

## PLACING THE RIGHT TO STRIKE WITHIN A HUMAN RIGHTS FRAMEWORK

### 1 Introduction

Traditionally human rights have been divided into three generations. First generation rights, often referred to as civil/political rights, deal with issues of liberty and protect individuals from state interference. Examples of such rights include freedom of speech, freedom of religion and the right to life. Second generation rights are socio-economic in nature and protect rights such as housing, education and health care, while third generation rights are collective rights, for example the right to self determination and the right to development.

Socio-economic rights and collective rights do not have the same status as civil and political rights in international law. They are usually included in supplementary international documents, are ratified by fewer states and are subject to states' economic constraints. The right to strike has often been described as a socio-economic right since it has been used to improve economic conditions for workers, such as wages, reasonable working conditions and a better standard of living (Novitz *International Protection of the Right to Strike: A Comparative Study of Standards Set by the International Labour Organization and the Council of Europe* (April 1998) published Oxford PhD 102; and see also Pillay "The Contemporary Protection of Social, Cultural Economic and Cultural Rights in International Law" [http://www.communitylawcentre.org.za/ser/docs\\_2002/socio-economic\\_rights\\_in\\_international\\_law.pdf](http://www.communitylawcentre.org.za/ser/docs_2002/socio-economic_rights_in_international_law.pdf)).

The purpose of this note is to highlight the importance of the right to strike within the human rights framework. It proposes to do so in two ways. First, by showing that criticisms levelled against socio-economic rights are unwarranted and inapplicable to strikes and, secondly, by demonstrating that the right to strike is in fact a civil and/or political right, deserving of greater protection under international law.

### 2 Criticism of socio-economic

Socio-economic rights are given less protection in international law since they are said to be undemocratic and place severe economic constraints upon the state. These two criticisms will be analysed in more detail.

#### 2.1 *Economic burden*

It is argued that socio-economic rights impose a positive obligation on the state to provide resources while civil and political rights are less intrusive

(Mureinik “Beyond a Charter of Luxuries: Economic Rights in the Constitution” 1994 10 *SAJHR* 464 467). Since it is more difficult to provide for socio-economic rights and these rights might be denied. Although it is true that certain socio-economic rights impose an economic burden upon the state, so do certain civil and political rights. According to the Constitutional Court:

“It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formally were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of separation of powers” (*Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 4 SA 744 (CC) par 77*).

The fact that a right is economically burdensome could thus apply to both socio-economic rights and civil/political rights. To therefore use this argument as a justification for restricting socio-economic rights is contradictory. In any event the fact that the enforcement of a right is costly should not restrict its significance as a human right. What is important is the value of that right to society. Since most socio-economic rights are valuable to society they should be enforced progressively despite their costs. One must also note that not all socio-economic rights create economic constraints. The right to strike is not subject to the same constraints as most other socio-economic rights. It does not impose a severe positive economic obligation upon the state. For the right to strike to be given effect the state need only ensure that it is not subject to any civil or criminal sanctions. In comparison with other socio-economic rights, such as the right to housing, such costs are minimal. Also the Appellate Division has indicated that the right to strike could be restricted where it serves no purpose other than to harm the employer economically. In *NUMSA v Vetsak Co-operative Ltd* (1996 *ILJ* 455 (A)) the Appellate Division held that it was fair for an employer to dismiss protected strikers where the shop stewards remained adamant in their demands, were not open to reason or persuasion and insisted on complete capitulation of the employer. In this case negotiations and the strike had merely become a “sham” and an exercise in futility, causing immense economic harm to the employer without any purpose.

## 2.2 *Socio-economic rights are undemocratic*

It is argued that socio-economic rights should not be subject to judicial review since to do so would be undemocratic (Currie *The Bill of Rights Handbook* 4ed (2001) 433). According to Mureinik, economic rights cost a great deal of money and impact on budgetary decisions. Judges should not be deciding what society can afford and what its priorities are. He argues that in a well-ordered democracy this is the responsibility of the legislature and the executive, not that of an unelected judiciary (Mureinik 1994 10 *SAJHR* 467).

