

Freedom of Association: Its emergence and the case for prevention of its decline?



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FREEDOM OF ASSOCIATION: Its emergence and the case for prevention of its decline

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ABSTRACT

Freedom of association emerged initially as a right of ‘citizens’ in countries of the North. Gradually, the compass of people able to claim this entitlement was extended from servants to women to migrant workers. The very inclusivity of the idea of an ‘association’ has, thereby, had profound implications for the parameters of acceptable behaviour of business and employers. The grander endeavour to promote international human rights, through United Nations (UN) institutions, as well as regional human rights instruments, has also had implications for our understanding of the coverage of freedom of association. The claim to universality of entitlement for every human being, going beyond a claim only for a citizen of a particular State, has the potential to promote wider access of workers of all kinds and nationalities to effective voice, whether through trade unions or other forms of protest, in emerging transnational labour markets. However, it would seem that the apparent imperatives of global capitalism led to a neutering of this entitlement under international law, resulting in a diminution of its efficacy and content, with corresponding effects in domestic labour markets. The international right to freedom of association has never, arguably, been as generous as the right of citizens to freedom of association in many European countries and, indeed, has arguably restricted trade union entitlements in those countries, as well as in the UK and US. It is suggested that, perhaps ironically, it is this destruction of meaningful freedom of association for workers in the North, and their consequent frustration at their disempowerment, that is allowing modern forms of discrimination and exclusion to flourish. Such developments are likely to have negative implications not only for certain types of worker, but also international legal legitimacy more generally.

INTRODUCTION

The relationship between business, labour and human rights is a complex one. Within this relationship, freedom of association can be seen as pivotal. Freedom of association can entail the capacity for an employer and an employee to enter into a contractual arrangement regarding the supply of labour. It is also the source of the entitlement for employers to form an ‘association’ to bargain over the terms of hire within their sector, while for workers it can be a source of bargaining power when they join and bargain within a trade union. In this way, not only the liberty of participants in contracts and associations is exercised, but there may be material advantage which flows from collective organisation. Further, the entitlement to freely associate in the private sphere can be extended to public debate, including the creation and support for political parties and public institutions. As such, the formal entitlement to associate with others can be viewed as a civil liberty, a political entitlement and a socio-economic right.

* An earlier version of this paper was delivered at a Socioeconomic Rights in History Workshop organised for a Leverhulme Trust International Network project on ‘Arguments for and against Socioeconomic Rights, Past and Present’ held at Harvard Law School in March 2017. I would like to thank participants and colleagues at Bristol for their comments; all omissions and errors remain my own.

However, so far, my tale tends to suggest a formal equality between business and labour, insofar as this pertains to the entitlement to associate. This is patently not the case. For a very long time, it has been widely accepted by courts and commentators alike, that an individual employee (or worker) is at a bargaining disadvantage when faced with an employer.¹ This stems from the employer's superior wealth and resources when compared to the worker's need to devote labour in order to earn enough income to support their basic needs (and potentially those of their dependents). The liberty that is freedom of association, then, inevitably serves workers more than it serves those for whom they work. It enables employees to share information regarding the 'going rate' for work and other terms and conditions. It allows bargaining to be conducted collectively behind a representative who will not expose the individual vulnerabilities of those represented. It will not be possible for the employer to refuse to employ (or dismiss on spurious grounds) those who seek higher wages. (A state of affairs which would otherwise lead to a beggar thy neighbour approach.) Instead all are committed and the likelihood of an employer hiring none (or dismissing all) is less likely given the inconvenience this might cause to the business as a going concern. Further, there is the scope for collective action in support of collective bargaining, which could take the form of withdrawal of labour, a strike. The employer, likewise, can withdraw employment, but while it makes little difference to the employer whether this is done in conjunction with an employers' association – the employer exercises real economic strength in any case – the withdrawal of labour by an individual worker is meaningless unless exercised in conjunction with a group of peers.

In this sense, 'freedom of association' has a particular potency. When linked to trade unions or other workers' organisations, collective bargaining and a right to strike, this apparent bare liberty has potentially disruptive effects regarding distribution of wealth and challenges to social hierarchies. It is arguably telling that E.P. Thompson's classic work on *The Making of the English Working Class* begins with a chapter titled 'members unlimited' and an account of organization by the London Corresponding Society.² Freedom of association can be understood as 'voice',³ but voice with an 'edge', offering opportunities to transform social and economic relations in profound ways, as I shall argue we once saw in the developed countries of the North, such as England.⁴ Moreover, this was a freedom which, given the profound influence of these states in the international community, came to be acknowledged by such institutions as the United Nations (UN), the specialized UN agency of the

¹ See Adam Smith, *Wealth of Nations* (1776) Book I, ch 8; also in the UK Supreme Court in *Autoclenz v Belcher & others* [2011] UKSC 41, para. 35.

² E.P. Thompson, *The Making of the English Working Class* (New York: Vintage Books, 1966), ch. 1.

³ See Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford: OUP, 2014); and Alan Bogg and Tonia Novitz, 'Investigating "Voice at Work" (2012) 33 *Comparative Labor Law and Policy Journal* 324.

⁴ There are self-evident divisions in wealth between States in the current international community. In the past, States were divided into those that were 'developed' and those that were 'developing'. Another way in which to establish a neat divide was with the 'Brandt line', which partitioned the global North and the global South. See Willy Brandt, 'North-South: a programme for survival: report of the Independent Commission on International Development Issues' (Cambridge, Mass.: MIT Press, 1980) and Willy Brandt, 'Common crisis North-South: cooperation for world recovery' (1983) available at <<http://agris.fao.org/agris-search/search.do?recordID=XF2015040077>> accessed 1 September 2017. In reality, there is a continuum of wealth and development that does not fit easily to a geographical divide, but on the basis that the terms 'North' and 'South' are widely used and less offensive than the connotations around 'development', I have employed these terms here. That said, it should be noted also that there are various 'emergent' economies, of which the 'BRICS' (Brazil, Russia, India, China and South Africa) are the most prominent. See <<http://brics.itamaraty.gov.br/>> accessed 1 September 2017.

International Labour Organisation (ILO) and regional human rights institutions. However, I shall suggest that an awareness of the radical aspects of freedom of association meant that its protection was never fully realised on the global stage. The failure to enable workers to act collectively in a post-colonial labour market, which operates across national boundaries through global supply chains and forms of migration, has culminated in a lack of commitment to this once well-established human right and the international legal regime which was meant to give it effect. Instead, it would seem that we are returning to forms of nationalism amongst the 'working class' in the developed world. This is a shift which may have palpable consequences, ironically, for business itself.

This paper draws on Samuel Moyn's conception of human rights in history as *The Last Utopia*, seeking to utilise his distinction between the nationally oriented rights of the citizen with the creation of a utopian vision of universal international human rights. He has said that: 'there is a clear and fundamental difference between earlier rights, all predicated on belonging to a political community and eventual "human rights"'.⁵ Certainly, it is immediately apparent that there are some important distinctions to be drawn, not least the legal texts and institutions which service access to national as opposed to international rights. Also, the ideological purposes they have served have been distinct.

However, as you will see, this distinction turned out not to be as neat and tidy as Moyn's words suggest. That simple oppositional idea unravelled, perhaps for a variety of reasons. What happened domestically in England with the extension of rights of citizenship, like freedom of association and its concomitant freedoms to organise, bargain and strike, has to be placed in a broader constitutional context of colonialism. Also, there seems to have been some copying of constitutional norms across Europe, which were to some extent manifested in English labour laws. Indeed, a Human Rights Act (of 1998) subsequently incorporated into British law significant aspects of the European Convention on Human Rights 1950, so that English constitutional rights are now entangled with European (regional) human rights law, at least for the time being. A distinction also became hard to sustain when observing how a narrow formalistic interpretation of freedom of association within international human rights institutions came to shape domestic labour laws, affecting access to collective bargaining (and thereby a share in an employer's wealth through wage claims) and the ability to strike (an industrial weapon which could add persuasion to those claims).

