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Statutory Interpretation and the Limits of a Human Rights Approach:
Royal Mail Group Ltd v Communication Workers Union

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1. Introduction

In the 1998 white paper *Fairness at Work*, the recently elected New Labour Government famously declared that when it came to trade union law there would be no going back: the days of strikes without ballots, mass picketing, closed shops and secondary action were over and the intention was to retain the ‘most lightly regulated labour market of any leading economy in the world’.¹ In the same year, the Human Rights Act was passed, giving direct vertical and indirect horizontal effect in UK law to the European Convention on Human Rights (the Convention; ECHR). Since then, it has become increasingly common for trade union lawyers to look to Article 11 of the Convention as providing grounds for an expansive reading of the very restrictive provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) dealing with industrial action. In 2008, the *Demir and Baykara* decision of the European Court of Human Rights (ECtHR) seemed to extend the scope for doing so considerably, confirming that Article 11 protected the right to collective bargaining and paving a clear route towards a subsequent ruling that it also protected the right to strike.² In 2011, the Court of Appeal in *RMT v Serco* addressed the long-standing debate as to whether there was a right to strike in this country or only a more limited freedom carved out by the statutory immunities, finding in favour of the former.³ Three years later, however, in *RMT v UK*, the ECtHR moved swiftly from an affirmation that the right to strike was ‘clearly protected’ by Article 11 to ascribing to member states a very wide margin of appreciation in justifying any breach under Article 11(2).⁴ The scope for referring to the Convention as grounds for an expansive reading of domestic legislation on industrial action was thereby significantly

¹ Cm 3968

² *Demir and Baykara v Turkey* [2008] ECHR 1345; KD Ewing and J Hendy, ‘The Dramatic Implications of *Demir and Baykara*’ (2010) 39 *Industrial Law Journal* 2.

³ *RMT v Serco Ltd; ASLEF v London & Birmingham Railway Limited* [2011] EWCA Civ 226; noted by R Dukes (2011) 40 *Industrial Law Journal* 302.

⁴ *National Union of Rail, Maritime and Transport Workers v United Kingdom* [2014] ECHR 366

narrowed.⁵ In truth, the ‘right to strike’ in the UK depends for its realisation on a complex statutory scheme. Even in jurisdictions where the right to strike is specified textually in a constitutional document, such a complex right must be operationalised through labour statutes. It is a classic instance of a ‘legislated’ right.⁶ Since the enactment of the Human Rights Act, and the evolving jurisprudence of the ECtHR, UK law may now be described as protecting a right to strike albeit one that is pieced together from a variety of sources: statutes such as TULRCA, the common law, Convention rights, and relevant case law.

In the recent case of *Royal Mail Group Ltd v Communication Workers Union (CWU)*,⁷ Lord Henny QC relied, in part, upon Article 11 in arguing for the trade union that it had not breached statutory requirements concerning the balloting of members in advance of industrial action; that the High Court had therefore erred in granting an injunction to prevent the industrial action from going ahead. The Court of Appeal was unconvinced. In her powerful commentary on the decision, Kalina Arabadjieva argued that due consideration of the rights protected under Article 11 should have led the Court to the opposite conclusion.⁸ In what follows, we take a different view. In *CWU*, the Court of Appeal rightly eschewed a restrictive statutory interpretation such as would minimize the scope of the union’s freedom on the grounds that the statute represented a special privilege from ordinary civil liability. Instead it interpreted the relevant statutory sections in accordance with their ordinary meaning and purpose. The case highlights that it is perfectly consistent with a rights based approach that the law should be configured in different member states in a variety of reasonable but incommensurable ways. The legislation represents on that logic a creative choice to identify and instantiate a specific scheme from a range of options. On this occasion, the legislative choice was within the range of rights- (and specifically Article 11-) respecting schemes for implementing the right to strike.

⁵ A Bogg and KD Ewing, ‘The Implications of the RMT Case’ (2014) 43 *Industrial Law Journal* 221.

