Recognition of the right to strike (terms and conditions apply)

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Overview

This paper argues that the right to strike is less clear-cut than is often assumed. It starts from two widely-accepted propositions. First, for workers the possibility of withholding their labour is an indispensable part of collective bargaining; without that, given the adversarial nature of the process, it would amount to "collective begging".[1] A recent judgment of the Canadian Supreme Court upholding this position is looked at by way of introduction.

Secondly, the basis for industrial trade unionism has been eroded in recent decades through the processes collective referred to as 'globalisation'. This development, intensified by the international recession of 2008-2009, has created a climate more favourable for employers to seek to advance their position by making inroads on labour rights.[2]

The challenge to the status of the right to strike launched by the employers' group at the International Labour Organisation (ILO) in 2012 is understood in this context. The crux of the employers' argument was that the relevant ILO conventions make no provision for a right to strike and that ILO supervisory bodies do not have the power to interpret conventions in such a way as to impose binding obligations on member states in regulating such a right. That challenge appears to have ended in a compromise; indeed, trade unions hailed it as a victory. The paper will consider whether this assessment is correct or whether, in essence, the employers' group has largely gained its objective by asserting the autonomy of member states in this regard. Certainly, the idea of a right to strike embedded in international law as clearly as self-evidently as has been assumed thus far has been placed in doubt.

Against this background, the focus turns to the national level and, specifically, the possibility of a more insidious limitation on the right to take collective action emerging in national law: waiver by individual employees. Recent jurisprudence in the United States of America dealing with one aspect of this question is looked at. From here the discussion shifts to South Africa, a country where the right to strike is constitutionally entrenched and protection of worker rights, in contrast to global trends, has been strengthened in recent years. However, interest arbitration by agreement, collective or individual, is permitted as an alternative to

* I am indebted to Musavengana Machaya, LL.D. candidate at the University of the Western Cape, for his assistance in tracing sources as well as his constructive comments on issues dealt with in this paper.
[1] ATJM Jacobs 'The law of strikes and lockouts' in R Blanpain (ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* 10 ed (Kluwer, Deventer, 2010) 659 at 660.
[2] See Bob Hepple e*t al Laws Against Strikes: The South African Experience in an International and Comparative Perspective* (FrancoAngelli, 2015) 17-19.

exercising the right to strike. This raises the question whether scope exists for employers to neutralise their employees' ability to take strike action by including an arbitration clause in contracts of employment. The paper concludes by considering the extent to which such clauses may be consistent with the constitutional right to strike.

The contested status of the right to strike

A recent high-water mark in the protection of the right to strike internationally was the judgment of the Canadian Supreme Court in *Saskatchewan Federation of Labour v. Saskatchewan.*[3]

At issue in this matter was a statute imposing a wide-ranging prohibition on strikes by public sector employees without providing review mechanisms or alternative means of resolving disputes. The Canadian Constitution (like ILO Convention 87,[4] discussed below, and unlike the South African Constitution) protects freedom of association but does not expressly protect the right to bargain collectively or to strike. In *Saskatchewan* the Supreme Court reversed its earlier judgments to the effect that the right to freedom of association does not imply a right to strike.[5] It had already come close to doing so in a judgment handed down a fortnight earlier, in which it held that the purpose of the right to freedom of association is "to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power".[6] In *Saskatchewan,* in a classic exposition drawing extensively on international and foreign law, the majority drew the further conclusion that

> "a meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services for the purpose of pursuing the terms and conditions of their employment through a collective agreement. Where good faith negotiations break down, the ability to engage in the collective withdrawal of services is a necessary component of the process through which workers can continue to participate meaningfully in the pursuit of their collective workplace goals."[7]

This judgment is important because recognising the right to strike as a basic right insulates it against legislative infringement. Were it simply a statutory right, it could be limited by the legislature with relative freedom, or even abolished. Instead, as was demonstrated in this case, its constitutional status required the court to invalidate legislation interpreted as limiting it to an impermissible extent.

But this does not end the debate about the status of the right to strike, even in Canada itself. Two of the seven judges in *Saskatchewan* dissented, inter alia on the ground that there is no

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[3] 2015 SCC 4.
[4] I.e., Convention concerning freedom of association and protection of the right to organize, 1948.
[5] *Alberta Reference* (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313.
[6] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, cited in *Saskatchewan* at para 55.
[7] Para 75.

basis for inferring a constitutional right to strike since Canadian employers are already under a statutory duty to bargain in good faith. "To say that this constitutional right [to associate and to bargain collectively] is meaningless without a concomitant constitutionalized dispute resolution process", it was reasoned, "would be to say that individuals can never vindicate their rights through the courts or other public institutions."[8] Other critics believe that a right to strike must be matched by a right not to strike – which would, of course, neutralise any constitutional guarantee.[9]

Both these arguments are revisited below. Significantly, however, among the authorities relied on by the majority in *Saskatchewan* was the ILO's Committee on Freedom of Association (CFA) and Committee of Experts on the Application of Conventions and Recommendations (CEACR). Although Convention 87 does not expressly mention a right to strike, it was noted, both committees "have recognized the right to strike as an indissociable corollary of the right of trade union association that is protected in that convention".[10] The judgment continues:

> "Though not strictly binding, the decisions of the Committee on Freedom of Association have considerable persuasive weight and have been favourably cited and widely adopted by courts, tribunals and other adjudicative boards around the world, including our Court".[11]

And, coincidentally, at the very moment that the court delivered its judgment, a protracted debate about the status of these very findings of the CFA and CEACR was approaching a turning point.

