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doi:10.1017/S0008197322000927

TRADE UNIONS AND THE LAW: A MATERIALIST PERSPECTIVE

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ABSTRACT. *This paper draws on Marxist scholarship concerning the law's emancipatory potential to shed new light on the history of UK trade unions, and their relationship with law. It traces the historical development of UK trade union law from the nineteenth century to the present day with a view to illustrating the importance of considering not just the content, but also the form, of law, in explaining the role of law in shaping the development of the trade union movement, and in understanding the limits of law, including human rights law, when it comes to realising the emancipatory potential of trade unions in society today. It concludes with some observations about how legal and social actors might make use of their understanding of the legal form when it comes to harnessing the law as part of their political strategies.*

KEYWORDS: *historical materialism, Marxism, labour law, industrial relations, social movements, trade unions, strategy.*

I. INTRODUCTION

In the UK, the legal framework regulating trade unions has been transformed since the 1980s, departing from the model that had underpinned the industrial relations system since the beginning of the twentieth century.[1] In recent years, that legal framework has also been influenced by the development of human rights law, with human rights arguments, and challenges, playing an increasing role in trade union strategies to challenge the domestic legal framework, and defend, and make more space for, their activities. These shifts in the legal environment parallel changes in the orientation, and strength, of the UK trade union movement itself, not merely in the sense of a considerable decline in trade union membership and collective bargaining coverage; but also, with trade unions increasingly

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[1] For a good overview, see A. Clegg, *A History of British Trade Unions since 1889*, 1st ed., (Oxford 1964); D. Brodie, *A History of British Labour Law, 1867–1945* (Oxford 2003); R. Lewis, "The Historical Development of Labour Law" (1976) 14 British Journal of Industrial Relations 1.

https://doi.org/10.1017/S0008197322000927 Published online by Cambridge University Press

being described as economic-corporate institutions, rather than as broad-based, representative institutions, playing an active role in regulating labour markets and workplaces, representing the interests of labour as a socio-economic class.[2]

These observations about the UK trade union movement, and the legal environment in which it functions, raise important questions about the role of law, and of trade unions, when it comes to their role in contemporary social struggles. In Marxian-inspired literature, social struggles tend to be distinguished depending on whether they are reformist in orientation, concerned with perfecting the existing system, modifying the effects of existing structures on socio-economic outcomes; or whether they are radical in orientation, oriented towards changing the basic structure of the system itself.[3] In the labour law tradition, this latter form of struggle has been conceived through the lens of struggles for democratisation: to democratise not only the political sphere, but also, of the economic sphere of the market, and production.[4] While for some, this form of radical struggle has been conceived in terms of how to overthrow, or transcend the capitalist mode of production, for others, it has been seen in terms of a more gradual transformation in the way in which property is distributed, and decisions about how to allocate society's collective resources – including labour – are made, with a view to shifting the emphasis away from a prioritisation of private profit, towards a prioritisation of social need.[5]

Trade unions' role in these struggles is complex. Trade unions play a fundamental role in capitalism in mediating its contradictions, helping to prevent the drive for accumulation from undermining the conditions for labour power's social reproduction, by placing pressure on employers, and other decision makers, to take the immediate interests of labour into account when economic decisions are made.[6] In so doing, trade unions might simply stabilise, and legitimise, capitalist social relations,[7] but they might also help *improve* living and working conditions, and/or even, assist in the formation of a working class political consciousness and the development of capacities for collective self-regulation. To the extent to

[2] For a good analysis of the different orientations of UK trade unions, see R. Knox, "Law, Neoliberalism and the Constitution of Political Subjectivity: The Case of Organised Labour" in H. Brabazon (ed.), *Neoliberal Legality* (London 2016), 181.

[3] H. Brabazon, "The Power of Spectacle: The 2012 Quebec Student Strike and the Transformative Potential of Law" (2022) 33(1) Law and Critique 1.

[4] For the scholarly influences behind these ideas, see R. Dukes, *Labour Law or the Law of the Labour Market?* (Oxford 2014).

[5] For the link between this orientation, modern social struggles and the Marxist tradition, see S. Ferguson, *Women and Work: Feminism, Labour, and Social Reproduction*, 1st ed., (London 2019).

[6] M. Dimick, "Counterfeit Liberty" (2019) 3 Catalyst 47; S. Webb and B. Webb, *The History of Trade Unionism* (London 1920).

[7] "Why Unions Are Good – But Not Good Enough", available at https://jacobinmag.com/2020/01/marxism-trade-unions-socialism-revolutionary-organizing (last accessed 4 February 2022); "Marxism and the Trade Union Question", available at https://www.wsws.org/en/special/library/globalization-international-working-class/21.html (last accessed 30 June 2022).

https://doi.org/10.1017/S0008197322000927 Published online by Cambridge University Press

which they do this, they might be said to contribute not merely to reformist, but also, to radical social struggles – to wider struggles to change the structure of contemporary society.[8] Importantly, however, the extent to which this is possible, fundamentally depends on the nature of the legal environment in which they operate, including the legal rules introduced to qualify the private law rules which constrain their legal existence, and scope of operation, and/or any rights introduced to make space for their activities.[9]

This article draws on a range of Marxian-inspired scholarship concerned with exploring the role of law in furthering radical social struggles, in the sense defined above,[10] in order to shed new light on the significance of the *legal form* of trade union regulation, and the various factors mediating that form, as capitalism has developed. This it does with a view to understanding the likely implications of the legal changes surrounding trade unions, and in particular, the growing role of human rights, when it comes to thinking about their role in radical social struggles today.[11]

The distinctiveness of the article's approach lies in its shift away from a focus on *legal content*, and on the biases, and beliefs, of specific legislatures, and/or judges, towards an approach that focuses more specifically on the limits of law *as a social form.*[12] More specifically, in terms of that form's effects on individual subjectivity,[13] on how social problems and conflicts are understood, and solutions to them conceived;[14] and on how political demands come to be framed, and institutionalised.[15]

Section II will introduce historical materialism, and the materialist critique of law which has been developed from its premises. This will provide legal and social actors with the necessary theoretical grounding to grasp some of the limits, and risks, associated with the legal form of social regulation, when it comes to furthering struggles for structural change. Section III will then conduct an historical study of the UK trade union movement, with a view to tracing the impact of the legal form *on* that

[8] Dimick, "Counterfeit Liberty".

[9] Lord Wedderburn of Charlton, "Industrial Relations and the Courts" (1980) 9 Industrial Law Journal 65.

[10] R. Knox, "Marxism, International Law, and Political Strategy" (2009) 22 Leiden Journal of International Law 413; H. Brabazon, "Dissent in a Juridified Political Sphere" in H. Brabazon (ed.), *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project* (London 2016), 179–201; H. Brabazon, "Occupying Legality: The Subversive Use of Law in Latin American Occupation Movements" (2017) 36 Bulletin of Latin American Research 21; P. O'Connell, "Law, Marxism and Method" (2018) 16 Triple C: Communication, Capitalism and Critique 647; D. Kivotidis, "Theses on the Relationship between Rights and Social Struggle" (2019) 17 N.I.L.Q. 407; C. Mieville, *Between Equal Rights a Marxist Theory of International Law* (London 2016).

[11] While this objective aligns with Marxist struggles to realise socialism, it is also consistent for the more moderate view of the Fabians, and early twentieth-century labour law scholars, such as H. Sinzheimer. On this, see Dukes, *Labour Law?*.

[12] J. Meakin, "The Opportunity and Limitation of Legal Mobilisation for Social Struggles: A View from the Argentinian Factory Recuperation Movement" (2022) 1 International Journal of Law in Context 1.

[13] S. Buckel, *Subjectivation and Cohesion: Towards the Reconstruction of a Materialist Theory of Law* (Boston 2020).

[14] Z. Adams, "A Structural Approach to Labour Law" (2022) 46 Cambridge Journal of Economics 447.

[15] Brabazon, "Power of Spectacle"; P. O'Connell, "Human Rights: Contesting the Displacement Thesis" (2018) 69 N.I.L.Q. 19; Meakin, "Opportunity and Limitation".

https://doi.org/10.1017/S0008197322000927 Published online by Cambridge University Press

movement, as capitalism has developed. This section will make the analysis of the legal form more concrete, therefore, by tracing its shifting articulations, in the institutional frameworks that have underpinned various stages of capitalism's, and the trade union movement's, development. Section IV will conclude by drawing out some of the strategic implications of this analysis, for social struggles generally, and for trade unions in particular.

II. Theoretical Context

A. Historical Materialism

There are three core premises at the heart of historical materialism. First is the historicity of ideas and institutions, and the centrality of the prevailing mode of production when it comes to shaping the complex ways in which we see, structure, and understand the world, as something which inevitably affects, to a greater or lesser extent, our concrete experiences; Second is the overriding role of class antagonism in shaping socio-historical development, and thus, the precise form, and nature, of those experiences at particular junctures.[16] In this latter respect, while historical materialism does not down-play the existence of conflicts between different groups, it stresses that the "core" class divide is that between those who produce wealth, and those who appropriate its surplus: between labour, and capital.[17] Third, human consciousness is profoundly shaped by the material context in which it is formed, the context with which individuals interact in the production of their social existence. It is through their interaction with the natural world, and other people, therefore, that particular ideas, beliefs, and assumptions about the world develop, and it is through such interactions that individuals develop their capacities to act, and become aware of their needs, and interest, and how to meet or satisfy them.[18]

In combination, these observations lead to the following two important conclusions relevant to our discussion of law, and its relationship with emancipatory struggles.