⁶ G. Webber, P. Yowell, R. Ekins, M Kopcke, B. W. Miller, and F. J. Urbina, *Legislated Rights: Securing Human Rights through Legislation* (Cambridge, CUP, 2018).

⁷ [2019] EWCA Civ 2150

⁸ <https://uklabourlawblog.com/2020/03/06/royal-mail-group-ltd-v-communication-workers-union-cwu-injunctions-preventing-industrial-action-and-the-right-to-strike-by-kalina-arabadjieva/>

2. *Royal Mail Group Ltd v CWU in the High Court and the Court of Appeal*

On 24 September, 2019, ballot papers were dispatched to around 110,000 members of the Communication Workers Union (CWU) in contemplation of industrial action against the members' employer, the Royal Mail Group Ltd (RMG). The ballot papers were addressed to the postal workers' home addresses and in the normal course of things would have been delivered there. It is not uncommon for postal workers to intercept their own mail as it is sorted in the delivery office. The CWU was no doubt conscious of the stringent thresholds introduced by the Trade Union Act 2016, and contained in section 226 TULRCA, to secure the participation in a pre-strike ballot of a majority of eligible members, in addition to majority support for the industrial action among those participating. With a view to maximising turnout and a 'yes' vote, the CWU encouraged its members working in delivery offices serving the area in which they lived to remove the letters from the frames in the delivery offices, complete the voting papers at work immediately, and return them as soon as possible in 'mass posting' exercises, filming this and posting the films on social media. This was duly acted upon by a large number – perhaps thousands – of members. On 15th October, the ballot closed, by which time 83,704 workers had voted, representing 75.9% of those to whom ballot papers had been issued. Of those who voted, 81,232 (or 97.1%) voted in favour of industrial action, with 2,421 against. On any view of the matter, there was a strong democratic mandate in favour of strike action.

On 13th November 2019, Swift J granted an injunction to restrain the CWU from calling strike action in reliance on the outcome of the ballot. Following the direction contained in section 221 TULRCA to have regard to the likelihood of the union establishing a defence to the action, the judge concluded that the balance of convenience favoured an injunction since it was not likely that the CWU would succeed on its argument that there had been compliance with section 230 TULRCA. If it could not succeed, the proposed industrial action would be unlawful and damages would not be an adequate remedy for RMG. The CWU then appealed to the Court of Appeal, with arguments turning on the strike ballot model contained in section 230 TULRCA. The section provides as follows that:

- (1) Every person who is entitled to vote in the ballot must—
 - (a) be allowed to vote without interference from, or constraint imposed by, the union or any of its members, officials or employees

[...]

(2) Except as regards persons falling within subsection (2A), so far as is reasonably practicable, every person who is entitled to vote in the ballot must—

(a) have a voting paper sent to him by post at his home address or any other address which he has requested the trade union in writing to treat as his postal address; and

(b) be given a convenient opportunity to vote by post.

[...]

(4) A ballot shall be conducted so as to secure that—

(a) so far as is reasonably practicable, those voting do so in secret.

It is widely accepted that TULRCA is highly complex in places, containing numerous sections that cause fiendish difficulties of comprehension even to trained legal practitioners.⁹ On the face of it, section 230 is not one of these, since its wording is reasonably clear. Nonetheless, of course, contentious questions of interpretation can arise in the course of applying the terms of the section to particular sets of facts. The CWU case was difficult, and possibly unique, because the union's plan to encourage coordinated interception of the ballot papers by each worker at his or her delivery office was rooted in an accepted workplace practice of retrieving one's own mail. In applying section 230 to the facts of the case it fell to be determined, above all, whether such encouragement amounted to the kind of 'interference' or 'constraint' contemplated by section 230(1)(a). The Court had also to consider whether or not the union had complied with the requirement in section 230(2) to send a ballot paper to each member entitled to participate in the ballot 'by post at his home address or any other address which he has requested the trade union in writing to treat as his postal address'. Finally, it had to consider whether the ballot had been conducted in compliance with section 230(4) 'so as to secure that ... so far as is reasonably practicable, those voting do so in secret'.

