

**BEFORE THE INTERNATIONAL COURT OF JUSTICE**

**REQUEST BY THE INTERNATIONAL LABOUR ORGANISATION FOR AN  
ADVISORY OPINION ON THE FOLLOWING QUESTION: 'IS THE RIGHT TO  
STRIKE OF WORKERS AND THEIR ORGANISATIONS PROTECTED  
UNDER THE FREEDOM OF ASSOCIATION AND PROTECTION OF THE  
RIGHT TO ORGANISE CONVENTION, 1948 (NO. 87)**

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**WRITTEN STATEMENT SUBMITTED BY  
THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA**

**15 MAY 2024**

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## I. INTRODUCTION

1. On 10 November 2023 the 349<sup>th</sup> Session of the Governing Body of the International Labour Organisation (“ILO”) resolved to request the International Court of Justice (“the Court”), in accordance with article 37(1) of the ILO Constitution, to render urgently an advisory opinion on the following question:

*Is the right to strike of workers and their organisations protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)?*

2. The request for the advisory opinion arises as a result of the International Organisation of Employers (“IOE”), the constituent employer body of the ILO, disputing the Committee of Experts on the Application of Conventions and Recommendations’ (“CEACR”) interpretation of articles 3 and 10 of the Convention 87 to include a circumscribed right to strike.
3. The dispute resulted in a failure in 2012 of the Committee on the Application of Standards (“CAS”) to discuss and decide individual cases concerned with CEACR’s observations on the right to strike. The employer representatives refused to discuss these individual cases on the grounds that Convention 87 did not include a right to strike. This ongoing failure has done serious damage to the functioning of the ILO system of standards and, despite attempts over several years since then to resolve the dispute, no consensus has been reached.
4. On 12 July 2023 the Worker Vice-Chairperson of the ILO Governing Body formally recommended that the dispute be referred to the ICJ and that the recommendation be put on the agenda of the Governing Body in November 2023 for discussion and decision<sup>1</sup>.
5. On 14 July 2023 the Minister of Employment and Labour on behalf of the Government of the Republic of South Africa wrote to the Director-General of the ILO unreservedly supporting the recommendation that the dispute be referred

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<sup>1</sup> The Dossier: ILO Collection of Documents, Vol 1 Document 5.

to the ICJ pointing out that South Africa's Constitution and Labour Relations Act, 1995 (LRA) enshrine freedom of association and the right to strike.<sup>2</sup>

6. In response to the Order dated 16 November 2023 made by the ICJ organising the proceedings, the Government of South Africa confirms that it is a State entitled to appear before the ICJ as it is a party to Convention 87, having ratified it on 19 February 1996. Accordingly, South Africa presents this, its written statement, in accordance with that Order.

## **II. BRIEF HISTORY OF THE DISPUTE**

7. Although there were lone voices by governments over certain of the Committee's interpretations of Convention 87, none were referred to the ICJ for a decision.
8. In the 1990 CAS deliberations, Employer members raised the issue of the Committee's interpretation of Convention 87 stating that they did not agree with the Committee on the right to strike and that it 'had progressively deduced from Convention No. 87 a right to strike which was hardly limited' and that its opinion was 'questionable in law' and 'touched directly on employers' interests'.<sup>3</sup>
9. In the 1992 CAS deliberations, the Employer members accused the Committee of an 'expansive application of the right to strike even though the legislative history of Convention No. 87 did not relate to it' and had expanded an 'ever-increasing right to strike' to include sympathy, political and solidarity strikes and at the same time applying a narrower definition of essential services.
10. In the 1993 CAS deliberations, the attack was resumed with the accusation that the interpretative methods in both international customary law and the Vienna Convention on the Law of Treaties did not allow for 'the "creation" of an extremely broad right to strike to be derived from Convention No. 87... gradually developed by the Committee of Experts' and that the 'right to strike developed by the Committee of Experts is virtually unlimited and the regulatory scope of

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<sup>2</sup> The Dossier: ILO Collection of Documents – Part I: Document 8.

<sup>3</sup> The Dossier: ILO Collection of Documents – Part II: Document 77.

the member States therefore tends to be non-existent. The formulae developed by the Committee of Experts, which allow almost any type of strike and proscribe almost any restriction as being contrary to international law, cannot be justified'.<sup>4</sup>

11. In 1994 CAS deliberations, the attack continued adding to their bow of arrows statements such as 'the Committee of Experts was creating and developing law' and that it had gradually expanded its views from one paragraph in 1959 to 44 in 1994. The employers 'were not so much criticising the fact that the Committee of Experts wanted to recognise the right to strike in principle, but rather that it took as a point of departure a comprehensive and unlimited right to strike.'
12. In the 1997 CAS, the employers conceded that the 'principle of industrial action formed part of the principles of freedom of association as set out in Convention 87'. However, 'their criticisms were aimed at all the detailed jurisprudence developed over the years on the basis of these principles'.
13. In the 2012 CAS, when the General Survey on the Fundamental Freedoms was being discussed, the Employers took exception to the Committee's opinions on the right to strike in particular that the subject had covered 20 pages of the Survey and as a prelude to its attack on the mandate of the Committee objected to the fact that the Committee's opinions were being 'received and promoted as soft law jurisprudence'.
14. In summary the standpoints of the employers in so far as the right to strike is concerned are:
  - (a) The concept of freedom of association does not include a right to strike;
  - (b) Convention 87 does not refer to the term 'strikes' and accordingly is not regulated by the Convention;
  - (c) That under the Vienna Convention on the Law of Treaties the Committee was not entitled to interpret the Convention as regulating strikes, particularly since in the preparatory work, 'it was clearly stated that the Convention 87 was not intended to regulate strikes';

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<sup>4</sup> Dossier: ILO Documents: Volume III: Quoted in Document 108.

- (d) That the Committee's starting point was a 'comprehensive and unlimited right to strike' which left no room for the 'regulatory scope of member States' and that in its application was 'narrowly interpreted'.
- (e) That the Committee relied on Committee on Freedom of Association (CFA) decisions in its observations.

### **III. SOUTH AFRICA'S INTEREST IN THE DISPUTE**

- 15. On 11 May 1988 a complaint on infringements of trade union rights by the South African Government was submitted to the ILO. Because South Africa was not a member of the ILO at the time, the complaint was forwarded to the Economic and Social Council of the United Nations in terms of an agreed procedure between the two international organisations.
- 16. After securing the consent of the South African government, the Council referred the complaint to the ILO Fact-Finding and Conciliation Commission for it to examine the alleged infringements. After hearing evidence and arguments presented by trade unions, employer organisations and the Government of South Africa, it issued a report on 8 May 1992.
- 17. That Report made a number of findings in respect of the right to strike drawing on the jurisprudence established by the ILO's two supervisory bodies namely the CFA and the CEACR, which had in turn relied on the commitment to freedom of association contained in the ILO Constitution and articles 3 and 10 of Convention 87 to derive a circumscribed right to strike.
- 18. The relevant findings and recommendations in the Report, in so far as the right to strike is concerned, are attached in Appendix I. In summary they addressed various impairments of the right to strike in respect of procedural requirements, protest action, essential services, and sanctions.
- 19. In response to the Report, the South African Government –
  - (a) introduced labour rights in its 1994 and 1996 Constitutions that mirror the essential elements of Convention 87 and 98 as they have been interpreted by the CFA and the CEACR, in particular the right to strike;

- (b) engaged in a complete overhaul of the legislation regulating labour relations culminating in the Labour Relations Act, 66 of 1995, which gave full effect to the recommendations of the Commission; and
- (c) ratified Conventions 87 and 98 in 1996.
20. In interpreting the constitutional right to strike and the provisions of the Labour Relations Act dealing with the right to strike, the Constitutional Court and the Labour Courts have had regard to the jurisprudence of the CFA and the CEACR.<sup>5</sup>
21. In the matter of *Association of Mineworkers and Construction Union and others v Anglo Gold Ashanti Limited t/a Anglo Gold Ashanti and others*, the limitations in the Labour Relations Act, 66 of 1995 on the right to engage in a secondary strike were challenged by the Union. The majority of the Constitutional Court held that the limitations were in accordance with the jurisprudence of the CFA and the CEACR in that the limitations were reasonable. The CFA reported on the complaint in its 404<sup>th</sup> Report to the Governing Body holding that, given ‘the efforts made by the Government to ensure full guarantees of freedom of association, in particular the right to strike’, it recommended that the Governing Body consider that the case did not call for further examination. However, it held that it did not determine that the limitations were in conformity with freedom of association and invited the ‘Government, along with the representative workers’ and employers’ organisations, to keep the application of [the limitations] under review and, where appropriated, to consider any measures that may be necessary to ensure conformity with freedom of association’.<sup>6</sup>
22. The effect of the decision means that the limitations remain under review by both the CFA and the CEACR. It is accordingly of critical importance for the

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<sup>5</sup> ILO Dossier: Collection of Documents – Part IV: Documents 369, 371 and 384. A more recent decision not included in the Dossier is *Association of Mineworkers and Construction Union v Anglo Gold Ashanti Limited t/a Anglo Gold Ashanti and others* (CCT 233/20 [2021] ZACC 42 - <https://www.saflii.org/za/cases/ZACC/2021/42.html>)

<sup>6</sup> [https://webapps.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_900967.pdf](https://webapps.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_900967.pdf)

South African Government and its courts to have the legal status of the jurisprudence of the CEACR on the right to strike finally determined.

