

Connecting Freedom of Association and the Right to Strike: European Dialogue with the ILO and its Potential Impact

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The International Labour Organization's supervisory bodies responsible for assessing state compliance with "freedom of association" have established an extensive jurisprudence on the right to strike. This jurisprudence is based on their interpretation of the ILO Constitution and various key ILO conventions concerning the right to organize and collective bargaining, in both the private and the public sector. Since the end of the Cold War, the employer lobby within the ILO has increasingly tried to undermine this aspect of ILO jurisprudence, so as to deny that there is any necessary link between freedom of association and the right to take industrial action. This pressure has come at a time when ILO norms are beginning to receive greater attention and respect, and are being applied in the human rights jurisprudence of other legal systems, including those of Canada and Europe. In 2007, the European Court of Justice for the first time explicitly recognized a right to strike, referring to ILO Convention 87 as a source of this entitlement, but limited it by imposing a proportionality requirement on its exercise. In 2009, the European Court of Human Rights indicated for the first time that the right to strike was implicit in Article 11 of the European Convention on Human Rights, again in reliance on ILO standards. This paper compares and contrasts those cases, investigating the extent to which European recognition of a right to strike can serve to reinforce or undermine ILO standards. The paper also considers the more general implications of these developments for Canadian human rights jurisprudence.

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1. INTRODUCTION

The *B.C. Health* case,¹ which has led to so much discussion and controversy in Canada,² has also been of great interest to labour lawyers in other countries. The treatment in that case of International Labour Organization (ILO) jurisprudence relating to freedom of association is of particular significance. In the majority judgment, McLachlin C.J. and LeBel J. stated that, while the findings of ILO supervisory bodies such as the Committee on Freedom of Association, the Committee of Experts on the Application of Conventions and Recommendations, and the Committee of Inquiry were “not binding,” those findings “shed light on the scope of s. 2(d) of the *Charter* as it was intended to apply to collective bargaining.”³ Judy Fudge has observed that “the big unanswered question looming behind [*B.C. Health*] is whether the right to collective bargaining can be limited to the duty to bargain in good faith or whether it will be extended to include the right to strike.”⁴

In Europe, whether by coincidence or design, we have witnessed legal developments comparable to those in Canada. Within both the European Union and the Council of Europe, ILO standards have been relied upon to establish that freedom of association entails not only a right to collective bargaining⁵ but also a right to

1 *Health Services and Support-Facilities Subsector Bargaining Ass'n v. British Columbia*, [2007] 2 S.C.R. 391 (“*B.C. Health*”).

2 For example, R.J. Adams, “Prospects for Labour’s Right to Bargain Collectively after *B.C. Health*” (2009), 59 U.N.B.L.J. 85; A. Blackett, “Mutual Promise: International Labour Law and *B.C. Health Services*” (2009), 48 Sup. Ct. L. Rev. (2d) 365; J. Fudge, “The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the *Health Services and Support* Case in Canada and Beyond” (2008), 37 Indus. L.J. 25; and perhaps most controversially B. Langille, “The Freedom of Association Mess: How We Got Into It and How We Can Get Out of It” (2009), 54 McGill L.J. 177.

3 *B.C. Health*, at para. 76, also citing Bastarache J. in *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, at paras. 16 and 27.

4 Fudge, *supra*, note 2, at pp. 41–42.

5 This was established within the Council of Europe in *Demir and Baykara v. Turkey*, Application No. 34503/97, November 12, 2008 (“*Demir and Baykara*”).

strike.⁶ This article examines various potential implications of these developments. Such analysis has to be sensitive to the very different relationship that each of these jurisdictions has with the ILO, and to their respective experiences in the implementation of ILO standards. Nevertheless, European developments may give scope for some overarching observations which are also pertinent to the Canadian system.

My intention is not simply to suggest that constitutional recognition of a right to strike is possible in Canada: that possibility is self-evident. Rather, my aim is to consider the collateral effects of the dialogue that is taking place between judicial institutions and the ILO. At a time when the ILO is under political and economic pressure to abandon its standard-setting activities, engagement with its standards in Europe and in Canada may lend support to that organization's project of promoting multi-level governance in the face of market-led globalization. However, the capacity to achieve that result turns on the accurate transposition of ILO standards into human rights law, so that we are not left with mere entitlements on paper that do not place any effective constraints on employers in the labour market.

For advocates of freedom of association and legal recognition of a right to strike, recent Canadian and European case law has come at a significant juncture. Since the end of the Cold War, the employer lobby has challenged the findings of the ILO Committee of Experts on industrial action. This challenge has yet to be manifested in the consensual findings of the ILO Committee on Freedom of Association, which is tripartite, but the political pressure for change is present. Moreover, following criticism from a number of academic commentators, and under the leadership of its present Director-General, Juan Somavia, the ILO has tended to move away from its

6 For EU jurisprudence, see Case C-438/05, *Int'l Transport Workers' Federation (ITF) and Finnish Seamen's Union (FSU) v. Viking Line*, [2007] E.C.R. I-10779, at para. 43 ("Viking"); and Case C-341/05, *Laval un Partneri v. Svenska Byggnadsarbetareförbundet*, [2007] E.C.R. I-11767, at para. 90 ("Laval"). For Council of Europe jurisprudence, see for example *Enerji Yapi-Yol Sen*, Application No. 68959/01, April 21, 2009. These cases are discussed in further detail below.

established role as a standard-setting body and to become merely facilitative through programmatic activity. This trend was arguably intensified by the International Labour Conference Declaration on Social Justice for a Fair Globalization 2008. The recent decisions of Canadian and European courts cut against the trend, and have the potential to reinforce and sustain the process of ILO standard-setting and supervisory activity. This is a dialogue in which influence can be exerted in more than one direction.

Adelle Blackett has argued that ILO principles and fundamental rights at work, when drawn into the protection of human rights in the domestic sphere, can offer “a counterbalance to . . . a particular vision of economic globalization”⁷ and can thereby build a stronger “economic constitution . . . supportive of workers, and their citizenship at work.”⁸ The ILO has long been searching for ways to address the social dimension of market-led globalization through multi-level governance. The World Commission on the Social Dimension of Globalization, established for this purpose, which reported in 2004, made a range of recommendations. It is notable that the Commission advocated greater recognition of workers’ human rights, thereby suggesting that hard law forms of enforcement could be appropriate. The Commission also endorsed soft law measures which would generate social dialogue at national, regional and international levels, whereby key political and social actors with apparently starkly opposed positions could reach deliberative consensus on vital issues.⁹

Consonant with the Commission’s recommendations, we may see constitutional jurisprudence at the European level, or in Canada, as having the capacity to promote worker protection at a time when it is being undermined by global market forces. Nevertheless, it may be wise not to overstate the beneficial impact of judicial recognition of a right to strike. In the European context, it has become apparent that

7 See Blackett, *supra*, note 2, at p. 366. See also B. Hepple, *Labour Laws and Global Trade* (Oxford: Hart, 2005), at p. 275: “It is within this dynamic relationship between multivalent legal orders that the ability of labour law to contribute to social justice within the global market will be determined.”

8 Blackett, *supra*, note 2, at p. 407.

9 See the report of the ILO-appointed World Commission on the Social Dimension of Globalization, *A Fair Globalization: Creating Opportunities for All* (Geneva: ILO, 2004).

acceptance of such a right will not necessarily enable industrial action, since it can be accompanied by considerable restrictions on its aims and scope.