The existing authorities on section 230 (1) are relatively sparse. In *RJB Mining UK (Ltd) v National Union of Mineworkers*, the union had encouraged certain employees not to vote in a

⁹ See for example the disagreement arising between members of the bench as to the meaning of section 226(2)(c) in the Court of Appeal decision in *Metrobus v Unite the Union* [2009] EWCA Civ 829; noted by R Dukes (2010) 39 *Industrial Law Journal* 82.

strike ballot when they had been entitled to do so.¹⁰ It was accepted that the union's conduct was not designed to coerce or intimidate individual voters into voting against their true wishes. Maurice Kay LJ took the view that the concepts of 'interference' and 'constraint' in section 230 (1) connoted conduct that was in some sense 'improper' (while also indicating that the union's conduct in the case likely reached the threshold of impropriety). When the *CWU* case came before the High Court, Swift J agreed that 'interference' under section 230 (1) necessitated improper conduct by the union.¹¹ He concluded that the union's plan and its implementation was improper on the grounds it had been designed to subvert the democratic model upon which section 230 (1) was based. In 1993, he noted, the statute had been amended precisely so as to remove the option of workplace ballots and to impose a model of voting in secret at the union member's home.¹² The retrieval by *CWU* members of their ballot papers from the frames in the delivery office and their voting at work was clearly at odds with that intention. Swift J also found relevant breaches of section 230 (2) ('have a voting paper sent to him by post at his home address') and, on the basis of video evidence from the Swansea delivery office, of section 230 (4) ('ballot shall be conducted so as to secure that... those voting do so in secret').

In the Court of Appeal, Males LJ rejected an approach that construed section 230 (1) through the concept of impropriety. He regarded the distinction between 'proper' and 'improper' interference as 'elusive'.¹³ An enquiry to determine whether conduct was 'improper' might lead the court into an interpretive cascade, he feared, requiring the judicial elaboration of objective standards to evaluate the union's conduct.¹⁴ Instead, therefore, Males LJ favoured an interpretive approach that focused on the concept of 'interference' in its statutory context:

‘[G]iving the section its natural and ordinary meaning, it is clear that Parliament intended that each voter should receive their ballot paper at their home address, and that the conduct of the union, by encouraging voters to intercept ballot papers at their workplace and to vote there immediately, had the effect of subverting that legislative intention and, as a result, amounted to interference. While the union's conduct did not interfere with the fact that

¹⁰ [1997] IRLR 621

¹¹ [2019] EWHC 3200 (QB) [22]-[23].

¹² Trade Union Reform and Employment Rights Act 1993, s. 17

¹³ *CWU* (above n 7) [48].

¹⁴ *Ibid.*

persons entitled to vote were allowed to do so, it did interfere with the process by which Parliament intended that such ballots should be conducted.’¹⁵

Males LJ then went on to consider whether Article 11 of the ECHR required a narrower interpretation of ‘interference’ that permitted a wider freedom of action to the union in this case. He rejected this argument, as we shall discuss in section 5 below. Having concluded that there was an ‘interference’ within the meaning of section 230 (1), the remaining legal points were addressed with brevity. As one element of the broader statutory scheme of secret postal voting at home, section 230 (2) contemplated that voting papers would be delivered to the members’ homes in the ordinary course of events. Since the union’s plan was aimed at disrupting this element of the scheme by coordinating interception of the letters before they reached the home addresses, it constituted a breach of the statutory provision. As for section 230 (4), Males LJ declined to find a breach of the statutory requirement. That some of the voting occurred in public was as a natural consequence of the breach of section 230 (2), and the interception of the mail in the delivery offices. It may not have been integral to the union’s plan that the voting was undertaken in public. To the extent that the filmed events in Swansea constituted a breach of section 230 (4), Males LJ would have been prepared to regard these as within the ‘de minimis’ exclusion. Males LJ’s judgment was supported by Simler LJ and Elias LJ, both former Presidents of the EAT and very experienced in industrial relations cases. While Elias LJ was evidently sympathetic to the union’s situation, on the basis that it had done nothing unethical in implementing its plan, he nevertheless regarded its actions as objectively inconsistent with the statutory arrangements.¹⁶