#### **IV. PRINCIPLE OF FREEDOM OF ASSOCIATION**

23. Conceptually, the principle of freedom of association is constituted at both individual and collective dimensions. The freedom is as much about the freedom *to* associate as it is about the freedom *of the* association.
24. As a logical construct, applicable to all kinds of association (whether political parties, religious bodies, companies, trade unions etc.), the individual dimension guarantees an individual's right to form, join and establish an association and the collective dimension guarantees the freedom of the association to determine its own rules and objectives without interference, and to pursue its legitimate activities subject to law.<sup>7</sup>
25. Accordingly the principle of the freedom of association is a nexus of intersecting and sometimes competing freedoms - made up not just of the individual's right to join or refuse to join an association or the association's right to refuse to admit or expel an individual, but the right of the association to make its own rules and develop its own programmes and to bind its individual members to those rules and programmes, the right of associations to associate with other associations, to pursue their legitimate activities and the right of individuals to participate or the extent of any right to refuse to participate in those activities.
26. The principle forms the bedrock of a modern democratic state ranging from the right to form political parties, religious institutions, schools, companies, partnerships, trade unions, employer organisations – all of which, although regulated, in some way get a special dispensation from the state for the pursuit of their legitimate activities such as the immunity given to shareholders of companies from company liabilities or trade unions for calling a strike. In other words inherent in the principle of freedom of association is that it is a regulated

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<sup>7</sup> In this respect the individual and collective rights and protections contained in Convention 87 accord with this conceptual elaboration of the principle of freedom of association.

freedom *of the* association to pursue its legitimate and lawful activities without liability or penalty.

27. The Constitution of the ILO specifically recognises the ‘principle of freedom of association’ in its Preamble as a fundamental measure to establish universal and lasting peace based on social justice. The Declaration of Philadelphia reaffirms the ILO’s commitment to the ‘fundamental principle’ of ‘freedom of association’. By becoming a member of the ILO, a state commits itself to that fundamental principle.

## **V. COMMITTEE OF FREEDOM OF ASSOCIATION**

28. It is on the basis of this principle that the Governing Body of the ILO in 1951 established the tripartite CFA to hear complaints lodged by worker or employer organisations against member states concerning infringements of the principle of ‘freedom of association’ – the sole textual source in the ILO Constitution for the CFA’s terms of reference. That mandate includes ‘determining whether any given legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the relevant Conventions’.<sup>8</sup>
29. In order to give content to the principle the CFA had recourse to the content of Conventions 87 and 98 and, on a case-by-case basis<sup>9</sup> and in accordance with precedent (uniformity over time) and equal application (uniformity across member states), developed a jurisprudence. In so doing, it has interpreted and applied the text of the two Conventions to the allegations contained in the complaints brought before it.
30. This jurisprudence was first captured in a Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO published by the ILO in 1972 and most recently in its 6th edition in 2018 but

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<sup>8</sup> The Dossier: ILO Collection of Documents – Part II: Document 90 paragraph 14.

<sup>9</sup> As of June 2016, the CFA had dealt with over 3,200 cases over 65 years.

referred to now as a 'Compilation of Decisions'.<sup>10</sup> The decisions themselves are contained in annual reports to the Governing Body.<sup>11</sup>

31. In its determinations on legislation and practice, the CFA has on many occasions had reference to the conclusions of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) on different provisions of Convention 87. There is accordingly an interlocking jurisprudence developed by these two supervisory bodies.

## **VI. CONVENTION 87**

32. Convention 87, in its Preamble, explicitly states that it is adopted to give effect to the principle of freedom of association contained in the Preamble to the ILO Constitution and its reaffirmation in the Declaration of Philadelphia.
33. The Convention guarantees both the individual and collective dimensions of the principle of freedom of association.
34. Article 2 establishes the right of workers and employers to establish or join organisations of their own choosing subject to article 8 paragraph 1, namely that, in the exercise of that right, workers and employers must respect the law of the land, and article 9 in respect of armed forces and police. Articles 3 to 7 and 10 outline the collective dimension of freedom of association – subject to articles 8 and 9. These rights and protections are informed by the principle of freedom of association as a logical construct.
35. Article 3 guarantees the right of worker and employer organisation to 'organise ...their activities and formulate their programmes'. Article 10 defines 'organisation' with reference to its purpose, namely to further and defend 'the interests of workers or employers'.
36. It follows logically that, given the purpose of a worker organisation contemplated in article 10, that the kinds of activities and programmes guaranteed in article 3

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<sup>10</sup> <https://www.ilo.org/publications/freedom-association-compilation-decisions-committee-freedom-association-pdf>

<sup>11</sup> <https://www.ilo.org/resource/reports-committee-freedom-association>

are those that further and defend the interests of workers. Those activities logically, given the collective nature of these organisations, must include legitimate and lawful collective action of one kind or another.

37. It is important to expand briefly on the requirement in article 8 paragraph 1 that the exercise of the right to take collective action must be lawful. Article 8 paragraph 2 states that the 'law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided in this Convention'. The reason for the specific attention to the 'law of the land' arises from a prior and ongoing history of legislative and juridical prohibitions on associational activity in both common law and civil law systems.<sup>12</sup> That history is, as the Canadian Supreme Court said in respect of the development of labour relations law in Canada, the history that spans three stages: repression, toleration and recognition'.<sup>13</sup>
38. The core obligation of the CEACR in respect of Convention 87 is to review the law of member states that have ratified the Convention in order to determine in each case whether the law of the land impairs the guarantees provided for in the Convention.
39. It is important to recognise that both the CFA and the CEACR operate very much like common law courts do – they apply the wording of the ILO Constitution or the Convention to the facts presented to them on a case-by-case basis. And over time, in accordance with precedent (uniformity over time) and equal application (uniformity across member states), a jurisprudence is created and developed. This jurisprudence is embodied in different editions of the Digest of Decisions of the CFA and the General Surveys prepared by the CEACR.

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<sup>12</sup> See Halton Cheadle, 'Constitutionalising the Right to Strike' in Hepple, le Roux, Sciarra *Laws Against Strikes: The South African Experience in an International and Comparative Experience*, Franco Angeli, 2015 at page 69.

<sup>13</sup> *Health Services and Support-Facilities Subsector Bargaining Association v British Columbia* 2007 SCC 27 at paragraph 44. A case that derived the right to collective bargaining from the constitutional right to freedom of association.

## VII. THE RIGHT TO STRIKE

40. In its first set of reports to the Governing Body in 1952, a number of strike cases were considered receivable by the CFA and accordingly examined. In a case dealing with a ban on union meetings by the government of Jamaica arising from a strike, the CFA held 'that strikes and union meetings are essential elements of trade union rights'. Since the very first round of strike related cases, the CFA has continued to examine such cases. The jurisprudence that it has developed in respect of strikes shares the contours of the jurisprudence developed by the CEACR.
41. In 1959 the CEACR in its General Survey<sup>14</sup> on Convention 87 raised, for the first time, the issue of prohibition on the right to strike in various contexts: the public service, compulsory conciliation procedures, and essential services stating that these prohibitions may 'possibly' contravene article 8(2) of Convention 87, which states that the law of the land may not impair the rights guaranteed by the Convention and the 'freedom of action of trade union organisations in defence of their occupational interests'. The only hard conclusion that it advanced in the 1959 Survey was that if strikes were prohibited, adequate alternative guarantees to safeguard their interests had to be provided.
42. Based on the periodic reports submitted by governments in accordance with the Convention, the CEACR reviewed the legislation submitted in the reports to determine whether it impaired the guarantees accorded by the Convention. Just as a common law court develops the common law, the Committee responded to the issues raised by that legislation either in the form of Observations or Direct Requests. It did not start with a preconceived view of the extent of the right to strike and still does not.
43. That jurisprudence was guided by the contours of the right to strike as contained in international and national instruments and recorded in its General Surveys on the subject.

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<sup>14</sup> It is important to note that the General Survey is based on reports from all member States whether they have ratified the Convention being surveyed or not.

44. The limitations on the right to strike contained in the CEACR's jurisprudence follows the contours of comparative legislation.

### **VIII. VIENNA CONVENTION ON INTERPRETATION OF TREATIES**

45. Article 31 of the Convention sets out the primary interpretative approach to treaties namely that it must be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty in context, in the light of the object and purpose of the treaty and subsequent practice. In other words, it has five components: good faith, ordinary meaning of the terms, the context of the terms, the objects and purpose of the treaty and subsequent conduct.
46. Article 32 of the Convention records that recourse may only be had to the preparatory work of the treaty as a supplementary means of interpretation in order to determine the meaning when the terms of the treaty are ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

#### Article 31: Good faith

47. There can be no suggestion that the CEACR (nor the CFA or the Commissions on Fact Finding and Conciliation for that matter) interpreted the provisions of Convention 87 other than in good faith. In order to decide whether the 'law of the land' impairs a guarantee in terms of article 8, it has to determine the scope of the guarantees.
48. Although there were the rare occasions over a period of 40 years when governments disputed the CEACR's jurisprudence on the right to strike, most governments and the worker and employer delegates or representatives did not dispute that jurisprudence.
49. The sustained critique of that jurisprudence by the IOE only arose in the 1990s with the explanation that the reason for its remaining silent was the cold war 'in a show of solidarity to preserve the supervisory machinery'.<sup>15</sup>

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<sup>15</sup> The Dossier: ILO Collection of Documents – Volume 5: Document 266 at page 258. See also the statement made by Alfred Wisskirchen, who was an employer member of Committee on the

50. Good faith requires a dispute to be raised immediately and in a sustained way in order for it to be determined before States that are party to that treaty give effect to the interpretation in their legislation and their practices.<sup>16</sup>

Article 31: Ordinary meaning of its terms and context

51. The following provisions have to be read together to deduce their ordinary meaning:

- (a) Article 10 which defines 'organisations' as 'any organisation of workers ... for furthering and defending the interests of workers or of employers'.
- (b) Article 3(1) grants worker organisations 'the right...to organise...their activities and formulate their programmes'. As collective organisations, those activities and programmes are inherently collective in nature.
- (c) Article 3(2) forbids public authorities from interfering with an organisation's right to organise its activities and formulate their programmes; or impeding the 'lawful exercise' of those rights.
- (d) Article 8, which obliges worker and employer organisations to respect 'the law of the land' in the exercise of their rights, requires that the law may 'not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention'.

52. Accordingly, the ordinary meaning of the activities and programmes of worker organisations envisaged in article 3 is to be found –

- (a) firstly, in the wording of article 10 namely that the organisation's activities are directed to further or defend the interests of workers;
- (b) secondly, logically the activities or programmes are collective in nature;

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Application of Standards from 1969 and the employer vice chairperson from 1983 to 2004, that 'no issue was made this [right to strike] and other differences during the long years of the cold war' in his article 'The standard-setting and monitoring activity of the ILO: Legal questions and practical experience', *International Labour Review*, Vol.144 (2005), No. 3, 253 at page 288.