So much is evident from the impact of judgments delivered by the European Court of Justice in the *Viking* and *Laval* cases.¹⁰ In those judgments, the ECJ said that there is a right to strike but that it has to be balanced against the economic freedoms of employers under the constitutional treaties of the European Union — that is, the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).¹¹ Any collective action taken by a trade union which has the potential to affect trans-border movement of goods, services, establishments or workers within the EU has to be justified in terms of a compelling interest of workers and must be proportionate in its effect. Should this justification not be made out, it is apparent that a trade union can be held liable for unlimited damages. In this scenario, the constitutionalization of a right to strike seems merely to legitimate the constraints placed by EU law on workers' organizations so as to secure employers' market freedoms.

A more promising example is perhaps set by the European Court of Human Rights, which has found not only that a union can assert its entitlement to take industrial action under Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the ECHR), but also that individuals are entitled to protection from discipline and other reprisals taken against them by reason of their participation in such action.¹² Unfortunately, the response of the U.K. Court of Appeal to the ECHR case law indicates that extensive procedural restrictions may still be placed on the exercise of a right to strike and be regarded as justifiable.¹³

ILO, European and Canadian cases all indicate that precedents relating to human rights standards are not immutable, but may be

10 *Supra*, note 6.

11 See, in this respect, the Treaty of Lisbon, OJ 2007/C 306/01, which amended the TEU and established the TFEU: available at <<http://www.eur-lex.europa.eu>>.

12 Outlined in K.D. Ewing & J. Hendy, "The Dramatic Implications of *Demir and Baykara*" (2010), 39 *Indus. L.J.* 2, at pp. 16–19, discussed below.

13 *Metrobus Ltd. v. UNITE the Union*, [2009] E.W.C.A. Civ. 829, I.R.L.R. 851.

readjusted and reinterpreted under the weight of political and economic pressures. Dialogue with the ILO therefore merits careful attention, especially in terms of its capacity to realize the kind of “global constitutionalism” envisaged by Blackett.

2. ILO NORMS AND SUPERVISORY PROCEDURES

The ILO Constitution, initially incorporated into Part XIII of the Treaty of Versailles and now a free-standing international instrument, is the primary source of the entitlement to “freedom of association.” In the preamble to that Constitution, there is explicit “recognition of the principle of freedom of association.” Moreover, in the supplementary Declaration of Philadelphia of 1944 annexed to the ILO Constitution, freedom of association was understood to be “essential to sustained progress.”¹⁴ The 1944 Declaration further stated that there was to be “effective recognition of the right of collective bargaining.”¹⁵ A “third constitutional moment”¹⁶ for the ILO came with the unopposed adoption of the 1998 Declaration on Fundamental Principles and Rights at Work, which made explicit the ILO’s engagement with human rights¹⁷ and set out as one of four fundamental rights “freedom of association and the effective recognition of the right to collective bargaining.”¹⁸ The 1998 document is declaratory of what are understood to be the constitutional obligations of ILO Member States.¹⁹

The principle of freedom of association is fundamental to the tripartite workings of the ILO, for there cannot be effective representation of workers and employers at the international level unless they

14 ILO Declaration of Philadelphia 1944, Article I(b).

15 *Ibid.*, Article III(e).

16 B. Langille, “The ILO and the New Economy: Recent Developments” (1999), 15 *Int’l J. Comp. Lab. L. & Ind. Rel.* 229, at p. 232.

17 See V. Leary, “The Paradox of Workers’ Rights as Human Rights,” in L. Compa & S. Diamond, eds., *Human Rights, Labor Rights and International Trade* (Philadelphia: University of Pennsylvania Press, 1996) 22.

18 ILO Declaration on Fundamental Principles and Rights at Work 1998, Article 2(a).

19 *Ibid.*, Article 2.

are able to form organizations for this purpose.²⁰ The legislative organ of the ILO is the International Labour Conference, where the national delegation of each Member State consists of one employer representative, one worker representative and two government representatives.²¹ The executive organ of the ILO is the Governing Body, which consists of 28 government members, 14 employer members and 14 worker members.²² The administrative secretariat of the organization is the International Labour Office, headed by the Director-General, which again contains discrete branches devoted to employers' activities and workers' activities.²³

In the period after the Second World War, pressure was placed on the ILO to adopt conventions which would specifically address "allegations of infringements of trade union rights in a large number of countries."²⁴ The result was the adoption in 1948 of Convention 87 on Freedom of Association and Protection of the Right to Organize. This instrument includes recognition of the right of workers' (and employers') organizations to organize their own activities,²⁵ an entitlement on which ILO jurisprudence relating to the right to strike has been based. Convention 87 does not make express reference to a right to strike. Nor does Convention 98 on Application of the Principles of the Right to Organize and to Bargain Collectively, which was adopted in 1949. Convention 98 does, however, provide for protection against acts of anti-union discrimination.²⁶ This has been interpreted as providing a basis for protecting strikers from punitive

20 T. Novitz & P. Syrpis, "Assessing Legitimate Structures for the Making of Transnational Labour Law" (2006), 35 *Indus. L.J.* 367, at pp. 382–386.

21 ILO Constitution, Article 3(1).

22 *Ibid.*, Article 7.

23 *Ibid.*, Article 10. See also <http://www.ilo.org/global/Departments____Offices/lang--en/index.htm>.

24 See *Record of Proceedings* (Geneva: ILO, 1950), ILC, 33d Session, App. XII, pp. 563–566. Discussed in H. Dunning, "The Origins of Convention No. 87 on Freedom of Association and the Right to Organize" (1998), 137 *Int'l Lab. Rev.* 149, at pp. 159–160.

25 ILO Convention No. 87, Article 3.

26 ILO Convention No. 98, Article 1.

sanctions imposed by an employer.²⁷ Conventions 87 and 98 have come to be known as two of the “core” ILO conventions.²⁸

The exceptional status of Convention 87 is such that Article 22 of the International Covenant on Civil and Political Rights 1966 (which relates to freedom of association, including the right to form and join trade unions) and Article 8 of the International Covenant on Economic, Social and Cultural Rights 1966 (which relates to all aspects of trade union activity, including the right to strike) state expressly that nothing in those provisions authorizes a state to prejudice its obligations under Convention 87.

Conventions 87 and 98 were later supplemented by other ILO conventions, which also make provision for freedom of association and collective bargaining. The most significant of these is perhaps Convention 151 on Protection of the Right to Organize and Procedures for Determining Conditions of Employment in the Public Service, adopted in 1978. Convention 151 provides that “public employees” are to enjoy adequate protection against acts of trade union discrimination.²⁹ Moreover, Article 9 states that “public employees shall have, as other workers, the civil and political rights which are essential for the normal exercise of freedom of association, subject only to the obligations arising from their status and the nature of their functions.” It should also be noted that the conventions which relate to freedom of association are accompanied by a number of soft law recommendations regarding their implementation.³⁰

Brian Langille has claimed that “under the ILO’s constitution, ratification of ILO treaties (called ‘conventions’) is an entirely voluntary

27 *Digest of Decisions of the ILO Governing Body Committee on Freedom of Association*, 5th ed. (2006), at para. 675 (“*ILO Digest*”).

