz,op.cit., p.198.
The ideological Cold War split is reflected in the instruments adopted by the Council of Europe. The European Convention on Human Rights (1950), confined to civil and political rights, makes no reference to the right to strike. This was left to the much weaker European Social Charter (1961, revised 1996) which in Article 6(4) provides that the Contracting Parties (who now include all EU Member States) undertake 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.’ It seems that the drafters of this provision were influenced by the developing jurisprudence of the ILO’s CFA. A similar provision was included in article 11 of the declaratory European Community Charter of the Fundamental Social Rights of Workers, 1989. The EU Charter of Fundamental Rights 2000, now included in the Treaty of Lisbon (which came into force in the EU on 1 December 2009) provides that ‘workers and employers, or their respective organizations, have in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest to take collective action, and to defend their interests, including strike action.’

The Cold War split is also reflected in the difference between the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR). The former makes no reference to the right to strike, while article 8(1)(d) of the latter states – in language reminiscent of the French
and Italian constitutions -that States Parties to the Covenant undertake to ensure the right
to strike, provided that it is exercised in conformity with the laws of the particular
country. This allows countries to regulate strikes on both procedural and substantive
grounds through legislation.

There are several reasons for believing that the narrow interpretations given to ‘freedom
of association’ in the past no longer accord with the purposes and spirit of modern
international law. The division between civil and political rights and socio-economic
rights is now largely discredited. Until fairly recently, human rights organizations tended
to concentrate on civil and political rights, while trade unions focused on local and
economic issues, with the use of the strike weapon falling within the trade union sphere.
At international level, the Conventions of the ILO were not originally conceived as
statements of human rights. However, the ILO’s 1998 Declaration of Fundamental
Principles and Rights of Work elevates ‘freedom of association and the right to collective
bargaining’ into the category of ‘fundamental principles’ from which rights may be
derived. But, as Amaryta Sen has pointed out, human rights cannot exist without social
justice. For this reason rights should be formulated in a way which allows them to be
integrated within the same overall framework as the goals of social justice. The ILO’s
‘decent work’ programme attempts to do this by stressing the importance both of social
dialogue and fundamental rights at work. Rights in this context are defined not simply as
negative means of defence against the state, but also as positive means to achieve
meaningful participation in society. In a pluralist society, where there are conflicting
interests, participation of all interest groups is essential to achieve some ‘balance’ of
power. Participative democracy can be strengthened by social dialogue. Collective bargaining and other forms of workers’ representation are important examples of social dialogue. On might say that a high incidence of strikes, particularly wildcat strikes, is an indication that social dialogue has broken down. In this sense the strike weapon as a last resort is an essential safety valve, a sanction aimed at achieving meaningful participation.

The equilibrium argument is central to any justification of the right to strike. The concentrated power of accumulated capital can only be matched by the countervailing power of workers acting in solidarity. Except in the most mechanistic sense, there is no equilibrium between the right to lock-out and the right to strike. While the rights to collective bargaining and to strike are necessary for workers to counteract the greater social and economic power of the employer, employers have a range of other economic weapons at their disposal including the right to dismiss, to engage replacement labour, to exclude workers from the workplace, and unilaterally to impose new terms of employment. In the words of Otto Kahn-Freund:

‘The power to withdraw their labour is for the workers what for management is its power to shut down production, to switch it to different purposes, to transfer it to different places. A legal system which suppresses that freedom to strike puts the workers at the mercy of their employers. This –in all its simplicity –is the essence of the matter.’11

Kahn-Freund’s justification reflects not only an equilibrium argument but also places the right to strike squarely in the category of protecting the dignity and hence human rights of workers who, without his right, would be powerless in the face of ‘strikes’ by capital.

Comparative institutional advantage

These arguments, based on social dialogue and fundamental human rights, have assumed centre stage in the light of modern globalization. The orthodox view is that globalisation is undermining the ability of nation states to regulate their own employment relations. In this scenario transnational corporations are able to put pressure on governments and unions to reduce labour costs by threatening to relocate. Trade unions and civil society are too weak to resist. International solidarity action between workers in different countries is frequently unlawful, and, in any event is usually impossible to organise because one worker’s redundancy in country A, may be another worker’s gain in country B. In theory, the increased demand for labour in low-cost countries will induce workers to migrate to fill these jobs and this, in turn, will lead to higher wages and benefits in those countries. In practice most workers do not migrate for a number of reasons, such as political opposition to and legal restrictions on immigration. Even when they are able to cross borders (as EU citizens can), they are generally unwilling to do so for reasons of family, language, culture, and cost. The combination of these factors leads those who argue for the orthodox view to say that deregulation or a severe weakening of employment rights is the necessary and inevitable consequence of modern globalisation. A cause-and-effect relationship is assumed between globalisation and the alleged shrinkage of the coverage of employment rights, the growth of more insecure, irregular, non-unionised forms of employment, and the decline of collective representation and collective bargaining. This means that there is a “race to the bottom”, the memorable phrase used by Mr Justice Brandeis in 1933 to describe the competition between states to
reduce regulatory requirements so as to attract business.\textsuperscript{12} Those who agree with this analysis are bound to dismiss constitutionalisation of labour rights as a waste of time and effort – firms that find that the entrenched rights to freedom of association and to strike will simply relocate to developing countries where these rights are not observed in practice.