<sup>16</sup> See also 1981 *Interpretation of the Algerian Declarations of 19 January 1981* by the *Iran-US Claims Tribunal*, ILR 62 (1982) 605 f.

- (c) thirdly, the obvious collective activities or programmes of worker organisations are those associated with making collective demands and exerting collective pressure on employers and government in furtherance or defence of worker interests.
- (d) fourthly, these collective activities include collective bargaining with employers and collective negotiation or consultation with government and, logically within the parameters of the law, collective pressure in the form of strikes, petitions and protest in pursuit of those demands.

Article 31(2): The objects and purpose of the treaty.

53. The preamble to the Convention states that the International Labour Conference had unanimously adopted the principle of freedom of association in the ILO Constitution and the Philadelphia Declaration to form the basis for international regulation. The objects and purpose are evident from the following:

- (a) The Preamble gives effect to the UN Resolution on Trade Union Rights (1947) which recognised the inalienable right of trade union freedom of association 'as well as other social safeguards essential to the improvement of the standard of living of workers and their economic well-being' and called upon the ILO to adopt a convention to guarantee the right.
- (b) The purpose is also plainly to provide those safeguards firstly by defining a workers' organisation as one to further and defend the interests of workers and then to guarantee the right of that organisation to do precisely that by protecting it from employer and state interference and impediment.
- (c) The requirement that, in the exercise of the rights, the law of the land had to be respected impliedly recognises a government's need to regulate, in the public interest, the exercise of collective action in the form of strikes, marches and protests.

Article 31(3)(b): Subsequent Practice

54. In *Kasikili/Sedudu Island (Botswana/Namibia)*<sup>17</sup> the ICJ referred to the commentary of the International Law Commission to underline the importance of subsequent practice in interpretation of treaties:

“The importance of such subsequent practice in the application of the treaty, as an element of interpretation is obvious: for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty. Recourse to it as a means of interpretation is well-established in the jurisprudence of international tribunals.”

55. There are several aspects of subsequent practice that need to be considered:

- (a) The CFA and the CEACR have consistently and uniformly interpreted Convention 87 to include a right to limited but lawful strikes for 72 years in the case of the CFA and 65 years in respect of the CEACR;
- (b) The overwhelming majority of ratifications of Convention 87 occurred after the CFA had stated in its 1952 Reports to the Governing Body that ‘the right to strike and that of organising trade union meetings are essential elements of trade union rights’ (145 ratifications out of 158). There were 130 ratifications after the CEACR had interpreted the Convention as according a limited right to strike. Accordingly, those Member States must be taken to have known of the import of the Convention at the time of ratification and did so on the basis that the Convention included a limited right to strike;
- (c) Member states have amended their laws or changed their practices as a result of the Committee’s observations or have taken its observations or General Surveys into account in drafting their laws regulating strikes (South Africa in 1996 for one);
- (d) The International Labour Conference in its 1957 Resolution concerning the Abolition of Anti-Trade Union Legislation in the Member States of the International Labour Organisation makes express reference to Convention

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<sup>17</sup> Judgement of 13 December 1999 – <https://www.icj-cij.org/case/98/judgments>.

87 in its Preamble and calls upon member States to ensure ‘the effective and unrestricted exercise of trade union rights, including the right to strike, by the workers’;

- (e) Apart from a few lone individual government voices in the 1960s and 1970s, the member States, the representatives of the employers and the workers did not raise an objection to the development by the CFA and the CEACR of a jurisprudence on a limited but lawful right to strike under Convention 87. Nor did they object to the use of the decisions and observations of the CFA and CEACR by ILO Commissions of Inquiry in terms of article 26 of the ILO Constitution or the Fact Finding and Conciliation Commissions (Japan and South Africa) in their findings and recommendations.<sup>18</sup>

Article 31(3)(c): Rules of international law

56. In the *Namibian Advisory Opinion* the ICJ pointed out that ‘an international instrument has to be interpreted and applied within a framework of the entire legal system prevailing at the time of the interpretation.’<sup>19</sup>
57. The endorsement of the right to strike in subsequent international conventions and treaties, which, if not express, have been interpreted to include the right to strike, constitutes an evolving interpretative framework within which the CFA and the CEACR must develop a jurisprudence on the right to strike.<sup>20</sup>
58. Given the nature of the ILO’s ratification process of member States individually acceding to conventions, the interpretation of Convention 87 has to be interpreted in the light of the evolving interpretative framework.

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<sup>18</sup> For the inferences to be drawn from the failure to dispute the decisions of the CFA and the observations and the General Surveys of the CEACR see the *Namibia Advisory Opinion* ICJ Reports 1971 at paragraph 34.

<sup>19</sup> ICJ Reports 1971 at paragraph 53. See also Judgement of 4 June 2008 *Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* at paragraphs 112 to 114. See also the use by other international tribunals of other international treaties in Oliver Corten and Pierre Klein, *The Vienna Conventions on the Law of Treaties: A Commentary*, Oxford University Press, 2011 at section 3, paragraph 44-47 at page 827-829, in particular the ICJ decision in the *Oils Platform* case in its Judgement of 6 November 2003, *ICJ Reports 2003*, page 182 paragraph 41.

<sup>20</sup> The Dossier: ILO Collection of Documents – Part IV: Documents 323 to 334.

59. In the *Namibian Advisory Opinion*<sup>21</sup> the ICJ pointed out that:

“mindful as the Court is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court must take into consideration the changes that have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within a framework of the entire legal system prevailing at the time of the interpretation.”

60. The evolving international interpretative framework in respect of a limited and lawful right to strike is to be found in –

- (a) Article 8(1)(d) of the International Covenant on Economic, Social and Cultural Rights requires State parties to undertake to ensure ‘the right to strike, provided that it is exercised in conformity with the laws of the particular country’ and article 8(3) which states that nothing in the article authorises States parties to ILO Convention 87 to pass or apply laws which prejudice the guarantees in the Convention;<sup>22</sup>
- (b) Article 22 of the International Covenant on Civil and Political Rights guarantees the ‘right to freedom of association’<sup>23</sup> and whilst it does not specifically refer to the right to strike, has been interpreted by the Human Rights Committee to so include such right;<sup>24</sup>
- (c) The jurisprudence of the European Court of Human Rights interpreting article 11 of the European Convention of Human Rights guaranteeing ‘freedom of association’ as including a right to strike;<sup>25</sup>

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<sup>21</sup> ICJ Reports 1971 at paragraph 31.

<sup>22</sup> Entered into force on 3 January 1976 and has been ratified by 172 States. See also the Joint Statement

<sup>23</sup> It, too, cross refers to Convention 87 too in paragraph 3 to the effect that nothing in the Article authorises State parties to ILO Convention 87 to pass or apply laws which prejudice the guarantees contained in the Convention.

<sup>24</sup> See the decisions of the Human Rights Commission in ILO Dossier: Part IV: Documents 343 to 347.

<sup>25</sup> ILO Dossier: Part IV: Documents 361 to 363.

- (d) The 2016 Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association to the effect that the ‘right to strike has been established in international law for decades, in global and regional instruments, and is also enshrined in the constitutions of at least 90 countries. The right to strike has, in fact, become customary international law’<sup>26</sup>
- (e) The Joint Statement in 2019 by the Committee on Economic, Social and Cultural Rights and the Human Rights Committee<sup>27</sup> on the basic principles of freedom of association protected by, among others, Convention 87 recalling that the ‘right to strike is the corollary to the effective exercise of the freedom to form and join trade unions’ which the Committees to the their respective Covenants have ‘sought to protect’.
61. The right to strike is also explicitly or implicitly guaranteed in 101 national constitutions<sup>28</sup> and at different levels of intensity recognised in national legislation<sup>29</sup>.
62. It is submitted that the extent of widespread State practice in which ratification of international conventions that have been interpreted to include a right to strike and conformity of domestic legislation reflects *opinion juris*, a genuine sense of obligation under international law.<sup>30</sup>

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<sup>26</sup> At paragraph 54.

<https://documents.un.org/doc/undoc/gen/n16/287/16/pdf/n1628716.pdf?token=3kgphDzEwIxuV9yKU9&fe=true>

<sup>27</sup> 6 December 2019. ILO Dossier: Part IV: Document 314.

<sup>28</sup> The Dossier: ILO Collection of Documents – Part II: Document 140 (Appendix III) identifies 97 countries that include the right to strike. It fails to include four countries that have derived the right to strike from the constitutional right to ‘freedom of association’ (Canada and Finland), the right to ‘act collectively (Japan) and the right of workers to form associations ‘to safeguard and improve working and economic conditions’ (Germany) – making a total of 101 countries that have constitutionalised the right to strike. See also Halton Cheadle ‘Constitutionalising the Right to Strike’ in Hepple, le Roux and Sciarra, *Laws against Strikes: The South African Experience in an International and Comparative Experience*, Labour Law in National, Integrated and Transitional Legal Systems, Franco Angeli, Milano 2015.

<sup>29</sup> Op cit. Appendix II identifies 170 of 187 member States having legislation at different levels of intensity that recognise a right or freedom to strike in one form or another.

<sup>30</sup> See James Brudney, ‘The Right to Strike as Customary International Law’, *Yale Law Journal of International Law*, Vol 46:1

Article 32: Supplementary Means of Interpretation

- 63. Article 32 of the Vienna Convention permits recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion to confirm or determine the meaning under article 31 but only if the terms are ambiguous or obscure or lead to an absurd or unreasonable result. Accordingly, being supplementary, the article does not authorise an autonomous or alternative method of interpretation based on the preparatory work of the Convention.
- 64. The fact that there is no explicit reference to the term 'strike' under the 'activities' that a worker organisation has the right to organise does not mean that it is not implicitly included or that that implication is ambiguous or obscure or that it leads to absurd or unreasonable results. Lawful strikes and other forms of lawful collective activities are self-evidently activities that worker organisations engage in as is evidenced by other international instruments and the extent to which it is recognised in national constitutions and legislation.