28 Final Declaration, World Social Summit held at Copenhagen, March 6–12, 1995, Commitment 3: “The debate over how to refer to workers’ rights was resolved with a general reference to relevant ILO conventions, followed by references to specific ILO conventions on forced and child labour, freedom of association, the right to organize and bargain collectively, and non-discrimination.” See also the Programme of Action adopted by the Copenhagen Social Summit (para. 54(b)). See for acknowledgment ILO Doc GB.267/LILS/5: para. 16.

29 ILO Convention No. 151, Article 4.

30 See, for example, Recommendation No. 91 concerning Collective Agreements 1951, and Recommendation No. 92 concerning Voluntary Conciliation and Arbitration.

matter,” seeking to indicate that too much attention is paid to their content in the *B.C. Health* case.³¹ Strictly speaking, this is not so, since states who are members of the ILO have strict obligations in respect of ILO conventions for which they did not vote and which they do not intend to ratify. Under the principle of tripartism, representatives of management and labour as well as representatives of states may vote on the adoption of conventions at the annual International Labour Conference, and adoption requires a two-thirds majority of all such representatives.³² Even where representatives of a particular government have voted against adoption of a convention, the Member State in question is still obliged to present that convention, once adopted by the ILO, to the domestic legislative body which has the power to give effect to it in the particular state. If that domestic legislative body approves the convention, then, regardless of government policy, the Member State must ratify it and ensure that it is given effect. Furthermore, even if the relevant legislative body does not approve the text, the state must still report “to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt with in the convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention.”³³ The ILO thus requires its members to take action beyond merely choosing whether or not to ratify a convention. Moreover, by virtue of membership in the ILO, every Member State is required to respect freedom of association.³⁴ The substance of this constitutional obligation has been elaborated upon by ILO supervisory organs that have, in their findings, explained the meaning of “freedom of association” by reference to first principles, as well as to the provisions set out in ILO conventions adopted by the International Labour Conference.

31 Langille, *supra*, note 2, at p. 194.

32 ILO Constitution, Article 19(2).

33 *Ibid.*, Article 19(5). See also F.L. Kirgis, “Specialized Law-Making Processes,” in O. Schachter & C.C. Joyner, eds., *United Nations Legal Order* (Cambridge: Cambridge University Press, 1995) 109, at p. 115.

34 See Adams, *supra*, note 2, at p. 86; and Blackett, *supra*, note 2, at p. 374.

From 1927 onwards, a legally qualified Committee of Experts on the Application of Conventions and Recommendation (CEACR) has considered the extent of state compliance with ratified conventions and recommendations, in response to state reports supplemented by those of management and labour. CEACR findings are then referred to a tripartite Conference Committee on the Application of Standards (CCAS) at each annual International Labour Conference. The latter Committee discusses the political and economic reasons for state non-compliance, and considers how these could be addressed. The CCAS also has the capacity to recommend that the Conference condemn the actions of a particular Member State. Condemnation is usually done by the ILO by means of a “special paragraph,” which is a brief statement adopted by the Conference Committee in its general report that identifies state conduct which is in clear violation of ILO standards. Exceptionally, condemnation may assume the form of a resolution that Members take measures in respect of that state.³⁵ It is through these means that compliance with Conventions 87, 98 and 151 is monitored annually. The CEACR also produces what are called “General Surveys” on freedom of association and collective bargaining.

Under Articles 24 and 25 of the ILO Constitution, “representations” may be brought by workers’ or employers’ organizations in respect of a Member State’s failure to comply with a ratified ILO convention. These representations will be heard by a three-member tripartite Committee of the Governing Body. In addition, under Articles 26 to 32 of the ILO Constitution, “complaints” may be heard by a Commission of Inquiry consisting of three independent members appointed by the ILO Governing Body. However, most relevant for our purposes are the specialized complaints procedures established in respect of freedom of association. The first of these is the Fact-Finding and Conciliation Commission on Freedom of Association, established in 1950, which can be invoked with the consent of the state concerned in order to investigate alleged violations of freedom of association. More effective, since it does not require

35 This power under ILO Constitution, Article 33, has been exercised only once, in respect of Myanmar/Burma. See <http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_007899/index.htm>.

state consent, is a procedure (established in 1952) whereby complaints of breach of the constitutional guarantee of freedom of association may be directed to a Governing Body Committee on Freedom of Association (CFA). The CFA will consider documentary evidence, and will if necessary conduct a “direct contacts” mission in order to make recommendations to the Governing Body. The CFA is a tripartite body, consisting of three employer, three worker and three government representatives, assisted by an independent chair. It reaches its decisions by consensus, and has now considered over 2,500 cases. The jurisprudence of the CFA is extensive, rigorous in its endeavour to be consistent in the Committee’s treatment of cases, and entirely transparent. Its content is encapsulated in a *Digest of Decisions*, which is now in its fifth edition, published in 2006.³⁶

On the subject of the right to strike, the *Digest of Decisions* states: “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.”³⁷ This has been the view taken by the CFA ever since 1952.³⁸ The right to strike is also said to be “an intrinsic corollary to the right to organize protected by Convention No. 87.”³⁹ Under ILO jurisprudence, trade unions are entitled 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.”⁴⁰ However, this is not an unlimited entitlement. So, for example,

the right to strike may be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population).⁴¹

36 See <<http://www.ilo.org/ilolex/english/digestq.htm>>. Cf. Langille *supra*, note 2, at p. 196.

37 *ILO Digest*, at para. 522.

38 Case No. 28 (Jamaica), 2d Report (1952), at para. 68.

39 *ILO Digest*, at para. 523.

40 *Ibid.*, at para. 527.

41 *Ibid.*, at para. 576.

The CFA makes it clear that these categories of worker are to be narrowly defined, as are the circumstances where a general restriction on strikes can be imposed.⁴² Any restrictions placed on the right to strike in the public service or in essential services are to be subject to certain “compensatory guarantees”:

where restrictions are placed on the right to strike in essential services and the public service, restrictions on the right to strike should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage and in which the awards, once made, are fully and promptly implemented.⁴³

This is consistent with the Committee of Experts’ interpretation of Conventions 87, 98 and 151.⁴⁴

It should be observed that in the 40 years from 1952 to 1992, there was no challenge made by the employer lobby to ILO jurisprudence on the right to strike as developed by the CFA and CEACR. Nor was there any apparent reason for such a challenge, given that CFA’s cases are decided by tripartite consensus, that is, CFA findings have always required the consent of the employer representatives. As there has been no disparity between CFA case law and the findings of the CEACR, the principles espoused by the latter were also understood to meet with the approval of employers represented at the ILO.⁴⁵ However, in 1994, at the end of the Cold War, the employer lobby changed its stance, asserting that it did not believe that the text of Conventions 87 and 98 could give rise to such a global, detailed, and precise entitlement to take industrial action. They raised this concern not in the CFA, but in the CCAS, that is, the Conference Committee which comments on the findings of the CEACR.⁴⁶ At the same time, employer representatives in the Governing Body requested that a proposal for a Convention on Dispute Settlement be placed on the agenda of the International Labour Conference. Such a convention would elaborate upon mechanisms for the settlement of

42 That is, “in the event of an acute national emergency and for a limited period of time.” *Ibid.*, at para. 570.

43 *Ibid.*, at para. 596.

44 See ILO CEACR, *General Survey, Freedom of Association and Collective Bargaining* (Geneva: ILO, 1994), at paras. 136–179.

45 T. Novitz, *International and European Protection of the Right to Strike* (Oxford: Oxford University Press, 2003), at pp. 199–203.

