CAN YOU DERIVE A RIGHT TO STRIKE FROM THE RIGHT TO FREEDOM OF ASSOCIATION?

By Sheldon Leader

Introduction

This is a question that persistently troubles labour law around the world, and the answers are sometimes dramatically different depending on a cross-cutting set of concerns, ranging from clashing views about the appropriate ways to construe relations of power between labour and capital through to issues of judicial neutrality and deference in a controversial terrain of industrial policy. We can begin with two sparse definitions: The right to freedom of association can be defined as “... the right of individuals to join one another and to take action for a legal purpose and by use of legal means.” ¹ The right to strike we will define as a right to the “…simultaneous and coordinated withdrawal of labour by workers.” ² The definitions don’t tell us much, but do take us to the point of building an answer to our central question.

I: Derivation

Can you derive a right to strike (RS) from the right to freedom of association (RFA)? That depends on what you are doing when you ‘derive’ the first right from the second. Consider various possibilities

1/Direct derivation: The RFA might require recognition of a RS because the latter is a species of the former. Striking is a species of associated activity in the same way that other activities may be jointly undertaken, as when individuals join others in campaigns to change a law or consumers boycott a business because of its practices. The RS would, if linked in this way to the RFA, stand alongside and often complement the institution of the trade union. At the same time, though, the RS could be exercised outside the control of a trade union.

2/ Indirect derivation: the RS might not be a species of RFA, but could nevertheless be derived from that right by being seen as an essential means of furthering the objectives of an institution, the trade union, that itself clearly is an embodiment of the RFA. As an analogy, one might say that a right not to be unfairly dismissed from work is

¹ Cf Leader, Freedom of Association, Ch 1. [footnotes below are sketchy at this stage]
² Cf. Tonia Novitz, International and European Protection of the Right to Strike 6
an indispensable support for the right not to be discriminated against on gender or ethnic
grounds, but is not a species of the RFA. The indirect link between RFA and the RS can
either identify an indispensable way of furthering essential union functions, or it may
identify more than one means of furthering those functions, each of which would be
sufficient as a support and none of which would be necessary. If none of the features is
present, there would be a violation of RFA.

3/ No derivation: it may be that no feature of strikes that form the RS in a
given jurisdiction can be derived in any of these three senses from the RFA.

The additional feature of equality: The RS, as derived from the RFA in one of
these three ways, should be accompanied by the equal right of all to enjoy it, such the
features it displays in some circumstances should apply in all other relevantly similar
circumstances.3

II: Strikes

Deciding which of the three species of derivation is legitimate, together with the
third possibility that no derivation is convincing, will depend on what feature of the strike
is in question. Consider, from a larger potential list, the following

Constant features

There are certain elements in a strike that are always present, and cannot
be eliminated without eliminating the strike per se. One is that strikes are designed to
pressure another party into agreement with the objectives sought by the strikers. They are
not simply collective expressions of a demand; they are also the exertion of pressure to
bring about compliance with the demand.

Varying features

Strikes are sometimes called and controlled by trade unions, and
sometimes take place outside of trade union initiative or control, with other variations in
between these two possibilities.

Strikes are sometimes part of a formal collective bargaining process,
occuring according to the protocols which that process stipulates. Others are occasional
and informal protests outside of any collective bargaining process.

Strikes are sometimes protected as part of statutory dismissal law, and
sometimes by other legal devices without the benefit of dismissal legislation.

3 Cf Brian Langille, ‘Judges Drafting Labour Codes’ …
Strikes are sometimes called for by trade union officials and at other times by union members without an initiative taken by those officials, though they subsequently receive approval by the union.

Strikes sometimes have the objective of pressuring government in order to further the interests of its members qua workers, and sometimes aim at pressuring government for freestanding political reasons, not uniquely linked to its members’ interests qua workers.

**III: Deriving different features of the right to strike from the right to freedom of association**

*The constant features*

We will focus here on the issue of pressure. There are many who argue that the RS cannot be derived from RFA because of a condition attached to the enjoyment of the latter. The right to freedom of association is, they argue, a feature of individual and collective freedom. As such, the collective action allowed under its umbrella cannot be used as a means to deprive third parties of their own liberty. Since the strike is always an act designed to exert precisely this pressure, it cannot come within the scope of the RFA.4 A response here can begin by looking at the RFA itself. There are two versions of the right: qualified and unqualified.5 An unqualified species can be exercised for any motive, while a qualified species requires that one’s reasons for taking collective action in a particular way is done for appropriate reasons. Thus we find courts exempting individuals who boycott a company because of its racist policies from liability for conspiracy to injure business on the ground that their motives have not been malicious. The exemption is given despite the fact that the boycott is designed to pressure the store into changing its ways.6 Here we see the RFA used precisely to limit the freedom of a third party, and the pressure arises precisely because of the strength in coordinated numbers. It is sometimes right that groups of people be penalized for doing what each of them singly could do – as when racists boycott premises – and this throws into relief situations in which that impact of collective action should be permitted. The quid pro quo for permitting this is that the right is narrowed to a species that relies on special motives.

