‘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. 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.’[1]

Does this statement accurately encapsulate the UK law on the ‘right to strike’? How do the different sources of law interact and what factors determine the correct balance to be reached between competing interests in regulating industrial action? Use case law, statute, legal commentary and social science material in your answer and provide illustrations to support your analysis.

In line with socialism and Professor Beverly Silver’s assertions, capitalism is established upon ‘two contradictory tendencies’: ‘crises of profitability and crises of social legitimacy’.[2] This ‘inherent labour-capital’[3] struggle is reflected within the UK’s hostile regulation of industrial action. The courts’ and legislature’s ideological approaches towards the collective right to withdraw labour unanimously and substantially favours economic growth above social welfare.[4]

Striking, overtime bans, and refusing to carry out certain tasks are collective forms of actions that can arise from workplace disputes.[5] These disputes typically occur because employers are unwilling to negotiate with employees and workers about their working terms or conditions. Undeniably, the duration – and the aftermath – of the collective action results in financial losses to the business and affect innocent third parties (i.e. the general public).[6] Therefore, in order to appease and ‘bring the labour under control’, the capital would ‘have to make concessions [i.e. comply with the strikers’ new terms], which provoke crises of profitability’.[7] However, the loss suffered by a business[8] during and after industrial action is justified on two persuasive grounds. The first ground identified by Gwyneth Pitt is the human right aspect.[9] To restrict the right to strike would be akin to the horrific period of slavery,[10] where man had no power to withdraw his labour. This justification is recognising the

[1] Alan Bogg and Ruth Dukes, ‘Statutory Interpretation and The Limits of a Human Rights Approach: *Royal Mail Group Ltd v Communication Workers Union*’ (2020) 49 ILJ 477, 478.
[2] Nicholas Pohl, ‘Political and Economic Factors Influencing Strike Activity During the Recent Economic Crisis: A Study of The Spanish Case Between 2002 And 2013’ (2018) 9 Global Labour Journal 19, 21.
[3] ibid, 21.
[4] Harry Smith, ‘How Far Does UK Labour Law Provide for The Effective Exercise of a Right to Strike?’ (2014) 6 The Student Journal of Law <https://sites.google.com/site/349924e64e68f035/issue-6/how-far-does-uk-labour-law-provide-for-the-effective-exercise-of-a-right-to-strike> accessed 15 December 2020.
[5] Hugh Collins, Aileen McColgan and Keith D Ewing, *Labour Law* (2nd edn, CUP 2019) 706.
[6] Gwyneth Pitt, *Cases and Materials on Employment Law* (1st edn, Pearson Education Limited 2008) 570.
[7] Pohl (n 2), 21.
[8] Beverly J Silver, *Forces of Labor Workers’ Movements and Globalization Since 1870* (CUP 2003) 17.
[9] Pitt (n 6), 570.
[10] Manfred Davidmann, ‘The Right to Strike’ (*Solhaam*, 1996) <www.solhaam.org/articles/right.html> accessed 15 December 2020.

inequalities in bargaining power between employer and employee.[11] This inequality has been further escalated by the growth of the modern-day unstable gig economy; one in nine UK workers are in precarious work.[12] This form of work has limited protection and much lower salaries.[13] Hence, a subsequent ground for the justification of withdrawal of labour is the equilibrium argument. The power of the employer and their actions can only be matched and questioned by a 'concerted stoppage of work'.[14] Essentially, the right to strike is more than the withdrawal of labour: it is also the encompassing 'right to free expression, association, assembly and power'.[15] Yet there is 'no positive legal right to strike in the UK'.[16]

Instead, 'the "right to strike" in the UK depends for its realisation on a complex statutory scheme'.[17] In contrast to its neighbouring European countries' (Spain and Italy) jurisdictions 'where the right to strike is specified textually in a constitutional document', the UK law 'protects a right to strike … from a variety of sources: statutes such as TULRCA, the common law, Convention rights, and relevant case law'.[18] The accuracy of Bogg and Dukes' encapsulation of the UK law on the 'right to strike' and how the different sources of law interact will be subsequently discussed.

i. Common Law

Judiciary

While Spain[19] and Italy[20] protect the right to strike by suspending the contract of employment during industrial action, this contract is broken under English law.[21] This is because the English common law does not confer a right to strike,[22] hence 'the rigour of the common law applies in the form of a breach of contract on part of the strikers and economic torts … [for] the organisers and their union'.[23]