Indeed, it would seem that the turn to 'nationalism' as reflected in the policies of Donald Trump in the US and Theresa May at the time of writing (in 2017) cannot be so neatly severed from past domestic and international systems. These, I suggest, have interacted in ways that have stripped workers of their scope to resist and moderate changes prompted by global capitalism. In so doing, the constitutional and broader human rights guarantees that were supposed to combine to restrain the worst manifestations of nationalism have generated popular support for the pursuit of such policies. Ironically, this is not ideal for the expansionary desires of business or the need of employers to harness the talents of labour regardless of nationality.

This leaves me with the reflection that it is highly probable that, despite the fiction of their separation (for example, in the eighteenth and nineteenth centuries), domestic labour markets never have

⁵ Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Mass. and London: Bellknap Press of Harvard UP, 2010) at 12.

operated in a way that is immune from geo-political dynamics and global social and economic relations. In this way, national and international law intersect to preserve but also potentially (ultimately) undermine ‘the logic of capitalism’.⁶

FREEDOM OF ASSOCIATION AS A RIGHT OF CITIZENS

My interest here lies in investigating the origins of the entitlement to ‘freedom of association’ as a right of citizens within domestic constitutional frames. My focus is on this evolution in England, although for reasons that become obvious I shall also touch on Britain’s colonial past and its relations with Western Europe. This narrative is necessarily complex, given that freedom of association operates as a civil liberty to join associations for whatever purpose and act collectively, as a political right to voice, as well as a socio-economic claim to more radical redistribution of the fruits of workers’ labour. Yet, it is possible, nevertheless, to detect the gradual extension of the entitlement to freely associate whether via domestic labour and other laws (in England) or through explicit constitutional norms (in some other Western European States). Incrementally, freedom of association was a right extended from the political nobility to the mercantile guilds, and then on to servants, women and even migrants. Its inclusivity of those who had been marginalised and disempowered then had significant and perhaps even unanticipated political and economic effects, arguably reflected in contemporary liberal democratic forms of capitalism and government in England, and arguably more generally in the global North.

The standard account offered by T.H. Marshall of *Citizenship and Social Class* claims that ‘citizenship’ had emerged through three stages: the emergence of ‘civil liberties’, followed by ‘political’ and then ‘social’ rights.⁷ This is an explanation which fits more neatly perhaps with English history than that in other jurisdictions, particularly in the South, where socio-economic concerns may prevail, given the scale of poverty. But it offers a starting point for our present purposes, even if it is one that must be probed and challenged shortly.

Freedom of association, according to Marshall, can be identified as a right necessary for individual freedom, which emerged from resistance to feudal command.⁸ On this view, freedom of association is a civil liberty, offering the choice whether to join an organisation, be that charitable, religious, political or scientific. It was only gradually that this freedom was extended to the sphere of labour and industry.⁹ That extension arguably began with the emergence of freedom of contract and the organisation of mercantile professions in ‘guilds’. These were more associations of employers than of workers.¹⁰ Collective price-setting for the supply of services was considered appropriate for the skilled

⁶ Mark Goodale, ‘Dark Matter: Toward a political economy of indigenous rights and aspirational politics’ (2016) 36(4) *Critique of Anthropology* 439 at 441.

⁷ T.H. Marshall, *Citizenship and Social Class* (Cambridge, CUP, 1950), 10 et seq.

⁸ *Ibid.*, at 17.

⁹ E. Alkema, ‘Freedom of Associations and Civil Society’ in Council of Europe, *Freedom of Association Proceedings* (Strasbourg: Council of Europe Press, 1994), at 58-9; and C. Wilfred Jenks, *The International Protection of Trade Union Freedoms* (London: Stevens & Sons, 1957), 14. See also for my discussion of these issues, Tonia Novitz, ‘Workers’ Freedom of Association’ in James A. Gross and Lance Compa (eds), *Human Rights in Labor and Employment Relations* (Illinois: LERA, 2009) at 125 et seq.

¹⁰ Steven Epstein, *Wage Labor and Guilds in Medieval Europe* (Chapel Hill: University of North Carolina Press, 1991), 3.

business man, but not for the servant, labourer or indeed woman. Indeed, master and servant (and wage-setting) legislation was used as a tool for their control, so as to repress associative or rebellious behaviour from workers, such as collective action for higher pay.¹¹ Their entitlements would only come later in the 18th century (as guilds declined)¹² and be recognised more fully in the 19th and 20th centuries through legislative means. Marshall's view was that it was the shift 'from servile to free labour', capable of making such choices, which was foundational to the creation of citizenship.¹³

Further, the 'guild' model clearly had some influence on socialist aspirations in the 1920s. In G.D.H Cole's account of *Guild Socialism Restated*,¹⁴ the concern is with the situation with which the industrialized communities of Europe, America and Australasia are at present confronted', according to which 'Society is to be regarded as a complex of associations held together by the wills of their members, whose well-being is its purpose'.¹⁵ Serving as a reminder that various socialist analyses dominated political mobilisation in the 1920s, his text is interesting because of what it goes on to say about the connection between bare civil liberties preoccupied by freedom and access to political participation. This, indeed, is the second aspect of Marshall's typology of rights.

Marshall identified the development of 'political' rights in the nineteenth century and 'social' rights in the twentieth century. 'Political' rights consisted of the 'right to participate in the exercise of political power',¹⁶ reflected by the achievement by working people of universal suffrage. Such political activity could not be possible, of course, without the civil liberty to associate, put to the dangerous purpose of challenging the social and economic status quo.

Marshall saw that this gradual successful assertion of an entitlement to full political participation in industrial and national government had led in turn to social rights being introduced, which could cover 'the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in society'.¹⁷

Marshall acknowledged that trade unionism might create 'a secondary system of industrial citizenship parallel with and supplementary to the system of political citizenship'.¹⁸ He also noted that workers'

¹¹ For extremely punitive measures that could be taken under English legislation and by English magistrates from 1562 – 1875, see Douglas Hay, 'England, 1562-1875: The Law and its Uses' in Douglas Hay and Paul Craven (eds), *Masters, Servants and Magistrates in Britain and the Empire, 1562 – 1955* (Chapel Hill and London: The University of North Carolina Press, 2004); also Simon Deakin and Frank Wilkinson, *The Law of the Labour Market* (Oxford: OUP, 2005), ch. 2.

¹² Henry Pelling, *A History of British Trade Unionism*, 2nd ed (London: Penguin, 1973) at 19: 'combinations of workmen did not grow out of the guilds; but as the guilds declined, so the need for combination grew, in order to enable the workers to maintain rights and privileges formerly guaranteed to them either by the guilds or directly by Act of Parliament'.

¹³ Marshall n.7, 18.

¹⁴ G.D.H. Cole, *Guild Socialism Restated* (New Brunswick, New Jersey: Transaction Inc, 1980), reprint of 1st ed., published 1920.

¹⁵ *Ibid.*, at 12.

¹⁶ Marshall n.7 above at 10-11.

¹⁷ *Ibid.*, at 10-11.

¹⁸ *Ibid.*, 40.

collective activity could only function in this way insofar as it might be permitted by the state.¹⁹ Indeed, on that issue, Marshall observed that ‘the basic conflict between social rights and market value’ had not been resolved, although he clearly prioritised the former.²⁰

Beatrice and Sidney Webb writing from the newly founded London School of Economics had asserted a role for trade unions in this process of industrial democracy.²¹ Those rebelling against a Fabian stance, such as Cole, also observed the potential for various forms of worker cooperatives and political organisations which reflected the objectives of labour.²² So Cole tells us in 1920 that:

The workers... as the dispossessed class both economically and politically, have to employ their industrial organization as almost the sole means at their disposal for making their will felt... As they acquire a greater sense of their industrial strength, they seek to turn it to more ambitious uses, and attempt to employ it as an instrument of communal government.²³

Between Cole’s time and that in which Marshall was writing, we saw the acquisition by women of a right to vote and, with the removal of a property bar, near universal suffrage, which enabled the statutory outcomes which Marshall knew to be essential for the realisation of social rights like freedom of association.