As noted already, the employers' group at the ILO was (and is) of the view that the silence of Convention 87 as to a right to strike precludes the CFA and CEACR from authoritatively inferring the existence of such a right, let alone defining it and expecting member states to apply it accordingly. Only the International Labour Conference, the employers argued, has the power to impose obligations on members.[12] The workers' group and many governments disagreed. Although simmering since at least 1994, the debate emerged as a serious controversy in 2012 when the employers' group refused to discuss alleged violations of Convention 87 unless it was accepted that the Convention did not contain a right to strike.[13]

It may be asked, in passing, why the employers' group was so concerned about Convention 87. Whatever the status of the CFA's and CEACR's interpretations, certain other international instruments which are unquestionably of a binding nature – such as the

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[8] Para 131.
[9] See, e.g., Terence Corcoran 'The right not to strike' *Financial Post* 19 February 2015.
[10] Para 67.
[11] Para 69.
[12] For the full argument, see International Organisation of Employers *Do ILO Conventions 87 and 98 recognise a right to strike?* (October 2014).
[13] For in-depth analysis of the debate and the issues it raises, see Janice R Bellace 'The ILO and the right to strike' (2014) 153 (1) *International Labour Review* 29 esp. 56-59.

International Covenant on Economic, Social and Cultural Rights – do recognise a right to strike.[14] Part of the answer may be political in a broad sense. As Bellace observes:

> "It may be that the collapse of Communism in eastern and central Europe reduced the desire of some members of the ILC to defend freedom of association and the right to strike. It may also be that increasing globalization intensified competitive pressures on employers seeking to remain in business and continue to be profitable at a time when manufacturing was shifting from the advanced market economies to low wage Asian countries. Almost immediately following the fall of the Berlin Wall in 1989, the Employers in the Committee on the Application of Standards pressed the point that the Committee of Experts was exceeding its mandate, alleging that the Experts were impermissibly interpreting Convention No. 87, although the discussion focused on the relative roles of the two bodies."[15]

Another part of the answer may well be that identified by the Canadian Supreme Court in *Saskatchewan*: the decisions of the ILO's supervisory bodies "have considerable persuasive weight and have been favourably cited and widely adopted by courts, tribunals and other adjudicative boards around the world" (above). International law, as embodied in ILO conventions, has a status akin to national constitutions in setting standards which national legislation must conform to. In this context the CFA's interpretations of conventions have been described as "an authoritative development of the principles of freedom of association contained in the ILO conventions".[16] The same could be said of the CEACR. Employers' organisations may well favour measures limiting the right to strike but if such measures are found to be in conflict with Convention 87 – as interpreted by the ILO's supervisory committees – it will place the relevant governments and employers' organisations at a legal disadvantage in the inevitable stand-off with organised labour. One pre-emptive device is to divest the supervisory committees' interpretations of any "authoritative" status.

Then, in February 2015 – after almost three years of deadlock – a compromise was reached in the form of a joint statement by the employers' and workers' groups plus two statements by the government group at the ILO.[17] Three items of the joint statement, it is submitted, are especially significant. The first two offer a basis for interpreting it as a victory for the workers' group. The joint statement starts with the following even-handed statement:

> "The right to take industrial action by workers and employers in support of their legitimate industrial interests is recognised by the constituents of the International Labour Organisation."[18]

Secondly, it defines the mandate of the CEACR in the terms adopted by that committee itself in its 2015 report:

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[14] See art 8(1)(d).
[15] Bellace 54.
[16] *NUMSA & others v Bader Bop (Pty) Ltd & another* [2003] 2 BLLR 103 (CC) para 30.
[17] ILO *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 leve*l (Geneva 23–25 February 2015) (hereafter 'joint statement').
[18] Joint Statement 2.

> "The Committee of Experts undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by member States, while cognizant of different national realities and legal systems. In doing so, it must determine the legal scope, content and meaning of the provisions of the Conventions."[19]

However, the sting is in the tail. The very next sentence of the CEACR's report, quoted in the joint statement, reads as follows:

> "Its [i.e., the CEACR's] opinions and recommendations are non-binding, being intended to guide the actions of national authorities."[20]

The significance of the compromise is reflected in a statement by the governments' group at the ILO dated 23 February 2015 (the day when the joint statement was issued). While accepting "that the right to strike is *linked to* freedom of association which is a fundamental principle and right at work of the ILO", the governments' group went on to recognise that it "is not an absolute right. *The scope and conditions of this right are regulated at the national level*".[21]

This amounts to granting that the CEACR (and, by implication, the CFA) may interpret Convention 87, but stipulating that its interpretation has no binding force. It may be argued that this encapsulates the CEACR's own assessment of its mandate, as reflected in the joint statement. However, it is a question of emphasis. What is now being stressed is the freedom of national governments in regulating the right to strike as they see fit rather than the importance of the supervisory bodies' interpretations. In this scenario, the role of the latter is limited to expressing opinions or 'soft law', but no more than that. If this had been implicit, which is debatable, it has been made explicit.

