

Article 11 ECHR and the Right to Collective Bargaining:
Pharmacists' Defence Association Union v Boots Management Services Ltd
[2017] EWCA Civ 66

Alan Bogg* and Ruth Dukes**

1. INTRODUCTION

Writing in this *Journal* seventeen years ago, Keith Ewing drew readers' attention to a somewhat complex set of rules contained in the then new statutory recognition procedure.¹ Taken together, these appeared to constitute a breach of international law. The issue arose in respect of a rule intended to prevent an independent trade union from utilising the procedure in situations where the employer already recognised a different union for the purposes of collective bargaining. The problem identified by Ewing was that this rule applied even where the recognised union was *not* independent of the employer, and even where the recognition agreement did not cover the core issues of pay, hours and holidays. This stood in contrast to the general thrust of the Schedule, which excluded non-independent unions from eligibility to apply for recognition under its terms. As a consequence of these rules, Ewing suggested, employers had been provided with an incentive to recognise non-independent unions voluntarily as a means of preventing an unwelcome application by an independent union. This amounted to a breach of Article 2, ILO Convention 98, Ewing argued, and its requirement that trade unions be protected by the state against employer 'interference'.

In the recent case of *Pharmacists' Defence Association Union* ('PDAU') *v Boots Management Services Ltd* ('Boots'), the employer, Boots, took advantage of the relevant rules of the statutory

* University of Bristol. We are grateful to Professor Alison Young for her helpful guidance on the Human Rights Act 1998 aspects of this commentary.

** School of Law, University of Glasgow

¹ Trade Union and Labour Relations (Consolidation) Act 1992, Schedule A1; KD Ewing (2000) 29 ILJ 267-33

recognition procedure in precisely the manner foreseen by Ewing. Knowing that the PDAU wished to be recognised by it, Boots entered into a recognition agreement with a non-independent trade union, the Boots Pharmacists Association ('BPA'), rendering the PDAU's subsequent application under the recognition procedure inadmissible. Before the Court of Appeal, it was argued on behalf of PDAU that the recognition procedure failed, for that reason, to comply with Article 11 of the European Convention on Human Rights ('ECHR', 'the Convention'); and that the PDAU was consequently entitled to a declaration of incompatibility pursuant to section 4 of the Human Rights Act 1998. The Court of Appeal did not accept the argument. In reaching its decision, the Court focused on the fact that the obstacle placed in the PDAU's path to recognition was not 'absolute'. It remained possible for an application to be made under the statutory procedure by a worker in the bargaining unit to have the BPA derecognised. If that application was supported by a sufficient number of workers under a statutory derecognition ballot, subject to the elevated majoritarian threshold requiring forty percent of the bargaining unit to vote in favour of derecognition, the PDAU's application for recognition under TULRCA 1992 Schedule A1 could then be reconsidered under the relevant statutory admissibility and validity criteria.

In what follows, we take issue with the Court of Appeal's decision on two sets of grounds. These relate, first, to the Court's interpretation of Article 11 and the right to collective bargaining protected by it (part 4) and, secondly, to the significance that the Court ascribes in its decision-making to the margin of appreciation (part 5). We begin in part 2 by explaining the facts and law pertinent to the case and, in part 3, the reasoning of the Court of Appeal. Our argument, which is developed throughout the course of the commentary, is that the Court's decision in *Boots* is of wider ranging significance than might first be apprehended. It is not only relevant to the matter of the interpretation of Article 11 ECHR, and the right to collective bargaining protected by it, important though that may be. The decision also raises issues of fundamental constitutional significance: the margin of appreciation, the separation of powers and the exclusion of sections of our society from participation in the institutions of democracy.

2. THE PATH TO THE COURT OF APPEAL

A. The Facts

The facts of the case illustrate well the potential for the statutory recognition procedure to be manipulated by an employer seeking to block an unwanted application from an independent trade union. Having ‘substantial membership’ among pharmacists employed by Boots, the PDAU first made a formal request to Boots to be recognised in January 2012. When the request was refused, it applied to the CAC the following month to be recognised under the terms of the procedure. At that point, Boots indicated a willingness to talk. Acting, presumably, in reliance on that indication, the PDAU withdrew its application. Instead of entering into talks with the PDAU, however, Boots almost immediately concluded a recognition agreement instead with the BPA, undertaking therein to bargain collectively with the union regarding ‘facilities for its officials and the machinery for consultation in respect of the matters upon which we will consult [and not] on any other matters’. In October 2012, the PDAU made a second application to the CAC to be recognised by Boots under the terms of the recognition procedure. Following a hearing in December 2012, the CAC reached the conclusion that this application was *admissible*. On an ordinary reading of the relevant part of the procedure, the PDAU’s application was inadmissible by reason of Boots’ prior recognition of the BPA. In the opinion of the CAC, however, such a reading would entail a breach of the rights of the PDAU and its members as protected by Article 11 ECHR. To avoid this breach, the CAC instead ‘read down’ the relevant paragraph (para 35) in accordance with section 3 of the Human Rights Act 1998, concluding that the BPA recognition agreement did not render the PDAU’s application inadmissible because it did not cover the core matters of pay, hours and holidays. Following an application by Boots for judicial review of the CAC’s decision, Keith J ruled in January 2014 that the inadmissibility of the PDAU’s application gave rise to a breach of Article 11, as the CAC had said, but that it was not possible, even construing the relevant paragraph in accordance with section 3 of the 1998 Act, to give it the meaning that the CAC had done. Accordingly, Keith J allowed Boots’ claim and quashed the CAC’s decision. The PDAU then responded with an application to the High Court for a declaration of incompatibility under section 4 of the 1998 Act. The Secretary of State was accordingly joined as an intervener. In July

2014, that claim was dismissed by Sir Brian Keith (by then retired) on the basis that there was in fact no breach of Article 11: the obstacle posed to recognition of the PDAU by the prior recognition of the BPA was not absolute, but could be removed by the derecognition of the BPA under the provisions of the procedure.

The facts of the *Boots* case were thus similar to those encountered some years before in the infamous *NUJ* decision, where the employer accorded voluntary recognition to a competing independent trade union, the British Association of Journalists, which had ‘at most’ a single member in the relevant bargaining unit.² In that case, however, it was not even open to the NUJ to seek statutory derecognition of its competitor union, clearing the way for it then to apply for statutory recognition itself. Applications for derecognition of an *independent* trade union are not admissible, under the procedure, if that union was recognised voluntarily by the employer. Even though the NUJ had a significantly greater number of members within the bargaining unit than the British Association of Journalists, then, the recognition agreement with the latter remained in force, preventing an application for statutory recognition from the former for as long as it continued to do so.

