A Human Right to Collective Bargaining?

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Abstract

The human rights discourse provides a strong framework for argumentation, on both a moral and a legal ground. Yet, the political gulf between human rights and work rights has yet to be fully bridged, leaving two camps with similar aims struggling independently of one another. What hope is that in the New Zealand context this gulf might be bridged, and what can we learn from other jurisdictions' struggles to reify a human right to collective bargaining?

Keywords: employment law, human rights, collective bargaining, freedom of association

1. Introduction

The industrial relations framework and employment law framework in New Zealand has been subject to massive upheaval in the past 30 years. In 1983, New Zealand labour law included compulsory unionism, national awards, compulsory arbitration in many sectors and differing legal frameworks for the public and private sector. In less than a decade, the pendulum had swung far in the opposite direction toward a system based on enterprise bargaining and individual contracts with little scope for the exercise of collective rights. As union density fell, the workers' share of national income dropped, and productivity gains have foundered. The Employment Relations Act 2000 (ER') strengthened the framework for collective bargaining and union rights, but failed to rebuild unionism in a tangible sense. Legislative clawbacks since 2008 have chipped away at this scheme, little-by-little undermining collective (and individual) workers' rights.

Compared with this swinging pendulum, the one progression of human rights law and policy appears more orderly. While the *kind* of human rights promoted by governments is politically determined, governments are, by and large, obliged to realise rights *progressively*, making it more difficult to wind back protective measures instituted by a particular government.

This paper assesses the potential for protecting collective bargaining through its recognition as a human right. Part 2 reviews some of New Zealand's international obligations with regard to the right to freedom of association. Part 3 will outline New Zealand's human rights framework, the presumption of consistency, and the current New Zealand position on the right to collective bargaining. Part 4 will look at recent jurisprudence from Canada, Europe and the UK, which has interpreted that right to include a right to collective bargaining. Part 5 will look at how legal acceptance of a human right to collective bargaining may have influenced the passage of the Employment Relations (Film Production Work) Amendment Act 2010 (the so-called Hobbit law), and assess the scope for deepening that right.

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2. The right of freedom of association at international law

The 1948 Universal Declaration of Human Rights (UDHR) contains numerous connections to the world of work, including freedom from slavery, child labour and discrimination at work. Art 22(3) provides: "Everyone has the right to form and join trade unions for the protection of his interests"[1] and art 20(1) provides: "Everyone has the right to freedom of peaceful assembly and association". Although collective bargaining itself is not included in the UDHR, commentators have remarked that "it seems clear that the framers intended that it be included as a prime aspect of freedom of association".[2]

In 1966, two legal documents – the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic Cultural and Social Rights (ICESCR) – gave effect to those rights. These were separated to account for the ideological difference of UN member states during the Cold War, with western capitalist democracies emphasising civil and political rights (CPR), and socialist countries favouring economic, social and cultural rights (ESCR). Both justified their political commitments with reference to the purported universality of their position.[3]

Both instruments contain obligations regarding the right to freedom of association. Art 22 of the ICCPR, substantially, restates the protections in the UDHR and recognises the primacy of ILO Convention C87 Concerning Freedom of Association and the Right to Organise in this area. No specific mention is made of collective bargaining or the right to strike. Art 22 reads:

1. 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.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. 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 ICESCR is more expansive in relation to work rights. Art 6 requires state parties to recognise and facilitate the right to work, and art 7 is more prescriptive, requiring fair and equal

[1] Roth notes that the UDHR was adopted by the United Nations a few months after C87 was adopted by the ILO and art 22(4) was based on C87 in Paul Roth (2000) (New Zealand's international treaty obligations and the ERA *NZLS Employment Law Conference 23-24 November 2000* 65)

[2] Roy J Adams "From Statutory Right to Human Right: The Evolution and Current Status of Collective Bargaining" (2008) 12. Just Labour 48, at 49.