Women’s entitlements to industrial citizenship and full utilisation of freedom of association were only incrementally established. The statutes of the 19th century would seem to give them protection, but when this was actually claimed by women to challenge unequal pay rates in the Ford Dagenham plant dispute, there was widespread shock that women could make the cultural challenge to men’s assumed superiority in the workplace. The resultant Equal Pay Act 1970 was seen as so controversial, that a lead-in time of 5 years was given before the statute gained legal effect. You can see that piece of legislation as the manifestation of women’s political rights as citizens, but also as a reminder that cultural norms can stand in the way of realization of equal exercise of formal entitlements and that it took greater industrial participation before this became a reality.²⁴ When ‘Asian’ women took action at Grunwick from 1976 to 1978, there was a double shock in that the leading participants were not only women but recent immigrants who were daring to make such claims and in reliance on solidarity with the rest of the trade union movement.²⁵ By the late 1970s, trade unions in the UK and elsewhere

¹⁹ Ibid., 68-9.

²⁰ Ibid., at 42.

²¹ Beatrice Webb and Sidney Webb, S. Webb and B. Webb, *Industrial Democracy* (London: Longmans, 1897); also *The History of Trade Unionism* (London: Longmans, Green and Co., 1907).

²² Cole n. 14 above at 17.

²³ Ibid.

²⁴ George Stevenson, ‘The Women’s Movement and ‘Class Struggle’: gender, class formation and political identity in women’s strikes, 1968–78’ (2016) 25(5) *Women’s History Review* 741. See also Sarah Boston, *Women Workers and the Trade Unions* (London: Lawrence & Wishart, 2015) ch. 10 who notes the rapidly expanding female membership of the TUC at that point in time.

²⁵ Stevenson n.24 above at 749 – 751; and Linda McDowell, Sundari Anitha, and Ruth Pearson, ‘Striking Narratives: class, gender and ethnicity in the ‘Great Grunwick Strike’, London, UK, 1976–1978’ (2014) 23(4) *Women’s History Review* 595.

were becoming more inclusive and democratic institutions, and can now be seen as acting for a broader based membership.²⁶

There are however still substantial and well-documented income gaps for women²⁷ and those of ethnic minorities in England,²⁸ so that the claim that there is full inclusion in civil, political and socio-economic citizenship is not entirely accurate. Further, the UK Supreme Court has recent decided that discrimination on grounds of a vulnerable immigration status can be differentiated from discrimination on grounds of race.²⁹ Indeed, a difficulty with Marshall's account is that it does not fully acknowledge the resistance of UK courts to the social concerns of the legislature. The judiciary has tended to be more sensitive to the prioritisation of property rights in the English constitutional framework.³⁰ This oppositional behaviour has only to a very limited extent been mediated by British ratification of international instruments, such as the European Convention on Human Rights and its incorporation in domestic legislation through a Human Rights Act 1998, as we shall see below.³¹

Of course, the categories of civil, political and social rights were also not as distinct as Marshall suggests.³² Social rights provided for in English legislation to join a trade union, bargain collectively and strike may be realised by statutory means because they are regarded as implicit in the long-standing civil liberty, freedom of association.³³ This interconnected understanding of these rights, through the prism of a constitutional perspective has had continuing influence in the field of labour law. For example, Ruth Dukes' exciting book, *The Labour Constitution*, asserts that understanding labour rights in constitutional terms remains a fruitful enterprise, giving a normative perspective on 'representation and voice'.³⁴

So, this is the positive story of the gradual expansion of entitlement at the national level, which did (for a time) have profound distributional effects. In the period after the second world war, English

²⁶ See <https://www.tuc.org.uk/equality-issues/black-workers> (accessed 9 November 2016); and the TUC Equality Audit Report 2016 at <https://www.tuc.org.uk/EqualityAudit2016> (accessed 9 November 2016). See also Sian Moore and Stephanie Tailby, 'The Changing Face of Employment Relations: Equality and Diversity' (2015) 37(6) *Employee Relations* 705 at 708-9; and Tonia Novitz, 'Collective Bargaining, Equality and Migration: The Journey to and from Brexit' (2017) 46(1) *Industrial Law Journal* 109.

²⁷ Currently for full-time workers this stands at 13.9%. See: <http://www.fawcettsociety.org.uk/policy-research/the-gender-pay-gap/> (accessed 1 March 2017).

²⁸ D. H. Blackaby, D. G. Leslie, P. D. Murphy and N. C O'Leary, 'White/Ethnic Minority Earnings and Employment Differentials in Britain: Evidence from the LFS' (2002) 54(2) *Oxf. Econ. Pap.* 270; Bridget Anderson, *Us and Them?: The Dangerous Politics of Immigration Control* (OUP, 2013).

²⁹ Joined cases *Onu v Akwivu and Taiwo v Olaigbe* [2016] IRLR 719 (SC).

³⁰ See for a useful historical account, Julian Hoppit, 'Compulsion, Compensation and Property Rights in Britain, 1688–1833' (2011) 210.1 *Past & Present* 93.

³¹ K. D. Ewing (ed.), *The Right to Strike: From the Trade Disputes Act 1906 to a Trade Union Freedom Bill 2006* (Liverpool: Institute of Employment Rights, 2007); see also Tonia Novitz, 'UK Regulation of Strike Ballots and Notices – Moving Beyond "Democracy"?' (2016) 29 *Australian Journal of Labour Law* 226.

³² As explained cogently by G. J. H. Van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views' in Philip Alston and Katerina Tomasevski (eds), *The Right to Food* (Utrecht, Martinus Nijhoff, 1984).

³³ See Tonia Novitz and Colin Fenwick, *Human Rights at Work: Perspectives on Law and Regulation* (Oxford: Hart/Onati International Series in Law and Society, 2010) at 12-13; Tonia Novitz, *International and European Protection of the Right to Strike* (Oxford: Oxford University Press, 2003), 45-6.

³⁴ Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford: OUP, 2014) at 216. See also her discussion of Marshall regarding his reluctance to subordinate social rights to market price.

wages rate and indicators of social welfare grew. Inclusive trade union protections can be viewed as contributing to that process, but as statutory protections of trade unionism were incrementally removed, inequalities have again become more stark.³⁵

FREEDOM OF ASSOCIATION AS A UNIVERSAL HUMAN RIGHT

In international law terms, the distinction between the national and the international is straightforward. We can define the national according to the sovereignty of states. The national then refers to '(a) a country with a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states'.³⁶ The international is what is created by these sovereign states in terms of laws, norms and standards which bind their conduct and their relations with each other.³⁷ In this section, in the context of understanding freedom of association as a universal human right under international law, we will see how this neat distinction breaks down, such that we need to think about transnational dynamics of voice in contemporary global labour markets.

By 1971, Niklas Luhmann was positing the existence of a 'world society' splintered into social, economic, scientific and technological dimensions which lay outside the control of the sovereign state recognised under international law.³⁸ Gunther Teubner has since offered the idea of an even more starkly fragmented polycentric globalized world, such that 'a variety of competing global regulation regimes have been established, each with their own legal decisional instances' to which he sees no ready solution.³⁹ This brand of autopoiesis, however, can be linked to a focus on communication between these legal spheres, rather than the power relations within and between them; yet, it emerges here that the latter is equally important. It matters which actors are engaged, how they are engaged and what the outcomes may be.

This part examines how the relationships between private actors (business and labour), which were transnational in nature, began to shape the creation of international human rights norms. It goes on to analyse the constraints on international human rights protections that emerged, including their effects on domestic protection of freedom of association. In this sense, the constitutional peculiarities of the UK regarding its connection to Europe have particular pertinence, for they illustrate how universal human rights norms can be destructive of the rights of citizens as well as constructive.

³⁵ See Lydia Hayes and Tonia Novitz, *Trade Unions and Economic Inequality* (London/Liverpool: CLASS/Institute of Employment Rights, London, 2014) available at: http://classonline.org.uk/docs/2014_trade_unions_and_economic_inequality_-_Hayes_Novitz.pdf accessed 1 September 2017.

³⁶ Article 1 of the 1933 'Montevideo' Convention on the Rights and Duties of States, which is generally understood as a restatement of the accepted position under international law.

³⁷ For one classic text, see Roland R. Foulke, 'Definition and Nature of International Law' (1919) 19(6) *Columbia Law Review* 429. For a discussion of the contemporary currency of such a view, see Hugh Thirlway, *The Sources of International Law* (Oxford: OUP, 2014), 17.