B. The Law

At the heart of the decisions of the CAC and Sir Brian (in both his guises) lay their respective interpretations of the statutory recognition procedure contained in Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992 (‘TULRCA’). The procedure was introduced in 1999, came into force in 2000, and was amended in 2004. Very broadly, it involves an application to the CAC by an independent trade union that has been refused voluntary recognition by the employer, consideration of that application by the CAC and, ultimately, the possibility of a declaration by the CAC that the union is ‘recognised as entitled to conduct collective bargaining’. ‘Recognition’ under the procedure, is recognition for the purposes of collective bargaining only, and collective bargaining is defined, for the purposes of the Schedule, as bargaining over pay,

² *R (on the application of the NUJ) v. CAC* [2006] IRLR 53

hours and holidays only (paras 1, 3). Admissible applications can be made only by independent trade unions, and only in respect of employers which (together with associated employers) employ at least 21 workers (paras 6,7). As we have already seen, applications cannot be made in connection with workers in respect of whom the employer already recognizes a trade union, even if that union is not independent (para 35). For the purposes of this last rule, the relevant definition of collective bargaining is not the one mentioned above, but the more general definition contained in section 178 of the 1992 Act (para 3(6)), according to which, 'collective bargaining' means negotiations relating to or connected with one or more of a list of specified 'matters'. (It may now be clear to the reader why Boots specified in its agreement with the BPA collective bargaining regarding 'facilities for officials' and 'machinery for consultation', since these are two of the matters referred to in section 178.)

Applications for derecognition of a trade union under the Schedule proceed in a similar manner to applications for recognition.³ To win a ballot in favour of de-recognition, a majority of the relevant workers must vote in favour, and the majority must include at least 40% of the bargaining unit. One difference, with particular importance in circumstances such as those arising in this case, is that only a worker or workers within the bargaining unit can apply to have a union derecognised: a would-be applicant union has no right to apply (part VI). And while the recognised (non-independent) union has a statutory right of access to the workers to be balloted (in addition to the employer's freedom of access), neither the applicant nor any other interested independent union has a similar right of access. In short, the procedure is weighted heavily against a successful application for derecognition.

The argument that the recognition procedure breaches not only international law, as Ewing argued in 2000, but also the European Convention on Human Rights, rests on the more recent interpretation of Article 11 by the Strasbourg Court in cases such as *Wilson v UK* ('Wilson') and *Demir and Baykara v Turkey* ('Demir').⁴ In *Wilson*, it was held that Article 11 required that a trade union and its members be free, in one way or another, to seek to persuade an employer to listen to the representations that it made; moreover, that it was the role of the state to ensure that

³ TULRCA Sch A1, parts IV to VII

⁴ (2002) 35 EHRR 20; (2009) 48 EHRR 54

union members were not prevented or restrained from using their union to represent them in attempts to regulate their relations with the employer. In *Demir*, it was famously held that the right to collective bargaining was an essential element of Article 11. Taking these two rulings together, could it be concluded that Article 11 places positive obligations on a state to ensure the effective right to collective bargaining, or the trade union's right that it should be heard on behalf of its members? If it could, then what was the precise nature of those obligations, and of those rights?

3. THE REASONING OF THE COURT OF APPEAL

As articulated in the lead judgement of Underhill LJ, the matter that fell to be determined by the Court of Appeal was this: whether, in rendering inadmissible an otherwise valid application by an independent trade union to be recognised to negotiate about pay, hours and holidays, by reason of the employer's recognition of a non-independent trade union in respect of other, entirely marginal, matters, paragraph 35 of the recognition procedure gave rise to a breach of the independent trade union's rights under Article 11 ECHR.

Proceeding to consider the extent of the rights accorded to an independent trade union by Article 11, the Lord Justice recognised, referring to *Demir* and *Wilson*, that the right to collective bargaining was protected as an essential element of freedom of association, and, moreover, that the state might be under a positive obligation to secure enjoyment of that right. In judging the nature and extent of the state's positive obligation, the Court referred only to Strasbourg authorities, including especially the recent case of *Unite the Union v UK* ('Unite v UK'; 'Unite').⁵ The invitation extended to the Court by Mr Hendy, acting for the PDAU, to be guided by a 2015 decision of the Supreme Court of Canada was declined on the grounds that that decision was not directly authoritative (para 48). On the basis, then, of the Court's rather minimalist reading of the Strasbourg case law, it judged that while Article 11 did guarantee a right to collective bargaining, it did not confer a 'universal right on any trade union to be recognised in all circumstances'. To the extent that the rules of any recognition scheme constrained access to collective bargaining for a

⁵ Application No 65397/13 (3 May 2016)

particular union (or its members), the constraints would have to be justified by relevant and sufficient reasons, and should strike a fair balance between the competing interests at stake. In assessing any such justification, however, the state should be accorded a wide margin of appreciation (para 54).

Turning then to consider the matter of whether the recognition procedure gave rise to a breach of Article 11 so interpreted, the Court found itself persuaded by the argument put forward on behalf of Boots and the Secretary of State, and adopted by Sir Brian in the High Court. It remained possible, so that argument went, for an application to be made under Part IV of the procedure to have the BPA derecognised; if that application was successful, an application for recognition made by the PDAU would then be admissible; for these reasons, the constraint imposed upon the PDAU by virtue of the prior recognition of BPA and the rule contained in paragraph 35 was not absolute, and there was no breach of Article 11. In reaching this conclusion, the Court of Appeal dismissed two objections raised by Mr Hendy for the PDAU. The first of these was that the rules allowing for an application for derecognition did not apply in this case. Their application was reliant on the BPA being ‘recognised as entitled to conduct collective bargaining’ under paragraph 134(1). Collective bargaining was not defined here, except that paragraph 136 stated that the definition contained in section 178 TULRCA did *not* apply. In the absence of that definition, so Mr Hendy argued, the fact that Boots had agreed to negotiate with the BPA about ‘facilities for its officials and the machinery for consultation arrangements’ could not sensibly lead to the conclusion that it was ‘recognised as entitled to conduct collective bargaining on behalf of a group or groups of workers’. It followed that no application for derecognition could be made; consequently, that the constraint placed on the PDAU *was* absolute.⁶

The second objection raised by Mr Hendy related to the requirement in the procedure that an application for derecognition be made by a worker or workers and not by the PDAU itself. The protections provided for in Part VIII of Schedule A1 for workers who were subjected to a

⁶ Of course, in the *NUJ* scenario outlined above, there is no possibility of an application for derecognition: see fn 2 above and associated text. It would seem to follow that the protected position of recognised independent trade unions that are not representative of the bargaining unit must now be regarded as a clear violation of a representative trade union’s right to collective bargaining as protected by Article 11. This would be so even on the Court of Appeal’s minimalist approach to Article 11 in *Boots*.

detriment, including dismissal, for exercising their rights under the Schedule, might not be sufficient to instil confidence in a worker that she would not suffer any disadvantage by reason of making an application for derecognition. There is nothing to prevent an employer from engaging in the kind of behaviour displayed in *Carrington v Therm-A-Stor*,⁷ provided that its retaliatory action was found to be attributable to the union's actions as distinct from those of the individual employees. It is significant, here, too, that the 'unfair practice' provisions contained in paragraphs 119A to 119H of the recognition procedure apply only after a statutory ballot has been ordered by the CAC. Finally, a worker otherwise minded to make an application for derecognition might in any case be reticent to appear disloyal to the BPA, or to colleagues who were active in it. The Article 11 rights of the PDAU could only be protected, Mr Hendy argued, by a mechanism that allowed it to apply *in its own right* for the derecognition of the BPA.