[3] For an interesting comparison of the two instruments see Margaret Bedggood "Economic Social and Cultural Rights: The International Background" and Karen Meikle "Economic, Social and Cultural Rights Protection in New Zealand- an overview" both in Margaret Bedggood and Kris Gledhill (eds) *Law into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2011). Meikle notes at 40 that New Zealand was not part of the 'Western consensus' attaching different importance to ESCR and CPR

remuneration, safe and healthy working conditions, equal promotional opportunities and reasonable restrictions on working hours. Art 8 takes a prescriptive approach to trade union rights, explicitly mentioning the ILO Conventions on freedom of association:

> 1. The States Parties to the present Covenant undertake to ensure:
>   a. The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
>
>   b. The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
>
>   c. The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
>
>   d. The right to strike, provided that it is exercised in conformity with the laws of the particular country. …
>
> 2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.
>
> 3. 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 apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

New Zealand has ratified both the ICCPR and the ICESCR, and has ratified the Optional Protocol to ICCPR, meaning non-compliance with ICCPR rights may allow direct complaints to the Human Rights Committee in the case of serious breaches. Before this action is available, applicants must (among other things) demonstrate they have exhausted all possible internal appeals procedures. New Zealand has signed the Optional Protocol for ICESCR (in 2008) but is yet to ratify it. While both ICCPR and ICESR are binding on our legislature, there is no international legal complaints mechanism that may be triggered by non-compliance with the norms contained in ICESCR.

While the ICESCR rights regarding work may provide greater scope, the ICCPR requires more immediate implementation. The ICCPR is said to be "self-executing",[4] while the ICESCR requires state parties to take steps to "achieve progressively the full realisation" of rights, key to which is the avoidance of retrogression where possible. Opie notes this imposes an obligation not to take unjustifiable retrogressive measures – they must be determined by law, compatible with the nature of the right and promote the general welfare in a democratic society.[5]
According to Adams:[6]

> The UN's covenant oversight committees [the Human Rights Committee and the Committee on

[5] Joss Opie "A case for including Economic, Social and Cultural Rights in the New Zealand Bill of Rights Act 1990" (2012) 43(3) VUWLR 471, at 474.
[6] Adams, above n 2, at 51.

> Economic, Social and Cultural Rights] have handed down decisions making it clear that both of the core covenants do, in fact, protect the right to bargain collectively as an inherent and inseparable aspect of freedom of association…. From the perspective of the international human rights community, collective bargaining is both an economic right and a civil right.

On ratification, the New Zealand government placed and has maintained identically worded reservations on art 22 of the ICCPR and art 8 of the ICESCR as follows:

> The Government of New Zealand reserves the right not [to] apply article [8 or 22] to the extent that existing legislative measures, enacted to ensure effective trade union representation and encourage orderly industrial relations, may not be fully compatible with that article.

This does not constitute a blanket "opt out" of the rights, but only a restriction to "ensure effective trade union representation" or "to encourage orderly industrial relations".[7] Further, the reservation applied only to "existing legislative measures" in 1978. The changes to the employment law framework have removed these restrictions. As Gault J noted in *Eketone v Alliance Textiles (NZ) Ltd*[8] with the passage of the Employment Contracts Act 1991 "there no longer appears disconformity between these international instruments and New Zealand's domestic law".

3. The New Zealand Human Rights Framework

3.1 The New Zealand Bill of Rights Act 1990

New Zealand's dualist legal system requires legislation to give effect to international law and make it binding at a statutory level. This position is qualified by both statute and by common law.

The rights set out in the New Zealand Bill of Rights Act 1990 (BORA) are largely CPR drawn from the ICCPR, with one of the Act's two objects being to affirm those obligations.[9] Section 17 guarantees the right to freedom of association.

While the BORA is not supreme law, its effect on law making has been profound. The architect of the Act, Sir Geoffrey Palmer, suggests that it has been "a set of navigation lights for the whole of government to observe".[10] *MOT v NOT*[11] established the process for testing the consistency of existing enactments with the BORA. First, s5 states that those rights may be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society", while s6 states that where possible meanings consistent with those rights "shall be preferred to any other meaning". Then s4 must be taken into account, stating that no provision shall be "impliedly repealed or revoked, or to be in any way invalid or ineffective" and courts cannot decline to apply provisions by reason only of their inconsistency.