46 *Record of Proceedings* (Geneva: ILO, 1994), ILC, 81st Session, 25/31–41.

industrial disputes and would set more extensive limits on industrial action, so that strikes would be regarded only as a “last resort.”⁴⁷ The strength of the employer lobby was increasing in a climate in which free market capitalism was seen to have prevailed over forms of state control.⁴⁸

This proposal ultimately has not reached the Conference agenda, but employer resistance to CEACR treatment of the right to strike is still evident from deliberations of the CCAS, for example, at the 98th Session of the Conference in 2009. In relation to whether the Ethiopian government’s actions were in compliance with Convention 87, an employer representative said: “An area in which there was no consensus with the Committee of Experts was on the matter of the exercise of the right to strike, as this was considered to be out of the scope of the Convention.”⁴⁹ In relation to Panama, “[t]he Employer members reiterated their view that an interpretation could not be derived from the Convention concerning the limits and scope of the right to strike, and they maintained this position.”⁵⁰ It would seem that as a result, no specific mention of the right to strike was made in the conclusions of the CCAS relating to Ethiopia and Panama. Nor was industrial action addressed in relation to conclusions reached on Turkey, although the question of the right to strike in that country had been raised by worker representatives.⁵¹

There seems, however, to be a curious disjuncture here between the stance of the employer representatives on the CCAS and their acquiescence in the findings of the tripartite CFA. It is true that in a recent case involving a complaint that the government of Chile had unjustifiably restricted the right to strike, the CFA’s interim report made no mention of any such entitlement.⁵² However, one cannot

47 *Minutes of the 262d Session of the Governing Body of the International Labour Organization*, GB.262/PV/Rev (Geneva: ILO, 1995), 1st Sitting, I/3.

48 Novitz, *supra*, note 45, at pp. 102–103.

49 *Record of Proceedings* (Geneva: ILO, 2009), ILC, 98th Session, Ethiopia, vol. 16, Part II(Rev.)/37.

50 *Ibid.*, Panama, vol. 16, Part II(Rev.)/56.

51 *Ibid.*, vol. 16, Part II(Rev.)/68–74.

52 Case No. 2626 (Chile), 354th Report (2009), at para. 305. In that case, the industrial action in question was called in respect of workers employed by government contractors. The union alleged that the government had responded by engaging in unlawful arrest and detention of members of the union. Also alleged were other acts of anti-union discrimination and dismissal of strikers.

read too much into that omission, as the report was only an interim one and other conclusions reached by the CFA in 2009 were consistent with its previous jurisprudence and that of the CEACR. For example, in a case concerning Japan, the CFA recognized the significance of the right to strike for “public employees who are not exercising authority in the name of the State.”⁵³ Moreover, in a case concerning Chad, the CFA recalled “that the right to strike is the intrinsic corollary to the right to organize protected by Convention No. 87,” and that restrictions in “essential services” should be limited to “those services the interruption of which would endanger the life, personal safety or health of the whole or part of the population.”⁵⁴

Although the CFA jurisprudence has remained consistent, it should be noted that the ILO standards-setting system has itself come under attack in recent years. Initially, at the end of the Cold War, concerns were raised that there was an “overproduction” of ILO standards, which led to an over-regulation of labour markets, thereby hindering productivity.⁵⁵ There have been calls for reform of the supervisory machinery, on the basis that reporting requirements for states are too complex and that the machinery has the effect of obscuring from view workers outside the formal labour market.⁵⁶ Langille has joined other critics of the ILO in asserting that “the ILO is not a State, its members are not firms”⁵⁷ — or in other words, that traditional standard-setting and supervisory mechanisms in international law are too clumsy to achieve effective governance. Langille argues for a more “soft law” or programmatic approach to achieving social justice, an approach which would rely on the awareness by states of their own self-interest rather than on their embarrassment before international tribunals.⁵⁸

53 Case Nos. 2177 and 2183 (Japan), 354th Report (2009), para. 951 at 922.

54 Case No. 2591 (Chad), 354th Report (2009), para. 1064 at 1114.

55 E. Cordova, “Some Reflections on the Overproduction of International Labour Standards” (1993), 14 *Comp. Lab. L.J.* 138.

56 See, for example, S. Cooney, “Testing Times for the ILO: Institutional Reform for the New International Political Economy” (1999), 20 *Comp. Lab. L. & Pol’y J.* 365; and T. Fashoyin, “Tripartism and Other Actors in Social Dialogue” (2005), 21 *Int’l J. Comp. Lab. L. & Ind. Rel.* 37.

57 B. Langille, “The ILO Is Not a State, Its Members Are Not Firms,” in G.P. Politakis, ed., *Protecting Labour Rights as Human Rights: Present and Future of International Supervision* (Geneva: ILO, 2007) 247.

58 B. Langille “What Is International Labour Law For?” (Geneva: ILO, 2005).

It may be telling that the employer lobby within the ILO supports these reforms, but the worker lobby does not. I have argued elsewhere that the flexibility emphasized by such reforms may not have the effect desired by academic commentators. ILO conventions can scarcely be called hard: they are general and adaptable to national circumstances, and only in the most exceptional cases is their application accompanied by any meaningful sanction.⁵⁹ Moreover, while soft law mechanisms are a valuable supplement to the ILO standard-setting and supervisory machinery, they are not an adequate replacement for them. This is because flexibility does not so much serve to protect the unemployed, or children, or women, or migrant labour in informal labour markets, as to protect those who have an economic interest in maintaining the *status quo*. Where there is flexibility, there is room for manoeuvre. Those who do the manoeuvring tend not to be the least advantaged, but those who have the resources and the capacity to exploit that flexibility. Protecting the workers who are most desperately in need requires giving them scope to express dissent and protecting them when they do so.⁶⁰ To this end, more than ever, we need greater legal protection of the right to strike through the medium of the ILO, rather than the abandonment of standard-setting and supervisory activity.

Leaving the merits of these arguments to one side, there is little doubt that the ILO has felt pressure to respond to the concerns expressed forcefully both by reformist academics and by powerful employers. The 1990s saw an attempt made by the ILO to rationalize international labour standards, by abrogating conventions which no longer served a useful purpose⁶¹ and focusing on four fundamental or “core” labour standards.⁶² Juan Somavia, as Director-General of the ILO, has promoted a vision of “Decent Work” which entails not only protection of fundamental rights but also employment promotion,

59 As in the exceptional example of Myanmar; see *supra*, note 35.

60 T. Novitz, “Social Justice in Action” (2010), 19 *Social and Legal Studies* 235, at p. 238.

61 See Instrument for the Amendment of the Constitution of the ILO 1997, Article 1, inserting ILO Constitution Article 19(9).