The Court did not accept the interpretation of Part IV advanced by Mr Hendy, that the BPA could not be regarded, as was required under the terms of paragraph 134(1), as 'recognised as entitled to conduct collective bargaining'. Such an interpretation, the Court said, would be plainly contrary to the policy of Schedule A1 in general, and the purpose of Part VI in particular to provide an escape route for workers covered by a recognition arrangement with a non-independent trade union. Nor did the Court regard it as fatal to the Respondents' argument that only a worker, and not the PDAU, could apply for derecognition of the BPA. Instead, it approved Sir Brian Keith's assessment (paras 67, 65), that:

[i]t is very unlikely that the PDAU will be unable to find a single pharmacist within Boots who wants the PDAU to be recognised for the purposes of collective bargaining in place of the BPA, and who is willing to put their head above the parapet. And if the PDAU is not able to find such a pharmacist, that is overwhelmingly likely to have been because there is insufficient support for the PDAU among Boots' pharmacists for any application for statutory recognition to be successful.

This assertion was proffered by the Court of Appeal without any reference to empirical literature on the operation of the recognition procedure. In any case, its conclusion that Article 11 had not

⁷ [1983] I.C.R. 208

been breached appears to have rested, above all, on its understanding that a wide margin of appreciation ought to be applied:

The devising of a statutory scheme of recognition inevitably requires a large number of detailed choices about both substantive and procedural matters... There will inevitably be some choices which not only could have been made differently but could have been made better. But I think it is clear from the case-law of the ECtHR referred to above that article 11 cannot be used as a tool to challenge this or that arguably sub-optimal element in a scheme provided that a fair balance has been struck. Both before and after *Demir* the Court has emphasised the wide margin of appreciation which must be accorded to member states in this area (para 68).

4. THE RIGHT TO COLLECTIVE BARGAINING

It has been mentioned above that in seeking to interpret Article 11 – and to understand both the nature of the ‘right to collective bargaining’ protected, and the nature and extent of the positive obligations placed upon a state to secure that right – Underhill LJ relied solely on the case law of the Strasbourg Court, and especially the recent case of *Unite v UK*. In considering the facts before him, he then introduced an additional framework of interpretation, namely, the Hohfeldian notion of rights and correlative duties.⁸ To the Lord Justice, the relevance of this framework to Article 11 was clear: ‘I cannot understand in what sense the union could be said to have a right to negotiate with the employer unless the employer were under an obligation to negotiate with it’ (para 54). It did not follow, however, as we have seen, that he regarded Article 11 as conferring ‘a universal right on any trade union to be recognised in all circumstances’. Why not? Because the ‘competing interests at stake’ might well justify limitations or ‘constraints’ on access to collective bargaining. In assessing whether any limitation or constraint was justified, moreover, the state should be accorded a wide margin of appreciation. In configuring the statutory recognition procedure to preclude an application from a trade union in circumstances where the employer already

⁸ WN Hohfeld and WW Cook. *Fundamental Legal Conceptions as Applied in Judicial Reasoning*. Vol. 115. (Praeger Pub Text 1964).

recognised a non-independent trade union, the UK government had acted, so the Lord Justice ruled, within that margin of appreciation.

A number of criticisms may be brought to bear on this reading of Article 11 and the right to collective bargaining. We find it regrettable, in the first instance, that the Lord Justice should have followed the ruling in the *Unite* case as closely as he did. As an admissibility decision, rather than a full judgment on the merits, the decision is not binding on the Strasbourg Court itself and does not carry the authority of *Wilson* or *Demir*. For Underhill LJ, it was more directly on point than either of the earlier cases, however, since it involved, like *Boots*, a complaint ‘based on the denial of a right to compel an employer to engage in collective bargaining’ – in this case, by way of the abolition, in 2013, of the Agricultural Wages Board (‘AWB’) (para 47). The principal message to be gleaned from *Unite* was that such complaints could be distinguished from *Demir*, on the basis that the latter had involved direct state interference with an existing collective agreement. In the words of the Strasbourg Court, cases involving, instead, the ‘denial of a right to compel ... collective bargaining’ were ‘far removed’ from *Demir*.⁹ As such, Underhill LJ concluded, they might ‘face an uphill struggle’ (para 47).

In our opinion, the *Unite* decision is poorly reasoned, and based upon a dubious understanding of the domestic legal framework.¹⁰ While it is true that the annulment of a voluntary concluded collective agreement, such as occurred in *Demir*, constitutes a very deep intrusion into the right to collective bargaining, the situation of the agricultural workers in *Unite* was such that the abolition of the established mechanism for collective bargaining, the AWB, was likely, in the absence of a successor mechanism, to render their right to collective bargaining nugatory. Given that in agriculture the vast majority of employers fail to meet the stipulated threshold of employing at least 21 workers, the statutory recognition procedure was of no practical use to them. In addition, the dispersed and often precarious nature of employment in the sector rendered it highly unlikely that groups of co-workers would be able to wield the threat of industrial action effectively, so as to force ‘voluntary’ recognition agreements upon employers. To characterise the abolition of the AWB as ‘far removed’ from the facts of *Demir* therefore lacks the sensitivity shown in *Wilson* to

⁹ *Unite v UK*, para 59

¹⁰ K Arabadijeva in the ILJ, forthcoming

the real position of the workers vis-à-vis their employer. Moreover, it appears to be underpinned by a narrow conception of the substance of the right to collective bargaining: if only an extreme measure such as the annulment of the collective agreement, or something very close, strikes at the very substance of the right, then there is not very much to it.

In *Boots*, the Court of Appeal's characterisation of the PDAU's complaint as 'based on the denial of a right to compel an employer to engage in collective bargaining' (para 47) was reinforced by its adoption of a Hohfeldian framework that rights must, as a logical necessity, correspond to correlative duties. The 'real question' before the Court, according to Underhill LJ, was whether Article 11 conferred a right to bargain collectively with the employer '*and its correlative obligation*' (para 53, our emphasis). In rendering the PDAU's application for recognition inadmissible, the recognition procedure *might* have been seen to deny the union a 'right to compel ... collective bargaining', but for the possibility of derecognition of the BPA. In our opinion, the Lord Justice's focus upon the existence of a putative obligation on the part of the employer to bargain collectively with the union is a misleading distraction. As Bogg and Ewing have argued, the Hohfeldian notion of rights and duties is unhelpful in the context of collective bargaining for the very reason that it leads to a preoccupation with jural relations between *private parties*, diverting attention from the crucial role that positive duties on governments play in securing the effective realization of human rights.¹¹ The better point of focus for a court tasked with interpreting the right to collective bargaining is not the employer's duty to recognise or to bargain, but rather the state's duty to ensure that collective bargaining is effectively promoted through a range of supportive techniques. This interpretation has the benefit of mirroring the existing requirements of international law and, especially, ILO Convention 98. It also fits neatly with the so-called 'voluntarist' tradition of the UK, according to which there was no legal duty on employers to recognise trade unions but, instead, a right to strike and – until 1980 – in some circumstances, the possibility of 'compulsory' arbitration, or the *erga omnes* extension of collectively agreed terms and conditions.¹² On this interpretation, furthermore, what the 'right to collective bargaining' entails is, indeed, not a 'universal right on any trade union to be recognised

¹¹ A Bogg and KD Ewing, 'A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada' (2011-12) 33 Comp. Lab. & Pol'y J. 379-416

¹² For discussion see R Dukes, 'The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?' (2008) 37(3) ILJ 236-267

in all circumstances’ but – arguably – a right for any independent trade union to be afforded the opportunity and appropriate positive legal support to persuade/apply pressure on an otherwise reluctant employer to recognise it. This is what the right to strike affords trade unions, and what the statutory recognition procedure aims to afford them in some circumstances. This is what *Unite* was denied when the AWB was abolished.