[7] The reservation originally related to compulsory industry-based union membership for the purposes of award coverage and to restrictions on minimum union size. These were also expressed as reasons for the original non-ratification of ILO C87 and C98. See (6 April 1995) 49 NZPD.
[8] *Eketone v Alliance Textiles (NZ) Ltd* [1993] 2 ERNZ 783, 794-795 (CA).
[9] Opie, above n 5, concisely traces the legislative history of the New Zealand Bill of Rights Act 1990 and the policy rationale for the exclusion of ESCR. He effectively rebuts many of the arguments against the inclusion of these rights.
[10] Geoffrey Palmer "The Bill of Rights Fifteen Years on" (keynote speech presented to the Ministry of Justice Symposium on the New Zealand Bill of Rights Act 1990, Wellington, February 2006) at [38].
[11] *Ministry of Transport v Noort* [1992] 3 NZLR 260.

The rights set out in the BORA are justiciable. As Opie notes:[12]

> As well as having jurisdiction to award damages for breach of those rights and other remedies such as declarations, the courts may indicate that an ordinary enactment is inconsistent with the [New Zealand Bill of Rights Act 1990]. Such an indication does not require Parliament to remedy the inconsistency or give rise to a right to relief, but may be seen as imposing an obligation (of a political or moral nature) on Parliament to reconsider the legislation in question and justify any decision not to rectify it.
>
> Proceedings under the Human Rights Act 1993 (HRA) may also be brought before the Human Rights Review Tribunal (HRRT) alleging that a public act, omission or enactment is inconsistent with the [New Zealand Bill of Rights Act 1990]'s right to freedom from discrimination. If the HRRT finds an inconsistency, it may grant various remedies including damages (other than when the inconsistency arises as a result of an enactment). In the case of an enactment, the HRRT may only make a declaration of inconsistency. Such a declaration does not bind the Government, but the declaration must be reported to Parliament, along with advice on how the Government intends to respond to the declaration.

The right to freedom of association alone is little help in establishing a right to collective bargaining. Indeed, the Employment Contracts Act 1991 (ECA), passed soon after the BORA, effectively defined the right of freedom of association as the freedom *not* to associate, establishing that "[e]mployees have the freedom to choose whether or not to associate with other employees for the purpose of advancing the employees collective employment interest".[13]

The ECA influenced the way the right to freedom of association was understood, implicitly establishing an individualised right. Industry-wide bargaining was replaced with enterprise bargaining, radically increasing the workloads of trade unions while isolating workers on different sites from one another. The right to freedom of association and the possibility of establishing a right to collective bargaining have since dwelled in the shadow of this individual interpretation.

3.2 The presumption of consistency

In instances of ambiguity, the ourts will seek to interpret legislation in a manner consistent with New Zealand's international obligations. As Richardson P observed in *Tranz Rail Ltd v Rail & Maritime Transport Union (Inc):*[14]

> The well settled approach of the Courts of New Zealand [is as] expressed, for example, in *Governor of Pitcairn and Associated Islands v Sutton* [1994] 2 ERNZ 492, 500; [1995] 1 NZLR 426, 433 (CA), as it happens an employment case: "Subject to any New Zealand legislation and consideration of any special local circumstances, the Courts of New Zealand will always seek to develop and interpret our laws in accordance with generally accepted international rules and to accord with New Zealand's international obligations".

In the case of international human rights treaties this presumption may be even stronger. In *Kelly v Tranz Rail Ltd*, Chief Judge Goddard noted:[15]

> In [*Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA)], the Court of Appeal made it clear that

[12] Opie, above n 5, 479-480.
[13] Employment Contracts Act 1991, s 5.
[14] *Tranz Rail Ltd v Rail & Maritime Transport Union (Inc)* [1999] 1 ERNZ 460 (CA) at [40].
[15] *Kelly v Tranz Rail Ltd* [1997] ERNZ 476 at 501.