The practical implications could be considerable. From a trade union perspective the debate was never simply about arriving at a legally correct interpretation of Convention 87. The International Trade Union Confederation characterised the employers' campaign as an attempt "to undermine the right to strike at national and international level". It explains:

> "These attacks come at a time when employers and governments implement austerity measures, the growth of precarious jobs is rampant and social protests are criminalized, with the intent to silence workers and their demands for decent jobs and social protection. Without the right to strike, collective bargaining is nothing more than begging."[22]

It is arguable that the employers' campaign has largely succeeded in its aim. The notion of a right to strike embodied in Convention 87 as interpreted by the CFA and CEACR, which member states are expected to conform to, has been dealt a serious if not fatal blow. Recognition of the "right to take industrial action" in the terms quoted above is the joint

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[19] Ibid.
[20] Ibid.
[21] Appendix II; emphasis added.
[22] International Transport Workers' Federation 'Employer groups around the world try to undermine the right to strike. Join the global action on February 18 to stop them.' (statement dated 13 February 2015).

statement's only reference to the right to strike. What this amounts to is an abstract right to be regulated by national governments, notwithstanding the opinions of the supervisory bodies and incorporating any limitations that national employers' organisations are able to secure. Having established this, the focus of the debate has moved to the role of the supervisory bodies and the Governing Body in "guiding" the application of Convention 87. In terms of the Joint Statement, the following topics are now on the agenda:

- The mandate of the CEACR as defined in its 2015 report;
- An approach to the way in which the CAS[23] list [of cases to be considered] is elaborated and the role for the workers and the employers representatives of the Committee in drafting of conclusions is to be respected;
- Improvement in the way the supervisory procedures operate, and
- Agreement on the principles to guide the regular Standards Review Mechanism (SRM) and its subsequent establishment.

What is at issue, therefore, is not so much the meaning of the right to strike in any binding sense but, rather, the non-binding competencies of supervisory bodies to "guide" national authorities in regulating such an abstract right. In a global context where organised labour is on the defensive, this process is unlikely to create serious obstacles to efforts by employers' organisations to restrict the right to strike at a national level. The effect, almost certainly, is to diminish the influence which the CFA and CEACR were able to exert in the past. From at least 1959 until 1994 their assertion of a right to strike embodied in Convention 87 and their role in interpreting that right had been widely accepted. This is no longer the case. The statement by the government group underlines a concept of national autonomy overriding any "right" contained in Convention 87.

The reliance placed by the Canadian Supreme Court or the South African Constitutional Court on the interpretation of the right to strike by the ILO supervisory bodies, in other words, may in future not be justifiable to the same extent. To establish the meaning of the right to strike, and the limitations that may be placed on it, it is necessary to turn to national legislation.[24]

The right to strike versus "the right not to strike"

The ILO government group's assertion that this right is "not absolute" is not at all controversial; no right is. Certain limitations on the right to strike have been widely accepted, also in the jurisprudence of the CFA and CEACR. Chief among these are:

- Procedural requirements that must be complied with before the right to strike may be exercised;[25]
- The prohibition of strike action affecting essential services;[26] and

[23] Committee on the Application of Standards.
[24] Here the picture is extremely varied. For a recent study covering 31 countries, see Bernd Waas (ed) *The Right to Strike* (Kluwer Law International, 2014).
[25] For an overview, see Waas n 24 23-32,

- ‘Peace clauses’ or ‘peace obligations’ expressly or implicitly limiting or excluding strike action, particularly during the currency of collective agreements.[27]

The last of these limitations stands out in that, unlike the first two, it is not necessarily imposed by law but may also be assumed voluntarily by trade unions in the course of collective bargaining. The rationale, clearly, is that trade unions are “bearers of power”[28] which, all things being equal, may be expected to conduct themselves rationally and not lay down the strike weapon without ensuring that the rights of their constituents are otherwise protected.[29]

But what is the position in systems where the right to strike is vested in individual employees (such as South Africa) rather than trade unions?[30] Does this offer scope for individual employees to waive that right? It is a question that has received relatively little attention from labour law scholars in the past. This may be partly because the notion of individual waiver appears incompatible with the logic of labour law to the point of being perverse. If the purpose of collective bargaining is to compensate for the individual worker’s lack of bargaining power, that purpose will surely be defeated if the employer can use its superior power to prevail on individual workers to sign away the right to act collectively.

Nevertheless, can it not be argued that the worker, as custodian of the right to strike, should have the power of deciding how, or whether, to exercise it? This proposition is reinforced by the fact that freedom of contract is embedded no less deeply in constitutions and in legal systems than the right to engage in collective bargaining or to strike, if not more so. Can freedom of contract be limited by prohibiting non-strike agreements by individual employees? Or should freedom of contract prevail over the right to strike, whether at a constitutional or statutory level?[31]

The question will obviously be approached differently in different legal systems. This paper will focus on South Africa, a country where the right to strike is constitutionally entrenched and enjoys a high degree of legal protection. To help set the scene, however, it is instructive to look at the position in the United States of America where a related issue recently came before the Court of Appeals in the case of *D.R. Horton, Inc. v. National Labor Relations Board.*[32]

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[26] Waas n 24 45-48.
[27] Waas n 24 32-35. Hepple notes that a no-strike clause negotiated by a trade union is usually binding only on the union and not on the individual workers in whom the right to strike may be vested: n 2 p 32.
[28] Paul Davies & Mark Freedland *Kahn-Freund’s Labour and the Law* 3 ed (Stephens 1983) 18.
[29] This proposition is clearly more questionable in the current global configuration where trade unions may often negotiate from a position of structural weakness. Even then, however, unions do retain bargaining power to a greater or lesser extent, certainly more so than individual employees.
[30] See Waas n 24 7-9.
[31] The question is not new. See, e.g., “The right not to strike” *New York Time* (14 August 1912), quoting a statement from the Anti-Socialist League of London in which it is argued that “Socialists have obtained control of the funds” of trade unions, which as a result “are being utilized for the selfish ends of revolutionary visionaries”. It concludes: “We uphold the right to strike, but equally the right not to strike.” See also argument by Advocate Frans Rautenbach “Should SA employees be permitted to contract out of the right to strike?” (South African Society for Labour Law seminar presentation, Cape Town, 18 February 2015, unpublished).
[32] 737 F.3d 344, 2013 WL 6231617, Case No 12-60031 (5th Cir. Dec. 3, 2013) (hereafter ‘*Horton’*).