The Court of Appeal’s preoccupation with Hohfeld is also incompatible with the important principle of effectiveness developed by the Strasbourg Court: that ‘the aim of the Convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective’.¹³ From this perspective, what matters is the *substance* of the protection and not its juridical form. The concept of a ‘duty to bargain’ is, of course, a central feature of the North American model of enterprise-level collective bargaining. It is not a feature of many European systems, in which collective bargaining is promoted in a wide variety of ways: through administrative support of sectoral bargaining; through the use of public contracting powers to promote the observance of representative collective agreements; or through legal machinery to guarantee the *erga omnes* effect of collectively agreed norms in an industry. The shocking failings of some ‘Hohfeldian’ schemes based upon a correlative ‘duty to bargain’, notably in the US, are well-documented. With a view to effectiveness, it would make little sense to elevate the ‘duty to bargain’ as an essential element of Article 11, especially in systems based upon sectoral bargaining arrangements. It would also seem absurd to consecrate a Hohfeldian reading of Article 11’s right to collective bargaining in a European context where the very idea of a ‘duty to bargain’ is utterly alien to labour law traditions in many European countries. In these circumstances, it is a great pity that the Court of Appeal was so reluctant to engage in any comparative perspective on the legal problems before it.

With respect then, it is our opinion that the Court of Appeal erred in relying so closely upon the decision in *Unite* and ought, instead, to have looked to the more authoritative cases of *Wilson* and *Demir*. Following *Wilson*, the *Court* might have chosen to focus not on the right to collective bargaining and its correlative duties, but rather, on the trade union’s fundamental *right to be heard*. In the *Wilson* case, as may be recalled, the protection of individual trade unionists’ rights was not

¹³ *Artico v Italy* (1981) 3 EHRR 1, para 33

regarded as sufficient to protect the rights of the trade union itself.¹⁴ According to the Court of Appeal in *Boots*, however, it did not follow from that ruling ‘that a scheme for compulsory recognition should place all the levers in the hands of a union for which recognition is sought rather than in the hands of those who wish to be represented by it’ (para 66). While we might agree with the terms of the Court’s statement, we would also agree with Mr Hendy’s argument that the proper lesson to be drawn from *Wilson* is that the PDAU ought to have been able to apply itself for derecognition of the BPA (para 64). This would be an aspect of its right to be heard. After all, even if an applicant trade union were to enjoy such a right (to apply for derecognition of a non-independent trade union), the ‘levers’ would, in substance, remain in the hands of constituent workers. Those workers would still be required to support derecognition *and then* to support recognition of the applicant trade union in a separate process, subject to the Schedule’s stringent majority support thresholds. In our view, then, it would have been possible for the Court of Appeal to find that the core right infringed in *Boots* was the PDAU’s fundamental ‘right to be heard’ by the employer under Article 11. The failure to provide the PDAU with a statutory right to trigger the derecognition procedure against the BPA, forcing it to rely on workers taking that step on their behalf, was a violation of the trade union’s independent right to be heard.

Following the ruling in *Demir*, it would also have been possible for the Court of Appeal to find that Article 11 had been breached by reason of the UK’s failure to ensure that the PDAU enjoyed a ‘practical and effective’ right to collective bargaining.¹⁵ It may be recalled that Underhill LJ was invited by Mr Hendy to consider the recent decision of the Supreme Court of Canada (SCC) in *Mounted Police Association of Ontario v Canada*,¹⁶ but declined to do so on the basis that he ‘did not find it helpful’.¹⁷ This was because ‘to the extent that the statements of principle there accord with those of the ECtHR they add nothing. To the extent that they differ, we must plainly take our lead from Strasbourg in interpreting the scope of article 11.’¹⁸ On their face, these propositions are

¹⁴ When the UK Government responded to the *Wilson* judgment by creating new rights for individual workers, but not trade unions, it was subjected to criticism by the Joint Committee on Human Rights (Thirteenth Report of Session 2003-04, 2.18-9) – see A Bogg, ‘Employment Relations Act 2004: Another False Dawn for Collectivism?’ (2005) 34 Ind Law J 72-82.

¹⁵ *Artico v Italy*

¹⁶ [2015] 1 SCR 1.

¹⁷ Para 48

¹⁸ *Ibid*

of course impeccable. It is a matter of some regret, however, that his Lordship declined to consider the Canadian jurisprudence. This is because the SCC in *Mounted Police Association of Ontario* was specifically concerned with the constitutional propriety of a statutory arrangement that imposed a labour relations regime on members of the Royal Canadian Mounted Police through a non-independent staff association, the Staff Relations Representative Program, while excluding collective bargaining arrangements with independent associations formed voluntarily by the workers themselves. These statutory arrangements were scrutinised under the Canadian Charter's protection of freedom of association under s 2 (d). While Underhill LJ is of course correct that the Court of Appeal must take its lead from Strasbourg, not Ottawa, the convergence of labour rights under the ECHR and the Canadian Charter justifies treating the Canadian jurisprudence as relevant to the interpretive task under Article 11. The justification for doing so here is particularly strong, given the overlapping concerns in *Boots* and *Mounted Police Association of Ontario*; and, by contrast, the fact that the ECtHR has yet to address substantive matters that are even remotely proximate to the factual context in *Boots*.

According to a majority of the SCC, the imposition of this specific labour relations model constituted a 'substantial interference' with the employees' freedom of association. This conclusion flowed from the SCC's affirmation of 'a purposive and generous' interpretation of freedom of association in section 2 (d) of the Charter.¹⁹ The application of this interpretive approach identified a constitutionally protected 'right of employees to meaningfully associate in the pursuit of collective workplace goals'.²⁰ This encompassed the 'right to a meaningful process of collective bargaining' as a 'necessary element' of the right to 'meaningfully associate in the pursuit of collective workplace goals'.²¹ The SCC then provided a normative elaboration of the constituents of a 'meaningful process of collective bargaining' in terms of 'choice' and 'independence'.²² 'Choice' is concerned with enabling 'employees to have effective input into the selection of the collective goals to be advanced by their association', which would be guaranteed by 'the ability to form and join new associations, to change representatives, to set and change

¹⁹ Para 47

²⁰ Para 67

²¹ Para 71

²² Para 81

collective workplace goals, and to dissolve existing associations'.²³ These mechanisms contribute to the 'accountability' of bargaining representatives to the workers they purport to represent.²⁴ 'Independence' is concerned to ensure that 'the activities of the association are aligned with the interests of its members'.²⁵ It will be comprised of matters such as 'the freedom to amend the association's constitution and rules, the freedom to elect the association's representatives, control over financial administration and control over the activities the association chooses to pursue.'²⁶ Taken together, this provided a constitutional metric for evaluating the Charter compliance of labour relations arrangements 'based on the degrees of independence and choice guaranteed by the labour relations scheme, considered with careful attention to the entire context of the scheme.'²⁷ In turn, the extent to which the scheme implemented a right to *meaningful* collective bargaining was determined by the degree of choice and independence. On this basis, a majority of the SCC concluded that the imposed labour relations model in the Royal Canadian Mounted Police organisation was a 'substantial interference' with s 2 (d) freedom of association.