³⁸ Andreas Fischer-Lescano and Gunther Teubner (Michelle Everson trans.), 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2003-2004) 25 *Mich. J. Int'l L.* 999 at 1000 citing Niklas Luhmann, 'Die Weltgesellschaft' (1971) 57 *Archiv For Rechts Und Sozialphilosophie* 21.

³⁹ Fischer-Lescano and Teubner n.38 above at 1005.

Transnational relationships between actors

The emergence of freedom of association as a right of 'citizens' in England and the enhanced liberty it offered arguably had flow on effects, constructing political, economic and social norms that served the interests of an ever-increasing pool of 'citizens'. The legitimisation of these claims through the medium of national law is the focus of many impressive historical accounts, perhaps the prime example being *The Making of the English Working Class*.⁴⁰ While there is obviously value in the close analysis of the network of social, economic and political relations that forge our domestic labour markets and their consequences, the expansion in the compass of social solidarity in a country like England, in the North, can be linked to simultaneous forms of empire, colonialism and trade controls operating in the South. The wealth generated by capital from the South arguably enabled a more generous settlement to be made for workers in the North. As has been recently and eloquently put: 'Conceptualising society as coinciding with the state and the national territory, in fact, obfuscates the constitutive role of colonialism and imperialism, and leads to a naturalisation of the international inequalities resulting from capitalist development.'⁴¹

This is a nascent and emerging preoccupation of historians who accept that analysis cannot be limited by national geographies, even (or especially) in the 18th and 19th centuries as the work of sailors, settlers and indigenous labour become relevant,⁴² and are indeed the subtext to many novels of the period.⁴³ Recent scholarship also points to Marxist concern, not only with forms of advanced capitalism in the North, but forms of labour (and other) exploitation in the South.⁴⁴

And yet, for some considerable period of time, treatment of workers (and indentured labour and slaves) in the South did not apparently lie within the purview of claims to socio-economic rights as constitutional rights. Rather, even after the abolition of slavery, the legal devices for indentured labour, such as the master and servant legislation designed in England were exported to other states as mechanisms for control and degradation of the labour of local populations.⁴⁵ In this way, the colonised populations were deprived of their associative entitlements, not only in the labour context, but also in broader political terms.⁴⁶

⁴⁰ See n.2 above.

⁴¹ Lucia Pradella, 'Marx and the Global South: Connecting History and Value Theory' (2017) 51(1) *Sociology* 146 at 148.

⁴² Cf. David Featherstone and Paul Griffin, 'Spatial Relations, Histories from Below and the Makings of Agency: Reflections on The Making of the English Working Class at 50' (2015) *Progress in Human Geography* 1 above at 4, citing Peter Linebaugh and Marcus Rediker, *The Many Headed Hydra: Sailors, Slaves and Commoners and the Hidden History of the Revolutionary Atlantic* (London: Verso, 2000) at 337 – 339 who contest E. P. Thompson's national preoccupations. In this respect, at 14 – 15, they cite also C. Anderson, *Subaltern Lives: Biographies of Colonialism in the Indian Ocean World 1790 – 1920* (Cambridge: CUP, 2012); and Nicole Ulrich, 'International Radicalism, Local Solidarities' The 1797 mutinies in Southern African waters' (2013) 58 *International Review of Social History* 61.

⁴³ Jane Austen being a prime example. See Moira Ferguson, 'Mansfield Park: Slavery, Colonialism and Gender' (2012) 13(1) *Oxford Literary Review* 118.

⁴⁴ E.g. Pradella n.41 above.

⁴⁵ Douglas Hay and Paul Craven in Hay and Craven n.11 above.

⁴⁶ *Ibid.*, at 58: 'in many of Britain's wide imperial possessions, the populations most subject to the law of master and servant were denied the vote throughout the whole period we have described'.

International solidarity from the 19th century would seem to be pursued by socialists, rather than rights activists. For example, there is Marx's rallying cry of 'WORKING MEN OF ALL COUNTRIES UNITE!' in the *Communist Manifesto* to consider.⁴⁷ One wonders whether this was a call to women as well as men,⁴⁸ although Marx's other writing suggests this should be so, the language is hardly inclusive. And was it really a call to those outside of Western Europe, Australia, Canada and the US (a narrow group of countries to which Cole in 1920 referred)?⁴⁹ From a stark Marxist perspective, like rights talk, cross-trade union solidarity is the manifestation of and a sop for capitalism, merely making the exploitation of workers more palatable. Nevertheless, other diverse brands of socialism and anarchism at that time, including that of Cole, saw in workers' associative freedoms genuine social and economic transformative potential.⁵⁰

While it may be possible to find examples of constructive North–South solidarity and transnational dialogue between workers' organisations from the 18th to the 20th centuries,⁵¹ what is better documented is the extent to which British trade unions and white settlers' organisations were complicit in the disabling of citizens' rights for local colonised workers.

Some of the past examples of racism in trade unionism have been termed 'White Labourism' and were 'shaped by circuits and flows of union organizing between the UK, South African and Australia in the early 20th century'.⁵² Notoriously, in South Africa, whites-only trade unions protected certain privileges ('the white standard') for white workers in the labour market;⁵³ although for some considerable time prior to the abolition of apartheid, many white workers joined forces with those of colour in the Congress of South African Trade Unions (COSATU) which was instrumental in organising protest and political change in South Africa.⁵⁴ This was seen simultaneously as a mark of solidarity and indicative

⁴⁷ Karl Marx and Frederick Engels, *The Communist Manifesto: A Modern Edition* (London: Verso, 1998) at 77

⁴⁸ *Ibid.*, at 57.

⁴⁹ See text accompanying n.15 above.

⁵⁰ For example, see Emma Goldman, *Making Speech Free 1902–1909* (Berkeley and Los Angeles: University of California Press, 2005) at 112 et seq. describing the visit of a UK trade union organiser, John Turner, to deliver speeches to trade unions in the US.

⁵¹ Featherstone and Griffin n.42 above at 4.

⁵² *Ibid.*, at 13; and Jonathan Hyslop, 'The Imperial Working Class Makes itself "White": White Labourism in Britain, Australia and South Africa before the First World War' (1999) 12(4) *Journal of Historical Sociology* 398.

⁵³ J. Knight and M. McGrath, *The Erosion of Apartheid in the South African Labour Market: Measures and Mechanisms* (Oxford: Institute of Economics and Statistics, 1987) at 39; see for the beginnings of this type of activism *Murdoch v Bullough* (1923) TPD 495.

⁵⁴ See Sakhela Buhlungu, Mick Brookes and Geoffrey Wood, 'Trade Unions and Democracy in South Africa: Union organizational challenges and solidarities in a time of transformation (2008) 46(3) *British Journal of Industrial Relations (BJIR)* 439. Its current objectives are stated to be as follows: 'COSATU believes in a democratic society free of racism, sexism and the exploitation of the working class.' See <http://www.cosatu.org.za/show.php?ID=926&categ=> (accessed 9 November 2016). See also Debbie Budlender, *Gender Equality and Social Dialogue in South Africa Working Paper 2/11* (Geneva: ILO, 2011) available at http://www.oit.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_150430.pdf (accessed 9 November 2016).

of the aspiration of freedom of association which would later become a fundamental entitlement set out in a new South African Constitution,⁵⁵ although not wholly realised in practice.⁵⁶

Arguably, a global view of economic, social and political systems as interconnected motivated the push for the adoption and protection of international labour standards. There was a perception that there were significant commonalities in the experience and condition of workers post-industrialisation, regardless of the country in which the worker was situated; hence the final rallying cry of the Communist Manifesto. It seems to have been the force of this sentiment which sparked the foundation of the International Working Men's Association (the 'First International') in 1864, that was in turn succeeded by the Second International demanding the eight-hour working day, and which led ultimately to a trade union drive to seek international protection of workers' rights.⁵⁷

Just as the First and Second International sought to reduce the potential for a negative spiral of competition which led manufacturers to progressively lower labour standards, so there is acknowledgement in the Preamble of the first International Labour Organisation (ILO) Constitution in Part XIII of the Versailles Treaty that 'the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions of their own countries'. Further, in Section II, there was resistance to trade in labour, admitting only of trade in goods (the input of workers into which should be protected through basic workers' rights): 'labour should not be regarded merely as a commodity or article of commerce'. It is here that the idea of labour rights as universal human rights may be said to originate.