3. The History of Ballots in UK Strike Law

Policy deliberations concerning the use of strike ballots have a long history in UK labour law. Auerbach notes that the first formal legislative proposal for selective strike ballots was contained in Labour’s ill-fated 1969 White Paper, *In Place of Strife*, which characterised strikes as a serious threat to the economy and other public interests.¹⁷ These and later proposals reveal a wide variety of possible schemes and underlying rationales for requiring ballots prior to industrial action. Should the state’s role be limited to providing financial incentives or

¹⁵ Ibid. [54]

¹⁶ Ibid. [89]

¹⁷ S. Auerbach, *Legislating for Conflict* (Oxford, OUP, 1990) 119.

otherwise promoting balloting or should there be direct legal compulsion? Should ballots be automatic or triggered by a request of members? Should compliance be coupled with the statutory immunities from tort liability or should it give rise to freestanding statutory liability? Should the ballot apply to all strikes or to a subset of strikes of particular magnitude or in particular sectors of the economy? Should ballots be workplace or postal?

In time, the ‘step by step’ approach to labour law reform taken by Conservative Governments in the 1980s and 1990s gradually concretised a model of balloting that was mandatory and highly prescriptive, based upon a highly atomistic democratic vision of voting as a private act undertaken in the seclusion of the union member’s home. The requirement to ballot members prior to industrial action as a condition of that action being lawful was first introduced by the Trade Union Act 1984. Until then, the decision whether to ballot members at all and, if so, how to ballot them (for example, by a show of hands at a workplace meeting), had lain with the union in question, having no bearing on the lawfulness or otherwise of pursuant industrial action. The Employment Act 1980 introduced some modest measures designed to encourage secret ballots in various forms of internal union decision-making, including strikes. This was based upon a perception that moderate rank-and-file members would exercise restraint on the political excesses of a more radical leadership,¹⁸ a theme that was reprised in the 1981 Green Paper *Trade Union Immunities*.¹⁹ The Green Paper considered the merits of secret ballots as a precondition of strikes based upon the following concern: ‘Too often in recent years it has seemed that employees have been called out on strike by their unions without proper consultation and sometimes against their express wishes.’²⁰ It then examined a variety of options for implementation, considering ‘member-triggered’ ballots against a more voluntarist approach based on state encouragement.²¹ In the Trade Union Act 1984, the modern approach was opted for, of mandatory strike ballots, linked to the availability of statutory immunity. As originally enacted, the section provided for ballot papers to be distributed at the workplace and for union members to be given an opportunity to vote either by post or at work. Perhaps surprisingly, the measures proved to be quite popular with trade unions, as leaders quickly realised that a ballot showing clear membership support could both confer a measure of

¹⁸ P L Davies and M R Freedland, *Labour Legislation and Public Policy* (Oxford, OUP, 1993) 450.

¹⁹ Department of Employment, *Trade Union Immunities* (London, HMSO, 1981) Cmnd. 8128.

²⁰ *Ibid.* [246].

²¹ *Ibid.* [253]-[260].

legitimacy on industrial action and constitute a significant tactical weapon in a dispute.²² Over the course of the next few years, it became apparent that the great majority of strike ballots were resulting in clear majorities in favour of industrial action, tending to undermine the 'unrepresentative leadership' thesis laid out in the 1981 Green Paper.²³

In 1988 and again in 1990, the pre-strike balloting provisions were amended in ways that need not concern us here.²⁴ In 1991, the question of ballots was revisited in the Green Paper *Industrial Relations in the 1990s* and plans outlined to amend the statute yet again so as (i) to require a union to give seven days' notice of its intention to call for industrial action following a ballot; (ii) to require that all strike ballots be conducted by post; and (iii) to provide for independent scrutiny of all ballots.²⁵ Without providing any evidence of unfair practices by trade unions in the course of ballots to date, the Government asserted that the introduction of mandatory postal ballots would 'provide additional safeguards against intimidation and irregularities'.²⁶