This argument is also dubious. The exclusion of socio-economic rights from any constitution would, in fact, be to the detriment of democracy. According to Davis, to protect first generation rights without protecting second and third generation rights would give one a distorted view of democracy. He argues that economic and social inequality is a form of political inequality since the denial of economic and social rights prevents citizens from participating adequately in the political process. He states that:

“A vote without food, association without housing, freedom to pray with out any access to medical care makes a mockery of a Bill of Rights which claims to promote democracy and detracts from a claim that government works in the interest of the impoverished particularly in South Africa with its legacy of apartheid, maldistribution of wealth and lack of opportunity for the vast majority of the population” (Davis “The Case Against the Inclusion of Socio-economic Demands in a Bill of Rights Except as Directive Principles” 1994 *SAJHR* 475 476).

Also, rather than denying democracy, strikes in fact promote democracy, particularly within the workplace. Normally employers, being the owners of capital, determine employee conditions of employment. To counter this, employees form unions and collectively they are able to challenge employer control and have a greater say within the workplace. A strike by employees ensures that their concerns are taken seriously (Shepard “Some Thoughts on Constitutionalising the Right to Strike” 1988 13 *Queens Law Journal* 168 197). According to McIlroy: “As long as our society is divided between those who own and control the means of production and those who only have the ability to work, strikes will be inevitable because they are the ultimate means workers have of protecting themselves” (McIlroy *Strike! How to Fight. How to Win.* (1984) 15). A similar viewpoint is expressed by the Constitutional Court. In *Ex parte Chairperson of the Constitutional Assembly* (1996 *ILJ* 821 (CC)) the Constitutional Court justified the exclusion of a constitutional right to lock out and the inclusion of a constitutional right to strike by indicating that the right to strike is not equivalent to a right to lock out and is essential for workplace democracy. According to the Constitutional Court employers enjoy greater social and economic power than individual workers and may exercise a wide range of power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace. To combat this and to a greater say in the workplace, the Constitutional Court held that “employees need to act in concert to provide them collectively with sufficient power to bargain effectively with employers and ... [they] exercise collective power primarily through the mechanism of strike action” (par 67).

The importance of the right to strike in creating workplace democracy is also reflected in a number of Labour Appeal Court judgments. In *Betha v BTR Sarmcol* (1998 *ILJ* 459 (A)) the Appeal Court protected strikers from abuse by the employer even where the strike was illegal, in order to uphold workplace democracy. In this case an employer and union had participated in long drawn-out negotiations for 20 months on a recognition agreement and were on the verge of an agreement. Employees asked the employer for time off for

some of the employees in order to partake in a May Day celebration. They were denied this and the employees went on strike. Their actions amounted to an illegal strike and they were dismissed by the employer. Despite the strike being illegal the court, in upholding workplace democracy, found in favour of the strikers. It found that the employer had provoked the employees by denying some of them an opportunity to attend the May Day celebration. The employer also took advantage of the illegal strike. It used the illegal strike as an opportunity to dismiss employees and especially to get rid of the union leaders. This would allow the employer to dominate or even avoid any further negotiations and any further strikes. This would deny employees a say within the workplace. Thus the Labour Appeal Court ordered reinstatement of those employees that were dismissed and thus protected employees, who partook in a strike in order to defend workplace democracy and thus avoid exploitation by the employer.

Strikes are essential in giving workers a say within the workplace, thereby promoting democracy. The two arguments against protecting the right to strike as a socio-economic right are thus erroneous.

### **3 The right to strike is a civil and/or political right**

The right to strike should be seen as a civil and/or political right, which is given greater protection under international law. This is because it is closely associated with traditional civil and political rights such as freedom of association, freedom of speech, the right to life, the right to dignity, the right not to be subject to slavery and the right to property.

Employees usually associate in the form of trade unions for the purpose of bargaining collectively. Without the right to strike employees would not be taken seriously during bargaining. The right to strike is thus essential for the purpose of collective bargaining and for the freedom of association of workers. The European Convention for the Protection of Human Rights and Fundamental Freedoms does not contain a specific provision relating to strikes. Parties to the Convention have, however, argued that the right to freedom of association guaranteed in article 11 should be interpreted to provide employees with the right to strike. The International Labour Organisation (ILO) Conventions also do not contain an express right to strike, yet the ILO Committee of Experts have interpreted ILO Conventions 87 and 98, which provide employees with a right to freedom of association, to include a right to strike (ILC *Provisional Record* (1992) 27).