> such [international human rights] treaties are far more than mere window-dressing. On the contrary, instruments of ratification of international conventions are documents of great solemnity under which, typically, the Government acknowledges that it has considered the convention and "[h]ereby confirms and ratifies the same and undertakes faithfully to observe the provisions and stipulations therein contained" (New Zealand's ILO Treaty Actions as shown in the International Labour Office Official Bulletin 1926-89 compiled in Ministry of Foreign Affairs and Trade, Wellington, June 1996). Of course, none of that can be said of conventions that have not been ratified, including Convention 87 of the International Labour Organisation being the well-known Convention concerning Freedom of Association and Protection of the Right to Organise and Convention 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively. However, …by becoming a member of the United Nations Organisation and its agency the International Labour Organisation, New Zealand has, as a matter of international law, accepted a number of fundamental principles including those embodied in the Charter of the United Nations, the Constitution of the International Labour Organisation and the Declaration of Philadelphia. These include freedom of association principles. There are, in addition, United Nations Organisation conventions that New Zealand has ratified and which seem to cover the same ground, albeit in somewhat different terms and in less detail than the International Labour Organisation conventions. I am, of course, referring to the International Covenant on Civil and Political Rights and more especially the International Covenant on Economic, Social and Cultural Rights. Both seem to contain, more or less directly, a guarantee of the right to strike as one of the fundamental freedoms, while recognising that it may be subject to limitations under national law as it is in New Zealand. … The two conventions are plainly treaties establishing human rights norms, or obligations within the contemplation of *Tavita v Minister of Immigration* ….

Opie notes that the presumption of consistency does not appear to have been argued in relation to cases where ICESCR has been raised and that doing so may have affected the outcome.[16]

3.3 The current position

The case usually cited in support of the individualised right to freedom of association is *Eketone v Alliance Textiles (NZ) Ltd.*[17] The facts are complex but revolve around a (successful) attempt by Alliance Textiles to compel its workers to sign a new collective contract by threatening lockouts and negotiating directly with the workers behind the union's back.

The workers alleged that 'undue influence' in the ECA should be given a meaning consistent with Canadian jurisprudence (before the Employment Court) and rights under the ICCPR and ICESCR (before the Court of Appeal). On behalf of the full court, Gault J considered the BORA, art 22 ICCPR and art 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Court declined to uphold the worker's complaint.
In relation to freedom of association generally his Honour stated:[18]

> [T]here is one other point arising from the judgements of the Employment Court which was argued and which warrants brief comments. It relates to the right of a person to choose whether or not to be represented by another person, group or organisation in negotiation for an employment contract. The rights to elect and pursue collective bargaining arise out of, but generally are not regarded as elements of, the freedom of association. *Colleymore v A-G* [1970] AC 538 (PC). This also is the view taken by the Supreme Court of Canada in *Reference Re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act* (1987) 38 DLR

[16] Opie, above n 5, at 513-516
[17] *Eketone v Alliance Textiles (NZ) Ltd*, above n 8. See for example, *Human Rights* (Brookers online) at BOR17.06: The right to freedom of association does not confer a right on the association to act collectively. Section 17 does not, for example, confer on a trade union the right to take industrial action: *Eketone v Alliance Textiles (NZ) Ltd*.
[18] *Eketone, at* 795-796.

> (4th) 161. Nevertheless, that right conferred by Part II of the Employment Contracts Act and that right should be fully accorded, bearing in mind ILO Convention No 98 concerning the right to organise and bargain collectively [Emphasis added].

Three important things should be noted about *Eketone*. First, Gault J's statement regarding collective bargaining and freedom of association is non-binding *obiter dictum* since the case was decided on other grounds.

Second, the question should be asked whether the cases he cites remain relevant and binding. Whether the decisions of the Privy Council in other jurisdictions are binding on the lower New Zealand courts is an interesting question. In *R v Chilton*[19] the Court of Appeal suggested (also as *obiter dictum*) that the answer was unclear, limiting the decision's application.