First, if actions and decisions are always structurally conditioned, the basic structure of capitalist society cannot be ignored when it comes to explaining how, and why, harms, problems, or conflicts, occur, or when it comes to thinking about what will be sufficient to address them.[19] Focusing purely on remedying individual harms, or imposing sanctions on individuals, will not, in other words, be sufficient to address the deeper structural causes of injustice of which rights violations must be seen as a mere expression. Rather, to address these problems and violations

[16] O'Connell, "Law, Marxism and Method".
[17] For an excellent analysis of this point, see Mieville, *Between Equal Rights*.
[18] P. Raekstad, "Revolutionary Practice and Prefigurative Politics: A Clarification and Defense" (2018) 25 Constellations 359.
[19] Adams, "Structural Approach".

https://doi.org/10.1017/S0008197322000927 Published online by Cambridge University Press

adequately, means turning our attention to the way in which access to social resources influences people's life chances, opportunities, and interests, and onto how to democratise decisions in relation to the use, and distribution, of those resources, in order to extend equality and autonomy from the civil political sphere, to the sphere of production.

Second, and importantly, historical materialism emphasises the importance of situating law within the context of capitalism, of understanding its basic and distinguishing features by reference to capitalism's basic structure, and logic. This immediately requires the law be thought of as a particular social form, a historically specific mode of social regulation, rather than simply by reference to its ever-changing content.[20]

B. The Materialist Theory of Law

In the early twentieth century, historical materialism inspired the development of a materialist critique of law, the most well-known example of which being the commodity form theory of law associated with the Marxist Scholar Evgeny Pashukanis.[21] At the core of this theory is an observation about the homology between the logic of commodity exchange and that of law, and the way in which social regulation increasingly assumed the *form* of law, with the generalisation of commodity production and exchange that went hand in hand with the development of capitalist social relations.[22]

In the context of exchange, individuals come to see themselves as equals, namely, in their capacity to alienate property free from coercion. In the context of these practices, they assume for themselves the role of abstract bearers of rights, rights *to* acquire objects from which they are excluded, and rights to enjoy and possess such objects free from interference. As exchange becomes generalised, something which only happens as labour power assumed the form of a commodity, and the majority of the population excluded from access to the non-market means of subsistence, people begin to acquire the *general* quality of legal subjects with rights.[23] That is, the legal subjectivity immanent in market exchange becomes generalised with the development of capitalist social relations.

This "legal" subjectivity implies an inherent isolation and opposition of interests:[24] competing claims to objects, by independent subjects.[25] It is this possibility for opposition and contestation that gives rise to the necessity for

[20] E. Pashukanis, *Law and Marxism: A General Theory*, 3rd ed., (London 1987); O'Connell, "Law, Marxism and Method".
[21] Pashukanis, *Law and Marxism*.
[22] Ibid., 79.
[23] Mieville, *Between Equal Rights*, 127; Pashukanis, *Law and Marxism*, 30.
[24] Pashukanis, *Law and Marxism*, 93.
[25] R. D'Souza, *What's Wrong with Rights? Social Movements, Law and Liberal Imaginations*, 1st ed., (London 2018).

https://doi.org/10.1017/S0008197322000927 Published online by Cambridge University Press

social regulation, social regulation which assumes a specific form as a result of this assumed status of the individual as formally equal.[26] That is, a form of social regulation and dispute resolution which is capable of settling disputes in a manner that is consistent with the subject's abstract equality and freedom, and which thus "takes" individuals as they appear in the context of the market: already equal and free.[27]

In capitalism, then, the dominant form of social regulation is one which abstracts itself from social relations, monopolising force, or power, outside the market, and exercising that power to resolve conflicts and disputes between abstract legal subjects which the law already finds in existence.[28] It is this force's apparently independent and impartial character, which ensures its compatibility with legal subjectivity. Historically, this independent and impartial character has been sustained through the granting of various positive rights, and/or the protections of various negative freedoms – the right to vote, to freely express oneself etc. – as well as various other, historically evolved doctrines – the principle that obligations can be imposed on individuals only if they are freely consented to, and/or enacted by an institution to whose power the individual explicitly or implicitly consents.[29]

The practices of commodity production and exchange thus give rise to a particular normativity,[30] and this profoundly shapes social perceptions and beliefs of all those who participate in the practices from which it develops, and so, tends to shape the struggles, and conflicts, that emerge in capitalism as well. As a result of this, the actual laws, and institutions, introduced, *tend* to be consistent with, and express, this normativity as well, to be oriented towards *realising* and *advancing* the values which it expresses.[31] While capitalism does not *pre-determine* the rules and institutions actually in existence, then, it does *profoundly shape their form,* and the assumptions on which they are based. This form then exercises a powerful role in shaping legal *content,* to the extent that it shapes perceptions about what a socially just society looks like, and what is required to achieve it.

The following important conclusions can be drawn from this discussion.

First, the law *necessarily* regulates social actors in abstraction from their wider structural contexts, and as such, *necessarily* abstracts disputes, and conflicts, from their wider context.[32] This means it tends to *individualise* and *depoliticise* those disputes and conflicts because they can only be explained by reference to the actions and decisions of subjects. Even

26 Mieville, *Between Equal Rights*, 86–87.
27 Pashukanis, *Law and Marxism*, 93.
28 Ibid., at 30, 93.
29 Pashukanis, *Law and Marxism*, 88.
30 I. Shoikhedbrod, *Revisiting Marx's Critique of Liberalism* (Cham 2019).
31 Mieville, *Between Equal Rights*, 96, 127 (emphasising the difference between the legal form and its historical actualisation)
32 Adams, "Structural Approach".

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where legal institutions acknowledge the existence of laws and institutions *shaping* behaviours, moreover, they cannot recognise how the impact of such laws and institutions are influenced by the basic inequality, at the core of capitalist society: the systematic exclusion of one class from access to the means of production and subsistence, and the monopolisation of those means in the hands of another, capital.[33] Given that it is this exclusion that *gives rise* to market practices, and thus, to legal subjectivity, law necessarily presupposes the causes of oppression and exploitation, but regulates behaviour and resolves conflicts *as if they did not exist,* obscuring them from view.

Second, to struggle for rights is to frame political demands, and critiques, *in legal language* and to presuppose the core features of capitalist societies which this implies.[34] Regardless of the political purpose behind such demands, therefore, rights-based struggles tend to divert attention away from deeper causes of injustice,[35] which the granting and institutionalisation of rights cannot change, while potentially legitimising the very structures which generate the perceived need for rights in the first place.

To struggle for rights, then, is to struggle in the *legal terrain*, on which the structural causes of the injustices rights are invoked to challenge, are obscured, It is, moreover, to conduct struggles that are collective in nature, in an inherently individualised way, fragmenting those struggles, and limiting the scope for them to lead to the satisfaction of what are ultimately *collective* demands.[36] In this way, as a mode of struggle, rights are potentially problematic: legal language frames critiques, and political demands, in ways that shape conceptions of the causes of problems in ways that legitimise, and valorise, features of the existing system, obscuring their relationship with relations of oppression and exploitation; while channelling struggles via legal institutions, in ways that depoliticise, and individualise, collective struggles, and political demands, often distorting the political objectives of those engaged in such struggles.[37]

Third, and on a more conjunctural level, the rights which tend to be seen as necessary, and desirable, in capitalism, are often those which *reinforce* the abstract logic of the legal form, for they are those which are seen as integral to securing the abstract freedom and equality implicit in societies based on generalised commodity exchange.[38] Hence, they tend to be oriented

[33] Ibid. That is not to say that the law cannot acknowledge inequality; however, that inequality tends to be explained away by reference to actions and decisions of individuals, rather than to the basic structure of the capitalist system.
[34] Meakin, "Opportunity and Limitation".
[35] O'Connell, "Human Rights".
[36] Kivotidis, "Theses on the Relationship between Rights and Social Struggle"; J. Youngdahl, "Solidarity First: Labor Rights Are Not the Same as Human Rights" (2009) 18 New Labour Forum 31.
[37] R. Knox, "Strategy and Tactics" (2012) 21 The Finnish Yearbook of International Law 193.
[38] D'Souza, *What's Wrong with Rights?*; K. Marx, "On the Jewish Question" in R. Tucker (ed.), *The Marx-Engels Reader*, 2nd ed., (New York 1978), 42–43.

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towards realising a narrow, abstract, individualistic freedom, rather than towards securing access to basic goods – social housing, food, water etc.