In his influential analysis of this period of legislative development, Auerbach drew attention to the distinction between 'internal' and 'external' justifications for the statutory imposition of balloting requirements on trade unions.²⁷ 'External' justifications were especially concerned with minimizing the effects of strike action on external groups such as employers, service users and customers, or the wider 'public'. Strict balloting requirements would tend to deter strike action, so that the weapon was only deployed as a last resort. 'Internal' justifications were concerned instead with the relations between the trade union leadership and its members, and with ensuring that trade union leaders were democratically accountable to the membership. As we have seen, this internal democratic argument often rested on a perception that a militant leadership might be held in check by a more moderate 'rank and file' membership.²⁸ During the debates that preceded the enactment of the Trade Union Act 1984, both types of justification had currency in the development of Conservative Party policy. While the 'internal' set of justifications was dominant at the level of political rhetoric in the enactment of the 1984 Act,²⁹

²² B Simpson, 'British Labour Relations in the 1980s: Learning to Live with the Law' (1986) 49 *Modern Law Review* 796.

²³ B Simpson, 'The Employment Act 1990 in Context' (1991) 54 *Modern Law Review* 418.

²⁴ For a full account of this period, see Davies and Freedland (above n 18) chapter 9.

²⁵ Department of Employment, *Industrial Relations in the 1990s* (London, HMSO, 1991) Cm 1602.

²⁶ *Ibid.* paras 2.11, 3.9.

²⁷ Auerbach (n 17 above) 118

²⁸ Davies and Freedland (n 18 above) 486.

²⁹ Auerbach (n 17 above) 153.

Auerbach is surely correct to argue that the reality of the Government's motivation was rather more complex. This balance between internal and external justifications has been a feature of political debates around strike ballots through to the most recent changes in the Trade Union Act 2016.³⁰ A recognition of this context to the legislative history sheds interesting light on the Court of Appeal's approach to statutory interpretation in *CWU*.

4. Statutory Interpretation in *Royal Mail Group v CWU*

When interpreting TULRCA, and section 230 in particular, it seems to us that there are broadly four approaches that might be adopted. The first, with which scholars and practitioners of labour law in this country are all too familiar, is to characterise the provisions of the Act and especially those designating some forms of industrial action as lawful, as exceptions to common law rules and principles and to interpret them, accordingly, as narrowly as possible. Lord Denning famously gave expression to this manner of reasoning in 1979, when he stated that, 'Parliament granted immunities to the leaders of trade unions, it did not give them any rights. It did not give them the right to break the law or to do wrong by inducing people to break contracts. It only gave them immunity if they did.'³¹ Interestingly, it appears that in the nineteenth and perhaps the early decades of the twentieth centuries this was rather more generally 'the orthodox common-law attitude towards legislative innovations', and not at all particular to trade union law. As Roscoe Pound once observed, judges trained in the common law showed themselves then, 'unable to conceive that a rule of statutory origin may be treated as part of the permanent body of the law'.³² This failure to treat statute and common law as coherent elements in an integrated body of law has been remarkably persistent in labour law more generally, a feature that is particularly curious given the many interactions and overlaps between these two sources of law.³³ Its persistence in the field of strike law is no doubt attributable to a judicial tendency to regard the statute as a privilege that places trade unions above the ordinary law of civil wrongs, in a view of the world still captive to the ghost of Albert Venn Dicey.

³⁰ See A. Bogg, 'Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State' (2016) 45 *Industrial Law Journal* 299, 322.

³¹ *Express Newspapers v McShane* [1979] I.C.R. 210

³² R Pound, *Jurisprudence* Vol. 3 (St Paul, West Publishing Company, 1959) 654-71.

³³ A Bogg, 'Common Law and Statute in the Law of Employment' (2016) 69 *Current Legal Problems* 67.