In our view, construing *Demir* through the lens of *Mounted Police Association of Ontario* identifies four issues of particular significance in the *Boots* litigation. First, the requirement of '*meaningful* collective bargaining' was plainly not satisfied in the blocking arrangements negotiated with the BPA. The 'Boots and the BPA in Partnership' agreement was entered into almost immediately after Boots had persuaded the PDAU to withdraw its statutory application, and it was 'concerned with purely consultative arrangements' except for collective bargaining rights in respect of facilities for officials and machinery for consultation.²⁸ These recognition arrangements seemed to be a nugatory shell of collective bargaining, nominal in substance albeit legally effective in blocking the PDAU's competing statutory application under Schedule A1. In no sense could the collective bargaining arrangement with the BPA be characterised as 'meaningful', and it is difficult to understand why *Demir* would countenance 'non-meaningful' collective bargaining under the Article 11 standard. Second, the default statutory priority accorded to non-independent associations undermines the 'accountability' that is an essential precondition

²³ Para 86

²⁴ Para 87

²⁵ Para 83

²⁶ Para 89

²⁷ Para 90

²⁸ Para 21

of ‘meaningful’ collective bargaining. While the origins of the BPA are such that it was not a staff association set up by the employer,²⁹ the Certification Officer nevertheless concluded that the BPA was ‘liable to interference’ by Boots.³⁰ It had never organised industrial action against Boots, existing in a relationship described as ‘cosy’, and enjoyed financial and material support from Boots.³¹ Third, the requirement of ‘choice’, specifically the ‘right to change representatives’, is arguably compromised by the cumbersome derecognition mechanism under Schedule A1 and its failure to accord a legal right to trigger the legal derecognition procedure to a representative and independent trade union seeking recognition on behalf of the workforce.

Finally, the SCC emphasised the constitutional division of responsibility between the courts and the legislator. The constitutional task of the court was to assess the constitutional compliance of legislation, albeit that ‘a variety of labour relations models may provide sufficient employee choice and independence.’³² This allowed a degree of creative latitude to legislators in the implementation of labour relations regimes that were constitutionally compliant, hence ‘the search is not for an “ideal” model of collective bargaining, but rather for a model which provides sufficient employee choice and independence to permit the formulation and pursuit of employee interests in the particular workplace context at issue.’³³ Moreover, s 2 (d) did not require ‘a process whereby *every* association will ultimately gain the recognition it seeks.’³⁴ There is thus no question of the constitutional standard in *Mounted Police Association of Ontario* ‘constitutionalising’ a conflictual ‘Wagner Act’ model of collective labour relations, or of judges engaging in a constitutional usurpation of the legislative job of drafting labour relations statutes.³⁵ These perceptive insights into the constitutional limits of judicial review in the sensitive area of collective labour relations may well have fortified the English Court of Appeal in *Boots* given its own latent anxieties about trespassing on Parliament’s role – on which, see Part 5 below.

²⁹ Decision of the Certification Officer of 20th May 2013 ‘An application by the Boots Pharmacists Association (BPA) under section 6 (1) of the TULRCA 1992 to be listed as an independent trade union’, para 47.

³⁰ Ibid Para 50.

³¹ Ibid Para 49

³² Para 92

³³ Para 97

³⁴ Para 98

³⁵ Brian Langille, ‘Why Are Canadian Judges Drafting Labour Codes—And Constitutionalizing The Wagner Model?’ (2009–2010) 15 CLEJ 101.

In our opinion, the Court of Appeal could have benefited greatly by giving its consideration to these core operative principles identified by the SCC as pertinent to interpretation of s 2 (d) of the Charter: ‘meaningful collective bargaining’, ‘choice’, and ‘independence’. Of course, we are not suggesting that the SCC reasoning provides mechanical answers to the legal questions in *Boots*. Assessing ‘choice’ and ‘independence’ invites controversial assessments of fact and degree. Furthermore, there are obviously important differences between the constitutionally impugned arrangements in *Mounted Police Association of Ontario* and those being challenged in *Boots*. For example, the SSRP was described by the SCC as ‘an organization they did not choose and do not control. They must work within a structure that lacks independence from management.’³⁶ By contrast, the Certification Officer’s report on the BPA suggests that its independence had been compromised to a lesser degree. Furthermore, worker ‘choice’ was utterly negated in *Mounted Police Association of Ontario* given that the labour relations arrangements were imposed through law, with collective bargaining through independent trade unions excluded. By contrast, the ‘choice’ in *Boots* was impeded by cumbersome legal procedures for derecognition that were insufficiently protective of individual workers. ‘Choice’ was not, however, wholly extinguished.

Nevertheless, the general interpretive approach in *Mounted Police Association of Ontario* has much to commend it. The SCC emphasised that the assessment of constitutional compliance of labour relations regimes should be undertaken contextually, examining the operation of the labour relations regime holistically and not taking single factors (such as ‘choice’ or ‘independence’) in isolation. From this contextual perspective, the Court of Appeal’s rather blinkered fixation on ‘choice’ as a cure to any potential Article 11 breach seems difficult to justify. The legislative arrangements were suspect in *Boots* because of the *cumulative interaction* between ‘choice’, ‘independence’ and ‘meaningful collective bargaining’. The default statutory priority accorded to nominal (meaningless?) recognition arrangements with a *non-independent* trade union, coupled with deficient legislative arrangements for protecting the workers’ choice to designate an alternative bargaining representative that was independent and representative, seem to us to present a clear example of an Article 11 violation. The surprising judicial decision to foreclose that contextual enquiry, disregarding comparative material that was directly relevant to the

³⁶ Para 106

interpretation of freedom of association standards under Article 11, allowed for a troubling lack of focus on the relevant issues in *Boots*.

5. JUDICIAL POWER AND HUMAN RIGHTS

The constitutional subtext to *Boots* represents a conservative conception of the judicial role in human rights litigation. There are two dimensions to judicial power in human rights adjudication under the Human Rights Act: (i) the relationship between the domestic courts and the ECtHR, and whether domestic human rights jurisprudence should ‘mirror’ the jurisprudence of the ECtHR; (ii) the constitutional division of responsibilities between the courts and Parliament in the protection of human rights.