The *Horton* judgment and its sequel

Labour rights are not constitutionally entrenched in the USA but are regulated principally by the National Labor Relations Act (NLRA). Section 7 of the NLRA reads:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)".

Section 8(a)(1) adds that "[i]t shall be an unfair labor practice for an employer … to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7". Despite this, it is accepted that trade unions may enter into no-strike agreements and waive their members' right to strike as well as most other labour rights.[33] At issue in *Horton*, however, was a somewhat different question: whether an employer can require individual workers to sign an arbitration agreement prohibiting them from pursuing employment-related claims collectively or as "class action", thereby limiting themselves to bringing individual claims against the employer (described as "America's largest new home builder"[34]) in any such dispute.

The National Labor Relations Board (NLRB) found that this stipulation amounted to a violation of the NLRA. It ruled that an "individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, … is engaged in conduct protected by Section 7 . . . central to the [NLRA's] purposes."[35] It also noted that section 2 of the Federal Arbitration Act (FAA) allows for the non-enforcement of arbitration agreements on any "grounds as exist at law or in equity for the revocation of any contract".[36] From this it inferred that "when private contracts interfere with the functions of the NLRA, the NLRA prevails".[37] Accordingly, it concluded that "Horton had committed an unfair labor practice under Section 8 by requiring employees to agree not to act in concert in administrative and judicial proceedings".[38]

In what was described as a victory for employers, the Fifth Circuit of the Court of Appeals rejected this decision. Although accepting that section 7 of the NLRA "effectuated Congress's intent to equalize bargaining power between employees and employers 'by

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[33] Stewart Schwab "The Union As Broker of Employment Rights" (Cornell Law Faculty Working Papers, 8-5-2009) 26-27; published in Cynthia L. Estlund and Michael L. Wachter (eds) *Research Handbook on the Economics of Labor and Employment Law* (Edward Elgar, 2012) 248 at 256-257.
[34] http://www.drhorton.com/.
[35] Cited at p 13 of *Horton* judgment (n 32).
[36] p 17 of judgment. Section 2 of the FAA is quoted at p 19. Interestingly, both the NLRB and the Fifth Circuit accepted that an employment contract may be regarded as "a transaction involving commerce" for purposes of s 2.
[37] *Ibid.*
[38] pp 12, 13 of judgment.

allowing employees to band together in confronting an employer regarding the terms and conditions of their employment'", and also that the NLRB must be accorded "judicial deference when it interprets an ambiguous provision of a statute that it administers", [39] the court found that "[t]he use of class action procedures … is not a substantive right" but "a procedural right only, ancillary to the litigation of substantive claims."[40]

The court further rejected the view that "the policy behind the NLRA trumped the different policy considerations in the FAA that supported enforcement of arbitration agreements".[41] It noted the FAA's saving provision (above) but did not agree that, given the purpose of the FAA,[42] the NLRA "supports a congressional command to override the FAA".[43] Horton's employment contracts ruling out collective legal action were therefore held to be enforceable.

At least two other Circuits of the Court of Appeals (the Second and the Eighth) had by then arrived at similar, though not identical, findings.[44] Despite this, in *Murphy Oil USA, Inc. and Sheila M. Hobson*[45] the majority of the NLRB reaffirmed the position it had adopted in *Horton* and rejected the contrary findings of the Fifth Circuit.[46] Specifically, it held that the rights created by section 7 of the NLRB are substantive, not merely procedural, and cannot be waived. It also found that, in the event of conflict, the FAA must yield to the NLRA[47] and that, by focussing narrowly on the FAA, the Fifth Circuit had not accommodated the NLRA.[48]

But it does not end here. At the time of writing, Murphy Oil had taken this decision on review to the Fifth Circuit and asked for an order requiring the NLRB "to cease its continued non-acquiescence with [the court's] decision in *D.R. Horton*".[49] Garland and Barbarino comment:

> "With the federal courts not following the NLRB and the NLRB refusing to heed to the position of federal courts, employers are in a quandary in deciding whether to require mandatory arbitration waivers as a condition of employment. … Until the Supreme Court lays this issue to rest, employers that require class action waivers in

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[39] pp 14, 15 of judgment.
[40] p 16.
[41] pp 17-18.
[42] I.e., "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings". Class arbitration, it was found, "sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment": *ibid*, with reference to *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Hence "[r]equiring a class mechanism is an actual impediment to arbitration and violates the FAA": pp 20-21.
[43] p 22.
[44] *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297-98 n.8 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013).
[45] Case 10–CA–038804 (October 28, 2014).
[46] Since the NLRB exercises national jurisdiction, it does not consider itself bound by contrary judgments handed down by one or more of the circuit courts of appeal, of which there are 12.
[47] With reference to the Norris-La Guardia Act, 29 U.S.C. ch. 6, § 104.
[48] For discussion, see David W. Garland and Jill Barbarino "NLRB's Murphy Oil Decision Reaffirms D.R. Horton Despite Rejection by Some Federal Courts" *Bender's Labor & Employment Bulletin* (January 2015) 16; Angie Cowan Hamada "The NLRA: A Real Class Act: Employees' Substantive NLRA Right to Pursue Concerted Legal Action" Presented to Midwinter Meeting of the American Bar Association Section of Labor and Employment Law, Kohala Coast, Hawaii, March 4, 2015.
[49] Hamada (n 48) 19 n 31.