**IX. CONCLUSION**

- 65. The Government of South Africa accordingly respectfully submits that it is essential that the Court provide clarity on whether Convention 87 guarantees a lawful but limited right to strike in order that it (and other Governments) can be certain as to its obligations under the Convention.

.....

**VP Madonsela**

**Ambassador Extraordinary and Plenipotentiary to the Kingdom of the Netherlands**

**FOR AND ON BEHALF OF THE GOVERNMENT OF SOUTH AFRICA**

**DATE:** .....

## ANNEXURE I

### Report of the Fact Finding and Conciliation Commission on Freedom of Association Relevant Extracts

#### *Right to strike: Procedural requirements*

641. The Commission considered this issue in the light of the principle that, while fulfilment of some procedures may well be acceptable, they should not become so cumbersome as to render lawful strikes almost impossible in practice.<sup>19</sup> In particular, it has kept in mind the principle that: The conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organisations.<sup>20</sup>

642. The Commission considers that both the complicated nature of the various pre-strike requirements and the length of time needed to fulfil them have had a negative effect on the exercise of the right to strike in South Africa. The procedural requirements set out in sections 27A, 35 and 65 (l)(d) and (2)(b) of the LRA should be amended so as to simplify the procedures in conformity with the principles on freedom of association.

643. On the particular question of strike ballots, namely whether an affirmative vote should require a majority of all the members of the union in the undertaking affected or simply of the workers who took part in the ballot, the Commission draws the Government's attention to the views of the ILO supervisory bodies on this point:

The requirement that an absolute majority of workers should be obtained for the calling of a strike may be difficult to fulfil especially in the case of unions which group together a larger number of members. A provision requiring an absolute majority may, therefore, involve the risk of seriously limiting the right to strike.

and

A provision requiring the agreement of the absolute majority of the workers of the undertaking concerned for the calling of a strike may constitute a serious limitation on the activities of trade union organisations.<sup>21</sup>

644. The Commission considers that the Government should take steps to remove the inconsistency existing between these principles on freedom of association and section 65(2)(b) of the LRA.

#### *Right to strike: Protest strikes*

647. The principles of the ILO on this subject are clearly stated by the Committee of Experts on the Application of Conventions and Recommendations:

The Committee considers that trade union organisations ought to have the possibility of recourse to protest strikes, in particular where aimed at criticising a government's economic and social policies. However, strikes that are purely political in character do not fall within the scope of the principles of freedom of association.<sup>22</sup>

and by other supervisory bodies:

The right to strike should not be limited solely to industrial disputes that are likely to be solved by the signing of a collective agreement; workers and their organisations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their interests.<sup>23</sup>

648. The Commission accordingly concludes that the regulation of "strikes" in section 1(1) and section 65(1A) should be amended so as to safeguard the legality of strikes over social and economic issues affecting workers' and trade union rights.

*Right to strike: Essential services*

656. The Commission is of the view that section 46 should be amended so that strike action is restricted only in those services which are genuinely essential in terms of the ILO definition mentioned above.

657. Employees in certain essential services have no dispute settlement machinery available to compensate for the removal of their right to take industrial action. Prison officers and nurses are examples. This is not acceptable. Measures should be taken promptly to allow such workers access to adequate machinery so that their occupational grievances can be heard.

658. The Commission has no comment on the situation of the police and members of the armed forces referred to by COSATU, as they may be excluded from the ILO's freedom of association principles. The position of armaments workers, however, should not, in the Commission's opinion, differ from that of other workers since, in periods of peacetime, they are not carrying out essential services. They are clearly not members of the armed forces covered by the Defence Act.<sup>27</sup>

*Right to strike: Sanctions*

667. Similarly, the Commission considers that the imposition of criminal sanctions on strikes declared solely for the promotion or defence of workers' occupational interests is contrary to the principle of the right to strike.<sup>30</sup> Such sanctions should be imposed only where there have been violations of strike prohibitions which are themselves in conformity with the principles of freedom of association.<sup>31</sup> It is clear from the Commission's conclusions (see paras. 639 to 659 above) that several of the strike prohibitions are not in conformity with the principles.

668. Dismissal of trade unionists for exercising the right to strike is contrary to the principle of freedom of association: When trade unionists are dismissed for having exercised the right to strike, [it] can only [be] concluded that they have been punished for their trade union activities and have been discriminated against contrary to Article 1 of Convention No. 98.<sup>32</sup>

670. The Commission is of the opinion that the unfair labour practice provisions of the LRA should be amended to provide appropriate protection against dismissal:

- of strikers engaged in a legal strike; and

- of strikers where the strike, although technically illegal, was in all other respects legitimately called for the promotion and defence of the workers' economic and social interests.

730. The principles developed by the ILO organs concerning strikes in the public sector recognise that the right to strike may be restricted or even prohibited in the civil service - civil servants being those who act on behalf of public authorities.<sup>49</sup> This principle was set out more fully by the Committee of Experts on the Application of Conventions and Recommendations in the following passage:

... [T]he principle whereby the right to strike may be limited or prohibited in the public service or in essential services, whether public, semi-public or private, would become meaningless if the legislation defined the public service or essential services too broadly. As the Committee has already mentioned in previous general surveys, the prohibition should be confined to public servants acting in their capacity as agents of the public authority or to services whose interruption would endanger the life, personal safety or health of the whole or part of the population. Moreover, if strikes are restricted or prohibited in the public service or in essential services, appropriate guarantees must be afforded to protect workers who are thus denied one of the essential means of defending their occupational interests. Restrictions should be offset by adequate impartial and speedy conciliation and arbitration procedures, in which the parties concerned can take part at every stage and in which the awards should in all cases be binding on both parties. Such awards, once rendered, should be rapidly and fully implemented.<sup>50</sup>

731. Applying these principles to the various branches of the public service in South Africa, it would seem that, at the very least, the possibility of strike action should be opened up for members of the teaching profession and post office personnel, subject to the possible need to ensure the maintenance of a minimum service which should be defined in consultation with the organisations of the workers concerned.<sup>51</sup> Where prohibitions or restrictions on strike action are maintained, these should be offset, as indicated by the Committee of Experts, by adequate, impartial and speedy conciliation and arbitration procedures.

#### *Final recommendations*

5. In the first place, in order to meet the Government's declared goal of respecting the international principles of freedom of association, the new Act should take full account of the Commission's conclusions concerning certain aspects of the present Act, and the need to amend a number of its provisions. These relate, in particular ... to restrictions, both substantive and procedural, on strike action (section 1(1), section 27A, section 35, section 46(1), (2) and (7), section 65(l)(d) and (2)(b), section 65(IA)).

15. The Commission finally recommends that South Africa bring its law and practice into full conformity with Conventions Nos. 87 and 98, so that when the time comes for South Africa to become once more a Member of the International Labour Organisation, one of its first steps will be to ratify in particular these Conventions for the protection of fundamental human rights.

## Footnotes<sup>31</sup>

<sup>19</sup> General Survey, para. 219.

<sup>20</sup> Digest, para. 377.

<sup>21</sup> Digest, paras. 380 and 384.

<sup>22</sup> General Survey, para. 216.

<sup>23</sup> Digest, para. 388.

<sup>27</sup> Digest, para. 421.

<sup>32</sup> Digest, para. 443.

<sup>49</sup> Digest, para. 394.

<sup>50</sup> General Survey, para. 214.

<sup>51</sup> General Survey.

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<sup>31</sup> The reference to the General Survey is 1983 General Survey on Freedom of Association, Collective Bargaining and Industrial Relations and the reference to the Digest is the Third edition 1985.

## ANNEXURE II

### 3. *Constitutionalising the Right to Strike*

Halton Cheadle

The shift from a functionalist justification for the right to strike to a human rights justification – described in chapter 1 – is reflected in the increasing number of countries that have either incorporated the right to strike in their Constitutions or have derived the right to strike from a constitutional right to freedom of association. Ninety-eight countries have a right to strike explicitly guaranteed in their Constitutions<sup>32</sup>, the majority of which introduced the right in their Constitutions after 1945. In a few countries the right is derived from the right to freedom of association.<sup>33</sup>

#### **Nature of a constitutional right**

Before engaging with the constitutional right to strike itself, it is necessary to briefly identify the key features of a constitutional right. As a general proposition, a constitutional right is a higher norm against which ordinary laws are tested for compatibility, even if the consequences of that determination by courts may differ from one legal system to another. In some systems, the courts may declare legislation or state conduct that is incompatible with the constitutional right invalid. In others, the courts may make a declaration that legislation is incompatible with the constitutional right and refer it to the legislature for its consideration. In some systems the right applies only to state action (principally legislation), in others to civil- or common-law rules, and, in a few, horizontally to private action, albeit at different levels of intensity.

The second feature of a constitutional right, as a general proposition, is that its content is, for the most part, meant to be given effect to by ordinary law such as legislation, the common law (in common-law systems) or civil and penal codes (in civil-law systems). Accordingly, the right to equality will often be given effect to by legislation that prohibits discrimination based on, for example, race or sex. Fair trial rights are generally given effect to by legislation, normally in the form of a criminal procedure statute. The right to reputation (as a constituent element of the right to dignity) is often given effect to in the tort rules on defamation, whether as a body of court-developed rules in a common-law system or as a code in a civil system. It is these rules on defamation that balance the constitutional rights to dignity (reputation) and the right to freedom of expression.

In summary, although the constitutional right may be generally stated, the content of the right is generally elaborated upon in subsidiary rules,<sup>34</sup> whether in the form of legislation, common-law rules or a civil code.

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<sup>32</sup> The ILO identifies 95 countries that include the right to strike. See par 61, *Background document for the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (NO. 87), in relation to the right to strike and the modalities and practices of strike action at national level (Geneva, 23-25 February 2015)*, ILO, Geneva, 2015. It fails to list Japan because art 28 of the Japanese Constitution does not use the term 'right to strike' but 'the right of workers to organize and bargain and act collectively'. The right to 'act collectively' means the right to strike – Y Kuwamura 'The right to strike: Japan' in B Waas (ed) *The Right to Strike: A Comparative View* (2014) 351.