It is tortious and indefensible[24] to induce an individual to breach their contract of employment.[25] This principle was established in *Lumley v Gye*,[26] and this liability

[11] Adam Smith, *An Inquiry into The Nature and Causes of The Wealth of Nations* (Cofide 1776).
[12] Bethan Staton, 'The Upstart Unions Taking on The Gig Economy and Outsourcing' (*Financial Times*, 20 January 2020) <www.ft.com/content/576c68ea-3784-11ea-a6d3-9a26f8c3cba4> accessed 16 December 2020
[13] Employment Rights Act 1996, s212.
[14] Trade Union and Labour Relations (Consolidation) Act (TULRCA)1992, s246.
[15] Brian Smart, 'The Right to Strike and The Right to Work' (1985) 2 Journal of Applied Philosophy 31.
[16] 'Industrial Action' (*UNISON National*) <www.unison.org.uk/get-help/knowledge/disputes-grievances/industrial-action/#:~:text=Although%20there%20is%20no%20positive,some%20tough%20conditions%20are%20met.&text=The%20union%20must%20have%20conducted,called%20upon%20to%20take%20part.> accessed 7 December 2020
[17] Bogg and Dukes (n 1), 478.
[18] ibid, 478.
[19] Article 18 of the Spanish Constitution and regulated by Royal Decree-Law 17/1977 of 4 March on Labour Relations ('RDLLR') and Article 4.1.e) of the Spanish Workers' Statute.
[20] Article 40 of the Italian Republic Constitution of 1948.
[21] Collins, McColgan, and Ewing (n 5), 714.
[22] *RMT v Serco; ASLEF v London and Birmingham Railway* [2011] EWCA Civ 226, [2011] ICR 848 [2].
[23] *Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829, [2010] ICR 173 [118].
[24] *South Wales Miners' Federation v Glamorgan Coal Co* [1905] AC 239.
[25] Collins, McColgan, and Ewing (n 5), 714.
[26] (1853) 118 ER 749.

extends to trade unions in the context of industrial action.[27] Additionally, there are two further economic torts trade unions can be held liable for: liability for conspiracy to injure (*Quinn v Leathem*)[28] and causing loss by unlawful means. Until *OBG Ltd v Allan, Douglas, and others v Hello! Ltd*,[29] the 'tort of procuring a breach of contract had been ["blurred"[30] and] extended [to be a wider] tort of unlawful interference with contractual relations'.[31] These torts were later distinguished and separated in the House of Lord's (HoL) judgment of *OBG v Allan*.

While it is not often, the courts are encouraged to distinguish and introduce new torts. The HoL in *OBG v Allan* subsequently outlined the distinguishing elements between unlawful means and the tort of procuring a breach of contract. The tort of procuring a breach of contract is an accessory liability. Whilst the tort of unlawful means is a 'primary liability that is not dependent on the third party having committed a wrong against the claimant'.[32] Yet, despite the tort differences, the HoL confirmed that the same act could give rise to liability under both unlawful interference and procuring a breach of contract.[33] This clarification and the development of unlawful interferences as a separate liability has notably accommodated employers in holding trade unions liable for more than one tort.

The *OBG v Allan* judgment is significant for discussing industrial action for two notable reasons. The first is that it confirms the judiciary's 'uncontrolled power'[34] in developing and 'defining torts boundaries on a case-to-case basis.[35] This power is 'ensur[ing] that trade unions cannot provide a lawful excuse or justification for their actions'[36]; trade unions are ultimately 'stood naked and unprotected at the altar of the common law'.[37] The insufficiency of protection for trade unions under the common law exhibits the judiciary's biased and hostile ideology towards industrial action.[38] This subsequently aligns with the following observation: the courts favour economic profits. This is discerned by the extent to which the contemporary judiciary extends protection for commercial bodies.[39] The primary function of English tort law was to protect physical integrity and property rights; tort law was never concerned with the protection of economic interests.[40] Nor had the common law ever been historically exercised to 'legitimately control aspects of the economy'[41] and yet *OBG v Allan* demonstrates the extent to which this has now changed. The judiciary has extensively and needlessly stretched the common law and its torts[42] to protect

[27] *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426.
[28] [1901] AC 495.
[29] [2007] UKHL 21, [2008] 1 AC 1.
[30] 'House of Lords Overhaul Economic Torts' (*Herbert Smith Freehills*, 17 May 2007) <https://hsfnotes.com/litigation/2007/05/17/house-lords-overhaul-economic-torts/> accessed 9 December 2020
[31] ibid.
[32] *OBG v Allan* (n 29).
[33] ibid, [37].
[34] Hazel Carty, 'The Economic Torts and English Law: An Uncertain Future' (2007) 95 Kentucky LJ 849.
[35] *Lonrho v Fayed* [1990] 2 QB 479, 492-93.
[36] Collins, McColgan, and Ewing (n 5), 714.
[37] ibid, 714.
[38] ibid, 849.
[39] ibid, 848.
[40] ibid, 847.
[41] ibid, 847.
[42] Cartey (n 34), 847.

