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# The right to strike

## Judy Fudge

Three recent decisions by the Supreme Court of Canada contain important lessons for those in Australia who believe that the interests of workers may be advanced by a constitutionally entrenched bill of rights.

The Supreme Court of Canada, in its new constitutionally entrenched role as the ultimate oracle/interpreter of Canada's fundamental values and freedoms, has decided that the right of workers to withdraw their labour collectively in order to obtain better working conditions from their employers is not a fundamental freedom worthy of Charter of Rights protection. On 9 April 1987 the court issued three decisions, *Re Public Sector Employees Relations Act (Alberta)*, *RWDSU v Saskatchewan*, and *PSAC v Canada*, upholding, respectively:

- legislation prohibiting all Alberta public sector employees from legally striking at any time;
- ad hoc legislation requiring Saskatchewan dairy-workers on lawful strike to return to work; and
- wage control legislation which had the effect of extending collective agreements beyond their negotiated terms and thereby precluding federal public servants from participating in lawful strikes.

Simply put, in the context of the present Canadian political economy, the constitutional protection of the 'freedom of association' does not include the right to strike. Rather, the Supreme Court said the freedom of workers to use their strongest weapon in their dealings with employers is a modern creation of legislation best left to the fine tuning and delicate balancing of the political process. The majority view was that questions concerning the appropriateness of banning strikes in particular situations are not 'amenable to principled resolution. There are no clearly correct answers to these questions. They are of a nature peculiarly apposite to the functions of the legislature.'

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Perhaps this decision was not surprising in the Canadian context. Questions of collective bargaining and a right to strike were discussed in the Parliamentary committee considering the Charter of Rights; and the general sense of those deliberations was that the right to strike was to be understood as separate and distinct from the freedom of association. Nonetheless, the Canadian decision should prove informative to those in other countries who would like to believe that entrenching a bill of rights will benefit the ordinary working person. What is important about the Supreme Court of Canada's decisions is not unique to the Canadian context: but rather the very mode of argumentation employed by the courts will be used in interpreting constitutionally protected rights and freedoms in all liberal capitalist countries, of which Australia is but one.

### THE MEANING OF 'FUNDAMENTAL RIGHTS'

The first question to be asked in evaluating whether entrenching a bill of rights will help working people is to ask what such a document is meant to signify. If anything, a bill of rights is meant to be the expression of the shared values, the community morality, of a country. Underwriting the legitimacy of the document is the notion that the values it expresses are grounded in consensus. It is this claim which requires further scrutiny. Moreover, it is this claim that allowed the Supreme Court in Canada to argue that, in the absence of specific reference to the right to strike, it was unprepared to give the definition of the freedom of association an expansive meaning so as to include the means an association such as a trade union would use to achieve the goal of collective bargaining.

## CONCLUSION

The iniquitous treatment received by Ms Thorne requires no further comment. The facts of the case speak for themselves.

Legal proceedings issued pursuant to legislation protective of human rights may produce at least temporary restraint on the exercise of raw power. The more enduring success in this case was with public exposure of discriminatory behaviour. That success, however, was limited by inadequate media coverage. The threat of public exposure is an important asset (and perhaps even a *raison d'être*) of such legislation and may be somewhat undervalued.

In this instance, legal proceedings also provided a small window with a limited view of the internal workings of government. Such a view is infrequently otherwise provided. This was, in short, one instance in which the management of information was not entirely successful.

The irrationality of the decision-making process revealed suggests further cause for scepticism and critical examination of claims that political and managerial

decisions are 'rational' — economically or otherwise. Rejection of the assumption that such decisions are or can be value-neutral is a key step in the process of critical examination.

The media and its relationship with government warrant similar scrutiny.