<sup>33</sup> Germany, Finland, and Canada.

<sup>34</sup> This is of course not always the case. In Italy, France and Spain, despite a specific requirement in the constitutional text that the right must be regulated by law, the failure by the legislature to do so has led to the courts having to determine the content of the right to strike – so much so that it has led to some commentators in Italy to parse the constitutional right in art 40 as follows: 'the right to strike shall be exercised in compliance with *case law*' – quoted in A Febbrajo 'Right to strike v right to economic activity: Striking the balance in Italy' (2009), <http://www.jus.unitn.it/cocoa/papers/PAPERS%204TH%20PDF/Strike%20Italy%20febbrajo.pdz>.

## Nature and reach of a constitutional right to strike

Before considering the constitutional texts in the different states and how they have been elaborated upon by the courts and the legislature, it is necessary to interrogate the nature and reach of a constitutional right to strike in general and its juridical justification. To understand the right one has to understand the history of legislative and juridical attempts to either suppress strikes or limit their exercise. The first raft of measures was penal. The second was delictual or tortious, and the third was contractual. This history is ubiquitous. These endeavours characterise both common-law and civil-law systems, although the different systems placed different emphases on different aspects.

In most common-law systems, there have been legislative attempts to penalise associational activity, particularly strikes.<sup>35</sup> As this legislation was changed to open up the possibility of associational activity, the courts developed common-law crimes of conspiracy and economic torts to make strikes unlawful or wrongful.<sup>36</sup> The common-law courts, to this day, regard strikes as a breach of contract entitling the employer to dismiss the strikers.<sup>37</sup> The common law is and always has been a hostile environment for trade unions, collective bargaining and strikes, and as collective bargaining became more politically accepted, the legislature responded in one of two ways: introducing a right to strike legislatively<sup>38</sup> or abstaining from doing so by insulating collective bargaining from common-law interference through legislatively created immunities (the so-called ‘collective laissez-faire’).<sup>39</sup>

Similar features appear in civil systems. In Italy, strikes were initially prohibited and, despite being de-criminalised in the late nineteenth century, were again prohibited under fascist rule. The prohibitions remained in force until 1960.<sup>40</sup> In France, a strike was regarded under the Civil Code as a breach of contract until 1950.<sup>41</sup> The legislative responses in civil systems have been either constitutional<sup>42</sup> or legislative.<sup>43</sup>

In other words, in order to understand a constitutional right to strike, one has to recognise that it is a right that stands in opposition to what is deeply embedded in the common law or in the civil and penal codes in civil systems. The history of the right to strike is therefore the progression from prohibition, to freedom and finally into a right or an immunity.<sup>44</sup>

It is illustrative in this context to briefly consider the effect of constitutionalising the right to strike on these penal and civil-law rules. Although in France the criminal prohibition of strike activity had long since been removed in the mid-nineteenth century, a strike continued to constitute a breach of contract under the Civil Code. It was only after the 1946 Constitution, which included the right to strike in its Preamble, that the *Cour de Cassation* held that the exercise of the constitutional right did not constitute a breach of contract.<sup>45</sup> In Italy, the criminal offence of striking in art 502 of the Penal Code was only

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<sup>35</sup> The Combination Acts of 1799 and 1800 in England. See the commentary in S Deakin and G Morris *Labour Law* 6 ed (2012) 7.

<sup>36</sup> See the cases cited and commentary in Deakin and Morris (n 4) 9–12 and 1040–54.

<sup>37</sup> Deakin and Morris (n 4) 1121–4.

<sup>38</sup> The National Labour Relations Act 1935 in the USA is an example.

<sup>39</sup> See the history and commentary on statutory immunities in the United Kingdom in Deakin and Morris (n 4) 1060–72.

<sup>40</sup> E Ales et al ‘Collective action in Italy’ in E Ales and T Novitz (eds) *Collective Action and Fundamental Freedoms in Europe: Striking the Balance* (2010) 77–8.

<sup>41</sup> S Laulom ‘Collective action in France’ in Ales and Novitz (n 9) 31.

<sup>42</sup> Such as the 1946 Constitution in France and the 1948 Constitution in Italy.

<sup>43</sup> Belgium and the Netherlands are examples.

<sup>44</sup> It is, as the Canadian Supreme Court said in respect of the development of labour relations law in Canada, a history that spans three stages: ‘repression, toleration and recognition’ in *Health Services and Support-Facilities Subsector Bargaining Association v British Columbia* 2007 SCC 27 par 44.

<sup>45</sup> Cass. Soc. 28 June 1951, cited in Laulom (n 10) 31.

declared unconstitutional by the Constitutional Court in 1960.<sup>46</sup> In 1962 the Italian Constitutional Court declared the articles of the Penal Code that made a strike against a public authority or strike by a public employee a criminal offence to be incompatible with the Constitution.<sup>47</sup> In Spain, the Spanish Constitutional Court stated that the right to strike in art 28.2 of the Constitution was not limited to a freedom to strike, because that ‘would imply the mere removal of prohibitive norms, leaving the State a neutral role as to the contractual consequences of this phenomenon’.<sup>48</sup> The impact of a strike on the contract of employment had to be regarded as a suspension of the contract rather than a breach.

But just as the historical context of the right to strike is critical to understanding the right, so is the distinctive nature of the right. Although it shares with some human rights the right to exercise power,<sup>49</sup> such as the right to protest, to form political parties, or to exercise freedom of expression, particularly the media’s freedom of expression, it differs markedly from those constitutional rights because it is a right to inflict harm – economic harm. In this way it may be quite different from any other human right, which may explain why the constitutional texts on the right to strike are so often qualified by making the right ‘subject to regulation’.<sup>50</sup>

### **The right to strike as a facet of the right to freedom of association**

Although 98 states include an express right to strike in their Constitutions, some courts have derived the right to strike from the constitutional right to freedom of association. In Germany, art 9.3 guarantees the right of workers to form associations ‘to safeguard and improve working and economic conditions’. The Federal Labour Court and subsequently the Constitutional Court derived the right of trade unions and employers to engage in collective action to achieve those constitutional objectives.<sup>51</sup> In the complete absence of legislation on strikes and lockouts, the Federal Labour Court has developed a complex and evolving jurisprudence on regulating the exercise of this derived right to strike.

In Finland, the Supreme Court derived a right to strike from, among other sources, the right to freedom of association in s 13 par 2 of the Constitution, 1999.<sup>52</sup>

In Canada, the Supreme Court held in a line of cases that the right to freedom of association guaranteed under section 2(d) of the Charter of Human Rights and Freedom included the right to bargain collectively<sup>54</sup> and thereafter the right to strike because it ‘is an essential part of a meaningful bargaining process. The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right.’<sup>55</sup>

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<sup>46</sup> Constitutional Court, 4 May 1960 n. 29 in *Giustizia Costituzionale*, 1960, 497ff, cited in Ales and Novitz (n 9) 88.

<sup>47</sup> Constitutional Court, 28 December 1962, n. 123, in *Foro Italiano*, 1963, I, c.5., cited in Ales and Novitz (n 9) 88.

<sup>48</sup> STC 11/1981 cited in Decision no. 5579/2012 of 11 June 2012 at 327 *ILLR* 32.

<sup>49</sup> Hepple in chapter 1 refers to this characteristic of the right as a means rather than as an end in itself. Although there is little difference, it may be preferable to view it as a right to exercise power.

<sup>50</sup> Other than, maybe, the right to freedom of expression, which may constitutionally permit injury to others in certain circumstances.

<sup>51</sup> Federal Constitutional Court of 26 June 1991 – 1 BvR 779/85, which summarises the jurisprudence developed by the Federal Labour Court since 1949 when the Basic Law was adopted. See also B Waas ‘The right to strike: Germany’ in B Waas (ed) *The Right to Strike: A Comparative View* (2014) 236.

<sup>52</sup> O Deinert ‘Collective action in Germany’ in Ales and Novitz (n 9) 53.

<sup>53</sup> See Supreme Court 2010:93, 31.3.2010 (T 2598) cited at 67 *ILLR* 31.

<sup>54</sup> *Health Services and Support-Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391

<sup>55</sup> *Saskatchewan Federation of Labour v Saskatchewan* 2015 SCC 4 at para [3].

## Individual or collective right

Conceptually, the right to strike is an individual right that can only be exercised collectively.<sup>56</sup> This means that, as a right, it has both individual and collective facets. The individual right is to participate collectively with others in the collective action and may include the right to participate in the decision to strike or to end the strike. As such, the individual rights are dependent on the existence of the lawfulness of the collective action, which brings into play the collective facet of the right. The lawfulness of the collective action is primarily determined by what kind of collective action is constitutionally or legislatively permitted, such as the procedural requirements that must be met before embarking on a strike or the limitations on strikes for purely political objectives or in essential services.

In some countries, like Germany, only a trade union may call a strike. This is because the right to strike is derived from the right to associate for the purposes of collective bargaining in art 9.3. Since only a trade union can conclude a collective agreement and there being no legislation giving effect to the right, the courts interpreted art 9.3 as only permitting a trade union to call a strike.<sup>57</sup> In Sweden,<sup>58</sup> the Constitution specifically gives the trade union the right to take industrial action, as do the Constitutions of Poland,<sup>59</sup> Argentina,<sup>60</sup> and Uruguay.<sup>61</sup> In Turkey, the Constitution grants an individual right to strike – ‘employees have the right to strike in respect of a labour dispute’ – whereas the legislation giving effect to the right requires the decision of a trade union before employees may engage in a protected strike.<sup>62</sup> Although the right to strike may be exercised only collectively, the employees who engage in such a strike have the individual right not to be dismissed for participating in the strike.