Third, while *Colleymore v A-G* remains the law in Trinidad and Tobago and no right to collectively bargain arises directly from the constitution[20], the statutory framework is very different from that in New Zealand. In that case, the appellants were union members employed by an oil company. Bargaining had broken down and legislation required that trade disputes be referred to the Minister, who could either promote a settlement through the industrial court (within 21 days), or if after 28 days it was not referred to the court a strike or lockout could take place after a further 14 days' notice.

The appellants argued that this procedure undermines the constitutionally-protected right of freedom of association, that the right embraces a right to bargain collectively, and is, in turn, ineffective unless backed by the right to strike. The court responded that, while the freedom of bargain collectively had been abridged, this was not an abrogation of the freedom to associate. In support, it notes that ILO C87 defines "freedom of association" without reference to collective bargaining, that those rights proscribed in the Convention are left untouched, and that the constitutional protection of freedom of association remains unaffected.

It is remarkable that the Privy Council interpretation of the Trinidad and Tobago constitutional right to freedom of association could be so influential on New Zealand's employment law. Long before the ILO Declaration on Fundamental Principles and Rights at Work coupled the rights of freedom of association and collective bargaining, ILO jurisprudence had established the rights as interdependent. It was not, however, until more recent decisions in Canada and Europe (including the United Kingdom) that we have seen the tectonic reversals of these prior positions, placing the right of collective bargaining squarely within the right of freedom of association.

4. The Right to Freedom of Association in Canada and Europe

Gault J's suggestion that the right must be interpreted consistently with freedom of association, as internationally recognised, prompts further discussion. Decisions from other jurisdictions and at the international level have expanded on the right to freedom of association, and may provide fertile territory for recognising a right to collective bargaining within the New Zealand right to freedom of association.

[19] *R v Chilton and Anor* [1 December 2005] (CA) CA333/04, at [112]-[113]. Prior to establishment of the Supreme Court on 1 January 2004: Thereafter they will be of persuasive value only.
[20] See Avril Rahim "National labour law profile: Trinidad and Tobago" (17 June 2011) International Labour Organization <www.ilo.org>.

4.1 Canadian Jurisprudence

Recent interpretations of the Canadian Charter right to freedom of association have included a right to collective bargaining. In the case of *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*[21] (*BC Health Services*), an appeal was brought before the Supreme Court of Canada challenging the constitutionality of Part Two of the Health and Social Services Delivery Improvement Act SBC 2002.

Those provisions gave employers greater flexibility in organising relations with employees in ways that would not have been possible under the conditions established in existing collective agreements. It introduced changes in transfers, subcontracting, employment security, lay-offs and bumping rights. Section 10 also invalidated any part of a current or future collective agreement that was not in conformity with the new Act, and also any collective agreement aiming to amend these restrictions.

The legal issue faced by the Court was to determine whether the guarantee of freedom of association laid down in s2(d) of the Charter protected collective bargaining rights and, if so, to determine whether these rights had been violated by the approved law. In ruling on the first point, the court deviated from existing case law, recognising that previous grounds relied on to exclude collective bargaining rights from the guarantee to freedom of association could no longer be supported because this would be inconsistent with Canada's historical recognition of the importance of collective bargaining. Moreover, the Court stated that collective bargaining is an integral part of freedom of association in international law. This international law can be used in the interpretation of guarantees in the Charter.

The weight placed upon Canada's international obligations is important. The Court stated that the sources most important to the understanding of s2(d) of the Charter are the ICESCR, the ICCPR, and C87. Because Canada had ratified all three, the Court recognised that these documents reflected both international consensus and principles that Canada had committed itself to uphold. Adams has said that:[22]

> [BC Health Services] may be seen by history to be a turning point in the way that collective bargaining is conceived and evaluated in Canada. Although long counted as a human right by experts and advocates, in Canada… prior to the Supreme Court decision, it was neither treated by governments as human right nor regarding by the public as a human right… It was treated instead as, if not exactly an ordinary partisan issue, no more than a statutory right; one which political parties of the left might strengthen and expand and parties of the right might contract and fetter.