62 See ILO Convention on Fundamental Principles and Rights at Work 1998, Article 2.

social protection and social dialogue.⁶³ This policy agenda, as noted above, was endorsed by the ILO World Commission on the Social Dimension of Globalization.⁶⁴ However, Director-General Somavia has sought to attain that objective primarily by emphasizing extensive programmatic action.⁶⁵

In 2008, the ILO Declaration on Social Justice for a Fair Globalization was adopted. On the one hand, this instrument could be seen as setting a new vision for what Blackett might describe as “global constitutionalism.” It envisages instantiation of the ILO “Decent Work Agenda,” including respecting, promoting and realizing fundamental principles and rights at work. This includes both the rights and the enabling conditions that are necessary for the full realization of all of the strategic objectives of that agenda. Once again, the importance to Decent Work of freedom of association and the effective recognition of the right to collective bargaining is stressed in the 2008 Declaration, particularly in terms of facilitation of social dialogue.⁶⁶

At the same time, the follow-up instrument to the 2008 Declaration is very much aimed at “reviewing and adapting the ILO’s institutional practices and governance” This is the subsidiary instrument appended to the 2008 Declaration in a way which may be considered comparable to that “follow-up” which supplemented the 1998 Declaration on Fundamental Principles. However, while the follow-up to the 1998 Declaration placed new reporting obligations on ILO Member States, the follow-up to the 2008 Declaration seeks not so much to place obligations on States to honour human rights principles, including freedom of association, as to redesign ILO activities to make them more facilitative and less critical. This may lead to some of the reforms advocated only by the employer lobby, rather than to consensus-based reforms which would ensure that the ILO provided an effective social counterweight to global market forces.⁶⁷ Much depends on the delicate political balance within the

63 *Report of the Director-General: Decent Work* (Geneva: ILO, 1999); see also *Report of the Director-General: Reducing the Decent Work Deficit: A Global Challenge* (Geneva: ILO, 2001).

64 *Supra*, note 9.

65 *Report of the Director-General: ILO Programme Implementation 2000–01* (Geneva: ILO, 2002).

66 ILO Declaration on Social Justice for a Fair Globalization 2008, Article I(A)(iv).

ILO. It is in this context that recent Canadian and European litigation can be seen as significant. The recognition of the relevance of ILO conventions and supervisory machinery may serve to affirm the value of standard-setting activity at a time when it is under threat. However, this is not the full story, at least not in Europe.

3. EUROPEAN PROTECTION OF WORKERS' HUMAN RIGHTS

The European experience suggests that reference to ILO standards when addressing the meaning of freedom of association does not necessarily further the realization of workers' human rights. It is true that European courts have gone one step further than the Supreme Court of Canada, as they have recognized that freedom of association implies not only a right to engage in effective collective bargaining but also a right to strike. Yet it remains possible in Europe to place substantial restrictions on industrial action. Indeed, in the European Union these restrictions are more extensive than they were before the European Court of Justice (the ECJ) formally recognized a right to strike.

The EU and the Council of Europe have historically played distinctive roles. The capacity of the EU to protect workers' rights has to be understood in terms of its origins as primarily an economic institution. Its orientation has been toward economic integration of the markets of Member States, as was reflected in the titles of its foundational institutions: the European Coal and Steel Community, founded in 1951, and the European Economic Community (EEC), created in 1957.⁶⁸ These institutions have evolved to form what is now known as the European Union, which promotes the creation of an internal market (now encompassing 27 Member States) through the realization of four "fundamental freedoms" which are economic in nature:

67 See the reforms proposed by B. Hepple, "Does Law Matter? The Future of Binding Norms," in Politakis, *supra*, note 57, p. 221, which are very different from those proposed by Langille. See also Hepple, *supra*, note 7, at pp. 271–275.

68 See P.L. Davies, "The Emergence of European Labour Law," in W.E.J. McCarthy, ed., *Legal Intervention in Industrial Relations: Gains and Losses* (Oxford: Oxford University Press, 1992) 313; and C. Barnard, "EC 'Social Policy,'" in P. Craig & G. de Búrca, eds., *The Evolution of EU Law* (Oxford: Oxford University Press, 1999) 479.

free movement of goods, freedom to provide services, freedom of establishment, and free movement of workers.⁶⁹ Protection of human rights within the EU is effected through the general principles jurisprudence of the ECJ, which is responsive to the human rights jurisprudence developed in the Council of Europe and now is understood to encompass those human rights set out in the declaratory EU Charter of Fundamental Rights 2000. Yet these human rights obligations operate only as an exception to key tenets of EU law. Within the EU legal framework, there is no free-standing right of workers to bring a claim for protection of their human rights, except when these rights are either denied or given effect by EU institutions and legislation. In other words, in an EU context, human rights act as a “shield” rather than as a “sword,” and thus tend to be invoked to protect a Member State or private party from the consequences of what would otherwise be regarded as a breach of EU law.⁷⁰

The Council of Europe, established in 1949, was designed to foster inter-governmental cooperation with a view to preventing the recurrence of fascism and totalitarianism in Europe. It was to set common standards for the conduct of governments and the scope of their common action on various matters, including realizing and maintaining human rights.⁷¹ Member States of the Council of Europe are obliged to ratify and comply with the ECHR, which was adopted in 1950 and entered into force in 1953. The ECHR sets out a number of essential civil and political rights, including (in Article 11) “freedom of association.” Article 11 consists of two paragraphs, the first of which explicitly recognizes that freedom of association extends to the “right to form and join trade unions.” The second paragraph

69 TFEU, Articles 26–66. For an excellent exposition on the implications of these provisions, see C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, 2d ed. (Oxford: Oxford University Press, 2007).

70 See B. Ryan, “The Private Enforcement of European Union Labour Laws,” in C. Kilpatrick, T. Novitz & P. Skidmore, eds., *The Future of Remedies in Europe* (Oxford: Hart, 2000) 141; and T. Novitz & P. Syrpis, “Giving with the One Hand and Taking with the Other: Protection of Workers’ Human Rights in the European Union,” in C. Fenwick & T. Novitz, eds., *Human Rights at Work: Perspectives on Law and Regulation* (Oxford: Hart, 2010) 463, at p. 467.

71 Statute of the Council of Europe 1949, Article 1; and see Council of Europe, *The Union of Europe: Its Progress, Problems and Prospects, and Place in the Western World* (Strasbourg: Council of Europe, 1951).

indicates that restrictions may be placed on that freedom, but only such restrictions “as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.” The same paragraph adds that the entitlement to freedom of association under Article 11 does not “prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.” In 1961, the Council of Europe adopted a separate European Social Charter (the ESC), which makes specific reference to the right to organize (in Article 5) and the right to engage in collective bargaining, including the right to strike (in Article 6).

The ECHR introduced an innovative supervisory mechanism, namely, a means by which individuals could bring a petition against a state before competent judges, who would give a final judgment on legal principles and award compensation to the victim where necessary. Today all members of the Council of Europe accept the right of individual petition and the jurisdiction of a single permanent European Court of Human Rights by virtue of Protocol 11, which entered into force on November 1, 1998. If petitions meet the preliminary requirements of admissibility, a seven-judge Chamber of the Court will, in the vast majority of cases, decide them on the merits. The Grand Chamber (consisting of 17 judges) will rule on more significant cases, and these judgments tend to receive the most attention. This supervisory system has been remarkable in the acknowledged binding quality of the judgments delivered and the public profile it has achieved. The supervisory machinery associated with the ESC is clearly less effective, so workers and trade unions prefer to rely on litigation before the European Court of Human Rights whenever possible.⁷²

72 See T. Novitz, “Remedies for Violation of Social Rights Within the Council of Europe: The Significant Absence of a Court,” in Kilpatrick, Novitz & Skidmore, *supra*, note 70, p. 231; R. Churchill & U. Khaliq, “The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?” (2004), 15 E.J.I.L. 417; A.M. Swiatkowski, “The European Committee of Social Rights and the Collective Complaints Procedure under the European Social Charter,” in Politakis, *supra*, note 57, p. 37.