As recently as 2011, in the case of *RMT v Serco*,³⁴ the Court of Appeal was asked by counsel for the employer to take precisely this kind of approach, construing the 1992 Act strictly against the trade union. Referring to Denning LJ's dictum, Elias LJ refused to do so. This was no longer a legitimate approach, he argued, if ever it had been:

The common law's focus on the protection of property and contractual rights is necessarily antithetical to any form of industrial action since the purpose of the action is to interfere with the employer's rights. The statutory immunities are simply the form which the law in this country takes to carve out the ability for unions to take lawful strike action. It is for Parliament to determine how the conflicting interests of employers and unions should be reconciled in the field of industrial relations. But if one starts from the premise that the legislation should be strictly construed against those seeking the benefit of the immunities, the effect is the same as it would be if there were a presumption that Parliament intends that the interests of the employers should hold sway unless the legislation clearly dictates otherwise.³⁵

In Elias LJ's opinion then, the TULRCA should simply be construed 'in the normal way, without presumptions one way or the other'.³⁶ It should be given, as Lord Bingham of Cornhill had reasoned, a 'likely and workable construction'.³⁷

As a further alternative to Elias LJ's proposed 'construction in the normal way', a so-called purposive approach might be taken to interpretation, looking to the statute itself rather than to the common law for guiding principles. A purposive approach might also involve recourse to the policy discourse and debates that preceded enactment of the legislation: white and green papers, parliamentary debates and so on. In the case of the TULRCA, a purposive approach might lead to a more expansive interpretation of the provisions concerning industrial action, in recognition that one of the main purposes underlying the legislation is to secure to workers and trade unions a right to organise and engage in such action. 'In substance, behind the form, the statute provides liberties or rights which the common law would deny to unions. The

³⁴ [2011] EWCA Civ 226.

³⁵ *Ibid.* [9].

³⁶ *ibid.*

³⁷ *P v National Association of Schoolmasters/ Union of Women Teachers* [2003] ICR 386, para.7

“immunity” is mere form.’³⁸ A fourth option would be to look outside of the statute for guiding principles to human rights law and to interpret specific statutory terms, insofar as possible, so as to give effect to the human rights of the parties to the dispute. In the case of the TULRCA, this would be based in the interpretative obligation in section 3 of the Human Rights Act 1998, giving interpretive effect to Article 11 ECHR and its protection of a right to strike.

In the *CWU* case, the Court of Appeal opted for a combination of the second and third of these approaches. This in itself is significant, suggesting that the first ‘narrow construction’ approach to the statutory immunities should now be regarded as safely interred. While we should never underestimate the scope for dead doctrines to be resurrected when judges are moved by the exigencies of circumstances, it would be quite something to see a reprise of the *McShane* approach today. In his lead judgment, Males LJ proceeded instead by identifying the purpose and intention of section 230 straightforwardly by reading its terms in full,³⁹ and then interpreting specific subsections and terms in line with that purpose and intention. He affirmed that it would also have been legitimate to have reference to the legislative history of the provision, contrasting the current with previous versions. Swift J, as we have seen, found it relevant that the statute had been amended in 1993 specifically to remove the option of workplace ballots so that only postal ballots were allowed.⁴⁰ Even without reference to that history, however, Males LJ found it to be sufficiently clear that the purpose of section 230 was ‘to ensure that a person entitled to vote is free to choose whether to do so, which way to cast his or her vote, and where and when to do so’.⁴¹ The section was ‘designed to ensure that ballots for industrial action were secret, free and fair’, as Smith LJ had put it in *British Airways v Unite*,⁴² those being essential components of democratic legitimacy. Parliament’s view as revealed in the wording of section 230 was that fulfilment of that objective – secret, free and fair ballots – required voting papers to be sent to those entitled to vote at their home addresses.⁴³ Giving the section its natural and ordinary meaning, Males LJ therefore concluded that it was clear that Parliament intended that each voter should receive their ballot paper at their home address, moreover, ‘that the conduct of the union, by encouraging voters to intercept ballot

³⁸ KW Wedderburn, *The Worker and the Law* 2nd edn (Harmondsworth, Pelican, 1971) 314.