In most countries, the collective right does not have to be exercised by a trade union; it can be exercised by any group of workers. In Italy, the right may be exercised by any group of workers, whether they are part of a union or not. In seeking to determine whether an employee’s absence from work without notice or a union’s prior approval of a strike constituted a constitutionally protected strike, the Italian Court of Cassation held that in the Italian legal order, legal monopoly by the union in respect of calling a strike does not exist – it is sufficient that the right to strike is exercised by more than one worker acting collectively.<sup>63</sup>

## Constitutional texts of the right to strike

Although the text of the constitutional right to strike varies from one country to another, there are two themes that permeate the language used. The first is the generally stated nature of the language – the concept of the strike is not defined or elaborated on, but is left to the legislature or the courts to determine. The second is that the right is invariably made subject to legal regulation.

### *Generally stated nature of the right to strike*

It is a feature of most constitutional texts that rights are generally stated, particularly those rights that

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<sup>56</sup> Also see chapter 1. This is the very obverse of the approach of the common law of tort to the withdrawal of labour, namely, that what the individual can do individually, the individual cannot do collectively.

<sup>57</sup> There appears to be a reconsideration of this approach in the labour courts given Germany’s ratification of European Social Charter, art 6.4 of which regards the right to strike as a workers’ right.

<sup>58</sup> Article 17 of the Instrument of Government (1974) reads: ‘A trade union or an employer or employers’ association shall be entitled to take industrial action unless otherwise provided in an act of law or under an agreement.’

<sup>59</sup> Article 59(3) of the Constitution of the Republic of Poland, 1997.

<sup>60</sup> Article 14*bis* of the Constitution of Argentina, 1994.

<sup>61</sup> Article 57 of the Constitution of Uruguay, 1967.

<sup>62</sup> Art 54 of the Constitution read with the Act on Labour Unions and Collective Labour Agreement, 6356, 2012 as amended.

<sup>63</sup> See Court of Cassation, Labour Division Decision no. 23552 of 17 December 2004 at 387 *ILLR* 25.

require extensive legislative or jurisprudential elaboration for their exercise.<sup>64</sup> The right to strike is one such right. In the 98 countries, not one of the constitutional texts defines the concept of a strike. This is not a constitutional failure or an ‘empty formula’<sup>65</sup> – it flows from the primary function of a constitutional right, which is to guarantee the exercise of the right rather than guarantee the grant of the right itself. Moreover, most of the constitutional texts in the 98 countries that have constitutionalised the right to strike specifically intend that the content of the right is to be determined by legislation.

In South Africa, the right is generally stated and the structure of the Bill of Rights, in which the right is situated, requires that the rights are to be given effect to by legislation or the common law.<sup>66</sup> The South African Labour Relations Act 66 of 1995 (LRA)<sup>67</sup> defines the right as an individual right that is collectively exercised, the collective exercise of which includes partial strikes. The lawful purpose of the strike includes strikes as part of the collective bargaining process and strikes in pursuit of the socio-economic interests of workers against the government itself. The policy, as it was developed by the executive, negotiated with the social partners, and debated and passed by the legislature, took into account South Africa’s public law obligations (in particular, ILO Convention No. 87 and the manner in which that Convention has been understood by the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations) and accepted practices, such as the use of partial strikes and protest strikes. Historically, trade unions had used protest strikes to oppose apartheid. This intense engagement with policy and practice is missing if courts, such as those in France, Italy, Spain and Germany are left to determine rules for strikes in the absence of legislation and the democratic processes that inform and develop those rules.

This absence of legislation leaves the policy choices involved in determining the content of the right to the courts, and the right being applied to the conduct of private actors, unmediated by legislation. So, in France and Spain, the courts have interpreted the constitutional right to apply to a complete cessation of work and not to a partial strike, such as an overtime ban or a work-to-rule. However, rotation or intermittent strikes are regarded as constitutionally protected in France, but not in Spain, where under certain circumstances they may amount to an abuse of rights.<sup>68</sup>

The distinction between the two sets of circumstances is important because under the Canadian and South African Constitutions the very structure of the Bill of Rights contemplates a generally stated right being limited by legislation. The scope of the constitutional right is, as a general rule, broadly interpreted; the actual content of the right being determined by legislation. In France, Spain and Italy, the courts have had to determine the content of the constitutional right from broad constitutional principles such as proportionality and the abuse of rights. So, in the former countries, it is proper to talk of limitation. In the latter countries, it is more a matter of giving content to the right which will logically define its boundaries – boundaries that will lead to the exclusion the constitutionality of socio-economic strikes in Germany or partial strikes in France and Spain.

### *Legal regulation of the right to strike*

In France, and in most francophone countries, the text of the constitutional right to strike requires it to be ‘exercised in accordance with law that regulates the right’. In Italy, the constitutional text states that the ‘right to strike shall be exercised in compliance with the law’. In Mozambique, the ‘workers shall have the right to strike, and the law shall regulate the exercise of the right’. In Serbia, the ‘employed shall have the right to strike in accordance with the law and collective agreement’. In Spain, the ‘right of workers to strike in defence of their interests is recognised. The law governing the exercise of this right shall establish the safeguards necessary to ensure the maintenance of essential services.’ In Turkey,

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<sup>64</sup> Such as the right to vote, socio-economic rights to education, housing, welfare etc.

<sup>65</sup> E Ales ‘The law and the courts regulating strikes in seven European countries’ in Ales and Novitz (n 9) 243.

<sup>66</sup> H Cheadle ‘Application’ in H Cheadle et al *South African Constitutional Law: The Bill of Rights* 2 ed (2014).

<sup>67</sup> Chapter X.

<sup>68</sup> See Ales (n 34) 244. See also chapter 1.

the right to strike and the employer's recourse to a lockout is 'regulated by law'. In Cambodia, the right can only be exercised peacefully and 'in accordance with the law'.

The ubiquity of this kind of wording in national constitutions indicates that it is a right that not only contemplates limitation but also one that requires the law for its proper exercise. It is a difference that Hepple identifies as a distinguishing feature of the right in his analysis of the right to strike as a human right in chapter 1. Of course, few rights are absolute and, even if the text of a particular right does not explicitly provide for legal regulation or limitation, courts interpreting the right will use one of a number of interpretive devices to do so – such as determining the scope of the right,<sup>69</sup> or its purpose,<sup>70</sup> or the interests it intends to protect. It could balance competing rights by using the principle of proportionality<sup>71</sup> or it could adopt an abuse of rights doctrine.<sup>72</sup>

The right to strike is in its very conception a right that contemplates restriction and limitation. Accordingly it is necessary to briefly consider an analysis of how a constitutional limitation of rights works. It begins with the explicit limitations in the text of the right itself. The French *Cour de Cassation* has interpreted the constitutional text that a 'strike is a right exercised in accordance with the law that regulates it' to conclude that, since the Constitution states that only a law can regulate strikes, the right could not be limited by collective agreement.<sup>73</sup>

Quite apart from the explicit limitations, there appear to be three constitutional principles that apply to the limitation of constitutional rights in general. The first is that subjecting a right to legal regulation *does not permit the obliteration of the right*. In the German Basic Law, that principle is encapsulated in the notion that legislation, which may regulate a right, may not infringe the 'essence of the right'.<sup>74</sup> In the Spanish Constitution, rights and freedoms are required to be given effect to by law, provided that their 'essential content' is respected.<sup>75</sup> In this sense the regulation of a right is different from the derogation of a right in a state of emergency. Most constitutions provide for derogation of a right and, in particular, the derogation of the right to strike in a state of emergency. But, even in a state of emergency, the derogation of the right may nevertheless be permitted only to the extent that the derogation is strictly required by the emergency.<sup>76</sup>

The second constitutional principle is that the limitation must be *justified*. This principle is exemplified in Constitutions with explicit limitation clauses. Article 1 of the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. Section 36 of the South African Constitution, based on the Canadian approach, uses similar language, stating that rights may be limited 'only in terms of laws of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. Article 28.2 of the

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<sup>69</sup> In France and Spain, the courts interpreted the right to exclude partial strikes.

<sup>70</sup> In Italy and France, the courts interpreted the right to include strikes against government in pursuit of the socio-economic interests of workers.

<sup>71</sup> Although *Viking* and *Laval* were not constitutional cases, the European Court of Justice in these cases balanced the right to strike and the right to freedom of movement. See Case C-438/05 *International Transport Workers' Federation (ITF) and Finnish Seamen's Union (FSU) v Viking Line (Viking)* [2007] ECR I-10779; Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet (Laval)* [2007] ECR I-11767.

<sup>72</sup> *Cass. Soc.*, 16 October 1991, Bull. *Civ.* V n 319 in which the *Cour de Cassation* considered that selective or rotating strikes may sometimes, given the degree of damage caused, constitute an abuse of the right to strike. See *Laulom* (n 10) 36.

<sup>73</sup> *Cass. Soc.*, 12 March 1996, Bull. *civ.* V n 88.

<sup>74</sup> Article 19(1) and (2) of the Basic Law.

<sup>75</sup> This has been parsed by the Spanish Constitutional Court as 'that part of the content which is indisputably required to ensure that the right will enable its owner to satisfy those interests for which the right is granted' See STC 11/1981 cited in Supreme Court (Social Chamber) Decision no. 5579/2012 of 11 June 2012 at 327 *ILLR* 32.

<sup>76</sup> Section 37(4)(a) of the South African Constitution. See also art 15 of the ECHR that permits a contracting state to 'take measures derogating from its obligations under this Convention [only] to the extent *strictly required* by the exigencies of the situation ...'.

Spanish Constitution permits the law regulating the right to strike to establish ‘the safeguards necessary to ensure the maintenance of essential public services’. Although the European Convention on Human Rights is not a constitution, but rather a Convention that affects the manner in which Constitutions in the European Community are to be interpreted, it requires the limitations on the listed grounds to certain of the rights in the Convention to be ‘necessary’.

Although the terms ‘necessary’ and ‘reasonable’ appear semantically to describe different levels of intensity, they are ultimately code for a proportionality analysis, which at its core involves a reasoning process of weighing up the importance of the purpose of the limitation against the extent of the limitation. In Germany, where the limitations clause in the Basic Law requires only that a right may be restricted by a law of general application and may not affect the essence of the right, the Constitutional Court applied the proportionality principle<sup>77</sup> to develop certain rules, for example, a strike must be the last resort,<sup>78</sup> and emergency services must be provided to preserve the productive capacity of the undertaking and the vital needs of the community.