Even where struggles for access to such goods occur, moreover, and thus, insofar as the right-form is invoked to frame so-called "social rights" (including rights surrounding collective representation and action) the realisation and institutionalisation of these entitlements as rights means subsuming them within a form in which the structure of capitalism is taken for granted, fundamentally distorting their meaning.[39] As a result, the satisfaction of the need to which the right corresponds, is only realisable *within the constraints set by existing structures.*[40]

III. Legal Form and Trade Unions

The above analysis outlines some of the core features of the legal form, and the particular notion of *rights* that is distinctive to it. This form *tends* to go hand in hand with a particular *form* of institutional framework, an independent state and legal system, before whom individuals can enforce rights enjoyed against all other individuals. Within the boundary of this form, however, there exists considerable scope for variation, and different societies will have different legal institutional frameworks, and different legal institutional practices, at different stages of capitalistic development, shaped by the particular way in which the class struggle has played out, and has shaped, and been shaped by, wider socio-economic conditions.[41] These variations will also influence how the state is conceived, and the extent to which its legitimacy is tied to the introduction of various guarantees; the form of such guarantees; how it is believed their content should be determined; and how it is believed they should be institutionalised and protected. As such, they will likely influence the precise impact, and implications, of the legal form, when it comes to struggles for social change.

In light of this, the followings section will now construct a history of UK trade unions and their relationship with the law, with a view to shedding light on how the precise impact and implications of the legal form on trade unions, and the nature of the factors influencing them, have changed over time, and for understanding the more specific implications on trade unions of the growing dominance, in law and legal argument, of human rights.

[39] F. Atria, "Social Rights, Social Contract, Socialism" (2015) 24 Social & Legal Studies 598; E. Christodoulidis, "Social Rights Constitutionalism: An Antagonistic Endorsement" (2017) 44 Journal of Law and Society 123.

[40] P. Patnaik, "A Left Approach to Development" (2010) 45 Economic and Political Weekly 33, 35–36.

[41] Buckel, *Subjectivation and Cohesion*, ch. 13.

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A. A History of UK Trade Unions and the Law

In the UK, statutory prohibitions on combinations were in force from the fourteenth to the eighteenth centuries.[42] In addition to this, in the eighteenth century, the courts also found combinations to be unlawful at common law, for being in restraint of trade.[43] It was only in 1824 that these restrictions were lifted, a move that went hand in hand with the abolition of all existing regulations of wages and hours, and thus, a shift to individualised wage negotiation in the context of a "free" market.[44] In 1825, however, new restrictions were introduced, in response to the perceived threat posed by widespread strike action, effectively rendering all actions taken in support of a strike, a crime, triable summarily.[45] As such, prior to 1871, while trade unions were not always unlawful per se, their existence and activities remained strictly regulated, and subject to criminal prohibitions.

By 1871, however, attitudes towards trade unions had begun to change.[46] Partly as a result of a depoliticisation of the trade union movement, a move away from more militant tactics, and an abandonment of the political ideals of Chartism,[47] coupled with an extension of the franchise, policy-makers and employer began to recognise the potential advantages of trade unions for stabilising industrial relations, and for regulating competition. It was these premises that were reflected in the Minority Report of the Royal Commission on Trade Unions 1867, which ultimately inspired the 1871 Trade Union Act.[48]

Underpinning the 1871 Act was a belief that the collective power of trade unions was a *necessary counterweight to the already supreme power of capital*.[49] This meant that where workers joined together to persuade employers to agree to particular terms, this could not be conceived as *coercion* in the way it had historically been seen in the common law. Rather than an abuse of collective power, an affront to the rules of free competition, therefore, trade unions were simply a necessary *collective* response, to a structural inequality inherent in capitalist societies, that sought to make genuinely free competition a reality. This was so regardless of the *content* of the demands being made. As the Minority Report argued: "we can understand no freedom to trade in which workmen are not free to

[42] E.g. Statutes of Labourers, 23 Edw. 3 (1349), 25 Edw. 3, st 1 (1350). The eighteenth-century combination acts are notable for being decoupled from any wider system of wage regulation. See 39 Geo. 3., c. 81 (1799); 39 and 40 Geo. 3, c.106 (1800). See: J.V. Orth, "English Combination Acts of the Eighteenth Century" (1987) 5 Law and History Review 175.

[43] *R. v Journeymen Taylors of Cambridge* (1721) 88 E.R. 9.

[44] 5 Geo. 4, c.95 (1824).

[45] 6 Geo. 4, c. 129 (1825).

[46] Brodie, *History of British Labour Law, 1867–1945*.

[47] R. Vorspant, "The Political Power of Nuisance Law: Labor Picketing and the Courts in Modern England, 1871–Present" (1998) 46 Buff. L. Rev. 113. See also the discussion Webb and Webb, *History of Trade Unionism*, 176–84.

[48] Cmd. 3623 (London 1968).

[49] Cmd. 3623, lxii.

https://doi.org/10.1017/S0008197322000927 Published online by Cambridge University Press

stipulate with an employer in concert for their own conditions. That their conditions are unreasonable or highly inconvenient to the employer is no coercion."[50]

To give effect to this rationale, the 1871 Trade Union Act[51] provided immunity for trade unions from criminal conspiracy, provided that the act committed by the trade union would not have been a crime had it been committed by an individual. This meant that trade unions could no longer be held unlawful merely by reason of being in restraint of trade. In this way, the law sought to give effect to the recognition that the exercise of *collective power* by representatives of labour, with a view to influencing the decisions of employers and third parties, was *legitimate* because it helped to qualify the inequality that existed between labour and capital, and which *impeded* genuinely "free" competition.[52]

Despite this premise, this rationale came to be obscured, or subverted, when translated into legal language. As such, when the courts interpreted the Act they implicitly acknowledged that Parliament had sought to recognise the legitimacy of trade unions, providing them with a limited immunity, but they interpreted the immunity narrowly, by reframing its rationale through the lens of the legal form. In effect, they assumed that Parliament intended *only* to accommodate trade unions *as they might do any other legitimate market actor*. This meant that trade unions would still be held to be acting unlawfully, where they sought to claim for themselves privileges to act in ways not sanctioned for other individuals or groups.[53]

Three aspects of the case law in the late nineteenth century supports this claim. First was the recognition in *Mogul Steamships*, that "legitimate trade competition" constituted a legitimate excuse for causing injury to third parties, where the means used were not themselves unlawful. The rationale being that to hold otherwise would be to place unions at a *disadvantage* vis-à-vis a range of other legitimate, "collective" market actors.[54]

Second was the decision in *Temperton v Russell*[55] that held that where otherwise lawful acts which caused injury to others could not be framed as part of legitimate market competition, an act might be unlawful simply by reason of being pursued for a malicious motive. Importantly, however, malice in this context was imputed from the fact that the actions were done in *combination,* thereby rendering unlawful any acts done by trade unions which go beyond what might be expected of other market actors, if they are oriented towards placing economic pressure on employers, or third parties,

[50] Ibid.
[51] 34 and 35 Vict., c.31 (1871).
[52] P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford 1979), 411–12.
[53] This was also reflected in strict interpretation of the scope of lawful picketing. See *R. v Bunn* (1872) 12 Cox C.C. 316, 340 (Cent. Crim Ct); *R. v Hibbert* (1869) 13 Cox C.C. 82, 87.
[54] *Mogul Steamship Co. Ltd. v McGregor*, *Gow & Co.* [1892] A.C. 25, 38–40.
[55] *Temperton v Russell* [1893] 1 Q.B. 715.

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and thus, causing loss.[56] This decision was followed by *Allen v Flood*[57] where it was confirmed that a lawful act done by an *individual* would not be unlawful merely by reason of malicious intent. The court affirmed, however, that "the decision in this case can have no bearing on any that involves the element of oppressive combination".[58] This dicta explains the outcome in *Quinn v Leathem*[59] where malice was deemed to suffice in a context that involved combination, especially given the acts in question were oriented towards enforcing a closed shop arrangement, rather than arising in the course of bargaining over terms and conditions.

Third, in *Taff Vale*,[60] the House of Lords held that trade union funds were available to satisfy a damages claim by an employer, against a union, for the tortious actions of its members. In so holding, it refused to find, in the absence of express wording, an intent, by parliament, to create a unique status for trade unions, that might justify immunity from being sued in tort, holding, in effect, that the Act equalised the position of trade unions, both in terms of rights, *and* obligations/liabilities.[61]

Throughout the nineteenth and early twentieth centuries, partly as a result of the growing strength of the Trade Union movement, and the establishment by them of a political wing able to voice their perspectives,[62] policy-makers had come to recognise how the division of society into classes leads to an inherent antagonism which, given the subordinate position of labour, necessarily exposes labour to ongoing risks that their working and living conditions will be depressed.[63]

This would, moreover, be the logical outcome of the free play of market processes,[64] because of the structural imbalance that existed between the power of workers and employers.[65] This led Parliament to recognise that trade unions performed a legitimate and important function in advancing the interests of labour in a context in which this could not be done through "individualistic" competition, and required that trade unions have available to them a broad repertoire of tactics which could enable the placing of economic pressure on employers, in order to encourage them to concede to

[56] Ibid., at [730].
[57] *Allen v Flood* [1898] A.C. 1 (H.L.).
[58] Ibid., at 148. See also Lord Morris, at 156.
[59] *Quinn v Leathem* [1901] A.C. 495.
[60] *Taff Vale Ry. Co. v Almaglamated Soc'y of Ry Servants* [1901] A.C. 426 (H.L.). See also *Giblan v National Amalgamated Labourers Union of GB* [1903] 2 Q.B. 600.
[61] See particularly *Taff Vale* [1901] A.C. 426, 430–32.
[62] The Parliamentary Committee of the TUC was established in 1871 with a view to lobbying Parliament for favourable Trade Union legislation.
[63] HC Deb. vol.155, col. 1494 (25 April 1906) (referring to trade unions as a safeguard against sweating) See also earlier discussion in the context of discussions about the truck acts: HC Deb. vol. 3 cols. 1256–59 (12 April 1831).
[64] HC Deb. vol. 155 col. 51 (30 March 1906).
[65] HC Deb. vol. 204 col. 2039 (14 March 1871).