(a) **The Right To Strike as Defined by the European Court of Justice**

In December 2007, in *Viking* and *Laval*, two separate cases which raised issues relating to the legality under EU law of industrial action, the European Court of Justice (the ECJ) explicitly recognized a right to strike for the first time.⁷³ In doing so, the ECJ relied in part on the EU Charter of Fundamental Rights (2000) and the European Social Charter (1961), but also made express reference to ILO Convention 87.⁷⁴ Yet the ECJ immediately went on to say:

Although the right to take collective action must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, it is to be protected in accordance with Community law and national law and practices.⁷⁵

This meant that the exercise of the right to strike could not unduly interfere with an employer's "fundamental freedoms" — that is, free movement of goods and services, and the freedom of establishment.

However, what was truly remarkable about *Viking* and *Laval* was that for the first time, the ECJ found that unions could be held directly liable under EU law for calling industrial action which impinged on employers' rights to free movement of establishments (in *Viking*) and free movement of services (in *Laval*).⁷⁶ Previously, only states had been held accountable. The *Viking* case was eventually settled, and we do not know the terms of the settlement.⁷⁷ In *Laval*, when the matter was remitted to the Swedish Labour Court, the union was found liable to pay exemplary damages to the employer and to bear most of the employer's trial costs and legal

73 See *supra*, note 6.

74 *Viking*, at para. 43; and *Laval*, at para. 90.

75 *Viking*, at para. 44; and *Laval*, at para. 91. The very same wording was used in each judgment.

76 See P. Syrpris & T. Novitz, "Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation" (2008), 33 Eur. L. Rev. 411.

77 As reported at <<http://www.itfglobal.org/news-online/index.cfm/newsdetail/1842>>.

fees.⁷⁸ Fears have been voiced that this could lead to potentially unlimited liability for unions which call industrial action, with a “chilling effect” on the exercise of the right to strike in EU Member States.⁷⁹

In the circumstances of the *Laval* case, the ECJ held that it was inappropriate for Swedish trade unions to take industrial action. A Swedish company had subcontracted construction work to a Latvian company, and even though both companies were owned by the same person,⁸⁰ the ECJ regarded the subcontracting arrangement as sufficient to allow them to avoid paying wages at Swedish levels. Swedish trade unions were held not to be entitled to take secondary action aimed at securing for the Latvian workers “posted” to Sweden wages comparable to those paid to Swedish workers. The Swedish unions’ boycott of Laval’s premises was regarded as a breach of the employer’s freedom to provide services in another EU Member State — a freedom which required that foreign service providers must have advance notice of the minimum terms and conditions that would apply to posted workers. Any attempt to impose collective bargaining on a foreign service provider meant that the terms which would apply to its workers would not be “sufficiently precise and accessible,” thereby making it “impossible or excessively difficult in practice” for the employer to determine its obligations with respect to minimum pay.⁸¹

In the *Viking* case the ECJ took the position that where industrial action affected the freedom of an employer to establish itself in another EU Member State (for the purpose, in that case, of reflagging a vessel and hiring cheaper labour), the trade union’s call for industrial action would have to be scrutinized to ensure that such action was in pursuit of a legitimate aim and was proportionate. More specifically, the union’s action had to be justified in terms of “protection of workers,” which was narrowly defined by the ECJ as meaning

78 Labour Court, Judgment 89/09, Case No. A 268/04, December 2, 2009. See unofficial translation by L. Carlson.

79 K. Apps, “Damages Claims against Trade Unions after *Viking* and *Laval*” (2009), 34 *Eur. L. Rev.* 141.

80 K. Ahlberg, N. Bruun & J. Malmberg, “The *Vaxholm* Case from a Swedish and European Perspective” (2006), 12 *Transfer* 155, at p. 159.

81 *Laval*, at para. 110.

that it was designed to protect the jobs and conditions of members of that union. The protection of workers would not be involved, the Court said in *Laval*, if the employer were to make an undertaking, enforceable under national law, “that statutory provisions would be complied with and the terms of the collective agreement governing their working relationship maintained.”⁸²

It has also been observed that the ECJ seems to regard industrial action as justified only when a union acts defensively — that is, to defend existing terms and conditions rather than to seek their improvement.⁸³ In *Viking*, the International Transport Workers’ Federation’s long-term policy aim of stopping the employer practice of using “flags of convenience” was not regarded as a sufficient justification for industrial action, even though that practice has detrimental effects on workers in the shipping industry.⁸⁴ This view on the part of the ECJ would seem to be entirely at odds with the ILO CFA jurisprudence. The CFA has indicated that legitimate aims of industrial action include the furthering of the broader social and economic interests of workers, and has stated that strikes opposing the re-flagging of ships should be regarded as permissible on this basis.⁸⁵

Moreover, the ECJ held in *Viking* that the union action in question had to be “proportionate,” in the sense that it was necessary “for the national court to examine, in particular, on the one hand, whether, under the national rules and collective agreement law applicable to that action, [the union] did not have other means at its disposal which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations . . . and, on the other, whether that trade union had exhausted those means before initiating such action.”⁸⁶ In so holding, the ECJ relied on a statement of the European Court of Human Rights to the effect that “collective action, like collective negotiations and collective agreements may, in the particular circumstances of a case, be one of the main ways in

82 *Ibid.*, at paras. 81–85.

83 A.C.L. Davies, “One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ” (2008), 37 *Indus. L.J.* 126, at p. 139.

84 *Viking*, at para. 89.

85 Case No. 2506 (Greece), 346th Report (2007), outlined in Novitz & Syrpis, *supra*, note 70, at p. 475.

86 *Viking*, at para. 87.

which trade unions protect the interests of their members,” but that it was not the only way.⁸⁷ Uncertainty as to whether action will be regarded as proportionate, combined with the risk of unlimited liability in damages, has meant that despite the statement on paper that a “right to strike” is now acknowledged, unions are less likely to be willing to risk legal liability by taking industrial action.

The jurisprudence of the ECJ in *Viking* and *Laval* has to be understood in the context of the ongoing enlargement of the EU and the importance of opening up the markets of Member States in Western Europe to those in Eastern Europe.⁸⁸ However, while some commentators have approved of the rulings on that basis,⁸⁹ others consider that they are a travesty because they are likely to maintain the low wages and poor conditions of many Eastern European workers.⁹⁰ Moreover, this jurisprudence seems ripe for exploitation by opportunistic Western European employers interested in expanding into Eastern European markets.

In the context of a current dispute between British Airways (BA) and the British Airline Pilots Association (BALPA), BA has established a subsidiary which would provide cheaper European short-haul flights and would hire pilots on terms and conditions inferior to those usually offered by BA. BALPA sought certain guarantees regarding this development, which BA refused to provide. Eventually, BA threatened the union with a lawsuit involving potentially unlimited liability if the union took strike action, because the transnational aspects of the dispute raised the spectre of liability

87 *Viking*, at para. 86.

88 See T. Novitz, “Labour Rights as Human Rights: Implications for Employers’ Free Movement in an Enlarged European Union,” in C. Barnard, ed., *The Cambridge Yearbook of European Legal Studies*, vol. 9 (Oxford: Hart, 2007) 357.

89 E.g. R. Blanpain, “*Laval* and *Viking*: Who Pays the Price?” in R. Blanpain & A.M. Swiatkowski, eds., *The Laval and Viking Cases: Freedom of Services and Establishment v. Industrial Conflict in the European Union* (2009), 69 *Bulletin of Comparative Labour Relations* xix, at p. xxii: “The European Court took the right decision.”