'already powerful organisations'.[43] Hence, from the perspective of trade unions and their members, the common law's (inadequate) protection for the 'right to strike' has been, undeniably, very disappointing.

II. Statutes

Legislature

One of the major problems facing trade unions was the 'exposure of their funds to legal action by employers'[44]; in 1901, Taff Vale Railway Co successfully sued the Amalgamated Society of Railway Servants union for £42,000.[45] This sum is equivalent to £5,196,328.39 today. This verdict, in effect, eliminated 'the strike as a weapon of organized labour'.[46] Naturally, workers turned to political parties for redress. The concern and advocacy for trade union reform accounted for 59% of the winning Liberal party's election manifesto.[47] The Liberal government, led by Prime Minister Henry Campbell-Bannerman, provided unions with wide immunity against any tortious liability arising from trade disputes under The Trade Disputes Act (TDA) 1906. Although this Act did not introduce a 'legislated right' for industrial action,[48] this statute effectively recognised the vulnerability of unions under the common law by 'secur[ing] a [statutory] freedom' instead. [49] The TDA is one of the 'most important pieces of labour legislation ever passed by a British Parliament'[50]; it effectively 'kept the courts at a minimum'[51] and neutralised the most obvious adverse effects of the *Taff Vale* judgment. The 'sympathetic politicians' were 'periodically reconstructing' the role of the 'class-conscious', profit-favouring judiciary.[52] The outcome of the 1906 general election 'served the unions' interests well'[53] and it continued to for 65 years.

The 'long enjoyed'[54] immunity of trade unions for liability in tort was reduced to partial immunity under the Thatcher government (1979-90). There is a 'scale of government ideology' which ranges from 'fully participative' to 'fully authoritative',[55] and the Thatcher government was the undoubtable latter. The Conservative ideology and economists, such as FA Hayek, viewed trade unions as an obstacle to economic growth.[56] This perception was heightened by the Winter of Discontent (1978-79): a

[43] ibid, 849.
[44] Richard Kidner, 'Lessons in Trade Union Law Reform: The Origins and Passage of The Trade Disputes Act 1906' (2018) 2 Legal Studies 37.
[45] *Taff* Vale (n 27).
[46] Merriam-Webster, *Merriam-Webster's Collegiate Encyclopedia* (Merriam-Webster 2000) 1157.
[47] Kidner (n 44), 47.
[48] Bogg and Dukes (n 1), 478.
[49] *RMT and ASLEF* (n 22) [2].
[50] Keith Ewing, 'The Right to Strike: From the Trade Disputes Act 1906 To A Trade Union Freedom Bill 2006' (*Institute of Employment Rights*, March 2013) <www.ier.org.uk/product/right-strike-trade-disputes-act-1906-trade-union-freedom-bill-2006/> accessed 11 December 2020.
[51] The Editors of Encyclopedia Britannica, 'Trade Disputes Act' (*Encyclopedia Britannica*, 20 July 1998) <www.britannica.com/event/Trade-Disputes-Act-United-Kingdom-1906> accessed 11 December 2020.
[52] Ewing (n 50).
[53] Encyclopedia Britannica (n 51).
[54] FA Hayek, 'Trade Union Immunity Under the Law' *The Times* (London, 21 July 1977) 15 <www.margaretthatcher.org/document/114630> accessed 11 December 2020
[55] Davidmann (n 10).
[56] Hayek (n 54).