Freedom of speech is also said to include the right to strike. A number of American cases have equated strikes with freedom of speech. In *NAACP v Clairborne Hardware C* (458 US 886 (1982)), for instance, a consumer boycott was protected as freedom of speech. In *State v Traffic Telephone Workers Federation of New Jersey* (66 A.2d 616, 1 N.J. 335, 9 A.L.R.2d 854 (1949)) the court held that picketing amounts to freedom of speech.

The right to strike is moreover integral to the right to life. The right to life could either be interpreted narrowly to refer to the right to be physically alive and to breathe, or it could be interpreted broadly to include the basic

necessities of life, such as housing, education, health care, *etcetera*. The Indian courts have used this broad definition of the right to life to provide Indian citizens with socio-economic rights. They have held that the refusal of the state to provide its citizens with socio-economic rights constitutes a denial of their basic necessities of life and therefore violates their right to life in the Indian Constitution (*Francis Corallie Mullin v Administrator of Delhi* AIR 1981 SC 746; and see also Gabriel "Socio-Economic Rights in the Bill of Rights: Comparative Lessons from India" 1997 1 *Human Rights and Constitutional Law Journal of Southern Africa* 8). One could take this argument further and state that the right to strike is essential to acquire the basic necessities of life. If workers are denied the right to strike for a living wage they would also not be able to afford other basic necessities such as education, health care and housing, *etcetera*.

Labour rights have often been associated with property rights. In the American case of *Perry v Sindermann* (408 US 593 (1971)) an employee was employed at a Texas university for a period of 10 years on consecutive one-year contracts. The college did not have a formal tenure system; instead it had an informal practice of tenure. The college refused to renew his tenth one-year contract. The court held that if the respondent could prove that there was an informal tenure system he would have a property interest protected by the fourteenth amendment of the American Constitution.

In addition, in terms of the concept of "self-ownership" we are all owners of our own bodies and therefore should not be forced to do anything with our bodies against our will. We can do whatever we wish with our bodies, provided that we are not aggressive to others who also have "self-ownership" over their bodies (Cohen *Self-ownership, Freedom and Equality* (1995) 68). Since we own our bodies, we also own the labour that we can perform with our bodies just as we do any other property. Being forced to work without the right to strike could therefore be seen as an infringement of one's property rights. One may also argue that our body belongs to us and hence is our property. By striking we are withholding the use of our body and any prevention of the right to strike would thus be a violation of our property rights.

Israel has argued that the denial of the right to strike violates one's freedom from forced labour. He argues that by prohibiting strikes or imposing criminal and civil sanctions upon strikers, one would be forcing employees to work, which would be a violation of their right not to be subjected to forced labour (Israel *International Labour Standards* (1989) 25).

The right to strike is also a violation of one's right to dignity. Workers find a sense of self-worth in their work, which is hindered if they are exploited by employers and have no say in this environment. One of the most effective ways in which workers can have a meaningful say in the workplace is if they have the power to halt production (Harmer "The Right to Strike Charter Implications and Interpretations" 1992 47 *University of Toronto Faculty of Law Review* 438). Strikes allow workers to retain their dignity and to show that they are not just cogs in a machine. It is a self-expressive activity releasing feelings of frustration and powerlessness when faced with injustice. According to Chief Justice Dickinson of Canada, strikes "go far beyond an exclusively pecuniary

nature to involve issues of livelihood and dignity" (*re Public Service Employee Relations Act* (1987) 1 S.C.R. 313, (1987), 38 D.L.R. (4<sup>th</sup>) 161). According to Weiler, "collective bargaining (and strikes) set the terms and conditions of employment rather than accepting what the employer gives them. It provides them with self-determination, which is the mark of a true human community" (cited Harmer 1992 47 *University of Toronto Faculty of Law Review* 438).