Today a globally linked capitalist economy (consisting of state, regional and international regulatory structures driven by the interests of private actors) demands ever-growing profits, leading to attempts to cut the costs of labour, often through transnational multiple sites of production, service delivery and distribution.⁵⁸ There is an attempt by larger multinational enterprises (MNEs) to devolve responsibility for the costs of labour through multiple forms of subcontracting across borders, including agency relationships and temporary movement or posting of workers.⁵⁹ In so doing, they subvert the application of domestic labour standards or even established labour rights deemed rights of citizens that might apply at a national level. Technical ways are found of demarcating labour so that

⁵⁵ See Chapter 2, which sets out a 'Bill of Rights'. In the Chapter, s. 18 states that: 'Everyone has the legal right to freedom of association' and s. 23 which sets out more concrete entitlements to organise, bargain collectively and take industrial action.

⁵⁶ As the Marikana massacre demonstrates; see Bob Hepple, Rochelle le Roux, Silvana Sciarra (eds), *Laws against Strikes. The South African Experience in an International and Comparative Perspective* (Milan: FrancoAngeli, 2015).

⁵⁷ See, for a history, G. M. Stekloff, *History of the First International* (Martin Lawrence Limited, 1928). Cf. Alvin W. Gouldner, 'Marx's Last Battle: Bakunin and the First International' *Theory and Society*, Vol. 11, No. 6, Special Issue in Memory of Alvin W. Gouldner (Nov., 1982), 853; and Gerry Rodgers, Eddy Lee, Lee Swepton, and Jasmien Van Daele, *The ILO and the Quest for Social Justice 1919-2009* (International Labour Office, 2009), 4.

⁵⁸ Wolfgang Streeck, *How will Capitalism End?* (London/New York: Verso, 2016) at 1: Capitalism promises infinite growth of commodified material wealth in a finite world... See also for the effects on commodification of labour, his analysis at 62 – 64.

⁵⁹ Tonia Novitz, 'Evolutionary Trajectories for Transnational Labour Law: Trade in Goods to Trade in Services?' (2014) *Current Legal Problems* 239.

they cannot claim standard socio-economic rights, such as freedom of association under domestic laws.⁶⁰

Even when granted such entitlements under more universal human rights systems to which domestic judges defer, it is difficult for the worker concerned to identify an employer to hold responsible, to ascertain the appropriate jurisdiction in which to bring a claim and to find the means (representational, linguistic and material) to do so.⁶¹ Highly complex contractual forms have been utilised, alongside ways of devolving and 'fissuring companies' so as to maximise profits,⁶² while cross-border elements are enabled by new forms of technology that bridge boundaries not only between economic actors, but states themselves. This is the 'continuous innovation' of capitalism aimed at promoting ever greater profits, which simultaneously creates 'continuous *uncertainty* in social relations'.⁶³ If this is what transnational labour markets look like, there is an even greater case for voice at national and international levels. However, as we shall see, in this respect, that there is less mileage in international protection of freedom of association than one might expect in light of these developments.

The constraints on international human rights protections

The grander endeavour to promote international human rights, through United Nations (UN) institutions, as well as regional human rights instruments, has also had implications for our understanding of the scope of freedom of association. The claim to universality of entitlement for every human being, going beyond a claim only for a citizen of a particular State, has the potential to promote wider access of workers of all kinds and nationalities to effective voice, whether through trade unions or other forms of protest, in emerging transnational labour markets.⁶⁴ Of course, as we know the right to a human right, without recourse to a political community within which it can be exercised, may be reduced to its barest minimum. As Hannah Arendt has commented in the *Origins of Totalitarianism*, 'No paradox of contemporary politics is filled with a more poignant irony than the discrepancy between the efforts of well-meaning idealists who stubbornly insist on regarding as "inalienable" those human rights, which are enjoyed only by citizens of the most prosperous and civilized countries, and the situation of the rightless themselves.'⁶⁵ The mere written statement of human rights is also not sufficient for their realisation, rather it is the ability of people individually and

⁶⁰ Valerio De Stefano, 'Non-Standard Work and Limits on Freedom of Association: A Human Rights-Based Approach' (2016) 'Non-standard work and the limits of freedom of association: A human rights approach' (2017) 46(2) *Industrial Law Journal* 185. See also Guy Standing, 'The ILO: An agency for globalization?' (2008) 39(3) *Development and Change* 355 .

⁶¹ Jeremias Prassl, *The Concept of the Employer* (Oxford: OUP 2015).

⁶² David Weil, *The Fissured Workplace: Why work has become so bad for so many and what can be done to improve it* (Cambridge: Harvard UP 2014).

⁶³ Streeck n.58 above at 205.

⁶⁴ For such a positive reading, see Alison Kesby, *The Right to Have Rights: Citizenship, Humanity and International Law* (Oxford: OUP, 2012), ch. 4.

⁶⁵ Arendt adds: 'The paradox involved in the loss of human rights is that such loss coincides with the instant when a person becomes a human being in general - without a profession, without a citizenship, without an opinion, without a deed by which to identify and specify himself - and different in general, representing nothing but his own absolutely unique individuality which, deprived of expression within and action upon a common world, loses all significance.' In other words, being barely human is insufficient for the meaningful exercise of rights. See Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace, 1951) at 297 - 302.

collectively to actively engage in political disputes which makes them meaningful; in this respect Jacques Rancière's notion of 'dissensus' is helpful.⁶⁶

So, either the international community needed to provide a genuine sphere for voice and influence; or international human rights law needed to support and enhance entitlements at national levels. Certainly, the promise of universal entitlement is powerful and indicative of scope for genuine political and economic challenge by collective worker voice to the status quo. However, this promise was not realised.

The ILO, a longstanding tripartite institution created in 1919, was given status as a UN agency in 1944. Certainly, the ILO was dependent for its very legitimacy on the idea of 'freedom of association' to be protected within states, which gave worker and employer representatives their representative credibility in a tripartite system of international governance.⁶⁷ Further, scope was given to transnational voice for representative trade unions within a 'workers' group' which could cooperate, despite apparently disparate national interests; while an employers' group consisting of representatives of employers' associations were given the same entitlements. Labour rights were stated internationally (beyond slavery) in the first ILO Constitution and restated as human rights in a supplementary constitutional instrument, the Declaration of Philadelphia in 1944. Again, in the latter instrument, it was stressed again that 'labour is not a commodity' and the significance of freedom of association was emphasised.⁶⁸ As Frederick Cooper has observed, the Philadelphia text seems to reflect the 'the welfare state and industrial relations regime toward which Europe was moving',⁶⁹ arguably akin to Marshall's expectations of 'citizenship and social class'.

The ILO acknowledges the relevance not only of state actors, but representatives of other interests in making the international workable, in terms of designing the rights promulgated and also bringing them home to be implemented. 'While the primary activity of the ILO was the drafting and approval of international treaties, these agreements were designed to create norms that would be promulgated and enforced at the *national* level.'⁷⁰ It has correctly been observed that: 'ILO norms are essentially soft ones that are dealt with through a complaint process that produces communications directed to member governments requesting them to take corrective action and to keep the ILO informed of its response. As with other soft law mechanisms, the more important question is whether they influence government action or the development of labor's domestic constitution.'⁷¹

⁶⁶ Jacques Rancière, 'Who is the Subject of the Rights of Man?' (2004) 103 (2/3) *The South Atlantic Quarterly* 297 at 304.

⁶⁷ For example, ILO Conventions can only be adopted by a 2/3 majority at the annual International Labour Conference from a constituency made up of ¼ employer representatives, ¼ worker representatives and ½ state representatives. See ILO Constitution, Article 19.

⁶⁸ Declaration of Philadelphia 1944, Articles I(a), I(b) and III(e); discussed in Novitz, n.33 at 100.

⁶⁹ Frederick Cooper, 'Social Rights and Human Rights in the Time of Decolonization' (2012) 3(3) *Humanity* 473 at 482.