## REFERENCES

1. It is understood that neither the Council nor the Tribunal has made a decision.
2. c.f. (1986) 7 *LISTA News* 9, 1. This reports another example from within the same ministry.
3. *Hansard*, 11 November 1986, p.1844; reports in the *Age* (p.5) and *Herald* (p.12) of 12.11.86.
4. *Hansard*, 11 November 1986, p.1844.
5. *ibid.*, p.1847.
6. See for example: Peachment, A., "Management" and the "Public Sector" — Never mind the Reality, Feel the Myth", (1986) 13 *Canberra Bulletin of Public Administration*, 130; Bryson, Lois, 'A New Iron Cage? A View from Within' (1986) 13 *Canberra Bulletin of Public Administration*, 362; Considine, M., 'Turning the Guns on the Public Service', (1987) *Australian Society* 21.
7. *Supra*, ref. 5 at p.135.



Here is where the difference between principle and policy comes in to play. Principles are essentially uncontroversial as they depend upon a consensus shared among the political institutions; however, the right to strike and the modern regimes of labour relations are based on political compromises made by elected representatives between the opposed interests of labour and capital. The fact that the freedom to strike in the Canadian context is both controversial and recent (when compared with the fundamental freedoms, such as, say, the freedom of expression, thought or religion) was sufficient evidence for the majority of the court to declare that the right to strike was not a fundamental right and, hence, not deserving of protection.

But that claim in and of itself was controversial — as both the dissenting decision of two members of the court and the length of time it took the court to resolve this dispute (almost two years elapsed from the time the appeal was heard until the decision was handed down) indicates. The dissentients (the Chief Justice and one other judge) held that the freedom of association

included not only the fact of association, but the means of obtaining the objects of the association. For them, 'the role of association has always been vital as a means of protecting the essential needs and interests of working people'. The capacity to bargain collectively, and the freedom to strike which is a necessary condition for achieving that capacity, were viewed by the Chief Justice as essential for workers to 'overcome their vulnerability as individuals to the strength of their employers'.

## NO CONSENSUS ON 'FUNDAMENTAL' VALUES

What does this dispute over the 'fundamentalness' of the right of workers to strike tell us about the entire program of entrenching certain open-textured freedoms and rights as the means of resolving controversy over the social consensus? It tells us that even at the highest levels of the judiciary, where the functionaries share a remarkable congruence of experience, training and attitudes, there is no consensus over the composition of the fundamental values in Canada.

Working people and owners of capital have historically disagreed, and continue to do so, about the appropriateness and the scope of the freedom to strike in any given situation. Australian society is not much different in this respect.

A recent Gallup poll taken one month before the Supreme Court released its decisions on the right to strike, indicates that Canadians are divided over the right to strike. While, 68% of Canadians support a right to strike, only 36% of them support the right of post office, airline, railway and telephone workers to withdraw their labour collectively. And support for the right to strike depends not only on the type of worker who may exercise the right, but also on the characteristics of the person asked the question. Younger people are more inclined to support the right to strike than those over 50, and union households more strongly favour the right to strike than non-union households.

Thus, even at a particular point in time the right to strike does not evoke a shared response among different groups within society. And, as we know, the right to strike itself has been subject to the historical see-saw battle between the courts and the legislature in the

Commonwealth countries, with the courts restricting and the politicians sometimes, not always, broadening the scope of the permitted collective withdrawal of labour. This battle, even as it was shaped in the courts, was subject to constantly changing views about the legitimacy of worker action. Why should we think there would be any less controversy over the right to strike merely because it was an entrenched constitutional right?

### A QUESTION FOR POLITICS, NOT LITIGATION

The problem is not that the Supreme Court of Canada failed to give workers' freedom to strike the legitimacy that a constitutionally protected right to strike would have given it, but, rather, that someone thought it was appropriate for courts to make this kind of decision in the first place. As John Griffith has so eloquently argued in rejecting the idea of entrenching a bill of rights in England, 'the law is not and cannot be a substitute for politics. This is a hard truth, perhaps an unpleasant truth . . . To require a supreme court to make certain kinds of political decisions does not make those decisions any less political.'<sup>1</sup>

The appropriateness and scope of the right to strike in any particular context is inherently controversial, depending on political judgments about the relative strengths of capital and labour and where the balance of power should lie. Even the decision of the dissentients of the Supreme Court of Canada who believed that the right to strike was fundamental demonstrates the accuracy of the latter aspect of the above proposition. In fact, the Canadian Charter of Rights specifically states that the rights and freedoms guaranteed therein are subject 'to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. The existence of this limitation clause is, in fact, the reason why the Chief Justice was prepared to find that the freedom of association included the right to strike, because it enabled the court to uphold certain limits to the right to strike provision.