Consideration of the first entails interpretation of HRA 1998 s 2 (1) (a) and its requirement that the court ‘must take into account any...judgment, decision, declaration or advisory opinion of the European Court of Human Rights’. It is uncontroversial that the ECHR should be regarded as setting a minimum ‘floor’ to domestic human rights protections. As binding obligations under international law, it is incumbent on domestic courts to develop the law so as to ensure respect for those obligations.³⁷ It is an altogether more controversial proposition that European human rights law imposes a ‘ceiling’ of human rights protection on national courts. The ‘floor’ approach would obviously confer greater creative latitude on domestic courts in developing a more protective domestic human rights law that is sensitive to national values. In *Boots*, the Court of Appeal seemed to adopt a ‘ceiling’ approach to Article 11, confining itself to the strictest and most limited reading of the right to freedom of association as reflected in the *Unite* admissibility decision.

Consideration of the second raises the matter of the relationship between the s. 3 interpretive obligation that ‘so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights’; and the

³⁷ For discussion, see Eirik Bjorge, ‘Common Law Rights: Balancing Domestic and International Exigencies’ (2016) 75 CLJ 220. For a recent example in labour law, where the Supreme Court developed the public policy of illegality in the light of the United Kingdom’s treaty obligations to protect the victims of trafficking, see *Hounga v Allen and another* [2014] UKSC 47.

provision in s. 4 for a ‘declaration of incompatibility’ where legislation cannot be so interpreted. The wider the scope of the s. 3 obligation, the greater the potential transfer of ‘legislative’ power to the judiciary as courts strain the ordinary linguistic meaning of the statutory words to ensure compatibility. By contrast, the s. 4 declaration provides a mechanism whereby the position of elected representatives, be it Parliament or the executive, is restored to primacy in the resolution of human rights problems. In *Boots*, consideration of this constitutional distinction between s. 3 and s. 4 was sidestepped because of the Court of Appeal’s conclusion that there had been no human rights violation. Since we reject that view, it is incumbent upon us to indicate how the Court of Appeal should have addressed this matter.

Beginning with the domestic court’s approach to ECtHR decisions, in the case of *Ullah*, Lord Bingham famously stated that the judicial responsibility in the domestic sphere was ‘to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.’³⁸ This has come to be known as the ‘mirror principle’. The metaphor of mirroring is in fact rather misleading, and subsequent cases (even those sympathetic to the general tenor of *Ullah*) soon qualified this principle somewhat. In *Pinnock*, for example, Lord Neuberger observed that, ‘Where there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line.’³⁹ The ‘mirror’ in *Pinnock*, such as it survives, is hedged with qualifications and this opens up ample room for judicial manoeuvre. For example, the absence of a ‘clear and constant line of decisions’ in the ECtHR necessarily expands the interpretive latitude for the domestic court. Inconsistency with a ‘fundamental substantive or procedural aspect’ of the domestic legal framework would also lead the domestic court to go its own way and maintain fidelity to indigenous legal values.

³⁸ *R (Ullah) v Special Adjudicator* [2004] 2 A.C. 323 HL at [20].

³⁹ *Pinnock v Manchester City Council* [2011] 2 AC 104, para 48.

The normative basis of the ‘mirror principle’ is strongly contested, though it does have staunch judicial defenders.⁴⁰ For example, Sales L.J. (who concurred with Underhill L.J.’s judgment in *Boots*) has applauded the principle as an interpretive doctrine for national courts in his extra-judicial writings. According to Sales L.J., this doctrine reflects the genesis of the HRA as giving domestic effect to Convention rights in order to make provision for domestic enforcement and domestic remedies. In so doing, it avoids the need for a lengthy and expensive trip to Strasbourg for claimants.⁴¹ Furthermore, alignment between domestic and European case law supports Rule of Law values by promoting a consistent and determinate approach to human rights standards.⁴² By contrast, a bifurcated jurisprudence, with national courts departing from the standards set by the ECtHR, might be productive of confusion and uncertainty. In our view, these arguments support the proposition that European human rights law sets a ‘floor’ for domestic courts. They do not support the position that the jurisprudence of the ECtHR constitutes a ‘ceiling’ for national human rights protections. We would regard this ‘ceiling’ approach as especially problematic in the *Boots* litigation for the following four reasons.

First, there is not yet, in the words of Lord Neuberger in *Pinnock*, a ‘clear and constant line of decisions’ for national courts to ‘mirror’ in respect of the specific regulatory problem in *Boots*. In contrast to the right to strike, there is very little detailed jurisprudence on the fundamental right to collective bargaining in the ECtHR. Nor is there European case law addressing the specific points raised in *Boots*. In these circumstances, it is incumbent on national courts to develop the domestic jurisprudence by appeal to the general principles underpinning freedom of association under Article 11.⁴³ As Lord Reed has observed in another context, it would be inappropriate for domestic courts ‘to adopt an attitude of agnosticism and refrain from recognising such a right simply because Strasbourg has not spoken.’⁴⁴ We have already seen that the Canadian case law

⁴⁰ Richard Clayton, ‘Smoke and mirrors: the Human Rights Act and the impact of Strasbourg case law’ (2012) Public Law 639.

⁴¹ Sir Philip Sales, ‘Strasbourg Jurisprudence and the Human Rights Act: A Response to Lord Irvine’ (2012) Public Law 253, 258-259.

⁴² *Ibid.* 260-261.

⁴³ For discussion of the role of principles in human rights reasoning, see Eirik Bjorge, ‘The Courts and the ECHR: A Principled Approach to the Strasbourg Jurisprudence’ (2013) 72 *Cambridge Law Journal* 289.

⁴⁴ Ambrose [2011] UKSC 43 at [128]. See further Lord Reed, ‘The Relationship between the Strasbourg Court and the National Courts – As Seen from the UK Courts’, in Katja S Ziegler, Elizabeth Wicks, and Loveday Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart, 2015) ch 3.

provided more determinate guidance on what might be entailed by those general principles under Article 11, and those general principles favoured the PDAU's arguments.

The second reason lies in the rather problematic nature of the *Unite* decision itself, upon which the Court of Appeal relied heavily in *Boots*. *Unite* is a short and thinly reasoned decision on admissibility, and the circumstances of the decision are clearly distinct from those in *Boots*. For example, the wide margin of appreciation in *Unite* was partly attributable to the process of democratic scrutiny that had preceded the abolition of the Agricultural Wages Board.⁴⁵ In *Boots*, by contrast, the relevant legislation had been implemented some years prior to the recognition of the fundamental right to collective bargaining in *Demir*. Again, the ECtHR in *Unite* was evidently moved by the fact that 'the applicant is not prevented from engaging in collective bargaining.'⁴⁶ In *Boots*, by contrast, the PDAU *had* been prevented, or at the very least greatly impeded, from engaging in collective bargaining by the existence of the bar to its statutory application under Schedule A1. The remoteness of *Unite* from the factual dispute in *Boots* meant that its legal relevance to the Article 11 analysis is heavily attenuated.