period characterised by widespread of strikes in response to the Labour government's wage cap (to maintain falling inflation).[57] Subsequently, Thatcher's government further justified the re-introduction of liability for trade unions upon the succeeding Green Papers: the 1981 *Trade Union Immunities*[58] and the 1989 *Trade Unions and their Members.*[59] Both papers outlined concerns regarding democracy, rights, and freedom of trade union members; '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'.[60] Accordingly, the Thatcher government introduced legislation that prior Conservative governments were afeard of passing: the Employment Act 1980, Trade Union Act 1984, and Trade Union Reform and Employment Rights Act 1993. These re-introduced vulnerability and high costs for unions. Under the Employment Rights Act 1980, 'trade-dispute' was re-defined, statutory liabilities were introduced and unions were exposed to injunctions and claims for damages. However, upon complying with the stringent balloting requirements (from secret ballot to the requirement for all ballots to be postal) in the 1984 and 1993 Acts, the dispute would be deemed lawful.[61] It is expensive for unions to comply and evidence the fulfilled balloting requirements, but if lawful union members are statutorily protected from unfair dismissals and injunctions.[62] While this is a brief summary of the Acts, these restrictive measures offer an insight into the Thatcher government's success in exercising its agenda of restricting the lawfulness of industrial action by limiting its previously protected scope and purposes.

Subsequently, the process of placing further controls on trade unions continued into the 21st century.[63] The 2015 Conservative government introduced the 'draconian'[64] Trade Union Act 2016 (TUA) – the most significant union legislation since the Employment Act 1980. The TUA introduced a minimum threshold of eligible members to vote in the ballot (at least 50% turnout and 50% voting in favour).[65] Moreover, in the instance the members are engaged in 'important public services',[66] 40% of all members entitled to vote must have voted in support of the industrial action. These stringent procedural requirements have to be strictly followed for a strike to be lawful.[67] Oddly, there was no pressing need to introduce these restrictive measures.[68] There were no significant problems in industrial relations at the time (ie, Winter of Discontent) nor any significant 'pressure from business for further laws on strikes',[69] but the Conservative government justified these 2016 measures through

[57] Alex Kitson, '1978-1979: Winter of Discontent' (*Libcom.org*, 24 January 2007) <http://libcom.org/history/1978-1979-winter-of-discontent> accessed 11 December 2020.
[58] Cmd, 8128, 1981.
[59] Cmd 821, 1989.
[60] *Trade Union Immunities* (n 58), para 247.
[61] Trade Union Reform and Employment Rights Act 1993, s238A.
[62] TULRCA 1992, ss237-38.
[63] Michael Ford and Tonia Novitz, 'Legislating for Control: The Trade Union Act 2016' (2020) 45 ILJ 227.
[64] Bart Cammaerts, 'The Efforts to Restrict the Freedom to Strike and To Deny A Right to Strike Should Be Resisted Fiercely' (*LSE Blogs*, 14 September 2015) <https://blogs.lse.ac.uk/politicsandpolicy/the-efforts-to-restrict-the-freedom-to-strike-and-to-deny-a-right-to-strike-should-be-resisted-fiercely/> accessed 11 December 2020.
[65] TUA 2016, s226(2)(a) (ii).
[66] ibid, s226(2)(e).
[67] ibid, s238A.
[68] Ford and Novitz (n 63), 291.
[69] ibid, 291.

the findings of Bruce Carr QC and Ed Holmes.[70] The Government submitted the Carr Review to indicate a consistent pattern of union bullying workers, and yet Carr himself 'did not contend his findings to be a sufficient basis' for influencing the TUA.[71] Instead, the true motivations behind the government's 2016 legislative programme are observed by the 'striking resemblance'[72] to Ed Holmes *Modernising Industrial Relations* (*MIR*) paper.[73] The policy paper daringly questioned the necessity of protecting industrial action by reflecting on the development of employment tribunals and discussing the economic consequences of strikes. The same 'free-market economic theory' that underpinned the *MIR*'s recommendations 'drove' the pragmatically restrictive and economically influenced 2016 statute developments.[74]

The substance of today's statute in protecting trade unions 'is far removed and much weaker than the position established in 1906'.[75] Since the Henry Campbell-Bannerman leadership, trade union membership has declined by more than half due to the 'three successive Conservative governments [who] have enacted labour legislation opposed by unions'.[76] It appears the deep-rooted ideology of the political party in power influences the legislative steps for protecting trade unions.[77] Therefore, the extent of the Conservative government's 'authoritarian, class-biased and oppressive'[78] industrial action policies will be exemplified and 'more evident than they are today when a Labour government is elected again'.[79]

Judiciary

While the likes of Maurice Kay LJ and Lord Neuberger MR 'characterised the statutory immunities as limited exceptions to the common law' to justify interpreting the statute provisions 'strictly against the trade union', the court's overall response to industrial action 'has been more mixed'.[80] The court in *Merkur Island Shipping v Laughton*[81] developed a three-part test to examine the legality of industrial action. This test encapsulates the substantive and procedural requirements for a lawful strike whilst observing the intertwined and 'uneasy' relationship between the common law and statute.[82] If the industrial action is unlawful at common law, the judiciary asks whether there is a 'prime facie statutory immunity' for the commission of torts.[83] This substantive question considers whether the action was 'in contemplation or furtherance of a trade dispute'[84] before questioning whether the