> mandatory arbitration agreements must recognize that challenges to the agreements through unfair labor practice charges remain a fact of life."[50]

Whichever way the issue is resolved, the possibility of individual waiver of the right to engage in collective arbitration proceedings does not in itself imply a possibility of individual waiver of the right to strike. The prevailing opinion appears to be that this remains precluded by the Norris-LaGuardia Act, which states that "[a]ny undertaking or promise… in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States".[51] However, the emerging body of precedent outlined above does indicate that the boundaries of individual freedom of contract are not cast in stone and may be subject to reinterpretation.[52]

The right (not) to strike in South Africa

The right of "every worker" to engage in collective bargaining and to strike is expressly guaranteed by section 23 of the South African Constitution and is regulated by Chapter VI of the Labour Relations Act (LRA).[53] Section 64 of the LRA sets out relatively straightforward procedural requirements for engaging in protected strike action, through which a series of immunities against dismissal and civil claims, as laid down in section 67, come into play.

But, although the right to strike is an individual right, the capacity of individual workers to dispose over it is significantly limited. First, it can only be exercised collectively.[54] Secondly, it can be waived by collective agreement irrespective of the wishes of the workers concerned, even if they are members of a minority trade union that was not party to the collective agreement.[55] Thirdly and most comprehensively, individual agreement to waive the right to strike is in principle prohibited. Section 5(4) of the LRA provides:

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[50] n 48 p 21.

[51] 29 U.S.C. § 103. Section 102 recognises individual workers' right to freedom of association, including the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection".

[52] See also Heidi Marie Werntz "Waiver of Beck Rights and Resignation Rights: Infusing the Union-Member Relationship With Individualized Commitment" 43 *Cath. U. L. Rev.* 159 (1994) where the author concludes (at 225-226): "Yet the Board's opinion in *Lockheed* tentatively begins to loosen the Board's grip on the union-member relationship by yielding to the power of freedom of contract, individually exercised, to affect the union-member relationship. By permitting 'clear and unmistakable' waiver of the right to revoke dues checkoff authorization, the Board has opened the door for speculation on the extent of waivability of other statutory rights." The reference is to *International Bhd. of Elec. Workers, Local No. 2088 (Lockheed Space Operations Co.)*, 302 N.L.R.B. 322 (1991).

[53] Act 66 of 1995.

[54] *Schoeman & another v Samsung Electronics SA (Pty) Ltd* [1997] 10 BLLR 1364 (LC) at 1367.

[55] Section 65(1)(a) of the LRA provides that "[n]o person may take part in a strike [if] that person is bound by a collective agreement that prohibits a strike … in respect of the issue in dispute". On the position of a minority trade union in this context, see *Chamber of Mines of South Africa and another v Association of Mineworkers and Construction Union and others* [2014] 3 BLLR 258 (LC).

> "A provision in any contract, whether entered into before or after the commencement of this Act, that directly or indirectly contradicts or limits any provision of section 4,[56] or this section[57] is invalid, *unless the contractual provision is permitted by this Act*" (emphasis added).

The italicised words are the catch. Section 65(1)(b) of the Act opens the door to contractual provisions that may "contradict" or "limit" employees' right to strike by stating that no person may take part in a strike if "that person is bound by an agreement that requires the issue in dispute to be referred to arbitration". In other words, it "permits" arbitration agreements, either collective or individual, to exclude the right to strike in respect of any "issue in dispute" referred to in the agreement.[58] On the face of it, this enables an employer to insert a term in its standard contract of employment stipulating that specified categories of disputes must be referred to arbitration and that employees are not permitted to engage in strike action in respect of such disputes. The effect would be to render strike action in respect of such disputes unprotected and expose employees who seek to exercise their right to strike in such cases to dismissal for misconduct.

How big is this loophole? Does it allow an employer to stipulate that every type of dispute that is likely to arise in practice – for example, over wages or changes in working practices – must be referred to arbitration and thus, for all practical purposes, to exclude the possibility of protected strike action by its employees? Case law offers no assistance in this regard; reported cases dealing with section 65(1)(b) are concerned with collective rather than individual arbitration agreements.[59] It is submitted that a number of considerations should be weighed up in addressing the question.[60]

(a) The limitation of basic rights

Section 36(1) of the Constitution states that rights included in the Bill of Rights (such as the right to strike) "may be limited only in terms of law 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". In making this assessment, a number of factors must be taken into account, including –

a. the nature of the right;

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[56] Section 4 regulates employees' right to freedom of association, including the right to join a trade union and participate in its lawful activities.

[57] Section 5(2)(b) prohibits any requirement preventing an employee from "exercising any right conferred by this Act".