90 See C. Woolfson, C. Thörnqvist & J. Sommers, “Labour Migration and the Future of Labour Standards after *Laval*” (2010), 41 *Indus. Rel. J.* (forthcoming); and C. Woolfson, “The Sense of Measure and Societies ‘Without Limit’ ” (2010), 19 *Social and Legal Studies* 226.

under EU law. BALPA therefore did not pursue such action, despite a strike ballot in which 93 percent of the eligible employees voted and 86 percent of those who did vote were in favour of a strike.⁹¹

The BA dispute was the subject of a complaint to the ILO. In its recent report, the Committee of Experts “observes that when elaborating its position in relation to the permissible restrictions that may be placed upon the right to strike, it has never included the need to assess the proportionality of interests bearing in mind a notion of freedom of establishment or freedom to provide services.” Moreover, the Committee expresses “serious concern . . . that the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of the *Viking* and *Laval* judgments, creates a situation where the rights under [Convention 87] cannot be exercised.”⁹² It would seem, therefore, that the recognition by the ECJ of a right to strike in reliance on ILO Convention 87 has in fact only placed further restrictions on the exercise of that right.

(b) The Right to Strike as Applied by the European Court of Human Rights

Until 2008, the European Court of Human Rights took the view that neither a right to collective bargaining nor a right to strike was necessary to ensure freedom of association as guaranteed in Article 11 of the ECHR. In part, this would seem to be due to the parallel existence of the European Social Charter, which provided expressly for such rights but gave states the option of whether or not to commit to compliance with certain provisions.⁹³ On the facts of the particular cases, early judgments in the European Court of Human Rights

91 *Application by the British Air Line Pilots Association to the International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations against the United Kingdom for Breach of ILO Convention No. 87*, drafted by John Hendy, Q.C., available at <<http://www.balpa.org/Document-Library/Industrial-Issues/BALPA-ILO-Application-2009-01-26.aspx>>, discussed further in Ewing & Hendy, *supra*, note 12, at pp. 44–47.

92 See Report of the CEACR 2010, available at <http://www.ilo.org/ilolex/gbe/ceacr2010.htm>.

93 ESC, Article 20. See *National Union of Belgian Police v. Belgium*, 1 E.H.R.R. 578 (1979), at para. 38, in relation to claims made regarding a right to consultation, which is also provided for under Article 6(1) of the ESC.

appear to have emphasized the efficacy of collective bargaining, and therefore to have been arguably defensible under ILO jurisprudence. For example, in the *Swedish Engine Drivers* case, the Swedish government refused to enter into a collective agreement with the applicant union, preferring to agree to terms with a larger, more representative organization — terms which would automatically be extended to the applicant union’s members. This was considered to be acceptable conduct, as it would be in compliance with ILO standards.⁹⁴ What was problematic was the general principle stated in these cases to the effect that there was no necessary connection between freedom of association and collective bargaining or industrial action. In *Wilson and Palmer v. U.K.*, the European Court of Human Rights said that collective bargaining “is not indispensable for the effective enjoyment of trade union freedom,” and that “[c]ontracting States enjoy a wide margin of appreciation as to how trade union freedom may be secured.”⁹⁵

Since 2008, the European Court of Human Rights has taken a substantially different view, expressly in reliance on ILO jurisprudence on the interpretation and application of Conventions 87, 98 and 151. The point of departure was the judgment in *Demir and Baykara v. Turkey*.⁹⁶ This case concerned a trade union, Tüm Bel Sen, established in 1990 to represent Turkish civil servants. That union made a collective agreement with the municipal council, which was not honoured. The district court upheld a claim to terms and conditions under the agreement, but this judgment was overturned by the Turkish Cour de Cassation. In the meantime, the national Constitution was amended (in 1995), and a law was introduced (in 2001),⁹⁷ to the effect that while civil servants’ unions could engage in collective bargaining under certain conditions, they were not entitled to enter into collective agreements directly with the authorities concerned. Monies originally paid out to civil servants by virtue of the

94 1 E.H.R.R. 617 (1979); applied Application No. 29529/95, *Schettini v. Italy*, December 9, 2000, unreported. See *ILO Digest*, at para. 949 *et seq.*

95 Application Nos. 30668/96, 30671/96 & 30678/96, *Wilson, Palmer and Others v. U.K.*, July 2, 2002, at para. 44.

96 *Demir and Baykara*, *supra*, note 5.

97 Law No. 4688 on civil servants’ trade unions, June 25, 2001.

district court proceedings therefore had to be repaid. A complaint under Article 11 of the ECHR was brought by two union members.

The Turkish government responded to the complaint by arguing that Turkey was not a party to Article 5 (the right to organize) or Article 6 (the right to bargain collectively) of the European Social Charter. This argument was not accepted, either at first instance or subsequently by the Grand Chamber, which delivered its judgment in November 2008. Instead, it was considered significant at both levels that Turkey had ratified ILO Convention 98. The Grand Chamber also stressed that civil servants are generally recognized as being entitled to engage in collective bargaining, as is reflected in ILO Convention 151, which was also ratified by Turkey.⁹⁸ This would seem to reflect a broader trend on the Court's part toward citing ILO conventions and ILO jurisprudence.⁹⁹

In *Demir and Baykara*, the Grand Chamber concluded as follows:

... 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 ...

Consequently, the Court considers 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 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 ...¹⁰⁰

A series of subsequent Chamber judgments indicates that the European Court of Human Rights now also recognizes that the right to strike merits protection under Article 11. For example, the case of *Enerji Yapi-Yol Sen*¹⁰¹ concerned another Turkish civil servants' union that was a member of the Federation of Public Sector Trade Unions, which was planning a peaceful one-day national strike aimed at securing a collective agreement. The Prime Minister's Public Service Staff Directorate responded by publishing a circular which, among other things, prohibited all public-sector employees from taking part in the strike action in question. Some of the union's board

98 *Demir and Baykara*, *supra*, note 5, at paras. 147–148.

99 V. Mantouvalou, "Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers" (2006), 35 *Indus. L.J.* 395, at pp. 404–407.

100 *Demir and Baykara*, *supra*, note 5, at paras. 153–154.

101 *Enerji Yapi-Yol Sen v. Turkey*, *supra*, note 6.

members nevertheless did take part, and were subjected to sanctions as a result. The Chamber considered that the circular and subsequent sanctions constituted a *prima facie* violation of the union's entitlement to act in defence of its members' interests under Article 11(1). It made specific reference to ILO jurisprudence to the effect that the right to strike is an indispensable corollary of freedom of association and the right to organize under Convention 87.¹⁰²

The judgment in *Enerji Yapi-Yol Sen* went on to consider whether the conduct of the Turkish government was defensible under Article 11(2). The Chamber accepted that the "right to strike was not absolute and could be subject to certain conditions" — in the case, for example, of civil servants exercising state authority. But a blanket prohibition of the sort imposed here could not be justified under Article 11(2). The Court concluded that "the adoption and application of the circular did not answer a 'pressing social need' and that there had been disproportionate interference with the applicant union's rights." Keith Ewing and John Hendy have commented that "so clear was Turkey's failure that it was not even necessary to refer to the ILO . . ."¹⁰³ Nevertheless, it may be noted that this judgment would seem to reflect CFA principles on the restrictions which may legitimately be placed on public-sector strikes.¹⁰⁴ Leave to appeal to the Grand Chamber has been refused, so this judgment is now to be regarded as final.