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their demands.[66] While Parliament had sought to recognise this in the 1871 Act, by 1906, it was clear that a different formulation would be necessary if this recognition was not to be distorted, or circumvented, via legal interpretation in the courts.

The Trade Disputes Act 1906 accordingly provided generalised immunity to unions in tort, while providing immunities from liability for certain economic torts, and crimes, committed by individuals, provided they were committed "in contemplation or furtherance of a trade dispute".[67] This did not merely express a legal content that was supportive to trade unions, it sought to use the law to *create a sphere of autonomy* for industrial relations,[68] that would reduce the scope for direct interaction between private law, and the trade unions, and, in turn, for a direct role, for certain legal institutions, such as the courts, in mediating industrial disputes.

Despite this clear awareness of the structural basis of trade unions inspiring the Act, when translated into legal language, the idea that Trade Unions ought to enjoy a specific status, as a result of the structural disadvantages suffered by them, and their members, was obscured – just as it had been in the 1871 Act. The policy was translated into a "formula" that implied that the actions taken by trade union members should be afforded legal protection, because there was something special about the particular sphere of social life, the context, in which they took place – rather than because there existed any particular class dynamic between the parties. Accordingly, the "trade dispute" was not defined by reference to a struggle *between classes*, but by reference to a sphere of activity, the economy, and the actors deemed to populate it, thereby linking the legitimacy of trade union action to its relationship with the economy, and reinforcing the formal separation of economics, and politics, which is integral to capitalist societies.[69]

This meant that on the few occasions where the courts were called upon to determine the legality of industrial action, their decision turned on their interpretation of a statutory formula that made no reference to the underlying rationale for its existence, and which, formally at least, endorsed, and presupposed, the very separation of economics and politics which is central to capitalist social relations.[70] This gave the courts considerable room to interpret the immunity narrowly, as they did frequently during periods of

[66] This lay behind the Minority Report's support for a broad right to strike: Brodie, *History of British Labour Law, 1867–1945*, 13. While some arguments to restrict the scope of the immunities were made, these tended to be relatively summarily dismissed: Brodie, *History of British Labour Law, 1867–1945*, 106.

[67] See the discussion in HL Deb. vol. 166 cols. 686–735 (4 December 1906), cols. 710–13 and 724.

[68] Brodie, *History of British Labour Law, 1867–1945*, 105 notes fear that litigation would restrict union bargaining power.

[69] Section 5 defines trade dispute as: "any dispute between employers and workmen, or between workmen and workmen, which is connected with, the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person."

[70] N. Dyer-Witheford and G. De Peuter, *Games of Empire: Global Capitalism and Video Games* (Minnesota 2009), 10–12.

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high strike activity, and to disregard the structural inequality shaping the dynamics of the disputes between trade unions and employers in practice.[71]

Policy-makers also reacted to periods of high strike activity, particularly where such was deemed to pose a threat to state power. This was so, for example, with the response to the General Strike, the 1927 Trade Union and Trade Disputes Act, which, ratifying a decision of the court,[72] sought to explicitly exclude political strikes from the scope of the golden formula. This statute was quickly repealed by the Labour Government of 1945,[73] however, and the broad-basis of the statutory immunities was restored. From this period, moreover, the trade union movement, backed up by Keynesian style demand management, full employment, nationalisation and comprehensive social protection, was able to amass considerable economic and political power.[74] Combined with active government support for industry-level bargaining, in the form of the Wages Councils, mechanisms for arbitration and for the extension of collective agreements, this led to a situation in which trade unions were able to rely on their economic strength to regulate meaningfully the working and living conditions of the working class, taking those conditions largely out of the realm of competition, but also, out of the courtroom.[75] This situation also gave trade unions significant negative *political* power, for they were able to use the threat of industrial action, and their influence over the regulation of work, to support the Labour party in government, and/or to block any potentially regressive policies that governments tried to introduce.[76]

In the 1960s, however, the environment in which trade unions operated began to change.[77] Support for industry-level collective bargaining by employers declined,[78] made increasingly impracticable by a concentration

[71] Some examples of narrow interpretations include: *Larkin v Long* [1915] A.C. 814; *Crofter Hand Woven Harris Tweed v Veitch* (1940) S.C. 141, 158; *Valentine v Hyde* [1919] 2 Ch. 129. Later cases include: *Huntley v Thornton* [1957] 1 W.L.R. 321, 439–350; *Stratford v Lindley* [1965] A.C. 269. This was perhaps most extreme in the context of the general strike: *National Sailors' and Firemen's Union v Reed* [1926] 1 Ch. 536. In *Crofter* (1940) S.C. 141, while a narrow interpretation was given to the requirement that a strike be in *contemplation* of a trade dispute, a much broader interpretation was articulated by Lord Fleming, at 161, and this latter was endorsed by the House of Lords in (1942) S.C. 1, 26–27 (H.L.).

[72] *National Sailors' and Firemen's Union v Reed* [1926] 1 Ch. 536.

[73] Trade Union and Trade Disputes Act 1946.

[74] C. Howell, *Trade Unions and the State: The Construction of Industrial Relations Institutions in Britain, 1890–2000* (Princeton 2005), 88.

[75] B. Simpson, "Trade Union Recognition and the Law, a New Approach – Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992" (2000) 29 Industrial Law Journal 193; R. Dukes, "The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?" (2008) 37 Industrial Law Journal 236; A. Bogg, *The Democratic Aspects of Trade Union Recognition* (Oxford 2009).

[76] H. Collins, "Trade Unions and the Government" (1960) I/5 New Left Review 71.

[77] For an overview, see Howell, *Trade Unions and the State*, 91.

[78] G. Latta, "The Legal Extension of Collective Bargaining: A Study of Section 8 of the Terms and Conditions of Employment Act 1959" (1974) 3 Industrial Law Journal 215, 215; K. Sisson, "Employers and the Structure of Collective Bargaining: Distinguishing Cause and Effect" in E. Wigham (ed.), *The Power to Manage? Employers and Industrial Relations in Comparative-historical Perspective* (London 1991), 256–71.

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in the size of British firms.[79] At the same time, economic restructuring, combined with occupational change, made managing worker resistance to internal firm changes imperative, and this gave rise to new, informal workplace-level representation, as well as growing unrest in the form of unofficial (wildcat) strikes.[80] Following (but largely ignoring the recommendations of) the Donovan Commission enquiry of 1969,[81] this led to an attempt to overhaul completely the industrial relations system through the Industrial Relations Act 1971[82] – an Act which largely failed, however, because of trade union opposition.[83] Following the restoration of the 1906 Framework in 1974, it was not until 1980 that significant change to the industrial relations framework was introduced.[84] In contrast with the 1971 Act, which reproduced many of the assumptions of the 1906 framework, this time, the reforms became a key pillar of the Conservative Government's new, neoliberal, agenda.

Rather than starting from an analysis of the logic of capitalism, and of the social relations that underpin the market, under the influence of neoliberal theory, neoliberalism conflates society with the abstract way in which it appears in the market, and thus, the way in which it is presented through the lens of the legal form.[85] Rather than giving effect to policy prescriptions rooted in an analysis of capitalist class relations, therefore, neoliberal policy-makers sought to design policy on the basis of an image of the world characterised by universal, abstract, individual freedoms.[86] In this framework, the State no longer appears as an active mediator of class conflict, introducing legislation with a view to *qualifying* the logic of private law, and of competition. Instead, it becomes a mechanism for *guaranteeing* and *reinforcing* that logic, a central part of which involves limiting the extent to which that logic can be distorted by the exercise of collective, and thus, trade union, power.[87]

Through an image of society in which class does not exist, and individuals are all naturally equal and free, trade unions appear from the perspective of neoliberal theory, not as institutions required to represent the interests of a socio-economic class; but as voluntary organisations that individuals might

[79] Howell, *Trade Unions and the State*, 91–92; J. Purcell and K. Sisson, "Strategies and Practice in the Management of Industrial Relations" in G. Bain (ed.), *Industrial Relations in Britain* (Oxford 1983), 96.
[80] Howell, *Trade Unions and the State*, 93–95.
[81] T. Donovan, *Report of the Royal Commission on Trade Unions and Employers' Associations 1965–1968* (London 1968).
[82] P. Davies and M. Freedland, *Labour Legislation and Public Policy* (Oxford 1993), ch. 7.
[83] Howell, *Trade Unions and the State*, 107.
[84] Trade Union and Labour Relations Act 1974, and Trade Union and Labour Relations (Amendment) Act 1976.
[85] Brabazon (ed.), *Neoliberal Legality*.
[86] D. Harvey, *A Brief History of Neoliberalism* (Oxford 2007).
[87] S. McBride, "Mrs Thatcher and The Post-war Consensus: The Case of Trade Union Policy" (1986) 39 Parliamentary Affairs 330; L. Panitch and D. Swartz, *The Assault on Trade Union Freedoms: From Wage Controls to Social Contract* (Toronto 1993).

https://doi.org/10.1017/S0008197322000927 Published online by Cambridge University Press

freely join if they believe this to be in their private interests.[88] This makes trade unions a means towards advancing the interests of individual workers in their bargains with their employers, rather than as entities which operate to take wages and working conditions out of competition, in the collective interests of society.[89] From this perspective, instead of a means through which to regulate the economy in ways that ensure the interests of labour can be taken into account, collective bargaining appears as a service which trade unions can offer to workers in competition with other unions,[90] and in competition with employers offering individualised bargaining – services which individuals might select where doing so would seem to offer private advantage.[91]

To the extent that collective bargaining can be seen as desirable to workers, this is linked with an inequality between workers and employers in the context of particular workplaces, rather than with a class-based inequality that systematically subordinates the interests of labour, to those of capital, *at the level of economic-political decision-making more generally*.[92] As a result of this, action to support collective bargaining, such as industrial action, is only deemed to be legitimate insofar as it directly relates to the relationship between workers and their employers, and the attempts by the former to secure agreements with the latter relating to terms and conditions. This is so, moreover, only insofar as that action does not impact upon the interests of those not party to the dispute in question.