In my book on \textit{Labour Laws and Global Trade}, \textsuperscript{13} I advance a different view. I argue that nations prosper in the global economy not by becoming more similar in their labour laws but by building their institutional advantages on a floor of fundamental human rights. I try to show that rights-based regulation – or, if you prefer, ‘regulated flexibility’ -is worth developing in order to give a developed country such as Canada a comparative advantage in global trade and investment. I shall not discuss here the objections to the orthodox theory – such as its over-emphasis on labour costs in decisions about relocating and outsourcing, its neglect of the positive gains from free trade that can offset job losses, and the unwarranted assumptions it makes that the strategies and structures of firms are similar across states. I simply put forward the notion that firms may concentrate their activities in countries that provide the advantages of certain institutional or regulatory frameworks. Firms that need to develop a new product quickly so as to get a market advantage – for example in biotechnology or telecommunications – want to be able to hire and fire workers rapidly, use temporary and agency labour, and not have to inform and consult, or bargain with, workers’ representatives. On the other hand, firms that


place a premium on continuity of production and long-range development need consensus rather than adversarial decision-making. They have a greater incentive to provide job security and in-house training as well as forms of worker involvement. Accordingly, they will tend to concentrate in countries where there is institutional support for these rights. This has been the case in sectors such as mechanical engineering, product handling, consumer durables and machine tools. Let me take a small example. It is quicker and cheaper to dismiss a worker in Britain than in Germany. In Britain there is no need to consult workers’ representatives except (as a result of EU law) in the case of collective redundancies or transfers of undertakings, the employment tribunals allow employers freedom to dismiss so long as they act within a range of reasonable responses and observe fair procedures, average amounts of compensation are low, and reinstatement is a rarity. In Germany, on the other hand, the works council must be consulted before every dismissal and failure to do so renders the dismissal null and void. The works council is in a better position than the employee to control the social aspects of the dismissal. From the employer’s point of view, the collaboration with the works council ensures a long-term relationship of trust and confidence. Firms that want high labour turnover may prefer UK dismissal law; those that place a premium on collaboration and stability may favour Germany – in reality, of course, dismissal laws are only one of the factors taken into account in relocation decisions.

This theory of comparative institutional advantage helps to explain why – contrary to many predictions – globalisation does not necessarily led to across-the board deregulation

---

of labour laws, or the disappearance of rights to freedom of association and to strike.

One of the paradoxes of globalisation is that “nations often prosper not by becoming more similar, but by building on their institutional differences.”\textsuperscript{15} A rights-based or ‘regulated flexibility’ model of labour law is one, increasingly popular, model of institutional arrangements that may confer comparative advantage.

Rights-based regulation sees employment rights as beneficial and necessary to economic development. Because it tends to favour a transfer of resources to enable those who wish to enter the labour market to do so, for example by providing rights to education, training and child care it is redistributive. It can also encourage high trust or co-operative workplace ‘partnership’ that leads to superior economic performance. This is the common argument for legal provision for better information, consultation and other forms of workers’ participation in the enterprise, and for the improvement of corporate governance.\textsuperscript{16} The right to strike – as a means of redressing the inequality in bargaining power between employer and worker, as a safety-valve and a recognition of workers’ dignity – also falls into this category.

There has traditionally been a strong emphasis on freedom of association and collective bargaining as core values. They have been elevated to the status of ‘fundamental principles are rights at work’ on the international plane. The question, then, is whether constitutionalisation of the right to strike is the best way for your country, in the light of its political and legal culture, of ensuring the comparative advantages of rights-based

\textsuperscript{15} Hall and Soskice, \textit{op.cit.}, p.60.

\textsuperscript{16} Deakin and Wilkinson (2000) at 56-61..
regulated flexibility. This is not a matter on which I, as an outsider, offer any prescriptions. I simply urge you to consider a series of related issues:

(1) Would constitutionalisation in effect result in unacceptable limitations on the right to strike, as the workers’ delegates to the ILO in the 1940s feared in the case of the ILO conventions? If the Canadian courts follow the ILO’s jurisprudence, they might not accept many attempted justifications of restrictions on the right to strike. On the other hand the courts could use arguments of proportionality to permit severe restrictions, especially in the public sector where most strikes now occur. Even the ILO has allowed the right to strike and the right to lock-out to be unfairly equated.

(2) Would a right to strike vested in the individual worker adequately reflect the organic character of collective labour solidarity as it has developed in Canada? The ILO jurisprudence recognises that the right is vested not only in individuals but also in workers’ organisations. But, an individual right can be used to foster the growth of minority or splinter unions that undermine stable and representative collective bargaining arrangements.

(3) Would the application of abstract constitutional principles by the judges be a suitable way to settle labour disputes? The history of national courts in respecting international labour standards is patchy, and the ordinary courts generally lack the dynamic elements of workers’ participation. Might not the efforts devoted to legal refinements of the right to strike and its limitations be more sensibly devoted to mediation, conciliation, and other methods of settlement of disputes?