Enerji Yapi-Yol Sen concerned the legitimate claims of a trade union to organize industrial action. Further case law decided by the Chamber of the European Court of Human Rights deals with the sanctions that may be placed on individual strikers. These cases are discussed at length by Ewing and Hendy.¹⁰⁵ For example, in *Danilenkov v. Russia*, discrimination against union members who had taken industrial action was found to be in breach of Article 11 of the ECHR, on the basis of Convention 98 as well as Convention 87.¹⁰⁶ It should also be noted that these cases indicate that public-sector strikes ought not to give rise to criminal conviction¹⁰⁷ or to any

102 *Ibid.*, at para. 24.

103 Ewing & Hendy, *supra*, note 12, at p. 15.

104 *ILO Digest*, at para. 576 *et seq.*

105 Ewing & Hendy, *supra*, note 12, at pp. 16–19.

106 Application No. 67336/01, *Danilenkov v. Russia*, July 30, 2009.

107 Application No. 23018/04, *Urcan v. Turkey*, July 17, 2008; and Application No. 22943/04, *Saima Özcan v. Turkey*, September 15, 2009.

form of disproportionate disciplinary action.¹⁰⁸ Once again, these findings are wholly consistent with ILO jurisprudence.¹⁰⁹

This recent case law on the ECHR may offer a positive model for change, especially since the EU is to accede to the ECHR after the Treaty of Lisbon, with the expected result that in human rights matters, the ECJ will defer to the European Court of Human Rights. One might therefore expect that the ECJ will reconsider its conclusions in *Viking* and *Laval* in the light of the subsequent ECHR cases.¹¹⁰

However, a note of caution is warranted by the way in which the judgments of the European Court of Human Rights have been applied in the United Kingdom. By virtue of the U.K. *Human Rights Act 1998*, "Convention Rights," including those set out in Article 11, are to be given domestic legal effect.¹¹¹ These rights are to be applied by U.K. courts in accordance with "any judgment" of the European Court of Human Rights. The English Court of Appeal, in the recent *Metrobus* case,¹¹² was reluctant to give the same weight to the findings of the Chamber in *Enerji Yapi-Yol Sen* as to the findings of the Grand Chamber in *Demir and Baykara*, although one wonders whether that reluctance would remain now that the Chamber judgment in *Enerji Yapi-Yol Sen* is final. The Court of Appeal also saw ILO jurisprudence merely as "part of the context" for the decision of the Grand Chamber in *Demir and Baykara*, and as not affecting "the substance of the points arising under the ECHR itself" in the *Metrobus* case.¹¹³ That case concerned the extensive notice and balloting requirements imposed on trade unions under U.K. industrial relations legislation,¹¹⁴ requirements which also have implications for protection from dismissal for trade union members who take industrial action. The Court of Appeal concluded that these constraints on the right to strike could be regarded as justifiable under Article 11, because they achieved an appropriate balance between the rights of workers and their organizations under Article 11 of the ECHR and

108 Application No. 30946/04, *Kaya and Seyhan v. Turkey*, September 15, 2009.

109 *ILO Digest*, at paras. 658 *et seq.*

110 See Novitz & Syrpis, *supra*, note 70.

111 *Human Rights Act 1998*, s. 1.

112 *Metrobus*, *supra*, note 13, at para. 35, *per* Lord Justice Lloyd.

113 *Ibid.*, at para. 50.

114 *Trade Union and Labour Relations (Consolidation) Act 1992*.

the employer's property rights under Article 1 of the First Protocol to the ECHR.¹¹⁵

Subsequently, U.K. judges hearing cases on industrial action at first instance have stated that they are bound by the rules of precedent to follow the findings of the Court of Appeal in *Metrobus*.¹¹⁶ However, Justice Laura Cox has commented that while the *Metrobus* decision is binding on her, counsel was

right . . . to draw attention to the United Kingdom's international obligations to recognise the right to strike contained in a number of instruments, including the Freedom of Association and Protection of the Right to Organize Convention (No. 87) of the International Labour Organization, which the U.K. was one of the first member states to ratify, in 1949. Sooner or later, the extent to which the current statutory regime is in compliance with those international obligations and with relevant international jurisprudence will fall to be carefully reconsidered.¹¹⁷

4. CONCLUSION: WHAT COMES OF DIALOGUE WITH THE ILO?

ILO standards are not immune from challenge or change. Yet at a time when the ILO's standard-setting and supervisory capacity has been questioned, human rights jurisprudence elsewhere can be regarded as reinforcing the significance, and ensuring the durability, of ILO jurisprudence on the right to strike.

What has happened in Canada is significant elsewhere in the world. The reference in the European Court of Human Rights' judgment in *Demir and Baykara* to "developments in labour law, both international and national"¹¹⁸ indicates that the litigators and the judges were aware of legal developments in other parts of the world, which were made with express reference to ILO standards. The collective dimension of recent ECHR jurisprudence may also be of

115 *Supra*, note 13, at paras. 101–113. See R. Dukes, "The Right to Strike Under U.K. Law: Not Much More than a Slogan" (2010), 39 *Indus. L.J.* 82, at pp. 89–90. Dukes notes that no reference was made to ILO jurisprudence in this context.

116 See *EDF Energy Powerlink Ltd. v. RMT*, [2009] E.W.H.C. 2852 (Q.B.), unreported judgment of October 29, 2009; and *British Airways plc v. UNITE the Union*, [2009] E.W.H.C. 3541 (Q.B.), unreported judgment of December 17, 2009.

117 *British Airways plc, ibid.*, at para. 27.

118 *Demir and Baykara, supra*, note 5, at para. 154.

interest to Canadians, insofar as it offers guidelines on how the approach taken in *B.C. Health* may be further developed to encompass protection of the right to strike under s. 2(d) of the *Canadian Charter of Rights and Freedoms*.

Nevertheless, it should be noted that mere recognition of a right to strike as a human right, even if based on ILO sources, may not be enough to ensure enhanced protection of collective action. This is illustrated by the recent judgments of the ECJ and the application of ECHR jurisprudence in the U.K. To be effective, and to ensure that there is some form of “global constitutionalism” which constrains the application of global market forces, the right to strike may need to be seen as an intrinsic aspect of freedom of association, available to promote and defend workers’ “economic and social interests” in as broad a sense as that envisaged by the ILO CFA and CEACR.¹¹⁹ Indeed, where greater attention is paid to the reasoning and past findings of ILO supervisory bodies on the status of the right to strike, as in the ECHR litigation, the result would seem to be more extensive legal protection of those who organize and participate in industrial action.

As Blackett notes, constitutional discourse offers the potential to mediate economic and political forces through recognition of human dignity. It seems entirely possible to achieve recognition of the right to strike through the medium of human rights jurisprudence, in reliance on ILO standards. A danger, however, is that our learning from other systems is merely partial and founded on misunderstandings and misapprehensions. If that were to happen — and as appears to be the case in the EU and U.K. systems — dialogue could be reduced to a form of “Chinese whispers,” distorting the meaning of jurisprudence developed elsewhere. “Transnational policy coherence”¹²⁰ could be lost, and with it the possibility of contesting the supremacy of market-led globalization. In this respect, there are opportunities for Canadian constitutional litigation, but also reasons for caution in terms of how arguments are constructed, presented and understood.

119 *ILO Digest*, at para. 522. See also CEACR, *General Survey* (1994), at para. 148.

120 Blackett, *supra*, note 2, at p. 407; Hepple, *supra*, note 7, at p. 275.