[70] ibid, 291.
[71] ibid, 291.
[72] ibid, 279.
[73] *Modernising Industrial Relations* n.7.
[74] Ford and Novitz (n 63), 279.
[75] Ewing (n 50).
[76] Brian Towers, 'Running the Gauntlet: British Trade Unions Under Thatcher, 1979-1988' (1989) 42 ILR Rev 163.
[77] Gareth Thomas and Ian K Smith, *Smith & Thomas' Employment Law* (9th edn, OUP 2007), 737.
[78] Davidmann (n 10).
[79] Bogg and Dukes (n 1), 492.
[80] Ruth Dukes, 'The Right to Strike Under UK Law: Not Much More Than A Slogan? *NURMT v SERCO, ASLEF v London & Birmingham Railway Ltd*' (2011) 40 ILJ 302, 309.
[81] [1983] ICR 490.
[82] Collins, McColgan, and Ewing (n 5), 847.
[83] TULRCA 1992, s219.
[84] ibid.

immunity had been procedurally lost by one of the three specified statutory reasons in TULRCA 1992.[85] The union's partial immunity could be lost for minor 'inconsequential breaches of the statutory rules'[86]; there is a series of High Court instances of injunctions being granted to 'ever more powerful and well-resourced employers'[87] owing to invalid strike ballots.[88] The readily available labour injunctions continued to be the "key piece[89]" of suppressing collective action until the minor development in 2011.

In *RMT v Serco Ltd; ASLEF v London and Birmingham Railway Limited* (*RMT and ASLEF*),[90] the Court of Appeal approved and applied Millett LJ's 1996 observation in *London Underground Limited v National Union of Railwaymen, Maritime and Transport Staff*:[91] 'the democratic requirement of a secret ballot is not to make life more difficult for trade unions … but for the protection of the Union's own members'.[92] Owing to this proposed democratic aim, the court in *RMT and ASLEF* confirmed it was 'to interpret the statutory provisions somewhat less stringently'.[93] This interpretation is a stark contrast to Maurice Kay LJ's understanding of parliament's intentions. The court furthered Millett LJ's aim by recommending a neutral, 'without presumptions one way or the other',[94] interpretation of TULRCA. Upon the fact TULRCA is premised on the existing common law framework, the court's 'judicial creativity' could have easily 'outflank[ed] the intentions of Parliament'.[95] Instead of a 'neutral' approach, the courts have the power to mitigate unions disproportionate vulnerability against injunctions, damages, and unfair dismissals by encouraging and favouring social legitimacy. Although, the *RMT and ASLEF* court 'only indicated a change in emphasis rather than substance'[96] (since unions are still burdened with the challenges of exercising a 'lawful' strike),[97] this judgment enhanced union's ability to resist injunction applications (as observed by *Balfour Beatty Engineering Services Limited v Unite the Union*).[98] The unbiased interpretation encouraged in *RMT and ASLEF* continues to be the leading approach to interpreting domestic statutes regarding industrial action.

III. ECHR

Judiciary

[85] ibid, ss222, 224, and 226.
[86] Dukes (n 80), 309.
[87] Kalina Arabadjieva, 'Royal Mail Group Ltd v Communication Workers Union (CWU): Injunctions Preventing Industrial Action and The Right to Strike' (*UK Labour Law*, 6 March 2020) <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/> accessed 12 December 2020.
[88] TULRCA 1992, s226.
[89] Arabadjieva (n 87).
[90] n 22.
[91] [1996] ICR 170.
[92] ibid, [180]-[182].
[93] Dukes (n 82), 309.
[94] *RMT and ASLEF* (n 22), [2].
[95] Smith (n 4).
[96] Ford and Novitz (n 63), 281.
[97] Arabadjieva (n 87).
[98] [2012] EWHC 267 (QB).