The reach of this interpretation was clarified in 2011 in *Ontario (Attorney General) v Fraser.*[23] While the majority of the Canadian Supreme Court upheld the precedent laid down in *BC Health Services*, the right to collective bargaining was framed in narrow terms – that s2(d) only requires that unions *be able* to participate in a meaningful workplace process with an employer, which includes the right to make representations to the employer and have them considered in good faith. Only where legislation "makes good faith resolution of workplace issues between employees

[21] *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia* [2007] 2 S.C.R. 391.
[22] Adams, above n 2, at 48.
[23] *Ontario (Attorney General) v Fraser* [2011] 2 SCR 3.

and their employer effectively impossible" will there be a violation of s2(d).[24]

While the majority stated it is too soon to declare that *BC Health Services* is unworkable (as argued by Justice Rothstein in dissent) and that it would be inappropriate to reverse the case (because none of the parties or interveners sought this result), *Fraser* is a considerable retreat from the high water mark set in *BC Health Services*. What has followed has been some confusion, and subsequent cases have given *Fraser* only a very conservative and legalistic interpretation, concluding that the right turned on whether the parties "had the opportunity for a meaningful process of collective bargaining."

Despite this subsequent partial retrenchment, Canadian jurisprudence has extended the content of the right of freedom of association to include access to collective bargaining.

4.2 European Court of Human Rights

More dramatic and far-reaching still is the 2008 case of *Demir and Baykara v Turkey*.[25] In that case, a Turkish trade union of municipal officials reached a collective agreement with a municipality. When the latter failed to fulfil its obligations under this agreement, the trade union initiated proceedings in the District Court. The Court ruled in favour of the union but was subsequently overturned by the Supreme Court. The Supreme Court denied the trade union's right to engage in collective bargaining with a municipality.

The Audit Court, as a result of this decision, ordered the trade union members to repay additional income they had received under the now-defunct collective agreement. Mayors who had concluded collective agreements of this kind were prosecuted in both the criminal and civil courts for abuse of power.

A member of the trade union and its president brought the case before the European Court of Human Rights (ECtHR). After an initial ruling, finding a violation of art 11 of the European Convention on Human Rights, the case was referred to the Grand Chamber of the Court at the request of the government of the Turkish Republic, which claimed that the Court could not, even in matters of interpretation, put forward against it any international treaties other than the European Convention on Human Rights.

The Grand Chamber reversed earlier jurisprudence to hold that the right to collective bargaining is an essential element of the right to freedom of assembly and association in art 11 of the European Convention on Human Rights and Fundamental Freedoms.[26] Perhaps more significantly, the Court also embedded the ILO jurisprudence (for example decisions of the Committee on Freedom of Association) into that right by holding that national systems must be compatible with the requirements of the ILO (and of the European Social Charter).

Ewing and Hendy comment that:[27]

> It is impossible to exaggerate the importance of these developments and implausible to argue that

[24] *BC Health Services* Citation, above n 21, at [98].
[25] *Demir and Baykara v Turke*y, Application No 34503/97, 12 November 2008.

[26] Worded similarly to ss 16 and 17 of the New Zealand Bill of Rights Act 1990.
[27] K.D. Ewing and John Hendy QC "The dramatic implications of *Demir and Baykara*" (2010) 39(1) Industrial Law Journal 2 at 20 and 47.

> somehow the decisions are wrong or that they will soon be re-examined and reversed. It is equally impossible to exaggerate the scale of the challenge they present for the common law and for judges schooled in the common law tradition. We now appear to have a comprehensive right to bargain and to strike, based on ILO and ESC standards. …
>
> From time to time, a decision is handed down by a court, which for different reasons, may be epoch-making, usually because of the great political consequences that flow in its wake. *Demir and Baykara v Turkey* may be one such case: it is a decision of one of the most important courts in the world, a decision that in principle will have direct implications for the law in at least the 47 countries of the Council of Europe in which some 800 million people live. Perhaps even more importantly, it is a decision in which social and economic rights have been fused permanently with civil and political rights, in a process that is potentially nothing less than a socialisation of civil and political rights. And perhaps even more importantly still, it is a decision in which human rights have achieved their superiority over economical irrationalism and 'competitiveness' in the battle for the soul of labour law, and in which public law has triumphed over private law and public lawyers over private lawyers.