It is this image of trade unions, and the "risks" they pose to others, and to the process of free competition, that is expressed in the legal reforms introduced from the 1980s onwards, continued by New Labour,[93] and which has since been built upon by subsequent Tory Governments.[94]

First, the 1980 Employment Act narrowed the scope of the trade dispute formula so that industrial action would only be covered by the immunities if it was taken in contemplation and furtherance of a dispute between workers *and their employers*, over terms and conditions of employment.[95]

Second, and by implication, the Act prohibited secondary action,[96] and limited the protection for picketing to peaceful picketing outside a worker's place of work. This effectively denied any role for trade unions, and

[88] Knox, "A Marxist Approach to *RMT v the United Kingdom*"; F.A. Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy, vol. 1: Rules and Order* (London 1973), 141.
[89] Knox, "Law, Neoliberalism and the Constitution of Political Subjectivity".
[90] Dukes, "Statutory Recognition Procedure 1999".
[91] K. Ewing, "The Function of Trade Unions" (2005) 34 Industrial Law Journal 1.
[92] For further analysis, see Z. Adams, "One Step Forwards for Employment Status, Still Some Way to Go: The Supreme Court's Decision in Uber" [2021] C.L.J. 221; Adams, "Structural Approach".
[93] Bogg, *Democratic Aspects*; K. Ewing and J. Hendy, "New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining" (2017) 46 Industrial Law Journal 23.
[94] E.g. Trade Union Act 2016.
[95] Employment Act 1982, s. 18.
[96] Employment Act 1980; Employment Act 1982.

https://doi.org/10.1017/S0008197322000927 Published online by Cambridge University Press

industrial action, in advancing the common interests of labour *as a class*, and limited the scope for industrial action to impact on the rights and freedoms of what were now conceived to be "third parties".

Third, a new balloting procedure was introduced as a condition for benefitting from the statutory immunities,[97] such that only if a majority of workers voted in favour of industrial action, would that action be protected. These balloting requirements have been made more complex and comprehensive in subsequent legislation, and currently establish a number of highly technical grounds on which to hold industrial action unlawful, and to do so without having any regard to the purpose of the action, and the broader politico-economic context of the dispute.[98]

Fourth, the general immunity previously enjoyed by trade unions in tort, was repealed, with the result that trade union funds were once again made available to employers in a claim for damages in relation to torts committed by trade union members in the course of industrial action – restoring *Taff Vale*.[99] In a context in which there exist a number of potential grounds on which to challenge the legality of industrial action, however, this now constituted an even greater threat to trade unions, raising the financial stakes of a strike significantly, further undermining the credibility of the threat of industrial action.[100]

Fifth, in relation to collective bargaining, the Government completely withdrew all support for collective bargaining, by dismantling the Wages Councils system;[101] removing the obligation on the Minister of Labour to promote joint regulation, such as through the provision of binding arbitration, and mechanisms of extension. While, in 1999,[102] the Labour Government introduced a statutory recognition procedure, which allows a member of an independent trade union who can show that a majority of workers in a bargaining unit are in favour of recognition, to secure an order from the CAC that the employer engage in collective bargaining, the content of this order, merely requires the establishment of *procedures* for bargaining.[103] It does not, then, mandate that a collective agreement be concluded, and that workers actually have their terms and conditions negotiated collectively. Indeed, the Labour Government was explicit that the purpose of the recognition procedure was not to force employers to bargain, or to promote a particular model of industrial relations, but to

[97] Trade Union Act 1984.
[98] For an overview, see B. Creighton et al., "Pre-strike Ballots and Collective Bargaining: The Impact of Quorum and Ballot Mode Requirements on Access to Lawful Industrial Action" (2019) 48 Industrial Law Journal 343.
[99] Employment Act 1982, s. 15.
[100] Simpson, "Trade Union Recognition and the Law".
[101] Wages Councils Act 1979 (restricting powers to create new Councils); Trade Reform and Employment Rights Act 1993 (abolishing remaining Wages Councils).
[102] Employment Relations Act 1999; see also Employment Relations Act 2004, Part 1.
[103] See the discussion in Simpson, "Trade Union Recognition and the Law"; Dukes, "Statutory Recognition Procedure 1999".

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ensure that the "free" choice of workers could be respected,[104] by empowering them *to take steps to be heard by the employer,* without guaranteeing any particular result.

In effect, the new procedure reflected a shift away from a commitment to having terms and conditions negotiated collectively, towards one which privileged "free competition" when it came to the *process* by which it was determined how terms and conditions would be negotiated in practice.[105] It is perhaps no surprise, therefore, that the removal from ACAS's terms of reference of a duty to promote collective bargaining, in 1988, was not re-instated.[106] Instead, particularly since the 1990s, new, individual employment rights have been introduced, helping to usurp the role previously played by industry-level bargaining in regulating basic terms and conditions.[107] These have, simultaneously, however, served to lower levels of protection, by re-orienting labour market regulation away from the objective of improving working and living conditions by taking wages and working conditions out of competition, towards actively facilitating competition, maximising efficiency, by "correcting" for market failure.[108]

Finally, and particularly since 1988, there has been a significant increase in the scope of regulation of internal trade union affairs, and, in particular, the relationship between trade unions and their members. New rights[109] have been introduced for individuals that can be exercised against trade unions, and trade union autonomy when it comes to disciplining members, and declining membership, has been significantly reduced, with litigation *against* unions by their members actively encouraged.[110] The effect of this is to commodify, and juridify, the relationship between unions and their members, undermining more co-operative, solidaristic forms of allegiance, and collective forms of identity.[111]

These reforms went hand in hand with a range of other steps designed to undermine the material foundations on which working class power in the post-war years had been built, with a view to "freeing" up the operation of market forces:[112] the abandonment of full employment and Keynesian

[104] Hansard (HC) Standing Committee E (16 March 1999, 10.45am) (Michael Wills); Department of Trade and Industry, *Fairness at Work*, Cm. 3968 (London 1998), Part 4.
[105] A. Bogg, "The Political Theory of Trade Union Recognition Campaigns: Legislating for Democratic Competitiveness" (2001) 64 M.L.R. 875.
[106] Employment Rights Act 1988.
[107] Individual rights were introduced in the 1970s by the Race Relations Act 1976; The Redundancy Payment Act 1965; The Sex Discrimination Act 1975; and the Employment Protection Act 1975. More rights followed, however, including the Wages Act 1986; the Employment Rights Act 1996; the National Minimum Wage Act 1998; and the Working Time Regulations 1998.
[108] Howell, *Trade Unions and the State*, 177–78.
[109] See particularly the Employment Act 1988 and the Trade Reform and Employment Rights Act 1933.
[110] The Employment Act 1988 created a Commissioner for the rights of trade union members with power to grant financial assistance and other assistance to individuals contemplating High Court proceedings against their unions.
[111] M. Tapia, "Marching to Different Tunes: Commitment and Culture as Mobilizing Mechanisms of Trade Unions and Community Organizations" (2011) 51 British Journal of Industrial Relations 666.
[112] Davies and Freedland, *Labour Legislation and Public Policy*, 56.

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demand management; widespread privatisation; disinvestment from public services, and a reduction in levels of social protection.

Actively eroding workers' bargaining power, encouraging a fragmentation of the working class through an intensification of labour market competition and an individualisation of work regulation, and re-animating the relationship between trade unions and their members so as to render them more impersonal, and transactional, all helped to undermine the foundations of unions' economic strength, their attractiveness to workers, while increasing the risks, to them, of engaging in industrial action.[113] This, in turn, facilitated a weakening of trade unions' *political* role, fundamentally changing the relationship between them and the Labour party.[114] No longer exercising a direct role in regulating workplaces, trade unions can no longer back up the labour party through a credible threat of industrial action; making the trade unions wholly reliable on the labour party to enact political change, while making the latter's reliance on the trade unions one of purely, financial, support. Alongside a much stricter approach to the regulation of public protest and political gatherings,[115] the scope for trade unions to exercise an influence over the evolution of policy, and the regulation of workplaces, has been significantly weakened, as has their ability to mobilise large groups in the sort of collective struggles from which more solidaristic bonds, and collective forms of political consciousness, might develop.[116]

Framing these policy interventions, however, was the accession, by the UK, to a number of human rights treaties, and the development in the case law of human rights bodies, of various rights in relation to trade unions. Most significant in this respect was Article 11 ECHR which, following the introduction of the Human Rights Act 1998, can be directly invoked in UK courts.