³⁹ *CWU* (above n 7) [59].

⁴⁰ *CWU* (above n 11) [22].

⁴¹ *CWU* (above n 7) [52].

⁴² *British Airways Plc v Unite the Union (No. 2)* [2010] EWCA Civ 69, [2010] ICR 136.

⁴³ *CWU* (above n 7) [52].

papers at their workplace and to vote there immediately, had the effect of subverting that legislative intention and, as a result, amounted to interference.’⁴⁴

There are two aspects of this approach that warrant particular emphasis. The first is that the decision to eschew reading ‘improper’ into section 230 (1) seems likely to limit the scope for judicial creativity in fashioning legal standards to support this interpretive exercise. By way of contrast, the statutory provisions on ‘unfair practices’ in recognition ballots under Schedule A1 elaborate a range of improper modes of interference, including ‘undue influence’ where this is ‘with a view to influencing the result of the ballot’.⁴⁵ In this second context, there is a statutory basis for the interpretive exercise. In relation to section 230 (1), in contrast, there is no statutory language that would guide judicial interpretation of what was proper or improper. This creates serious legitimacy concerns, as judges would be left with a relatively free hand to fashion their own normative standards of ‘proper’ and ‘improper’ behaviour. Males LJ’s approach curtails the scope for this.

The second is that Males LJ focuses exclusively on ‘internal’ democratic considerations. We think that this represents a kind of ‘constructive’ statutory interpretation.⁴⁶ This is because the exclusive focus on internal democratic legitimacy places section 230 in its normatively best light. As we have seen, Auerbach’s legislative history identifies ‘external’ justifications as important in the legal development of strike ballots. These ‘external’ concerns are more focused on limiting the disruptive effects of strikes on employers, consumers and service users, and the wider public. Were the purpose of the relevant provisions to be interpreted in line with those external justifications, the provisions might be understood as obstacles for the union, intended to deter the exercise of the right to strike. Following the approach of Millett LJ in *London Underground Limited v National Union of Railwaymen, Maritime and Transport Staff*, Males LJ declined to interpret TULRCA as imposing impediments on the trade union for the benefit of the employer.⁴⁷ In this way, *CWU* represents a settled judicial approach that uses the ‘internal’ perspective as a constructive interpretive framework for the strike ballot provisions.

⁴⁴ Ibid.[54]

⁴⁵ TULRCA 1992, Schedule A1, para 27A

⁴⁶ See, further, R Dworkin, *Law’s Empire* (Oxford, Hart, 1998).

⁴⁷ [1996] ICR 170, 180.

5. Article 11 to the Rescue?

Before the Court of Appeal, two distinct Article 11 arguments were made in support of the union's position. The first of these, as we have seen, was that Article 11's protection of the right to strike supported a narrow reading of 'interference' in section 230 (1) which would exclude the union's conduct in the case. The second was that the grant of an injunction constituted a disproportionate interference with the right to strike given the overwhelming democratic mandate for strike action in this specific instance. Both arguments were rejected by Males LJ. On the first point, Males LJ simply observed that 'to hold that a union must not interfere with the process by which Parliament has determined that ballots must be conducted does not in any way set a "trap" for the union so as to require the natural meaning of the section to be toned down. I conclude therefore that Article 11 does not require section 230 be given anything other than its natural meaning.'⁴⁸ On the second point, where the union's conduct constituted 'interference' with the statutory ballot, the strike action was unlawful within the terms set by Parliament in prescribing the democratic model. In such a situation, it was not disproportionate for a court to issue an injunction to restrain strike action that was very likely in breach of the statute. Given the court's approach to the interpretation of 'interference', it is difficult to see how its approach to the injunction could have been any different.

The current approach to human rights interpretation in domestic law continues to be shaped by Elias LJ's reasoning in *Serco*. In that case, as we have seen, Elias LJ proposed an approach based on neutral interpretation of TULRCA, 'without presumptions one way or the other'.⁴⁹ In our view, this is a matter that ought to be revisited. We believe that there should be a presumption in favour of the interpretation that supports the fundamental right (in this case, the right to strike): neutral interpretation does not meet the interpretative duty in section 3 HRA 1998 which requires a Convention-compatible interpretation 'so far as it is possible to do so'.