Even in a Bill of Rights without an explicit limitations clause, such as France, the principle of proportionality is employed in the determining the ambit of the constitutional right.

The third constitutional principle is the *universality of human rights*. It is this universality that allows for a linkage between the international law of human rights and the constitutional adjudication of the limitation of rights. It provides a comparative and international benchmark for determining the bounds of reasonableness. The language used in the Canadian Charter of Rights and Freedoms and the South African Constitution refers explicitly to free and democratic societies as limitation comparators. Moreover, the South African Constitution specifically requires the Bill of Rights to be interpreted with reference to international law, which the South African Constitutional Court has interpreted to include both ratified and unratified international instruments.<sup>79</sup>

In Canada, the Supreme Court has made increasing use of international law in interpreting the provisions of the Charter of Rights and Freedoms. Since Canada has a dualist system of law, incorporation of international agreements into domestic law is properly the function of Parliament, yet the Canadian Supreme Court recognises Canada’s international law obligations as a tool in interpreting the rights in the Charter. The rights in the Charter should be presumed to provide at least as great a level of protection as is found in the international law human rights documents that Canada has ratified. In determining whether the Charter’s guarantee in s 2(d) that everyone has ‘freedom of association’ includes the right to strike, the Supreme Court<sup>80</sup> had recourse to art 8(1)(d) of the International Covenant on Economic, Social and Cultural Rights (CESCR), art 22(3) of the International Covenant on Civil and Political Rights and ILO Convention No 87 concerning Freedom of Association and Protection of the Right to Organise and the interpretations of ILO supervisory bodies.<sup>81</sup>

In *Numsa v Bader Bop (Pty) Ltd*<sup>82</sup> the South African Constitutional Court had to determine whether ambiguous provisions of the LRA limited the right of a minority trade union to strike in support of having the employer recognise its elected worker representatives. The court relied on decisions of the Committee on Freedom of Association to conclude that such a limitation would not comply with South Africa’s public law obligations.

But even in Constitutions that do not require reference to comparative and international law and

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<sup>77</sup> The proportionality principle is an administrative principle developed in German administrative law but one that has been applied by the Constitutional Court to constitutional analysis. See Waas (n 20) 244–5 and Federal Labour Court of 19 June 2007-1 AZR 396/06.

<sup>78</sup> The principle of *ultima ratio* has itself undergone some revision as a result of the courts’ permitting warning strikes. See M Weiss *Labour Law and Industrial Relations in Germany* 4 ed (2008).

<sup>79</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) par 35.

<sup>80</sup> *Saskatchewan Federation of Labour v Saskatchewan* 2015 SCC 4.

<sup>81</sup> At 67 to 71.

<sup>82</sup> 2003 (3) SA 513 (CC) pars 29–36.

jurisprudence, these authorities have been used as a benchmark for constitutional interpretation.<sup>83</sup> Moreover, in respect of those states that have ratified the CESCR, the UN Committee on Economic, Social and Economic Rights has stated that domestic law must be interpreted as far as possible in a way that conforms to a state's international legal obligations.<sup>84</sup> Although the decision was controversial, the Constitutional Court in Germany has referred reluctantly and belatedly to the European Social Charter to determine that secondary strike action was protected union activity under art 9(3) of the Basic Law.<sup>85</sup>

### **Necessary or reasonable limitations of the right to strike**

In the process of determining the parameters of the constitutional right to strike, the courts have had recourse to the concepts of *necessity* and *reasonableness* – either because the limitations clauses expressly use these concepts or because they have been developed by courts to do so. But in each case they are code for the concept of proportionality, which in turn has several emanations.

In both Canada and South Africa, the limitations clauses in their respective Constitutions require the limitation of rights to be 'reasonable'. The courts in both countries have interpreted this requirement of a rights limitation to be an exercise in proportionality, which involves balancing the interests of society with the interests of the affected individuals or groups. In examining how this balance is struck the courts have looked at the importance of the purpose of the limitation, the rational connection between the limitation and the purpose, minimum impairment of the right to achieve the purpose, and the proportionality between the effects of limitation and the purpose.<sup>86</sup> Although these limitations clauses and the manner in which the respective courts have understood their mandate have not yet been employed in determining the reach of constitutional protection for strikes in these jurisdictions, the approach nevertheless constitutes one juridical methodology for justifying legislative limitations on the right to strike.

The German courts, having derived a right to strike from art 9.3 of the Basic Law, were required to determine the parameters of that right in the absence of legislation giving effect to it or regulating its exercise. The Federal Labour Court initially developed the principle of social adequacy to determine the constitutionality of a strike but, as Manfred Weiss argues, that principle served only as a basis for the development of more specific criteria.<sup>87</sup> And as it became obvious that the principle of social adequacy was not helpful in the resolution of concrete cases, the Federal Labour Court applied the constitutional principle of proportionality<sup>88</sup> in the context of the right to strike. The first criterion is the suitability of the strike as a means to achieve its demands. This means that the employer must be able to meet the demands.<sup>89</sup> The second criterion is that the strike must be necessary – in other words, it must be the last resort, all other measures having failed. The third element is *proportionality stricto sensu*, which means that the strike has to be reasonable, taking into account the rights and interests of those directly or indirectly affected by the strike. From this application of the principle of proportionality to the right to strike, the Federal Labour Court developed the following specific requirements for a constitutionally protected strike: the strike must respect the peace obligation, the strike must be fair, the strike must be the last resort, and the strike must be preceded by a secret ballot.

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<sup>83</sup> See H Cheadle 'Reception of international labour standards in common-law legal systems' 2012 *Acta Juridica* 348.

<sup>84</sup> General Comment 9 adopted at 51<sup>st</sup> meeting on 1 December 1998.

<sup>85</sup> Federal Labour Court of 19 June 2007-1 AZR 396/06 (cited in 394-399 *ILLR* 27). See also Waas (n 20) 237 fn 6.

<sup>86</sup> Canada: *R v Oakes* (1986) 26 DLR (4th) 200 227; South Africa: *S v Makwanyane* 1995 (6) BCLR 665 (CC) par 104.

<sup>87</sup> Weiss (n 47) pars 493 and 494.

<sup>88</sup> The three elements of the principle are: First, the measure must be suitable for the achievement of the aim pursued. Secondly, no other less invasive means could have been employed to achieve the aim. Thirdly, under proportionality *stricto sensu* the social benefits outweigh the injury of the individuals affected by the limitation.

<sup>89</sup> This has two implications: the demands must be lawful, and they must be capable of being included in a collective agreement, the underlying assumption of which is that the only justification for harm to the employer is the employer's ability to either legally or practically agree to the union's demands.

In each of the above cases, the proportionality test involved the need to strike a balance between social interests (represented by a social purpose of sufficient importance) and the rights of workers to exercise the right to strike. On any one of the tests above, a limitation of the right to strike in services that would affect the life or safety of the population would be justified on grounds of proportionality.<sup>90</sup>

The difficulty arises when the limitation of the right to strike is justified on the basis of ‘balancing’ another right. At an abstract level the balancing of rights is in reality the court placing its thumb on one side of the scales – it is about creating a hierarchy of rights. In *Viking* and *Laval* the European Court of Justice held that the ‘fundamental’ right to strike had to be reconciled with the right to establishment guaranteed under art 43 (now art 49) of the Treaty on the Functioning of the European Union. But the reconciliation amounted to no more than the ‘fundamental right’ to strike giving way to the right to establishment without engaging in a minimum impairment analysis.

This ‘balancing’ of one right against another also finds expression in French constitutional discourse. In a case where the French *Cour de Cassation* had to determine whether voluntary assistance to an employer by other employers during the course of a strike constituted an infringement of the constitutional right to strike, it approached the question by formulating the issue as reconciling two constitutional rights: the freedom to work and the freedom to strike. Applying the constitutional principle that exceptions must be strictly construed, the *Cour de Cassation* saw no reason to forbid an employer from keeping the business operating beyond what was already prohibited in the Labour Code, and in that manner reconciled the two constitutional principles.<sup>91</sup>

### **Constitutionally determined content of the right to strike**

There have been a range of responses by the courts in determining the content of the right to strike, with courts either deciding whether the legislation regulating strikes is valid or developing principles, in the absence of legislation giving effect to the right. What follows is a selective comparative overview of how some courts have responded to the different modalities of collective action.<sup>92</sup>

#### *Collective bargaining strikes*

This is the primary justification for the inclusion of a right to strike in Bills of Rights and in some instances the only justification. In Germany, the courts have set their face against any other basis for the right to strike derived from art 9.3. The article guarantees freedom of association ‘to safeguard and improve working and economic conditions’. The German Constitutional Court interpreted this to mean that only strikes over disputes that fix employment conditions are constitutionally guaranteed.<sup>93</sup> Put another way, only strikes over disputes that can be resolved by the conclusion of a collective agreement are guaranteed.<sup>94</sup>

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<sup>90</sup> The formulation is the one devised by the Committee on Freedom of Association and developed by the Committee of Experts on the Application of Conventions and Recommendations. See *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* 5 ed (2006) par 581.

<sup>91</sup> Cour de Cassation (Social Chamber) Mes. Trouboul, Kerminon, CGT v. Société Entremont [11.01.2000] 61 *ILLR* 19.

<sup>92</sup> It is beyond the scope of this chapter to give an exhaustive overview of the different ways in which courts have interpreted their mandate. The examples that follow are illustrative of the different approaches that courts have taken and could take in interpreting a generally stated right to strike.

<sup>93</sup> Federal Labour Court of 14 February 1978-1 AZR 76/76; see also Federal Labour Court of 07 June 1988-1 AZR 372/86.

<sup>94</sup> This logic has the consequence that a certain category of public service officials (beamtete) whose terms and conditions of appointment are determined in accordance with constitutional procedures are held by the Constitutional Court not to be permitted to bargain collectively, to conclude collective agreements and accordingly to strike which is at odds with the manner in which the European Court of Human Rights has interpreted art 11 of the European Convention of Human Rights, which Germany has ratified.