⁷⁰ David M. Trubek, Jim Mosher and Jeffrey S. Rothstein, 'Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks' (2000) *Law and Social Inquiry* 1187 at 1190.

⁷¹ Eric Tucker, 'Labor's Many Constitutions (and Capital's Too)' (2011-12) 33 *Comparative Labor Law and Policy Journal* 355 at 368.

In 1944, it was envisaged that ILO standards would assist in setting the terms of fair trade. The Havana Charter for an International Trade Organisation (ITO) recognised (in Article 7) that 'unfair labour conditions, particularly in production for export, create difficulties in international trade'. Members would 'take whatever action may be appropriate and feasible to eliminate such conditions in its territories' and those who were members of the ILO would 'cooperate with that organization' so as to give effect to that undertaking. Disputes arising relating to labour standards would also be referred to the ILO.⁷² However, the provisional application of the General Agreement on Tariffs and Trade (GATT), due to the refusal of the US Congress to endorse Truman's proposals, meant that labour rights were never fully integrated into the international trade regime. The General Exceptions clause in Article XX only makes explicit reference to 'prison labour' as a labour standard which would give grounds for a member's breach of other key provisions in the GATT, although labour standards could arguably come within the compass of other 'public morals' and 'human health'.

This is problematic since it is possible to achieve an unfair comparative advantage in trade in goods by hiring very cheap labour so as to lower manufacturing costs, but also to cut costs when engaging in trade in services by using supply chain and migrant labour in ways that evade standard forms of labour regulation.⁷³ The result can be that collectively agreed rates of pay are systematically undercut and the options to apply for local jobs are removed.⁷⁴

By the time the World Trade Organisation (WTO) was created in 1994, no reference was made to workers' rights as constitutive of the justice of world trade. Instead, the WTO became more adept at pursuing economic objectives, such as the removal of non-tariff barriers and effective enforcement of appended agreements through a dispute settlement mechanism.⁷⁵ Despite acknowledgement of certain 'core labour standards', including freedom of association and effective recognition of the right to collective bargaining' in the Singapore Ministerial Declaration of 1996, the WTO has resisted any further measures which would give effect to such rights. As Eric Tucker has concluded: 'When viewed as part of a larger international project to constitutionalize a neoliberal social structure of accumulation, it is fair to conclude that its indirect effects weigh in the direction of strengthening the hand of capital...'⁷⁶

⁷² See the Havana Charter for an ITO, available at: <http://www.jus.uio.no/english/services/library/treaties/15/15-02/ito.xml>. See also Clair Wilcox, 'The London Draft of a Charter for an International Trade Organization' *The American Economic Review*, Vol. 37, No. 2, *Papers And Proceedings Of The Fifty-Ninth Annual Meeting Of The American Economic Association* (May, 1947), 529-541.

⁷³ See Novitz n.59 above, drawing on the findings of Marion Pannizon, 'Trade and Labor Migration: GATS Mode 4 and Migration Agreements' (Friedrich-Ebert-Stiftung, 2010) and Philip Martin, *GATS, Migration and Labour Standards* DP/165/2006 (ILO, 2006) available at: <http://www.ilo.org/public/english/bureau/inst/publications/discussion/dp16506.pdf>.

⁷⁴ Novitz n.26 citing at 127 the findings of the European Commission, *Commission Staff Working Document, Impact Assessment*, Strasbourg, 8.3.2016 SWD(2016) 52 final, at 13 and 36; and also the extensive research conducted by Jan Cremers, *In Search of Cheap Labour in Europe: Working and Living Conditions of Posted Workers* (Brussels: CLR Studies: European Institute for Construction Labour Research, 2011).

⁷⁵ See Andrew Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (Oxford: Oxford University Press, 2011).

⁷⁶ Tucker n.71 above at 371.

While they were not integrated in the 'hard law' world trade system, key ILO Conventions (Nos 87 and 98) protecting freedom of association, collective bargaining and the right to organise were incorporated into the international human rights architecture. Article 22 of the 1966 International Covenant on Civil and Political Rights (ICCPR) stated that: 'Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.' Article 8 of its twin instrument, the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), contained more far-reaching provisions relating to trade unions, rather than freedom of association *per se*, including qualified recognition of the right to strike. In both UN human rights instruments, these provisions are subject to the proviso that: 'Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.'

The benefits of a human rights approach for labour standards have been disputed. As Vidya Kumar has observed 'employers are also human beings and will, therefore, possess universal human rights attaching to their dignity'.⁷⁷ The issues of power, obvious at the national level have the potential, to be lost in more formal entitlements distant from their subjects. A difficulty with the minimalist discourse of human rights is that it barely acknowledges the structural power inequalities between labour and capital and 'depoliticizes... by externalizing the impact and relevance of uneven economic development and colonial history'.⁷⁸ Further, there is a tendency to individualize such entitlements, so that the protection of more forceful collective dissent and action is lost.

In the Human Rights Committee, for example, the plea to protect a right to strike as a facet of freedom of association was rejected,⁷⁹ despite this having become a longstanding facet of ILO jurisprudence on freedom of association. Certainly, norms such as a right to secondary or solidarity action which could have been of a considerable use to workers seeking to negotiate terms and conditions globally,⁸⁰ never became a feature of an international human rights tradition. This is despite contemporary complications caused by various forms of migration, which create complex inter-related labour markets,⁸¹ and ongoing attempts by trade unions to organise globally.⁸²

⁷⁷ *Ibid.*, at 133.

⁷⁸ Vidya Kumar, 'Rethinking the Convergence of Human Rights and Labour Rights in International Law: Depoliticisation and Excess' in Ruth Buchanan and Peer Zumbansen (eds), *Law in Transition: Human Rights, Development and Transitional Justice* (Oxford: Hart, 2016) above at 128. Cf. Moyn n.5 above, ch 4, for e.g. at 171 – 172.

⁷⁹ *JB et al v Canada* CCPR/C/28?D/118/1982, with a strong dissenting opinion led by Roslyn Higgins. See Sarah Joseph, 'UN Covenants and Labour Rights' in Fenwick and Novitz n.33 above at 348 – 352.

⁸⁰ Lord Wedderburn, 'Multinational Enterprise and National Labour Law' (1972) 1 *ILJ* 12; Paul Germanotta and Tonia Novitz, 'Globalisation and the Right to Strike: The Case for European-Level Protection of Secondary Action' (2002) 18 *International Journal of Comparative Labour Law and Industrial Relations* 67.

⁸¹ Judy Fudge, 'Precarious Migrant Status and Precarious Employment: The paradox of international rights for migrant workers' (2012-13) 34 *Comparative Labor Law and Policy Journal* 95; Chantal Thomas, 'Convergences and Divergences in International Legal Norms on Migrant Labor' (2011) 32 *Comp. Lab. L. & Pol'y J.* 404; and Cathryn Costello and Mark Freedland (eds) *Migrants at Work* (Oxford: OUP, 2014).

⁸² See the Global Unions website: www.global-unions.org/. See also Jamie McCallum, *Global Unions, Local Power: The New Spirit of Transnational Labor Organizing* (Ithaca, NY: Cornell University Press, 2013). Trubek et al, n.70 above at 1196 observed in 2000 that: 'telecommunications unions in the United States, Mexico and

In regional human rights systems, both the European Court of Human Rights and the Inter-American Court of Human Rights gave priority to the individual right to disassociate over the positive entitlement to effective bargaining, which could achieve superior economic outcomes for workers.⁸³ This led to the dismantling of presumed trade union membership in the form of a 'closed shop' in the UK and other European states, even though this mechanism for protection of worker interests had been accepted as appropriate by ILO supervisory bodies.⁸⁴

In the period post the Cold War, ILO influence has further come under threat. The 1998 ILO Declaration of Fundamental Principles and Rights at Work seemed to many labour activists promising in that the instrument set out certain core labour standards, including 'freedom of association and the effective recognition of the right to collective bargaining' (Article 2(a), which were declared to apply to all ILO member states by virtue of their constitutional obligations regardless of ratification of particular ILO conventions. Further a Declaration of 2008 on Social Justice for a Fair Globalization (Article I(A)(iv)) reiterates the significance of these entitlements within a broader 'decent work' agenda, which includes 'social dialogue and tripartism'.