The more challenging question is whether the legislative scheme envisaged under section 230 (1) violates the human right to strike protected under Article 11. The difficulty for the Article 11 argument in *CWU* is the following. As we have suggested, the right to strike is a fundamental

⁴⁸ *CWU* (above n 7) [65].

⁴⁹ (above n 38) [9].

human right which must be given effect through legislation. A comparative assessment of the right to strike demonstrates the sheer variety of reasonably different (and incompatible) legislative schemes for its implementation.⁵⁰ This is an area where the legislator has a creative democratic choice to specify the details of the legislative scheme for implementation. Obviously, there will come a point where the detailed specification is *unreasonable*, where the legislative scheme damages the realization of the human right. Currently, the ECtHR specifies this threshold at an unduly high level in *RMT v UK*, where the restrictions render the right impossible (rather than substantially difficult) for workers and unions to exercise it. Nevertheless, it seems to us that the legislative determination of ‘interference’, as reflected in the Males LJ’s interpretation in *CWU*, is within the range of choices open to a reasonable legislator in a democratic government. Whether the right to strike should be conditional on an internal democratic process, and the form that this democratic process should take, is a matter squarely within the province of the legislature. A judiciary that does not respect principled democratic limits on its interpretive role is as likely to produce a new *Rookes v Barnard* as it is a thumping victory for the workers.⁵¹

6. Rights versus Immunities Revisited

CWU has provided an opportunity for a rich scholarly disagreement about the judicial role and the scope of a human right to strike in supporting an interpretation of the TULRCA scheme that gives a wide liberty of action to trade unions and workers. We acknowledge in particular the powerful critical arguments of Kalina Arabadijeva, that *CWU* represents the failure of a solid rights-based foundation for the right to strike in UK law. We have offered our own contrary arguments, and these are more supportive of the Court of Appeal’s reasoning in *CWU*. In essence, we regard *CWU* as within the post-*Serco* genre of rights-based judicial interpretation, rather than an exemplar of the older ‘immunities’ approach.

⁵⁰ This is best captured in the idea of *determinatio*, based in the work of Aquinas and developed by scholars working the Thomist tradition of natural law theory such as John Finnis. This highlights how legislation has a central role in selecting a scheme of public coordination where there are reasonable and incommensurable alternatives for specification. On *determinatio*, see Robert P George, ‘Natural Law and Positive Law’ in Robert P George (ed), *The Autonomy of Law: Essays on Legal Positivism* (Oxford, OUP, 1996).

⁵¹ [1964] AC 1129 (HL).

That said, we wish to conclude by making clear our own normative view of UK strike law, lest there be any misunderstanding of our position. The detailed balloting provisions in UK strike law have been criticised for specifying a highly atomistic vision of democracy that is contrary to more solidaristic and participative democratic models.⁵² *CWU* is a vivid case study of the democratic limitations of this statutory model. From a democratic perspective, we share those criticisms wholeheartedly, particularly given the overwhelming mandate for strike action on the facts of this case.

Yet the question in *CWU* was narrower than any of this: was Swift J's interpretation of 'interference' in a detailed statutory scheme, developed by Parliament, incompatible with the human right to strike? We find it difficult to argue that it was. It was instead a small legal fragment of an extensive statutory scheme designed to implement the right to strike through legislation. There is no doubt in our mind that TULRCA is bad strike law. But bad law does not always denote a violation of rights that should be justiciable in the courts. In *CWU*, the Court of Appeal gave democracy its due and interpreted section 230 (1) in a way that was consistent with the statutory language and purpose. When a Labour government is elected again, the virtues of this interpretive restraint may be more evident than they are today.

⁵² See, for example, S. Fredman, 'The New Rights: Labour Law and Ideology in the Thatcher Years (1992) 12 OJLS 24.