In South Africa, the Labour Appeal Court distinguished between the right to strike as part of the collective bargaining process (the right in s 23 of the Constitution) and the statutory right to take protest action against government policy, sourcing that right in another constitutional right, namely, the right of assembly, protest and petition.<sup>95</sup> The court made specific reference to the fact that the constitutional right to strike in s 23 was followed by a provision conferring the right to engage in collective bargaining, and accordingly that the right in s 23 was a right to strike in a collective bargaining context and not a right to take protest action in pursuit of the socio-economic interests of workers.<sup>96</sup>

### *Solidarity strikes*

In France, the *Cour de Cassation* has held that solidarity strikes fall within the scope of the constitutional protection of strikes if the primary strike is lawful.<sup>97</sup> In Spain, the Constitutional Court struck down wording that unduly restricted recourse to solidarity strikes.<sup>98</sup> In Italy, the Constitutional Court held that the prohibition on solidarity strikes in the Penal Code would not apply if the following requirements were met: the solidarity strike was called in support of a primary strike, the primary strike was by workers in the same sector, the solidarity strikers shared the economic interests of the primary strikers, and the purpose of the strike would not be realised without the support of the secondary strikers.<sup>99</sup> In Germany, the courts originally took the stance that solidarity strikes would be constitutional only in exceptional circumstances,<sup>100</sup> but have more recently developed a less stringent approach to the question.<sup>101</sup>

### *Partial strikes*

In France, the *Cour de Cassation* has held that the right to strike in the French Constitution implies a complete stoppage of work and that partial strikes, such as a work-to-rule, a go-slow or an overtime ban, all fall outside the constitutional protection of the right to strike.<sup>102</sup> In Spain, the Constitutional Court also determined that constitutional protection will be extended only to complete stoppages of work.<sup>103</sup> In Italy, an overtime ban is constitutionally protected but not a work-to-rule.<sup>104</sup>

### *Rotation or selective strikes*

Rotation or selective strikes are strikes called in respect of particular employers in a sector and area. Instead of calling a strike in a whole sector and area, the union strikes individual employers selectively or in rotation. This strategy, which indicates the workers' support for the strike while limiting the economic harm, has been recognised by the *Cour de Cassation* in France as constitutional, but nevertheless remains vulnerable to being declared an abuse of the right if the strikers are in breach of the principle of 'proportionate damage'.<sup>105</sup> In Italy, the rotating strike is constitutionally protected and, provided it is lawful, not subject to proportionality scrutiny.<sup>106</sup>

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<sup>95</sup> *Business South Africa v Congress of SA Trade Unions* (1997) 18 ILJ 474 (LAC).

<sup>96</sup> Also see chapter 8.

<sup>97</sup> Crim. of 12 January 1971, D. 1971 129.

<sup>98</sup> Art 11(b) of the Royal Decree Law of Labour Relations prohibited solidarity strikes 'unless directly affecting the professional interest of those who promote or uphold the strike action'. The Constitutional Court in STC 11/1981 held that the requirement of a *direct* effect was unconstitutional.

<sup>99</sup> Constitutional Court, 28 December 1962, n. 123, in *Foro Italiano*, 1963, I, C.5. (n 14).

<sup>100</sup> Federal Labour Court of 12 January 1988 1 AZR 219/86 (cited at 394 *ILLR* 27).

<sup>101</sup> See Federal Labour Court of 18 February 2003-1 AZR 142/02 and Federal Labour Court Decision of 19 June 2007.

<sup>102</sup> See *Soc. of 22 Feb. 1978*, *Bull. V p. 102*; *Soc. of 2 Feb. 2006*, *Bull. V No 52*; *Soc. of 22 Jul. 1986*.

<sup>103</sup> See *Waas* (n 20) 518.

<sup>104</sup> *Ales et al* (n 9) 80.

<sup>105</sup> *Ales et al* (n 9) 36.

<sup>106</sup> A Stewart and M Bell (eds) *The Right to Strike: A Comparative Perspective* (2008) 71

### *Intermittent and warning strikes*

In Spain, intermittent or rotation strikes are considered to be outside of the constitutional guarantee of protection, whereas in France intermittent strikes are protected if they do not cause disproportionate damage. In Italy, intermittent strikes are permitted provided that, subject to the normal limitations relating to essential services, they do not cause irreparable harm to the employer.<sup>107</sup>

### *Strikes in breach of a collective agreement*

In France, the *Cour de Cassation* interpreted the text in the French Constitution, which provides that the right had to be exercised ‘in accordance with law that regulates the right’, to mean that only legislation can limit the right to strike and, accordingly, that a peace obligation in a collective agreement cannot do so. On the other hand, in Germany, the Federal Labour Court applying the constitutional principle of proportionality concluded that a strike in breach of a peace clause in a collective agreement is not constitutionally protected.<sup>108</sup>

### *Strikes in essential services*<sup>109</sup>

In Spain, the constitutional text specifically qualifies the right to strike by requiring that the law provide such safeguards. The Constitutional Court has interpreted the concept to include public services that need to be provided in order to guarantee that citizens can exercise their constitutional rights. The criterion is not the activity as such but the object of the services themselves, such as health and social welfare, the administration of justice, public finances, rail transportation, electricity, radio and television, public education, air and maritime passenger transport, private security, energy, social services and telecommunications.<sup>110</sup> This list extends more widely than the definition fashioned by the ILO supervisory bodies.<sup>111</sup>

### *Sit-ins*

In France, a sit-in is considered an abuse of right because it is a ‘manifestly illicit disturbance in particular when [it] seriously [impedes] the freedom of work’.<sup>112</sup> In Italy, the occupation of buildings in pursuit of a trade dispute did not amount to a strike and accordingly was not protected under the Constitution.<sup>113</sup>

### *Political strikes*<sup>114</sup>

In Italy, the Constitutional Court has held that a strike directed not against the employer but against the state is a legitimate means of promoting workers’ social dignity and equality. The court explicitly referred to art 3 of the Constitution, which guarantees social equality and imposes a duty on the Republic to remove impediments to worker participation in the political, economic and social organisation of the country. As Treu states, this was—

recognition by the supreme constitutional authority that social equality and the full participation of the workers in the social and political life of the country ... are not fully pursued by the duly constituted political machinery and, therefore, that the workers and their organisations can legitimately exert direct pressure on them towards those

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<sup>107</sup> Stewart and Bell (n 75) 71.

<sup>108</sup> Weiss (n 47) 495.

<sup>109</sup> Also see chapter 6.

<sup>110</sup> STC 26/1981 and STC 51/1986.

<sup>111</sup> See n 62 above.

<sup>112</sup> *Lopez et al c/ Ste La Generale Sucriere*, Bull. Civ. V, no 263, quoted in L Carta, M Deschamps, A Jannin and A-L le Ludec ‘France’ in Stewart and Bell (n 75) 34 fn 32.

<sup>113</sup> Court of Cassation Criminal Division II Decision no. 35178 of 03 July 2007, cited at 343 *ILLR* 28.

<sup>114</sup> Also see chapter 8.

ends.<sup>115</sup>

In France, the courts have limited the ambit of strikes to work-related demands, but have given an extensive interpretation to what constitutes those demands, permitting strikes over government measures relating to nationalisation, privatisation, social protection and retirement.<sup>116</sup> In Spain, although strikes for ‘political reasons or any other purpose beyond the workers’ professional interests’ are statutorily prohibited, the Constitutional Court has held that strikes opposing legislation affecting worker interests constituted strikes in support of worker interests and are accordingly outside of the ambit of the statutory prohibition. In Germany, the strict limitation of the constitutionally derived right to strike to conclude a collective agreement means that political strikes are not constitutionally protected.

### *Disputes of right*

In South Africa, legislation prohibits strikes in respect of most rights disputes, but this legislation has not been challenged as unconstitutional. In Germany, a rights dispute, even if the right is established in a collective agreement, is not the subject of a constitutionally protected strike. On the other hand, in the Swedish Constitution, the right to take industrial action may be limited only if legislation or a collective agreement specifically limits the right.<sup>117</sup> Accordingly, the Labour Court has refused to declare a strike over a rights dispute that is not specifically limited by legislation or agreement as unconstitutional.<sup>118</sup>

### **Conclusion**

It is evident from the above that, despite the very similar language used in formulating the constitutional right to strike in most constitutions and the constitutional requirement that the right be regulated by law, many legislatures have failed to do so, leaving the courts with the unenviable task of giving content to the right. Much of the constitutional jurisprudence then has been about the development of the content of the right rather than about determining the validity of the legislative development of the right.

In many instances, the courts drew their inspiration from the constitutional text itself. In Germany, it is the very language in art 9.3 guaranteeing the right of workers to organise for the purpose of improving working and economic conditions that led the courts to interpret the constitutional guarantee as being limited to the conclusion of collective agreements only. From that it followed logically that political strikes directed at government, even if government policy or legislation directly affected workers’ working and economic conditions, were held not to be constitutionally guaranteed and therefore not lawful. The same may be said of the manner in which the French courts concluded that a peace clause in a collective agreement cannot limit the constitutional right to strike because the text required the right to be exercised within a framework of laws.

In other instances, the courts determined the boundaries of a constitutionally protected strike with reference to other constitutional rights by balancing the rights. In France, for example, the right to strike was balanced with the right to work in order to determine that an employer’s action in keeping its business operating during a strike did not violate the right to strike.<sup>119</sup>

Without guidance from the legislature, and often with a reluctance to resort to international labour and human rights law, the constitutional and labour courts have given content to a generally stated right to strike without a full understanding of the role and function of strikes in collective bargaining and the labour market.

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<sup>115</sup> T Treu *Labour Law in Italy* 4 ed (2014) 234.

<sup>116</sup> Cass. Soc. 15 February 2006, Bull. civ. V no 65, cited in Laulom (n 10) 36.

<sup>117</sup> Art 17.

<sup>118</sup> Labour Court AD 2006 No. 58 441 *ILLR* 26.

<sup>119</sup> See n 57.