The unqualified species of the RFA cannot support the right to strike, but the qualified version (hereafter the QRFA) can do so. If the RFA fails, why should the QRFA succeed? The reasons for endorsing and making available the QRFA to workers are two. First, in some cases it is legitimate for the freedom of one group to be used so as to limit the freedom of another in order to cope with an imbalance of power and thereby to give a fair chance for a demand to be heard. Secondly, even where there is no imbalance of power – as is true of some boycotts – and indeed certain strikes - the pressure exerted is an acceptable by-product of permitting a coordination of personal choices to try to bring

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4 Ref to e.g. Shermers …
5 cf. Leader, fn 1 p. 15-16, 118
6 NAACP v Claiborne Hardware
about a result. The qualified right to freedom of association falls into a larger group of qualified civil liberties – such as freedom of expression - liberties that do not always need to respect the boundary that they do not interfere with competing liberties but are allowed precisely to carve out exceptions and to cross that boundary.

The right to strike can therefore be derived from the qualified right to freedom of association. The result is what we see: that the right to strike is limited to action taken for legitimate concerns with conditions of employment, but beyond those concerns the restrictions on an unqualified RFA would apply.

If the RS is to be derived from the QRFA in this special way, then the next question is which of the three sorts of derivation described above would be legitimate? The answer, it is submitted, is that it is the first. The RS is a species of right to freedom of association, it is not simply a means to further the legitimate function of the trade union. It is of course also that, in most of its important contexts. But the case for supporting a RS goes further. It applies in all situations in which restrictions are imposed where collective action is undertaken for special legitimate purposes: inside or outside of trade union functions. This takes us to the variable features of strikes.

The varying features

‘Unofficial’ vs. ’official’ strikes: If this argument is valid, it follows that the unofficial strike deserves as much protection as does the official one. Removing the qualified right to freedom of association from unofficial strikers, when official strikers enjoy it, violates the equality condition referred to above. While the RS is exercised collectively, it does not follow that it is legitimate to limit it to an institution, the trade union. Other, less formal collectivities should have an equivalent entitlement. Unless a special justification can be advanced for creating this difference between the two types of strike, which would have to rely on the need to protect competing fundamental rights of others and be shown to be proportionate, then both sorts of strike have equally fundamental status.

Strikes as part of and outside of collective bargaining: it is tempting, as does a recent decision of the European Court of Human Rights, to derive the right to strike from the right to freedom of association in the second of the ways described above. It is true that the ability to strike is indispensible to viable collective bargaining, and hence to legitimate trade union functions. But it doesn’t follow that the ability to strike is not equally indispensible for workers in other contexts. They may be motivated to strike despite the terms of the agreement, and might have concerns about discrimination against them as minorities which the collective agreement has produced.

The right to strike protected by statutory dismissal law or by other types of legal provision: Can these modes of protection of the right to strike be derived from the right to freedom of association? Yes, in one of the variants of the second sort of derivation. They

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7 ref
8 Ref to treatments of no strike provisions
are alternative ways of giving specificity to the right to freedom of association in this context. While freedom of association does not dictate which of these legal devices is to be used, if a system had none of them, it would be in violation of this fundamental right.

*The position of trade union officials:* Should these officials be protected from liability for their initiative taken in calling a strike, and can this protection be derived from the right to freedom of association? The answer is yes, and the derivation is of the second sort described earlier. It is protection essential if the trade union is to carry out its legitimate function.

*The political strike:* those strikes which pursue political objectives in service of their members’ interests qua workers deserve full protection of a QRFA. Those strikes which are for separate political objectives would appear not to benefit from any species of the RFA, so they would fall into category three.

**Conclusion**

Recent evolution of the law in Europe is moving the right to strike squarely into position as a fundamental right. It can, for the reasons explored, be derived from the right to freedom of association. In some ways, though, the relationship between these two rights has only begun to take shape. Going further, so as to make practical use of this linkage, will require that we work from both ends: seeing what characteristics of the right freedom of association merit focus, and seeing what fit there is with different features of the right to strike.