These initiatives belie significant pressure now placed on the ILO to reform its standard setting procedures and take on a less legalistic, development-oriented role.⁸⁵ This is reflected in Article II of the 2008 Declaration, which does not envisage action by ILO member states in furtherance of the Declaration's objectives, but rather that 'the Organization should review and adapt its institutional practices'. The employers' lobby has gained in strength within the ILO, such that it has recently challenged long-established principles protecting a right to strike as a facet of freedom of association.⁸⁶ This would seem to be because freedom of association has been designated by the ILO

Canada have formed an alliance for coordination of action and mutual assistance. Similarly, the unions at BMW facilities in Germany, Brazil and the United States recently announced their intention to pursue contracts that expire simultaneously to prevent the automaker from shifting production during contract negotiations.' More recently, Magdalena Bernaciek, 'Polish Trade Unions and Social Dumping Debates: Between a rock and a hard place' (2016) 22(4) *Transfer* 505 at 513 outlined the work of Solidarnosc's international office, which has included placing Polish posted workers in touch with Norwegian trade unions, so that they could become members and recover unpaid wages through legal proceedings, but also supporting boycotts by Danish unions in response to the undercutting of wages in otherwise applicable collective agreements.

⁸³ Starting with Application Nos 7601/76 and 7806/77 *Young, James and Webster v UK* Judgment of 13 August 1981, which led to abolition of the UK closed shop, despite allowances made within that system for conscientious objectors. Virginia Mantouvalou, 'Is There a Human Right not to be a Trade Union Member?' in Fenwick and Novitz n.33 above at 439. See also *Baena Ricardo (270 Workers v Panama)*, Judgment of 2 February 2011, at para 159.

⁸⁴ In 1954, a case brought by a trade union (The Aeronautical Engineers' Association (Croydon)) challenging the operation of a closed shop was rejected by the CFA in Case No. 96, 13th Report of the CFA stating that: '138. The Committee considers, therefore, that the complainant has failed to offer sufficient proof that the refusal of the employers to recognise the complaining organisation as a bargaining agent constitutes, in the present case, an infringement of trade union rights.' The closed shop was not considered to lead to anti-union discrimination by virtue of ILO Convn No. 98. An attempt to raise the same issue again in 1957 was rejected: see Case No. 162, 26th Report of the CFA.

⁸⁵ Brian Langille, 'Imagining Post "Geneva Consensus" Labor Law for Post "Washington Consensus" Development' (2010) 31 *Comparative Labor Law and Policy Journal* 523, 534–35.

⁸⁶ Claire La Hovary, 'Showdown at the ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike' (2013) 42 *Industrial Law Journal* 338.

as a 'core' labour standard, which as a result is profoundly influential in domestic litigation, trade relations and even the design of international corporate codes of conduct.⁸⁷ In so doing, the employers' lobby has prompted a constitutional crisis, challenging the relevance of supervisory bodies such as the ILO Committee of Experts on the Application of Conventions and the ILO Committee on Freedom of Association.

There has been a contraction of protection of workers' rights as human rights in the international sphere, which then has repercussions for domestic protection of such entitlements. When, in the context of the 2008 financial crisis, certain European states were called upon by the Troika (the International Monetary Fund, the European Central Bank and the European Commission) to 'reform' their labour law systems so as to remove national systems of bargaining and supplementary scope for solidarity action, the international human rights system provided no counterbalance for the protection and preservation of workers' domestic legal entitlements, even when rooted in the national constitutional texts and jurisprudence.⁸⁸ Economic objectives were allowed to prevail, just as the social effects of global trade in goods and services could not be countermanded by reliance on workers' rights at international law.⁸⁹

The inadequacy of this state of affairs has been identified by the current UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Miana Kiai, issued in September 2016. He has observed that: 'The majority of the world's workers, particularly those in vulnerable situations such as migrant, women and domestic workers, are disenfranchised of their rights to freedom... of association in the workplace'. He attributes that disenfranchisement to a number of factors, including 'the increasing power of large multinational corporations and the corresponding failure by States to effectively regulate and enforce norms and standards against those actors'.⁹⁰ In this respect, he also observes the ways in which conditions imposed by UN agencies, such as the IMF and World Bank, have been premised on 'limiting or denying workers' rights and benefits'.⁹¹ Further, he notes that while the WTO permits preferential trade agreements which may include labour provisions including freedom of association, as a basis for fair trade competition, these are 'incapable of delivering sustainable improvements in the enabling environment for freedom of association for workers without binding enforcement mechanisms and a clear political commitment by the signatory States'.⁹² The result is, as he observes, the growing disparities of wealth between workers and those for whom they work. His findings, however, remain only recommendatory.

⁸⁷ Janice Bellace, 'Pushback on the Right to Strike: Resisting the thickening of soft law' in Adelle Blackett and Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Cheltenham: Edward Elgar, 2015).

⁸⁸ Stefan Clauwaert and Isabelle Schömann, *The Crisis and National Labour Law Reforms: A mapping exercise* ETUI Working Paper 2012.04; and Aristeia Koukiadaki, Isabel Tavora, Isabel and Miguel Martinez Lucio, *The Transformation of Joint Regulation and Labour Market Policy in Europe during the Crisis: Comparative Project Report* (University of Manchester/The European Commission 2014).

⁸⁹ Alain Supiot, 'A Legal Perspective on the Economic Crisis of 2008' (2010) 149(2) *International Labour Review* 151; see also Alain Supiot, *The Spirit of Philadelphia: Social Justice vs. the Total Market* (London: Verso, 2012).

⁹⁰ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association A/71/385 at 26/29, 14 September 2016 available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/71/385&referer=/english/&Lang=E.

⁹¹ *Ibid.*, at 24/29.

⁹² *Ibid.*, at 24/29 – 25/29.

Overall, it would seem that we are witnessing the ‘thinning’ of the freedom of association protections that had emerged in countries like Britain by 1950 and the hollowing out of the capacity to act collectively both nationally and transnationally. This paper concludes by considering the effects that this process has had on labour and on business.

BLENDING THE NATIONAL AND THE INTERNATIONAL – IMPLICATIONS FOR FREEDOM OF ASSOCIATION FOR LABOUR AND BUSINESS

There is certainly potential for the more concrete manifestation of freedom of association nationally, regionally and internationally. Doing so might enable workers to resist forms of globalisation and trade which threaten their access to jobs, their wages and working conditions. There could then be a multi-level inclusive process of dissensus in which new political and economic accommodations were probed and forged. Curiously, this is not now what academics, politicians or even workers are calling for. Indeed, many workers would seem to have been seduced by a different promise, namely that of ‘America First’⁹³ and ‘Make Britain Great Again’,⁹⁴ that is, nationalism.

It is difficult to find a simple concrete definition of nationalism. Ernest Gellner, however, offered a nice summary which has proven to be influential: ‘Nationalism is primarily a political principle, which holds that the political and the national unit should be congruent.’⁹⁵ In a context of industrialisation, nationalism offers a unifying process of cultural connection overcoming uneven economic effects.⁹⁶ Nationalism can be understood as a fiction, which within ‘nations’ enables political agitations against foreigners ...’.⁹⁷ These are the ‘others’ (whether constructed ethically or linguistically or in some other way) against whom in times of crisis, whether political, economic or societal, we need to be defended.⁹⁸

In the UK there are now calls for ‘British jobs for British workers’.⁹⁹ Surveys of those in England correlate being in favour of exit from the European Union (Brexit) with identification with being ‘English’, rather than ‘British’.¹⁰⁰ This now manifested in Government policy aimed at ‘controlling

⁹³ See, for example, reportage at: <http://www.bbc.co.uk/news/world-us-canada-38698654>. See also the ‘America First Job Plan’ announced 17 February 2017 available at <http://www.express.co.uk/news/world/766378/US-President-America-First-job-growth> (accessed 8 March 2017).

⁹⁴ This term was used by the British Prime Minister, Theresa May, four times in a single speech on 17 January 2017. See <https://www.theguardian.com/commentisfree/2017/jan/18/theresa-may-speech-donald-trump-brexite> (accessed 8 March 2017).