[58] "Issue in dispute" refers to categories of dispute rather than specific disputes. The Labour Appeal Court has interpreted the term "issue in dispute" in s 65(1)(a), which prohibits strike action by any person who is "bound by a collective agreement that prohibits a strike … in respect of the issue in dispute", as meaning that "there may be certain *types of disputes* which parties may agree in a collective agreement should not be the subject of strikes and lock-outs": *County Fair Foods (Pty) Ltd v FAWU & Others* [2001] 5 BLLR 494 (LAC) para 13, emphasis added; and see argument by Rautenbach (n 31 above) 2-4.

[59] For example, relating to disputes about production levels: see *Ceramic Industries Ltd t/a Betta Sanitaryware v NCBAWU & others* [1997] 5 BLLR 547 (LC).

[60] Since each of these topics has given rise to much analysis and case law, the discussion that follows is highly condensed.

b. the importance of the purpose of the limitation;

c. the nature and extent of the limitation;

d. the relation between the limitation and its purpose; and

e. less restrictive means to achieve the purpose.

This provision has been the subject of a vast body of judicial interpretation.[61] Without applying the test in detail it will be accepted that, in principle and on balance, section 65(1)(b) is capable of meeting the standard set by these five criteria. However, this does not answer the concrete question posed by section 36(1); that is, the "extent" to which section 65(1)(b) permits the limitation of the right to strike.[62] Crucially, the Constitutional Court accepts that a limitation of a basic right "must not negate the essential content of the right".[63] This suggests that the *limitation* of the right to strike contemplated by section 65(1)(b) cannot be interpreted so extensively as to permit the effective *negation* of the right to strike by excluding it in respect of all, or practically all, "issues in dispute". In terms of section 36(1) the purpose of the statutory limitation (i.e., creating an alternative to the right to strike) must be seen in conjunction with the purpose of the right to strike (i.e., addressing the power imbalance between individual employees and their employers). It cannot be understood as aggravating that imbalance by effectively abolishing the right to strike.

(b) The purposes of the LRA

The reach of section 65(1)(b) is further clarified by the purposes of the LRA. Collective bargaining, of which the right to strike forms an intrinsic part, is central. One of the primary objects of the Act is "to provide a framework within which employees and their trade unions, employers and employers' organisations can … collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest".[64] In addition, the Act sets out to promote both "orderly collective bargaining" and "collective bargaining at sectoral level".[65] This alone indicates that the right to strike cannot be limited unduly without

[61] The Constitutional Court has summarised its effect as follows: "In essence [section 36(1)] requires a weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment": *Ex Parte Minister of Safety and Security and Others: In Re: S v Walters and Another* 2002 (7) BCLR 663 (CC) para 27.
[62] The Constitutional Court has explained that courts "must interpret legislation so as to give effect to [the] fundamental values and to the specific provisions of the Bill of Rights which encompass them": *Daniels v Campbell NO and Others* 2004 (7) BCLR 735 (CC) para 45. The reference here is to the "foundational values" of "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms" set out in s 1 of the Constitution.
[63] As stated in s 33(1)(b), Constitution of the Republic of South Africa Act 200 of 1993 (the "interim Constitution") and applied in *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) para 103. Although the limitation clause is differently worded in the final Constitution, it is accepted that s 36(1) "does not in any material respect alter the approach expounded in *Makwanyane*": *De Lange v Smuts NO and Others* 1998 (7) BCLR 779 (CC) para 87.
[64] Section 1(c)(i).
[65] Section 1(d)(i), (ii).

undermining a central purpose of the LRA. Indeed, case law has repeatedly emphasised that the right to strike must not be interpreted restrictively.[66]

A further object of the LRA is to promote "the effective resolution of labour disputes".[67] It may readily be accepted that there are certain types of dispute that lend themselves to arbitration or adjudication – that is, to be decided on the basis of objective norms. But, equally, there are other types of dispute – in particular, those arising from conflicting demands or "interests" as distinct from enforceable rights – which are difficult for a third party to resolve in the absence of a high degree of mutual trust and acquiescence in the outcome by both parties. More is said below of "interest arbitration". For the moment, suffice it to say that waiver of the right to strike over issues where employers and employees do not share the necessary degree of trust and acquiescence will not be conducive to the effective settlement of such disputes.

(c) Freedom of contract

A rationale for the right of individual employees to waive the right to strike is most obviously to be sought in the principle of freedom of contract.[68] However, this freedom (like the right to strike) is not unlimited. In *Barkhuizen v Napier*[69] the Constitutional Court had occasion to analyse the scope of freedom of contract and its relationship to countervailing individual rights.

At issue in this matter was a standard clause in an insurance contract which placed a 90-day limit on the institution of court proceedings after rejection of a claim. Mr Barkhuizen had issued summons well beyond the 90-day limit and, upon being met with the plea that his action was barred, argued that the limiting clause was unconstitutional because it violated his right of access to courts and was contrary to public policy. The High Court upheld his case, but both the Supreme Court of Appeal[70] and the Constitutional Court found otherwise. The Constitutional Court accepted that "intruding on apparently voluntarily concluded arrangements is a step that judges should countenance with care", but also that "the constitutional values of equality and dignity may prove to be decisive when … the parties' relative bargaining positions is an issue."[71] Courts, it was found, should "employ [the Constitution and] its values to achieve a balance that strikes down the unacceptable excesses of 'freedom of contract', while seeking to permit individuals the dignity and autonomy of