However, the very inquiry into what constitutes a demonstrably justifiable limitation in a free and democratic society is itself extremely controversial. For example, one member of the court who agreed with the Chief Justice that the constitution protected the right to strike, disagreed with his conclusion that legislation ordering workers who were in a legal strike position, where the government did not present any evidence of harm to third parties caused by the strike, constituted a demonstrably justified limitation. Even if the courts were not required by the constitution to consider whether a particular legislative limitation of a fundamental right or freedom was justified, American constitutional jurisprudence has demonstrated that such considerations are always involved. In the American constitutional context this drawing of appropriate limits is always engaged in, but as part of the initial definition of the right, rather than as an explicit second step as in the Canadian case.

In fact, the right to strike is never absolute. Even in countries such as France or Japan where the right to strike is explicitly entrenched within their respective constitutions it does not mean that the use of economic action in a particular situation is unrestrained or not controversial. Like all constitutional rights the right to strike is liable, and likely, to be balanced against the other rights with which it conflicts — most notably, even when not explicitly authorised, the right to use private property as its owner wishes.

### A COST/BENEFIT ANALYSIS

What would a constitutionally entrenched right to strike give to working people? Arguably, it would give symbolic legitimacy to the collective withdrawal of labour by workers in their continuing struggles for better working conditions and standards of living. And, perhaps, it would make governments less willing to restrain strikes in situations where strikes have previously been seen as legitimate. And, less likely, workers might be able to use this right to extend their collective power in new ways. All this will depend on the courts balancing of countervailing rights and the 'consensus' of values at any particular time.

If these are the benefits of entrenching a right to strike, what are the costs? Entrenching the right to strike in a constitutional document will shift the locus of political debate about the scope of workers' power from democratic institutions, where working people have some voice through the electoral process (however nominal it may seem at times), to the courts. If we are unhappy with the particular balance that elected representatives select, we can withdraw our support and ask for new scales. If, on the other hand, we are unhappy with the balance that the supreme appellate court selects, there is nothing much we can do but hope that in the future a new consensus will be revealed (by some magic) to the judiciary. Dissatisfaction with the political process cannot be remedied by shifting the responsibility to resolve essentially controversial political questions to another institution, particularly if that institution is even less responsive to the democratic process than the one we were initially dissatisfied with.<sup>2</sup>

Entrenching a bill of rights will result in a massive judicialisation of political discourse. Instead of asking for abstract rights which depend for their interpretation and application in a concrete situation on an institution designed to be beyond the influence of various interests, the demand should be for concrete entitlements from institutions which are accountable to the majority of people, who, in Australia as in Canada, are working people. Symbolic victories, where in the end control of the larger debate is lost, are of little value. Australian working people owe few of their victories to the courts; rather, they have won them by engaging directly in political and economic struggles.

Concrete demands both to address particular situations and to achieve a vision of the future constitute the best strategy for accountable social change. Australians concerned about the plight of working people in a political climate not very favourable to workers' aspirations should not put their trust in a document or institution over which they have no control. Canadian workers' will have to struggle to minimise the damage to political debate caused by entrenching fundamental freedoms. By refusing an entrenched bill of rights (even one that contains some abstract references to their aspirations) Australian working people can avoid this drain on their limited resources, and channel their struggles to win concrete victories.

### REFERENCES

1. (1979) 42 *Modern Law Review* 1 at 16.
2. See Hanks, P., 'Keeping Rights in Perspective', (1986) 11 *Legal Service Bulletin* 2.