⁹⁵ Ernest Gellner, *nations and Nationalism*, 2nd ed. (Oxford: Blackwell, 2006) at 1. See also John Breuilly, ‘Introduction’ in this edition and E.J. Hobsbawm, *Nations and Nationalism since 1780*, 2nd ed. (Cambridge: CUP, 1992) at 9-10.

⁹⁶ Hobsbawm n.95 above at 11 and 78.

⁹⁷ *Ibid.*, at 163

⁹⁸ *Ibid.*, at 170 – 176.

⁹⁹ Delphine Strauss, ‘How British Jobs for British Workers Can Happen After Brexit’ *The Financial Times* 1.11.16 available at: <https://www.ft.com/content/b7700992-9c99-11e6-8324-be63473ce146>. Indeed, there was even discussion at the Conservative Party conference in October 2016 of how British employers could be named and shamed for hiring ‘foreign’ workers: <http://www.telegraph.co.uk/news/2016/10/04/jeremy-hunt-nhs-doctors-theresa-may-conservative-conference-live/> (accessed 9 November 2016).

¹⁰⁰ Michael Kenny, ‘The Genesis of English Nationalism’ (2016) *Political Insight* 8.

immigration'.¹⁰¹ Despite empirical evidence that movement of EU citizens to the UK creates a net gain to the UK economy and that EU workers do not constitute a drain on social welfare,¹⁰² it is said that immigrants cause concern 'about pressure on public services, like schools and our infrastructure, especially housing, as well as placing downward pressure on wages for people on the lowest incomes'.¹⁰³

Arguably the idea of international human rights (including freedom of association) could act as a corrective to the more exclusionary forms of nationalism; indeed, Hobsbawm would regard them as capable of taming nationalism altogether.¹⁰⁴ A 'supra-national restructuring of the globe' through European and international legal structures could offer scope for a complete change in perspective and, even, greater wisdom.¹⁰⁵ However, in the absence of operational national protection of freedom of association and the operation of international guarantees so as to correct market shocks, that corrective is currently absent. Indeed, the erosion of meaningful freedom of association at the international level, its implication for labour laws in the North, and workers' consequent frustration at their disempowerment, may be what is allowing contemporary forms of nationalism to flourish. Traditional trade unions (or even other alternative forms of collective worker engagement, such as the works councils which operate in Europe)¹⁰⁶ could not insulate workers from economic effects (loss of jobs and reduction of real pay) for workers in the North. It is interesting that it was the poorest, those earning less than £20,000 per annum tended to vote for Brexit, especially in areas such as the Midlands and the North where workers were struggling to 'adapt and prosper amid a post-industrial and global economy'.¹⁰⁷ As the 'bargain involving generous redistribution and insurance against economic shocks in exchange for support for global trade was struck after World War II in Western democracies' has been whittled away, it is those localities where there have been such trade shocks and populations feel unpredicted which have turned to anti-immigrant sentiment and voted for Brexit.¹⁰⁸

¹⁰¹ HM Government, *The United Kingdom's Exit from and Partnership with the European Union* (2017) Cm 9417, Chapter 5 titled 'Controlling Migration' at 25.

¹⁰² Christian Dustmann and Tommaso Frattini, 'The Fiscal Effects of Immigration to the UK' (2014) 124(580) *The Economic Journal*, F593-F643; confirming findings in Christian Dustman, Tommaso Frattini and Caroline Halls, 'Assessing the Fiscal Costs and Benefits of A8 Migration to the UK' (2010) 31(1) *Fiscal Studies* 1.

¹⁰³ HM Government, *The United Kingdom's Exit from and Partnership with the European Union* (2017) Cm 9417 at 25.

¹⁰⁴ Hobsbawm n.95 above at 176 observes that 'nationalism by definition excludes from its purview all who do not belong to its own "nation", ie the vast majority of the human race'.

¹⁰⁵ *Ibid.*, 184 – 192.

¹⁰⁶ Stan De Spiegelaere, 'Too little, too late? Evaluating the European Works Councils Recast Directive' (Brussels: ETUI Research Paper, 2016) available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2809520; see also Jan Cremers and Pascale Lorber, 'Transposition of provisions of the Recast Directive on the functioning of the European Works Council' in *Variations on a theme: the implementation of the EWC Recast Directive* (Brussels: ETUI, 2015): 85-107.

¹⁰⁷ M. Godwin and O. Heath, 'Brexit Vote Explained: Poverty, Low Skills and Lack of Opportunities' Joseph Rowntree Foundation (JRF), 31 August 2016, available at <<https://www.jrf.org.uk/report/brexit-vote-explained-poverty-low-skills-and-lack-opportunities>> accessed 9 November 2016.

¹⁰⁸ Italo Colantone and Piero Stanig, *Global Competition and Brexit* (2016) BAFFI CAREFIN Centre for Applied Research on International Markets, Banking, Finance and Regulation available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2870313> accessed 1 September 2017.

The more painful irony is that such nationalism is likely to strip away not only at the theoretical universalism of international human rights (however weak and minimalistic this may be), but even further reduce national-level inclusiveness of access to freedom of association envisaged by Marshall. It is becoming politically acceptable to marginalise those designated as ‘outsiders’ again, whether ‘citizens’ or not. This may have profound effects on workers’ capacity to associate and exercise voice collectively in labour market and democratic institutions domestically, internationally and indeed transnationally.

When Theresa May says ‘we are now the party of the workers’¹⁰⁹ it is evident that the Conservative government is not being inclusive of all workers, certainly not ‘foreigners’ or ‘immigrants’. Nor do they seem to welcome engagement with voices from the trade union movement. Prime Minister May has now brought into force the Trade Union Act 2016, which imposes more draconian controls over the trade union movement than were previously contemplated under British law.¹¹⁰

This, in turn has particular effects on business, so that it is not only workers who are now engaged in opposition and protest. Discriminatory laws and nationalism, which distances the UK from international human rights structures and forms of European governance (whether within the European Union or Council of Europe) limits the markets to which business has access and also the workers they can hire to ensure productivity, regarding manufacture of goods or delivery of services.¹¹¹ In the US, large multinationals have protested against Trump’s travel ban aimed at those from some predominantly Muslim countries.¹¹² The British Confederation of British Industry (the CBI) is likewise voicing concerns regarding the effects of Brexit.¹¹³ What seems evident is that the failure to keep a form of balance in industrial relations, which entails legal and social protections of freedom of association, can have palpable effects on workers which in a given democratic system of governance will have unintended consequences for business. Ideally, employers will now see the need to restore balance, both voluntarily through corporate governance mechanisms, but also legally through the remaining international legal structures operational on the global stage and restore their credibility. Without doing so, it seems probable that everyone will suffer.

¹⁰⁹ See the use of this term reported at <<https://www.theguardian.com/politics/2016/oct/05/theresa-may-conference-interventionist-government-for-workers>> accessed 8 March 2017 and <<https://www.rt.com/uk/361707-theresa-may-dress-conference/>> accessed 8 March 2017.

¹¹⁰ Alan Bogg, ‘Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State’ (2016) 45(3) *Industrial Law Journal* 299 at 300. For an overview of the measures in question, see Michael Ford and Tonia Novitz, ‘Legislating for Control: The Trade Union Act 2016’ (2016) 45(3) *Industrial Law Journal* 277.

¹¹¹ ‘British businesses fear losing EU workers after Brexit’ Politico 25 April 2017 available at: <<http://www.politico.eu/article/british-businesses-fear-losing-eu-workers-after-brexite/>> accessed 1 September 2017.

¹¹² ‘Amazon pledges legal support to action against Trump travel ban’ The Guardian, 31 January 2017 available at <https://www.theguardian.com/technology/2017/jan/31/amazon-expedia-microsoft-support-washington-action-against-donald-trump-travel-ban> accessed 1 September 2017.

¹¹³ This has taken the form of overall support for Brexit as a strategy, but caution as to the modes of negotiation and short term outcomes – see for e.g. ‘Brexit is now directly damaging business investment in Britain’ Business Insider UK, 16 July 2017 available at <<http://uk.businessinsider.com/cbi-brexite-is-directly-damaging-uk-business-investment-2017-7>> accessed 1 September 2017.