Article 11 provides for freedom of assembly and association, as part of which it guarantees certain rights in relation to the freedom to join a trade union. Like all rights in the ECHR, Article 11 is linked with the principles of democracy, and individual autonomy,[117] and the importance to

[113] For good analyses, see Tapia, "Marching to Different Tunes"; Knox, "Law, Neoliberalism and the Constitution of Political Subjectivity".

[114] Press Association, "Labour Backs Extensive Reforms over Links with Trade Unions", *The Guardian*, 1 March 2014, available at: https://www.theguardian.com/politics/2014/mar/01/labour-ed-miliband-reforms-links-trade-unions (last accessed 29 June 2022); Knox, "Law, Neoliberalism and the Constitution of Political Subjectivity", 151.

[115] Public Order Act 1986; Criminal Justice Act 1994; Police Crimes, Sentencing and Courts Act 2002. See also M. Ford and T. Novitz, "Legislating For Control: The Trade Union Act 2016" (2016) 45 Industrial Law Journal 277.

[116] However, new style trade unions have begun to push the boundaries of the law in this respect. See e.g. H. Smith, "The 'Indie Unions' and the UK Labour Movement: Towards a Community of Practice" (2022) 43 Economic and Industrial Democracy 1369; J. Holgate, "Community Organising in the UK: A 'New' Approach for Trade Unions?" (2015) 36 Economic and Industrial Democracy 431.

[117] L. Valentini, "Human Rights, Freedom, and Political Authority" (2012) 40 Political Theory 573, 579, 582; B. Begüm, "'Personal Autonomy' and 'Democratic Society' at the European Court of Human Rights: Friends or Foes?" (2013) 2 Journal of Law and Jurisprudence 230.

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each of individuals being able to join together to pursue common objectives.[118] It is, moreover, a right enforceable against the State, the enjoyment of which the State is under an obligation to guarantee, insofar as such is compatible with its obligations to protect the equal rights and freedoms of its other subjects. As a *human* right, moreover, it is deemed to be a right that inheres in an individual's humanity, to be derived from philosophical reflection, rather than via democratic debate. As such, there is limited scope for citizens to participate directly in the process by which the content, and scope, of that right, and the state's obligations in relation to it, is determined.

In the framework of Article 11, the right to join a trade union enjoys no special status, it is simply one example of a sort of association which individuals might join for this purpose,[119] an association defined by the fact that it is deemed to be oriented towards advancing the *occupational* interests of its members.[120] This aspect of Article 11 is thus confined to persons in an employment relationship,[121] and is linked with the value of democracy within the framework of subordinate employment relations,[122] rather than any broader understanding of the function of trade unions in a *capitalist* society more specifically.

An important implication of this approach is that the right to join trade unions is not deemed to be any more important than the right to freely associate *generally*; and nor does freedom of association carry any extra weight as compared with the various other Convention rights with which it might conflict.[123] This means that the right to join a trade union, and the union's ability to take steps to advance the interests of its members, must be guaranteed within a framework that ensures equal protection to rights and interests of others, effectively limiting the extent to which trade union activity can qualify the private law rules underpinning the market, and/or cause disruption to society with a view to generating pressure for change. By virtue of Article 11(2), moreover, it is always open for states to restrict the enjoyment of this right, if such restrictions are "prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others".

These features of the human rights framework have meant that human rights law has been particularly useful for challenging those aspects of the domestic legal framework which actually *subvert* the logic of the

[118] *Moscow Branch of the Salvation Army v Russia* (2007) 44 E.H.R.R. 46.
[119] *National Union of Belgian Police v Belgium* (1979–80) 1 E.H.R.R. 578; *Manole and "Romanian Farmers Direct" v Romania* (Application no. 46551/06), Judgment of 16 June 2015, not yet reported.
[120] *Swedish Engine Drivers' Union v Sweden* (1979–80) 1 E.H.R.R. 617.
[121] *Sindicatul "Pastorul cel Bun" v Romania* (2014) 58 E.H.R.R. 10, at [141], [148], concerning members of the clergy; *Manole and "Romanian Farmers Direct" v Romania* concerning self-employed farmers.
[122] *Sindicatul "Pastorul cel Bun" v Romania*, at [130].
[123] See also Articles 17 and 18 of the European Convention.

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legal form, to the advantage of capital, by effectively treating trade unions *less favourably* than other associations, and/or the right to join trade unions as subordinate to other rights and freedoms.[124] Even here, however, these challenges tend to legitimise and reinforce, rather than challenge and problematise, the abstract way in which trade unions are conceptualised, and regulated, via the neoliberal domestic legal framework.

In *Wilson and Palmer v UK*,[125] a worker successfully challenged the failure by the UK Government to take steps to prevent employers offering financial incentives to workers with a view to getting them to forego collective bargaining, or union representation. This power was deliberately facilitated by a provision of the Trade Union Reform and Employment Rights Act 1993. In its reasoning, however, the Court's focus was on the inequality this power created between different groups *in the enjoyment of the freedoms* protected by the Convention, rather than its wider implications for the power of trade unions, and their ability to represent labour[126] – reinforcing the premise that the value of trade unions is to the *individual*, rather than to labour, or wider society.

Likewise, in *Young and Webster v UK*,[127] the ECHR declared incompatible with Article 11, the ability under UK law for an employer to make membership of a union a condition of employment, and/or to threaten to dismiss a worker for failing to join a trade union when such was not a condition of work when they were hired. In its reasoning the court framed the freedom to associate was a matter of free, or un-coerced choice. It thus emphasised the *freedom* element of freedom of association over the *association* element, and in so doing, was able to avoid engaging with the fact that an element of *compulsion* in relation to trade unions, might actually further the substantive goal of association, by improving the bargaining power of trade unions, and thus, their capacity to advance the interests of labour as a *class*.[128]

In those cases where human rights law has been mobilised to challenge aspects of the legal framework compatible with an individualistic notion of trade unions, abstracted from an analysis of capitalist society, trade unions have been far less successful, with the result that their challenges has often

[124] E.g. *Demir and Baykara v Turkey* (Application no. 34503/97), Judgment of 12 November 2008, not yet reported; *Trade Union of the Police in the Slovak Republic and Others v Slovakia* (Application no. 11828/08), Judgment of 25 September 2012; *Ognevenko v Russia* (2019) 69 E.H.R.R. 9; *Karaçay v Turkey* (Application no. 6615/0), Judgment of 27 March 2007, not yet reported; *Doğan Altun v Turkey* (Application no. 7152/08), Judgment of 26 May 2015, not yet reported; *Sigurður A. Sigurjónsson v Iceland* (1993) 16 E.H.R.R. 462; *Cheall v United Kingdom* (Commission decision), (1986) 8 E.H.R.R. 74; *Associated Society of Locomotive Engineers & Firemen (ASLEF) v United Kingdom* (2007) 45 E.H.R.R. 34; *Enerji Yapı-Yol Sen v Turkey* (Application no. 68959/01), Judgment of 21 April 2009, not yet reported.

[125] *Wilson, National Union of Journalists and Others v United Kingdom* (2002) 35 E.H.R.R. 20.

[126] Ibid., at [47].

[127] *Young, James and Webster v United Kingdom* (1983) 5 E.H.R.R. CD519.

[128] Ibid., at [55].

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led to a declaration as to the compatibility of UK law *with* human rights, potentially closing off scope for future challenge.

In *RMT v UK*, for example, the RMT Union relied on Article 11 to challenge the UK Government's ban on secondary action. While the court recognised that secondary action was an aspect of the right to strike, which was one form of action which trade unions might take to further the interests of their members (within Article 11(1)), it held that a complete prohibition on secondary action was within the scope of Article 11(2), and so, a proportionate means of achieving the legitimate aim "of protecting the rights and freedoms of others not limited to the employer side of an industrial dispute".[129] On the one hand, secondary action "has the potential to impinge on the rights of persons not party to the industrial dispute, to cause broad disruption within the economy, and to affect the delivery of services to the public".[130] On the other hand, moreover, because *solidaristic* action is not at the core of Article 11, it not being necessary for trade unions to be able to advance the interests of their members, such was a matter over which the UK government enjoyed a wide margin of appreciation. In light of this, the court was not willing to hold that a *complete* ban was disproportionate.

Thus, through a conception of trade unions as primarily concerned with the immediate economic interests of their members, and of industrial action as primarily directed at *those immediate* interests, human rights law was unable to challenge attempts by states to undermine the *solidaristic* and *representative* function which trade unions perform in the context of capitalism.[131] At the same time, by emphasising that industrial action impacts on the rights and freedoms of those not party to an industrial dispute, the court endorsed the premise that it is *legitimate* for the state to restrict the exercise of industrial action, notwithstanding that impacting on such rights and freedoms is often the only way that industrial action can serve its purpose of placing economic pressure on employers, and/or the government, to resolve the dispute in a way that takes the interests of workers into account.