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[66] See, e.g., *NUMSA & others v Bader Bop (Pty) Ltd & another* [2003] 2 BLLR 103 (CC); *South African Transport and Allied Workers Union and others v Moloto NO and another* [2012] 12 BLLR 1193 (CC); *National Union of Mineworkers and another v Eskom Holdings (Pty) Ltd and others* [2011] 1 BLLR 102 (LAC); *Ceramic Industries Limited t/a Betta Sanitaryware v NCBAWU & others* [1997] 5 BLLR 547 (LC).
[67] Section 1(d)(iv).
[68] Though not expressly guaranteed in the Bill of Rights, it is accepted that the constitutional values of dignity, equality and freedom imply freedom of contract. As Cameron JA has expressed it, "contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity": *Brisley v Drotsky* 2002 (12) BCLR 1229 (SCA) para 94.
[69] 2007 (7) BCLR 691 (CC).
[70] In *Napier v Barkhuizen* 2006 (9) BCLR 1011 (SCA).
[71] n 69 above, paras 12, 13.

regulating their own lives."[72] On this basis the Constitutional Court found no reason to strike down the clause in question.

Would a broad no-strike clause in a contract of employment be seen as an "unacceptable excess" of freedom of contract? The importance attached by the Constitutional Court in *Napier* to "the parties' relative bargaining positions" is significant. In a dissenting judgment Sachs J went on to state a further principle which the majority accepted but did not find applicable.[73] A standard-form contract such as an insurance contract, Sachs J reasoned, is premised on the needs and interests of the party that has drafted it without regard for fundamental values or the freedom of the other party to seek to protect its own interests.[74] Such contracts are "drafted in advance by the supplier of goods or services and presented to the consumer on a 'take-it-or-leave-it' basis, thus eliminating opportunity for arm's length negotiations".[75] Sachs J concluded:

> "[T]his is not to say that once we recognise that the legal enforcement of standard form terms provides the basis for domination of this sort, we are pushed toward the conclusion that such terms should be completely unenforceable. … [W]hat is needed is a principled approach, using objective criteria, consistent both with deep principles of contract law and with sensitivity to the way in which economic power in public affairs should appropriately be regulated to ensure standards of fairness in an open and democratic society. More specifically it calls for examination of the 'tendency' of the provision at issue and the extent to which, in the context of the contract as a whole, it vitiates standards of reasonable and fair dealing that the legal convictions of the community would regard as intrinsic to appropriate business firm/consumer relationships in contemporary society."[76]

To the extent that contracts of employment are often in standard form – in effect, "contracts of adhesion", which employers draft in advance on a "take it or leave it" basis – the above criteria may well find application. It was not disputed that standard form contracts are convenient and allow for certainty and standardisation where large organisations are involved in multiple transactions. But is it appropriate to conceive of the contract of employment in this framework? Given that the basic rights of employees are at issue, considerations of convenience hardly appear to justify incorporation of a comprehensive no-strike clause purportedly in accordance with section 65(1)(b) as one of the "take it or leave it" provisions of a standard employment contract. Such a clause, it is submitted, would represent an "unacceptable excess" and create a situation where the right to strike must trump freedom of contract.

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[72] Para 70, citing the SCA judgment at para 13. Or, in the words of Cameron JA in *Brisley v Drotsky* (n 68), "the limits of contractual sanctity lie at the borders of public policy" (para 92).
[73] Paras 87-88.
[74] Para 145, citing Rakoff "Contracts of Adhesion: An Essay in Reconstruction" (1983) 96 *Harvard Law Review* 1173 at 1237: "Form terms are imposed on the transaction in a way no individual adherent can prevent, and a major purpose and effect of such terms is to ensure that the drafting party will prevail if the dispute goes to court."
[75] Para 135.
[76] Para 146.

(d) Interest arbitration

To the extent that section 65(1)(a) contemplates interest arbitration (as opposed to rights arbitration) as a substitute for strike action, the merits and demerits of interest arbitration enter the equation. Only a very cursory overview can be attempted here, focussing specifically on its implications for the right to strike.[77] On the face of it, the substitution of interest arbitration as "a legitimate replacement for strikes and lock-outs"[78] appears to be conducive to a further object of the LRA; that is, the advancement of "industrial peace".[79] However, this proposition is problematic to the extent that interest arbitration by individual agreement does not sit easily with the central object of the LRA: the promotion of collective bargaining. In *Saskatchewan Federation of Labour v. Saskatchewan*[80] the Canadian Supreme Court explained it thus:

> "Alternative dispute resolution mechanisms … are generally not associational in nature and may, in fact, reduce the effectiveness of collective bargaining processes over time …. Such mechanisms can help avoid the negative consequences of strike action in the event of a bargaining impasse, but as Dickson C.J. noted in *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460, they do not, in the same way, help to realize what is protected by the values and objectives underlying freedom of association:
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> > . . .as I indicated in the *Alberta Labour Reference*, the right to bargain collectively and therefore the right to strike involve more than purely economic interests of workers. . . . [a]s yet, it would appear that Canadian legislatures have not discovered an alternative mode of industrial dispute resolution which is as sensitive to the associational interests of employees as the traditional strike/lock-out mechanism. . . . [pp. 476-77]".[81]

The ILO points at further drawbacks of interest arbitration such as "creeping legalism, high cost, [and] increased study time per case".[82] The impact of private interest arbitration on collective bargaining, it states,

> "have been described as its 'chilling effect' or how the availability of interest arbitration affects the parties' willingness to engage in serious bargaining, and its 'narcotic effect' or the assumption that parties who have used interest arbitration will

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[77] For discussion from a South African perspective, see Catherine O'Regan *The Development of Private Labour Arbitration in South Africa* (1989) 10 *ILJ* 557; Christopher Albertyn *Interest Arbitration: Its Use in Broader Public Sector Disputes in Ontario* (2013) 34 *ILJ* 1675; Alan Rycroft *Strikes and the amendments to the LRA* (2015) 36 *ILJ* 1.
[78] Albertyn n 77 1675.
[79] s 1.
[80] n 3 above.
[81] Para 60, with reference to Bernard Adell, Michel Grant and Allen Ponak *Strikes in Essential Services* (2001) 8.
[82] ILO Governing Body "New trends in prevention and resolution of labour disputes" (5th agenda item, GB.274/3 274th Session, Geneva, March 1999) para 158.