The third reason is the failure of the Court of Appeal to grasp the normative significance of 'subsidiarity' in the domain of fundamental rights jurisprudence. A comparative perspective on the European 'right to collective bargaining' indicates that there is not one European right, there are many. Different collective bargaining systems display a kaleidoscopic variety: the legal enforceability of collective agreements between the parties; the incorporation of norms into individual contracts of employment; the variety of legal methods for extending the normative effects of collective agreements *erga omnes*; the juridical status of peace obligations and the permissible role of members-only bargaining. As we have already noted, the Hohfeldian interpretation of Article 11's right to collective bargaining as logically correlative to a duty to bargain is untenable in a European context. In these circumstances, it might be better to think of interpretive authority as *devolved* by the ECtHR to the national courts, and hence a responsibility

⁴⁵ Para 64. For the role of democratic deliberation in the 'margin of appreciation' doctrine under the ECHR, see *Animal Defenders International v United Kingdom* [2013] ECHR 362.

⁴⁶ Para 65

shared, rather than allocated exclusively to one or the other.⁴⁷ This allows the national court to develop highly abstract rights, such as the right to collective bargaining, in ways that are sensitive to national traditions. The ‘mirror’ metaphor is ill-suited to circumstances of regulatory diversity, which are common in the field of labour rights and acute in respect of collective bargaining systems.

Finally, the Court of Appeal in *Boots* was evidently influenced by the fact that ‘both before and after *Demir* the Court has emphasised the wide margin of appreciation which must be accorded to member states in this area.’⁴⁸ We regard this emphasis on the Strasbourg margin of appreciation as misplaced in a domestic context. Despite some suggestions to the contrary,⁴⁹ the margin of appreciation doctrine is specifically concerned with the appropriate normative limits of international adjudication vis-à-vis national legal orders.⁵⁰ According to Lord Hoffmann in *Re G*,

‘it must be remembered that the Strasbourg court is an international court, deciding whether a Member State, as a state, has complied with its duty in international law to secure to everyone within its jurisdiction the rights and freedoms guaranteed by the Convention. Like all international tribunals, it is not concerned with the separation of powers within the Member State. When it says that a question is within the margin of appreciation of a Member State, it is not saying that the decision must be made by the legislature, the executive or the judiciary. That is a matter for the Member State.’⁵¹

We believe that the judicial anxieties underlying the ‘mirror principle’ more often relate to the appropriate constitutional limits of human rights adjudication by national courts. The concerns about the integrity of the ECHR as a uniform body of norms are usually a red herring. Given the fundamental issues of constitutional principle at stake, it would be better to address those concerns

⁴⁷ For a nice discussion in these terms, see Dean Spielmann, ‘Whither the Margin of Appreciation?’ (2014) 67 *Current Legal Problems* 49, 63.

⁴⁸ Para 68

⁴⁹ Sir Philip Sales and Richard Ekins, ‘Rights-Consistent Interpretation and the Human Rights Act 1998’ (2011) 127 LQR 217, describing ‘deference’ as the ‘domestic analogue’ of margin of appreciation.

⁵⁰ David Pannick, ‘Principles of Interpretation of Community Rights under the Human Rights Act and the Discretionary Area of Judgment’ [1998] *Public Law* 545, 548-549; Paul Craig, *Administrative Law* (Sweet and Maxwell, 7th ed 2012) 618.

⁵¹ *Re G* [2008] UKHL 38, para 32.

directly, rather than mediating them through the margin of appreciation doctrine. In truth, the margin of appreciation doctrine is an unhelpful distraction when the national court is considering how *it* should proceed in a domestic human rights challenge to legislation in a parliamentary democracy. We recognise that the constitutional considerations are rather finely balanced. There is a long and inglorious history of judicial activism in the field of social legislation, with the common law used to disrupt and impede social democratic agendas pursued through public power.⁵² From out of this history emerged a politically progressive case for judicial abstention in the field of labour relations. Generally speaking, there are sound reasons of democratic principle and institutional expertise for judicial deference to legislatures in adjusting the complex political trade-offs in collective labour relations. This was no doubt reflected in the primary significance of statute as a ‘source’ of labour law from the middle decades of the twentieth century onwards.⁵³ It is nonetheless the case that courts are increasingly important as a defensive backstop to vindicate basic rights against legislative and executive encroachment, particularly in the era of economic austerity.

This brings us, finally, to the appropriate choice between interpretation and declaration of incompatibility under the HRA. The interpretative obligation under s. 3 of the HRA could be engaged in two ways in *Boots*. The first was reflected in the reasoning and approach of the CAC Panel. Applying the interpretive test in *Ghaidan v Godin-Mendoza*,⁵⁴ the CAC read the words ‘in respect of pay, hours and holidays’ into paragraph 35(1), the effect of which was to exclude the limited form of recognition arrangement between Boots and the BPA as a bar to the admissibility of the PDAU’s statutory application under Schedule A1. In the first High Court hearing, Keith J. rejected this interpretive move. This was because the words inserted into paragraph 35 (1) were in fact specifically excluded by the express words of paragraph 3(6). The second possible route was the interpretation of ‘collective bargaining’ under Part VI of the Schedule, dealing with derecognition of a non-independent trade union. It may be recalled that the wide meaning of ‘collective bargaining’ in section 178 TULRCA is expressly dis-applied by the legislation in the

⁵² Lord Wedderburn, ‘Laski’s Law Behind the Law. 1906 to European Labour Law’ in Richard Rawlings (ed), *Law, Society and Economy: Centenary Essays for the London School of Economics and Political Science 1985–1995* (OUP 1997)

⁵³ Paul Davies and Mark Freedland, *Labour Legislation and Public Policy: A Contemporary History* (OUP 1993).

⁵⁴ [2004] 2 AC 557, HL.

definition of the gateway into Part VI. The Court of Appeal concluded that the meaning of ‘collective bargaining’ under paragraphs 35 (1) and Part VI ought to be uniform; otherwise, if the meaning in Part VI were narrower, it would have the effect of entrenching a recognition arrangement with a non-independent trade union while disabling workers from pursuing derecognition. The Court of Appeal would have been prepared to invoke the special interpretive principles under s. 3 HRA 1998, but did not think it was necessary to do so.

It should be clear that we regard the second interpretive route as flawed, because we do not regard the existing derecognition machinery as compliant with Article 11. The first interpretive route adopted by the CAC is more promising, albeit that it was given short shrift by the High Court. Its effect is to facilitate an admissible application by an independent trade union, obviating the need for a separate derecognition process, in circumstances where the voluntary recognition arrangement does not cover the ‘core’ issues of ‘pay, hours and holidays’. Despite its attractions, however, we think that the interpretive issues are too complex to be amenable to judicial resolution in this way. The interpretation proposed by the CAC was a direct contradiction of the express words in the statute, which specifically applied the broader definition in s. 178. We would not regard this objection as insuperable. However, there are larger concerns here with the relative institutional competence of the courts and the legislature in the determination of complex policy choices in the ‘political’ domain of labour relations. It seems to us that there are a range of possible Convention-compliant interpretations of paragraph 35 (1). One such interpretation was adopted by the CAC in *Boots*, and it was one that was closely tailored to the factual circumstances of that dispute. It is not difficult to imagine that there might be other contexts where this s. 3 interpretation was unfit for purpose. Imagine, for example, a variation on the facts of *NUJ*. A non-representative and non-independent trade union, perhaps with ‘at most’ one member in the bargaining unit, enters into a voluntary recognition arrangement with an employer that covers ‘pay, hours, and holidays’. The CAC’s interpretation would be of no help in this situation.