In *Unite the Union v the UK*,[132] an admissibility decision concerning a challenge to the decision of the UK government to abolish the last remaining Wages Council, the Agricultural Wages Board, the European Court rejected the argument that because industry-level bargaining was virtually impossible in the agricultural sector, and individual workplaces too small for workers to avail themselves of the statutory recognition procedure in that sector, the State had an obligation to maintain, or not abolish, a mechanism for compulsory bargaining in that sector. The Court was emphatic

[129] *National Union of Rail Maritime and Transport Workers (RMT) v United Kingdom* (2015) 60 E.H.R.R. 10, at [82].
[130] Ibid., at [82].
[131] *Unite the Union v UK* [2017] I.R.L.R. 438.
[132] Ibid.

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that Article 11 does not imply a right to have one's terms and conditions bargained collectively; it merely requires that a union be able to take steps to ensure that unions can *strive* for the protection of their members' interests.[133] This includes the "right … to seek to persuade the employer to hear what it has to say on behalf of its members, and in principle, a right to bargain collectively with the employer".[134] However, in this case, the "applicant is not prevented from engaging in collective bargaining",

> even accepting the applicant's submission that voluntary collective bargaining in the agricultural sector is virtually non existent and impractical, this is not sufficient to lead to the conclusion that a mandatory mechanism should be recognised as a positive obligation. The applicant remains free to take steps to protect the occupational interests of its members by collective action, including collective bargaining, by engaging in negotiations *to seek to persuade employers and employees to reach collective agreements and it has the right to be heard.*[135]

The Court would not, therefore, interpret Article 11 so as to impose any obligation as to *result* on member states, any commitment to ensuring that trade unions can actually function to secure decent working conditions to workers. Instead, Article 11 was merely concerned with process, or rather, the freedom to try, *within the material constraints within which one exists,* to advance one's interests in whatever way one chooses, including via collective negotiation.[136] However far the existence of the right to join a trade union might go in acknowledging a *conjunctural* inequality between workers and their employers, therefore, within the framework of particular employment relationship, it remains hamstrung by the legal form when it comes to acknowledging how underlying structures systematically constrain the enjoyment of "rights" in an unequal way.

[133] Ibid., at [53].
[134] Ibid., at [55]. See also *Wilson and Palmer v UK*, at [44].
[135] *Unite the Union v UK* [2017] I.R.L.R. 438, at [65] (emphasis added).
[136] The Supreme Court drew on this interpretation of Article 11 in *Kostel v Dunkley* [2021] UKSC 47, [2022] 2 All E.R. 607, holding that the prohibition in section 145B TULRCA on employers making offers to trade union members which, if accepted, would have the result that one or more terms of their employment will not (or will no longer) be determined by collective bargaining, implies that employers must exhaust all existing collective bargaining procedures before they can attempt to negotiate a term directly with an individual trade union member. While going further than the Court of Appeal had in its interpretation of what Article 11 requires in this context, this decision re-affirms the premise that human rights law does not impose any obligation of result, and that the states' positive obligations under Article 11 does not require that it make provision to ensure that workers can have their terms and conditions negotiated collective. workers do not, therefore, have any right to have their terms and conditions negotiated collectively. The Minority opinion even endorsed the view that an offer might not realise the prohibited result (and be unlawful) where it has the effect of taking a term out of collective bargaining where such is the product not of the employer's intention to circumvent collective bargaining, but to pursue a "legitimate business purpose". The right to collective bargaining as protected by Article 11 do not therefore trump the employers' rights with regard to their freedom to conduct their business. For a critique of this decision, see S. Brittenden and R. Arthur, "The Right to Trade Union Representation: *Kostal UK Ltd. v Dunkley & Ors*", available at https://uklabourlawblog.com (last accessed 15 December 2022).

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In a number of domestic cases, the UK courts have relied on this narrow conception of Article 11 to reject further challenges to aspects of the legal framework with regard to trade union recognition and industrial action.[137] Thus, in a series of cases concerning the statutory recognition procedure, workers have sought to challenge the fact that UK law allows an employer to pre-empt an application for statutory recognition by voluntarily recognising another union, regardless of whether that union is independent;[138] regardless of the scope of that recognition;[139] and regardless of whether the union is representative.[140]

In effect, then, human rights law has not only proved a highly limited resource in challenging aspects of the legal framework relating to trade unions, but even where it has been capable of so challenging, it has done so in a way that helps legitimise an image of trade unions that significantly constrains the scope for them to meaningfully represent and advance the interests of labour, and, in turn, to develop collective political consciousness through collective self-regulation, and/or solidaristic, collective action.

IV. Conclusion

The impact of the law on trade unions during the period 1945 to the 1970s was profoundly shaped by a number of elements of the wider post-war environment:[141] a willingness of employers to compromise in favour of socio-economic stability; governments committed to a particular macroeconomic policy that served partly to de-commodify labour, and take wages and working conditions out of competition; and an already strong trade union movement, rooted in the experiences of war time arbitration and cooperation, as well as a particular industrial structure and mode of business organisation. In addition to this, however, were a number of features specific to the *way* in which law was understood, and the relationship between legal content, and form, conceived,[142] and how this informed social struggles, and legal practice.

It was shown, for example, how the legal framework in relation to trade unions was developed from an analysis of the class dynamics of capitalist society, and the choice of certain legal techniques which, while primarily motivated by historical experiences, were nonetheless implicitly attuned to

[137] *Metrobus Ltd. v Unite* [2009] I.R.L.R. 851; *RMT v Serco and ASLEF v London and Birmingham Railway Ltd.* [2011] EWCA Civ 226, [2011] I.R.L.R. 399.

[138] *Pharmacists' Defence Association Union v Boots Management Services Ltd.* [2017] EWCA Civ 66, [2017] I.R.L.R. 355.

[139] *PDAU v Boots.*

[140] *R. (on the application of the IWGB) v Secretary of State for BEIS* [2021] EWCA Civ 260, [2021] I.C.R. 729.

[141] Howell, *Trade Unions and the State*.

[142] R. Knox, "Neoliberalism, Labour Law, and New Labour's Turn to Constitutionalism" in M. Gordon and A. Tucker (eds.), *The New Labour Constitution: Twenty Years On* (Oxford 2022); Howell, *Trade Unions and the State*; Knox, "Law, Neoliberalism and the Constitution of Political Subjectivity"; Brabazon, "Dissent".

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some of the limitations inherent in the legal form, and the limitations of the formal equality and freedom which it expressed. This included: an attempt to minimise contact between trade unions and legal institutions, to secure them a sphere of operational autonomy in which alternative conceptions of justice, and legitimacy, could be forged; a system of statutory immunities drafted so widely so as to limit the scope for legal intervention in industrial disputes; and the use of law to incentivise voluntary, sector-level, organisation, and thus, facilitate collective self-regulation, so as to increase the power that trade unions had vis-à-vis the future development of the law.

The embedding of legal policy in an understanding of the class structure of capitalist society was also important for encouraging a focus not solely on the victims of so-called rights violations, but, more broadly, about the *function* which certain practices served in capitalist society. Thus, the trade dispute formula provided a means through which courts could assess the legality of certain actions by reference to their purpose, and while this assessment was always distorted by the legal form, there was nonetheless considerable scope for a purposive or functional interpretation to be given to the legal framework that was informed by an analysis of the material context in which law functioned.[143] In this way, the legal framework was structured so as to encourage courts to *contextualise* their analysis of legal conflicts, insofar as this could be achieved within the limits of the legal form.

These features of the legal framework were directly linked with a particular understanding of the state, and the basis of its legitimacy, that emerged in the early twentieth century. During this period, the State was seen as an active mediator of class conflict, with a responsibility to use law and policy to advance directly redistributive goals, informed, moreover, by widespread, democratic debate.[144] The result was a particular orientation to social regulation that saw it as a means through which to qualify,[145] rather than to facilitate, or emulate, the logic of the legal form as expressed in the private law institutions constituting the market, underpinned by a particularly expansive conception of the scope of the political.[146] Political participation was not deemed to be confined to the ballot box, and/or access to the courts, therefore,[147] rather, it was to be enacted, and carried out, in a range of institutional fora. As a result, rights-based discourse, and rights-based institutions, played a much less dominant role in the mediation of political conflict, and, by implication, came to exercise a much less dominant influence over the formation of political consciousness.[148] Because collective struggles could

[143] B. Bercusson, "One Hundred Years of Conspiracy and Protection of Property: Time for a Change" (1977) 40 M.L.R. 268.
[144] Brabazon (ed.), *Neoliberal Legality*.
[145] P. O'Connell, "On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights" (2007) 7 Human Rights Law Review 483.
[146] Knox, "Law, Neoliberalism and the Constitution of Political Subjectivity".
[147] Brabazon, "Dissent", 175.
[148] Knox, "Neoliberalism, Labour Law and New Labour's Turn to Constitutionalism".

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be enacted, and conducted, outside the court room, then, the significance of the individualising and depoliticising effects *of* law, and legal institutions, was less, and conceptions of what was just, could be articulated in a myriad of forms.[149]

While legal subjectivity continued to be pervasive, therefore, and policy objectives still channelled through an inherently abstract, individualistic and depoliticised language,[150] there also existed many other avenues through which *alternative* conceptions of justice could be forged, and through which *collective* demands could be articulated, and *collective subjectivities* developed. This, in turn, influenced how laws were framed, and interpreted, mediating the *impact* of these features of the legal form in practice.