The connection between the right to strike and the right to dignity has also been recognised by the Constitutional Court. In *NUMSA v Bader Bop (Pty) Ltd* (2003 ILJ 305 (CC)) the Constitutional Court had to determine whether section 21 read with section 65(2) of the Labour Relations Act 66 of 1995 (hereafter "the LRA"), which provide representative unions with the right to strike for the purposes of acquiring organisational rights, restrict non-representative unions from striking. The court indicated that it did not since section 20 of the LRA enables parties to bargain for organisational rights and this also applies to non-representative unions. It said that representative unions can use section 21 read with section 65(2) of the LRA. They can either strike for organisational rights or refer the dispute to arbitration. It interpreted the LRA broadly to protect the right to strike and the right to dignity. It indicated that a failure to interpret the LRA broadly would not only violate the right to strike but also the right to dignity. The court said that strikes are "of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees" (par 13).

Since the right to strike is integral to these traditional civil and political rights, a violation of the right to strike would violate these rights, hence entrenching the place of this right within the human rights hierarchy, especially against states that have not ratified ILO instruments. For example, states such as the United States of America, that have failed to sign a number of ILO instruments but who are party to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and thus would not normally be required to provide employees with the right to strike, would now be required to do so.

One must note, however, that protection given to employees' right to strike within these dimensions would not be absolute and could be restricted where it is reasonable to do so. This is recognised by a number of international and regional bodies, including the ILO, and by the South African legislature and judiciary. According to the ILO, strikes can be restricted in essential services, during wars and emergencies, where disputes are rights disputes or where parties voluntarily agree to avoid strikes. These restrictions are acceptable to the ILO provided that they do not unduly restrict the right to strike (International Labour Office *Freedom of Association: A Workers Educational Manual Second Edition* (1987) 66). In South Africa, although section 23(2)(c) of the 1996 Constitution provides employees with a constitutional right to strike this right can be restricted by reasonable limitations in accordance with section 36 of the Constitution. These limitations have been given effect to by the LRA. The LRA requires employees to partake in pre-strike procedures and also prohibits strikes in circumstances recognised by the ILO, that is, section 65 of the LRA prohibits strikes on issues covered or prohibited by collective

agreements, strikes in essential services, and in most rights disputes. Section 64 requires strikers to comply with pre-strike conciliation and notice periods prior to striking. In *Mzeku v Volkswagen SA (Pty) Ltd* (2001 ILJ 1575 (LAC)) the Labour Appeal Court held that it was substantively fair for an employer to dismiss employees who had failed to comply with the pre-strike procedures. In this case the dismissed strikers argued that pre-strike procedures as regulated by the LRA violate international law. This argument was rejected by the Labour Court of Appeal who held that "There is no provision in [ILO] Conventions 87 and 98 to the effect that employees can resort to a strike as and when they please without following any procedures that may be laid down by national law or that national law falls foul of these conventions if it prescribes procedures that must be followed before there can be an exercise of the right to strike" (par 26). The ILO allows national legislation to require employees to partake in reasonable pre-strike procedures provided that the method, quorum and majority required are not such as to make the exercise of the right to strike difficult or improbable (ILO *Freedom of Association and Collective Bargaining: Report of the Committee of Experts on the Application of Conventions and Recommendations International Labour Conference* (1994) par 171).

#### **4 Conclusion**

At this stage in our political history, with intensive globalization and investment across borders, employees are left vulnerable. With increased international competition for investment between states labour standards are often sacrificed to reduced production cost and increased profitability, thus encouraging foreign capital (Donoso "Economic Limits on International Regulation: A Case Study of ILO Standard Setting" 1998 *Queens Law Journal* 189 219). In order to counter these forces, employees need the right to strike. This note has highlighted the significance of the right to strike within a human rights framework. It has shown that criticisms levelled against socio-economic rights are unwarranted, particularly with regard to the right to strike. It also revealed that strikes are associated with a number of civil and political rights including the rights to life, property, dignity, not to be subjected to slave labour, freedom of expression and freedom of association. By creating such links, states not party to ILO instruments but party to widely ratified international civil political instruments, such as the Covenant on Civil and Political Rights, will also be required to protect employees' right to strike and would only be allowed to restrict strikes where it is reasonable to do so. By dispelling myths regarding the insignificance of socio-economic rights and by regarding the right to strike as a civil political right, its status in international law is significantly uplifted.

Mohamed Alli Chicktay  
*University of the Witwatersrand (WITS), Johannesburg*