The decision was reinforced by a second ECtHR case, *Enerji Yapi-Yol Sen v Turkey*, in which the court held that the right to strike was an essential part of the right to bargain collectively. While the right was not absolute, the impugned restriction – a prohibition on public sector trade unions taking industrial action – could not be upheld within a democratic society. Both *Demir and Beykara* and *Enerji Yapi-Yol Sen* have been debated in UK courts as part of the right of freedom of association.

In *Metrobus Ltd and Unite the Union*, the right to strike was raised to challenge the placing of disproportionately onerous obligations on unions running strike ballots prior to industrial action. The Court had little to say on the issue of collective bargaining as a human right but rejected the proposition that the ECtHR had established a right to strike.

However, as Ewing and Hendy argue, "...even if that general proposition is not accepted, a more restricted argument seems irrefutable: that if the right to collective bargaining is an essential element so must be any necessary element to its exercise".[28]

A similar issue was argued in *EDF Energy Powerlink Ltd v RMT*[29] where the applicant requested permission to have the issue heard at the Supreme Court. The Court refused, stating that such permission could not be granted on the basis of an "academic appeal."

A January 2013 decision[30] from the UK Central Arbitration Committee Panel (CAC) went even further, using *Demir and Beykara* to amend the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). The Pharmacists' Defence Association Union had submitted an application seeking recognition for collective bargaining by Boots Management Services Limited. The application was rejected by the employer on the grounds that they already had a formal and productive working relationship with another organisation, the Boots Pharmacists Association.

Schedule A1 of TURLCA established that an application to the CAC

> is not admissible if the CAC is satisfied that there is already in force a collective agreement under which a union is recognized as entitled to conduct collective bargaining in respect of pay, hours and

[28] At 24.
[29] *EDF Energy Powerlink Ltd v RMT* [2009] EWHC 2852 (QB).
[30] *The Pharmacists' Defence Association v Boots Management Services* Central Arbitration Committee TUR1/823/2012.

> holiday on behalf of any workers falling within the relevant bargaining unit.

Accordingly, the Union was only granted the right to bargain over facilities for union officials or consultation machinery, which, they argued, failed to fulfil the scope of art 11.

The CAC concluded that the prohibition on an independent union seeking recognition under the statutory procedure for the right to collective bargaining was an infringement of art 11:[31]

> A right merely to bargain collectively over facilities for trade union officials or consultation machinery cannot fulfil the scope of article 11 or be sufficient to preclude the exercise of the right to collective bargaining over the wider (legitimate) interests of the workers concerned. …. The Union must be permitted to be a striver for recognition under the statutory process where no other union has recognition rights (as those are properly understood in this context). The Panel therefore concludes that a literal interpretation of paragraph 35 interferes with the Union's rights under Article 11(1), for the reasons set out above.

Under s2 of the UK Human Rights Act 1998, the precedent in *Demir and Beykara* was used to justify a change in the wording of the Act to broaden its scope, allowing multiple unions to gain recognition for bargaining.

Discussion of these decisions in British courts, as well as the forceful position taken by the Canadian judiciary in interpreting Charter rights, implies there is growing applicability for the right to collective bargaining within New Zealand courts. While the establishment of the right to collective bargaining in the ECtHR may not be directly binding on New Zealand, it is still of significant persuasive value as an important decision from one of the most influential courts in the world. It provides a strong platform on which to assess the content of the right to freedom of association consistently with international interpretations.

Given these shifts in comparable jurisdictions, New Zealand's current position in relation to freedom of association appears increasingly out of step. Human rights are a constantly evolving field of law, and it may be time for a reappraisal of our law in light of these international developments.