Since the 1980s, however, under the influence of neoliberalism, there has been a shift in the way in which law, its material context, and the relationship between form and content, have been conceived and understood.[151] By obscuring the class structures underpinning markets, neoliberalism immediately abolishes any direct role for the state in promoting substantive policy objectives, and instead, roots the state's legitimacy to its ability to establish and preserve conditions for maximum individual freedom:[152] extending the reach and operation of markets, providing protection for property rights, and the enforcement of contracts, and/or removing market distortions.

Importantly, moreover, because individual freedom is conceived *in abstraction* from the structural conditions which underpin those markets, it pays no regard to the way in which the structure of capitalist societies differentially *constrain* certain groups, and thus, shape what freedom actually means for them in practice. As such, the state's role in promoting individual freedom is limited to the removal of "external" interferences or distortions on an autonomy deemed to naturally exist – rather than empowering differently situated individuals to act autonomously in practice.[153] This creates a situation in which, rather than public law being designed to *qualify* private law, to pursue explicitly *political* goals, forged through broad-based, political debate; the *content* of public law is modelled on the assumptions of private law, and subordinated to its logic.[154]

[149] C. Tate, "Why the Expansion of Judicial Power" in C. Tate and T. Vallinder (eds.), *The Global Expansion of Judicial Power* (New York and London 1995), 28–33.
[150] V. Hamzić, "Alegality: Outside and beyond the Legal Logic of Late Capitalism" in Brabazon (ed.), *Neoliberal Legality*, 190.
[151] Brabazon, "Dissent"; A. Riles, "An Ethnography of Abstractions?" (2000) Cornell Law Faculty Publications Paper 781.
[152] Harvey, *Brief History of Neoliberalism*.
[153] D. Trubek and A. Santos, "The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice" in A. Santos and D. Trubek (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge 2006).
[154] D. Trubek, "The 'Rule of Law' in Development Assistance: Past, Present, and Future" in D. Trubek and A. Santos (eds.) *New Law and Economic Development*, 87.

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Because the legal framework is no longer informed by a direct analysis of capitalist class dynamics, but is predicated instead on an abstract analysis of market relations, the policy *underpinning* legislation has aligned itself to the logic of the legal form, such that legal content ceases to be *explicitly politicised*, but is instead modelled on an abstract image of society, and the individual, as it appears in the context of exchange, and through the framework of legal discourse.[155] The result is significantly reduced scope for a directly politicised legal content to mediate the impact, and implications *of* the legal form, and thus, for social actors to influence legal interpretation in ways that can help advance, however imperfectly, a policy that is at least broadly sensitive to capitalist class dynamics. In practical terms, this has led to a situation wherein the scope for the law to embody competing ideas of legitimacy, and competing conceptions of social justice, has been constrained, helping to further naturalise, and universalise, the logic of the legal form, and the ideology of neoliberalism which it has been harnessed to support.[156] This has had a profound impact on trade unions, because, in a context in which the legal framework is explicitly hostile to trade unions, *and* the policy underpinning that framework mirrors the logic of the legal form, there exists little scope to meaningfully challenge that logic, and thus, to advance an alternative conception of trade unions that might be capable of influencing the interpretation of that framework in practice.

It is this problem that the rise to dominance of human rights, in understandings of rights, and of justice more generally, as well as in social struggles expresses.[157] By presenting certain rights as natural and universal, and thus, timeless and uncontested, human rights law makes human rights appear as more reliable, and objective, than other discourses, and so, a more advantageous language in which to frame critiques of socio-economic practices and outcomes, as well as a potentially more legitimate, and robust, means through which to challenge them.[158] Given the alignment between the content of human rights and the logic of the legal form, this helps to limit the extent to which state policies oriented towards promoting competition, and facilitating market transactions, can be meaningfully challenged – at exactly the time when the scope for *domestic* challenge to such policies is being closed off. By helping to depoliticise the legal framework constituting markets, and underpinning the structures of power and domination that underpin market transactions, moreover, it also helps insulate those policies from critique.

155 Brabazon, "Dissent".
156 Ibid.
157 On the relationship between neoliberalism and human rights, see U. Özsu, "Neoliberalism and Human Rights: The Brandt Commission and the Struggle For a New World" (2018) 81 Law and Contemporary Problems 27; S. Jensen, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values* (Cambridge 2016); J. Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (London 2019).
158 Kumar, "Rethinking the Convergence of Human Rights and Labour Rights in International Law".

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The analysis in this paper does not suggest that the limits of the legal form were entirely overcome in the period prior to the 1970s;[159] or that law came to perform a directly *radical* role, challenging the structures of capitalism directly. The legal framework underpinning industrial relations still presupposed the formal separation of the economic and the political, and never cast doubt on the monopoly of capital over the means of production.[160] This framework *also* abstracted itself from its broader structural context, taking certain features of the world as given, and to a degree, legitimising those features in the process. However, while law never fundamentally challenged capitalist relations of production *in itself*; policy-making was nonetheless informed by an analysis of the structures of the capitalist system, and an implicit awareness of the limitations *of* law, and was informed by broad-based political debate. This allowed for the legal form to be *politicised* through legal content, and for the law to be deployed to establish conditions *from which* a broader based, political challenge to, and critique of capitalism, might be built. It allowed, in other words, for a partial democratisation of society, and the economy, that had significant implications for the precise balance of power between capital and labour that prevailed in practice.[161]

These observations provide the basis for some preliminary conclusions with regards to questions of strategy. First, in the context of neoliberalism, because avenues for struggle are significantly curtailed, human rights challenges may often be the *only* opportunity for certain groups to challenge serious abuse, and/or the only forum through which political goals can be advanced. At the same time, the universalising and totalising nature of human rights can provide a basis for challenging domestic policies and practices on the basis of "common sense" and "taken for granted" assumptions which may lead to legal changes which are more difficult to go back-on in the future, protecting against the whims of particular governments. This might then make them particularly appealing in a context in which many of the gains historically secured by the working class appear to have been eroded.

The attractiveness of human rights in our current neoliberal conjuncture should not blind us, however, to the significant risks, and limitations, of human rights language and practice in the context of capitalism, and neoliberal capitalism in particular – nor to the particular reasons *why* they appear so attractive in that context either. The structural relationship between the logic of human rights and of neoliberal capitalism[162] makes human rights law extremely risky as part of a strategy for *structural*

[159] Hamzić, "Alegality"; T. Krever, "Law, Development, and Political Closure under Neoliberalism" in Brabazon (ed.), *Neoliberal Legality*, 34.
[160] Knox, "Law, Neoliberalism and the Constitution of Political Subjectivity", 101–02.
[161] Ibid., at 102.
[162] Knox, "A Marxist Approach to *RMT v the United Kingdom*".

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transformation, and particularly liable to reinforcing and legitimising capitalism's class structures; but also, the particular way in which they are institutionalised and conceptualised in neoliberal capitalism as well.[163]

It needs to be recognised, then, that human rights law is not only insufficient, but also, often highly counterproductive when viewed from the perspective of the struggle for structural change, particularly given its close relationship with the logic, and assumptions, of neoliberalism, and its tendency to legitimise the outcomes produced by the latter. While human rights challenges may be the *only* avenue available to protect against the most egregious harms, and when this is the case, such challenges should not be avoided, they should nonetheless be pursued in a way that seeks to politicise, and contextualise, the violation in question so as to avoid valorising and legitimising the logic of the legal form which it expresses.[164] This means embedding human rights challenges – as with *any* legal challenges – in a wider emancipatory discourse[165] that illustrates not only the necessity, but also the *insufficiency* of human rights, in remedying the problems identified, exposing that which the legal form conceals, *politicising* the wider legal and institutional frameworks in the context of which human rights law functions.

In practical terms, what the analysis suggests is that trade unions, and other social actors, need to start thinking about legal struggles not so much in terms of enforcing and vindicating rights, or demanding new ones, but in terms of what institutional changes might be required to secure greater autonomy *from* the law, and what sort of legal reforms will be required to effect such changes, *and to see the role of rights, and human rights, as instrumental to this objective*.[166] This means thinking about how human rights arguments could be harnessed to encourage various institutional reforms,[167] or to place certain legal rules or institutions beyond the realm of domestic challenge, while, simultaneously, paying attention to how the way in which such arguments for reform are made might impact on how trade unions are conceptualised, and the conditions for legitimacy subsequently interpreted.[168]

[163] D'Souza, *What's Wrong with Rights?*; Kivotidis, "Theses on the Relationship between Rights and Social Struggle".
[164] This is a strategy Robert Knox calls "principled opportunism": Knox, "Strategy and Tactics".
[165] O'Connell, "Human Rights".
[166] P. O'Connell, "On the Human Rights Question" (2018) 40 Human Rights Quarterly 962; E. Sparer, "Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement" (1984) 36 Stanford Law Review 509.
[167] For a similar strategy, see Ferguson, *Women and Work*; Adams, "Structural Approach"; Patnaik, "Left Approach to Development".
[168] Knox, "Strategy and Tactics".

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