We could introduce a more elaborate set of provisions into the statutory framework through s. 3 interpretation, such as a requirement that any voluntary arrangement be ‘representative’ or ‘approved by a majority of workers’. We might then need to add further words to elaborate how such representativity might be tested by the CAC. By now, the Court would surely be straying

across the boundary from interpreting into legislating. In these circumstances, the court is going beyond its constitutional remit.⁵⁵ The sensitive judgements of social and economic policy required in the field of labour relations means that there ought to be an extra ‘tilt’ in favour of a s. 4 declaration in situations where regulators are faced with politically controversial ‘polycentric’ issues of this kind. In other words, we agree that judges should not be engaged in the business of drafting detailed labour statutes, and courts should be cautious of the legislative cascade that might ensue under the interpretative obligation.

None of this provides an excuse for judicial reticence in the face of human rights violations. Rather, it supports the PDAU’s pursuit of a ‘declaration of incompatibility’, to give the government an opportunity to reconsider the legislative scheme in the light of evolving human rights standards under Article 11. This would also have enabled the government to address the wider problems in this area, in particular the position of non-representative arrangements with independent trade unions in *NUJ*-type situations. It is ironic that a Court of Appeal motivated by a concern to respect the democratic role of Parliament closed off what will probably be the PDAU’s only effective opportunity to access the democratic process to prompt a second look at this deficient legislation, by way of a s. 4 declaration.

6. CONCLUSION

A quick reading of *Boots* might generate the misleading impression that this is simply another technical dispute arising out of a rather marginal piece of legislation; of interest, perhaps, to a dwindling band of zealots pursuing esoteric studies into ‘collective labour law’, but of no wider importance than that. It is our contention that this would be a misreading of the decision. Beneath the surface of statutory technicalities lies a set of issues of fundamental constitutional significance.

As we have seen, the Court of Appeal was acutely sensitive, in *Boots*, to democratic concerns regarding its role in scrutinising legislation against the yardstick of human rights standards. Such

⁵⁵ See *Bellinger v Bellinger* [2003] 2 AC 467, HL.

concerns are not, of course, necessarily misplaced. The ‘right to collective bargaining’ is indisputably a fundamental human right in the international legal order, recognised as such in a wide variety of binding international instruments. In Claire Kilpatrick’s terms, the right is testament to the *polycentricity* of fundamental labour rights.⁵⁶ This polycentricity creates complex interpretive challenges at the domestic level, and it necessitates the making of controversial normative choices as to how to concretise heterogeneous (and sometimes conflicting) norms into a workable set of legal rules and principles at the level of the nation state. In the event of repeal of the Human Rights Act 1998, the politicisation of legal decision-making in this country may become even more acute as domestic courts navigate their way through a multivalent legal universe. From this perspective, the crucial constitutional question is not *whether* labour rights are human rights, but *who* should determine their content in circumstances of reasonable disagreement. In this respect, the Court of Appeal well understood the constitutional character of the decision before it.

Having asked the right constitutional question, however, we believe that the Court of Appeal then provided the wrong answer. Difficulties arose, in part, because of the Court’s choice to frame its decision around the highly abstract ‘right to collective bargaining’, as opposed to the narrower and more precise ‘right that the trade union should be heard’. Had the case been reasoned with reference to the latter, the scope for normative controversy would have been narrowed and the Court’s own constitutional legitimacy bolstered. There would have been no need for the distracting detour into the work of Wesley Hohfeld, which did little to advance the Court’s understanding of the rights afforded by Article 11. In focussing instead upon the more abstract ‘right to collective bargaining’, however, the Court gave itself a much more difficult task. Notwithstanding the decision in *Demir*, it may be doubted to what extent the right to collective bargaining provides a satisfactory yardstick for judicial scrutiny of detailed labour relations statutes. In general terms, the content in any particular jurisdiction of the constitutional right to collective bargaining tends, in practice, to be ‘filled in’ by the detailed specification provided by the legislature. Constitutional challenges then tend to focus on exclusions from the existing

⁵⁶ Claire Kilpatrick, ‘Has Polycentric Strike Law Arrived in the UK?’ (2014) 30 *International Journal of Comparative Labour Law and Industrial Relations* 293.

legislative scheme, rather than the substance of the statutory rights themselves.⁵⁷ It is this mischief that Brian Langille has in mind when he talks of judges ‘constitutionalizing’ labour relations statutes or ‘drafting labour codes’.⁵⁸ We acknowledge that this risk is a real one, but contend nonetheless that the identification of general constitutional principles, such as in *Mounted Police Association of Ontario*, may provide mediate norms that enable the courts to respect democratic legitimacy whilst opening up some critical space between constitutional standards and domestic legislation.

We contend, finally, that abstract constitutional concepts such as ‘parliamentary sovereignty’ or ‘parliamentary democracy’ should be examined critically by the courts with a view to ascertaining what these doctrinal pieties mean in real terms for trade unions and working people. What matters is the constitution as it is, not as it might have appeared in Dicey.⁵⁹ Readers of this *Journal* will be aware that the Trade Union Act 2016 imposed new constraints on the abilities of trade unions to maintain political funds, adding to an existing body of restrictive norms that operate to stifle the political advocacy activities of charities and other civil society groups.⁶⁰ These may have significant limiting effects on the opportunities for working people to participate in the legislative process, through their trade unions and the Labour Party. If that proves to be the case, litigation like that in *Boots* may provide the only viable avenue for democratic participation left for trade unions and workers. In such circumstances, the democratic arguments against judicial review are, we believe, greatly attenuated.⁶¹

⁵⁷ This phenomenon seems to be occurring in the constitutional litigation in Canada. On the exclusion of agricultural workers from the general framework of labour relations, see *Fraser v Ontario (Attorney General)* [2011] 2 SCR 3. On the exclusion of the Royal Canadian Mounted Police, see *Mounted Police Association of Ontario v Canada (Attorney General)* [2015] 1 SCR 1. This has prompted Brian Langille to argue in favour of equality as the appropriate constitutional standard for challenging such exclusions: see Brian Langille, ‘The Freedom of Association Mess: How We Got Into It and How We Can Get Out of It’ (2009) 54 McGill LJ 177, 210-212.

⁵⁸ See, e.g., Langille (n 57).

⁵⁹ JAG Griffith, ‘The Political Constitution’ (1979) 42 MLR 1.

⁶⁰ Alan Bogg, ‘Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State’ (2016) 45 ILJ 299, 307-312.

⁶¹ This is recognised by progressive sceptics of judicial review, like Jeremy Waldron, who concede that democratic arguments against judicial review depend upon the assumption that democratic institutions are well-functioning: see Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 *Yale Law Journal* 1347.