> be more likely to rely on the same approach to resolve impasses in future negotiations."[83]

Albertyn responds to this criticism by arguing that

> "[t]he board of arbitration should be sure, before engaging in the arbitration, that the parties have made serious efforts to conclude a collective agreement. If they are not satisfied of this, as for example if there are a very large number of outstanding issues, the board of arbitration can refer the issues back to the parties for further bargaining before they undertake the arbitration."[84]

However, this may not be feasible in a situation where individual employees have waived the right to strike in favour of interest arbitration. From an employer's perspective, a no-strike clause may be intended not so much as a deadlock-breaking mechanism in a bargaining context but, rather, to avoid collective bargaining and, instead, allow terms and conditions of employment to be determined purely on an individual basis, albeit through the imposition of standard terms, with interest arbitration as the sole dispute-resolution device.[85] Such a regime, for reasons already noted, is likely to be unconstitutional.

Concluding observations

There are further considerations relevant to the right to strike which go beyond the scope of this paper. Its careful definition and circumscription by legislation and case law testify to its *sui generis* nature in law as well as its socio-economic importance. In legal terms it marks the dividing line between breach of (the employment) contract and legitimate bargaining conduct: in effect, the right of employees to suspend performance of their basic contractual duties while negotiating an amendment of existing terms and conditions. But, more than this, they are negotiating the terms of their continued subordination to the employer's authority.[86] In a context of bargaining inequality, this alone would render any strict application of the law of contract vulnerable to interrogation as a possible infringement of their right to equality and human dignity.

Having said that, what the LRA protects is not so much a right to strike as a right to a deadlock-breaking mechanism in disputes of interest in the form of a right either to strike or, alternatively, to refer the dispute to (private) arbitration by agreement. But the limitation on the right to strike imposed by section 65(1)(b) must be subject to the same level of scrutiny as any other limitation of a basic right. The fact that the limitation requires agreement by the

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[83] *Ibid.*
[84] Albertyn (n 77) 1681.
[85] A further advantage, from an employer's perspective, is that courts are less inclined to interfere with private arbitration proceedings than with statutory arbitration proceedings conducted by the CCMA or bargaining councils: see *Lufuno Mphaphuli & Associates v Andrews* 2009 (6) BCLR 527 (CC). See also *Jonker v Okhahlamba Municipality* [2005] 6 BLLR 564 (LC) where the Labour Court found that it had no jurisdiction to issue an interdict in a dispute which was subject to private arbitration.
[86] For discussion of this aspect of the employment relationship, see D du Toit "The right to equality versus employer 'control' and employee 'subordination': Are some more equal than others?" Paper presented at 2nd Labour Law Research Network Conference, Amsterdam, June 2015.

employee is not conclusive. In general, waiver of (or agreement not to invoke) rights is treated with caution and should be excluded where a right was created not for the benefit of the individual concerned but in the public interest.[87] This would certainly be applicable to the right to strike which, given its collective aspect, will inevitably be undermined by individual renunciation.

It has also been noted that the notion of individual waiver of the right to strike must be seen in the general context of bargaining inequality between employers and employees and the scope it allows for individual employees' consent to be obtained under undue pressure. Taken together, it is submitted, these considerations make it impossible to interpret section 65(1)(b) as permitting a standard contractual clause effectively preventing individual employees from exercising their right to strike.

However, it may not be necessary to resort to constitutional litigation; to the extent that such a clause would deprive employees of the possibility of taking collective action and, hence, of engaging effectively in collective bargaining, it would be inconsistent with the LRA and thus fall to be struck down in terms of section 5(4) (above).

Against this background it is therefore suggested that section 65(1)(b) should be interpreted narrowly as far as individual agreements are concerned. This would involve consideration of the principles of public policy, as explained in *Barkhuizen v Napier*, giving due weight to the actual balance of bargaining power between the employer and the employee concerned. Perhaps the key question would be the employee's ability to resist the employer's demand: does the employee in fact have an option to negotiate the clause, or is it imposed on a 'take-it-or-leave-it' basis as a precondition for being offered employment? If so, it is submitted, it would be contrary to public policy and in conflict with section 5(4) of the LRA. If not, a number of tentative conclusions can be drawn:

(a) individual agreements in terms of section 65(1)(b) should be limited to specific issues rather than embracing a multiplicity of issues;

(b) such issues should be appropriate, in the sense that they lend themselves to arbitration;

(c) the circumstances should be such that arbitration can be seen as an adequate substitute for the right to strike in resolving any disputes that are likely to arise; and

(d) on balance, the agreement should not be unduly invasive of the employee's right, and that of fellow-employees, to protect their interests by means of strike action in respect of the issue in question.

[87] See, e.g., *Ryland v Edros* 1997 (1) BCLR 77 (C) at 95.