5. Applying the Broader Right to Freedom of Association

We will now apply the evolving norm of the right to collective bargaining to a recent New Zealand context. The events which led to the passing of the Employment Relations (Film Production Work) Amendment Bill 2010 (the 'Hobbit amendment') are by now well-known.[32] It is sufficient to note that on 28 October 2010, following talks with Warner Brothers, the government amended the ERA under urgency.

No regulatory impact statement was prepared for the Hobbit amendment and neither were public submissions heard as it went through all three readings consecutively under urgency.[33] The

[31] At [77].
[32] For Helen Kelly's detailed timeline see: Helen Kelly "The Hobbit Dispute" (12 April 2011) Scoop www.scoop.co.nz>.
[33] It would be very interesting to see what a regulatory impact statement would have looked like. While the government has never released the relevant Crown Law opinion, a draft letter to Peter Jackson and Fran Walsh from Ministers Brownlee and Finlayson states "Having considered the possibility of amendments to the ERA or Commerce Act carefully, our view following extensive consultation with the Crown Law Office, is that, for the reasons set out below, it would not be appropriate to recommend such amendments. The letter contains a cogent statement of the reasons why the

changes excluded from the definition of employee: "a person engaged in film production work as an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer" or "a person engaged in film production work in any other capacity"[34] unless that person has a written employment agreement providing that they are, in fact, an employee.[35]

Warner Brothers and the New Zealand Council of Trade Unions clashed in interpreting the effect of the changes. The former claimed that film workers were prohibited from bargaining collectively by the Commerce Act 1986 on price fixing grounds, while the latter thought the workers could negotiate standard terms because that Act did not apply.[36]

Regardless of which interpretation would win in court, contractors miss out on several ancillary collective bargaining rights: They do not have a right to take industrial action in pursuit of a collective agreement or access to the various mechanisms intended to help the parties resolve their differences and come to an agreement. Individually, contractors are denied protections against unfair disadvantage and unjustified dismissal, minimum statutory terms and conditions (such as minimum wage rates) and several protections implied into employment contracts such as good faith and fair dealing.

The Hobbit amendment process and outcome highlight many of the worst excesses of our law-making process[37] and there is no guarantee that the s7 check by the Attorney-General would have had any further effect. A narrow interpretation of s17 of the BORA would hold that, regardless of the law, those workers could associate freely as they saw fit, and that it was not the role of the state to uphold any further protection.

A judicial application of s17 that took into account the precedents of *BC Health Services*, *Demir and Beykara* and the relevant ILO Jurisprudence could have gone one step further, undermining the *obiter dicta* of *Eketone*. In that instance, the role of the state would be to protect the rights of those workers to bargain collectively, regardless of the nature of their legal relationship. Further, such a decision would also imply a high water mark for legislators to respond to.

6. Conclusion

The current New Zealand position regarding the status of collective bargaining as articulated *Eketone* is increasingly isolated from the international mainstream. It may struggle to stand up in the face of a correctly argued case. While the international jurisprudence cited here is not without its critics but its importance ought not be underestimated. Establishing a human right to collective bargaining can provide a pathway to rebuilding union density and restoring workers' share of the national income to a level that better reflects their contribution to national productivity.

Employment law is fine as it is. The draft letter was released on 26 February 2013 under strong pressure from the Ombudsman.

[34] What is now s 6(1)(d) of the Employment Relations Act 2000.

[35] Pam Nuttall has teased out the interesting circularity of this definition given the requirement in s 6(3) that the court or Authority must take all relevant matters into account and is not to treat statements by the parties describing their relationship as determinative. See Pam Nuttall " '...Where the Shadows lie': Confusion, misunderstanding, and misinformation about workplace status" (2011) 36(3) NZJER 73.

[36] See, for example, Helen Kelly "The Hobbit Dispute" (2011) 36(3) NZJER 30 but note the situation may change with the passage of the Commerce (Cartels and Other Matters) Amendment Bill (341-2) currently before the House.

[37] See, for example, Margaret Wilson "Constitutional Implications of 'The Hobbit' Legislation" 2011 36(3) NZJER 90 at 97.