Admittedly, the scope of Maurice Kay LJ's strict interpretation was narrowly limited by the European Court of Human Rights (ECtHR).[99] The ECtHR confirmed, in *Enerji Yapi-Yol Sen v Turkey*,[100] that Article 11 of the European Convention on Human Rights included protection of the right to strike. This Article, and Article 6 of the European Social Charter[101] bestow the right to strike for their member states members and due to the UK Human Rights Act 1998, 'British workers are understood to enjoy a right to strike'.[102] This, unlike the mere domestic statutory immunities, is the only instance of a 'legislated' right to strike in the UK.[103]

Under section 3(1) of the Human Rights Act 1998, 'statutory provisions must be read and given effect in a way which is compatible with the Convention rights'[104] – 'the opportunity to test this line of argument'[105] in the English courts arose in *Metrobus Ltd v Unite the Union* (*Metrobus*).[106] The Court of Appeal rejected the *Enerji* arguments; the Court denied the authority's relevance for the interpretation of UK statutory provisions. This judgment continues to be the leading precedent on the UK's provisions of Article 11,[107] despite the *RMT* and *ASLEF* judgment. In *RMT and ASLEF*, the UK courts acknowledged the 'clearly protected'[108] right to strike under ECHR Article 11. However, the court emphasised the importance of a 'fair balance to be struck between the competing interests of the individual and the community as a whole'.[109] The emphasised interests of the 'community' motivated the court's justification for the ban on secondary action owing to its 'potential to … cause broad disruption within the economy and to affect the delivery of services to the public'.[110] Subsequently, the court confirmed that this ban aligns with Article 11(2) 'on the basis of a wide margin of appreciation accorded to the State'.[111] While the court is correct to recognise their bestowed margin of appreciation, the court rationalised the granting of the injunction, 'which itself cost the union a substantial sum',[112] upon economic factors. This factor is not only 'wholly irrelevant to the specific facts of the application' but it disregarded and postponed 'the exercise of what was acknowledged to be a convention protected right'.[113] The court effectively and 'successfully prevented industrial action on the basis of legal' human rights provisions 'which are intended to benefit workers'.[114]

In short, there 'is no point creating rights' or passing human rights legislation if the 'court is not prepared to defend them'.[115] There will continue to be an erosion of human rights protection until there is greater coordination between the domestic courts and the ECtHR. It is credible to conclude that the UK judiciary is more

[99] Keith Ewing and Alan Bogg, 'The Implications of The RMT Case' (2014) 40 ILJ 221, 222.
[100] [2009] ECHR 2251.
[101] 'The right to bargain collectively.'
[102] Keith Ewing and John Hendy, 'The Dramatic Implications of Demir and Baykara' (2010) 39 ILJ 2.
[103] Bogg and Dukes (n 1), 478.
[104] ibid.
[105] Dukes (n 82), 303.
[106] n 23.
[107] Dukes (n 82), 310.
[108] Ewing and Bogg (n 99), 221.
[109] *RMT and ASLEF* (n 22), [77].
[110] ibid, [82].
[111] ECHR Art 11 (2).
[112] Ewing and Bogg (n 99), 251.
[113] ibid, 221.
[114] Arabadjieva (n 87).
[115] Ewing and Bogg (n 99), 223.

concerned with profitability, self-preservation of UK powers, and 'in appeasing political forces'[116] above the interests of the individuals it and the Convention Rights was established to serve.

Legislature

The *RMT and ASLEF* court's 'blessing of a wide margin of appreciation' in the 'encompassment' of Article 11 offered a 'green light for further restrictive legislation on industrial action' by the 'only too happy Government'.[117] Here, Boggs and Ewing detect 'the crude politics of power'.[118] Upon observing the Court of Appeal's reluctance to exercise EU conventions, and the UK courts' developments that continue to be 'very much in line with the political approach of the Conservative government',[119] it materialises that the court and government are not 'looking to open a third (ECtHR) front'.[120]

The Government has recently launched an 'independent review' of the Human Rights Act.[121] The review aims to evaluate 'the duty to take into account' ECtHR case law and assess 'whether dialogue between our domestic courts and the ECtHR works effectively and if there is room for improvement'.[122] It is worth highlighting that this 'independent' review will be led by former Court of Appeal Judge, Sir Peter Gross – the same judge who remarked that 'the more that controversial areas are "outsourced" … the greater the challenge for … judicial leadership'.[123] The former judge is a notable advocate for greater domestic judicial leadership.[124] This advocacy hints the likelihood of the review condemning the relevance and precedence of the ECtHR (and Human Rights Act 1998) in 'controversial' matters such as industrial action. This review has the powerful ability to eliminate the only instance of a legislated right to strike in the UK.[125]

Ultimately

'The notion of lawful industrial action is restrictive', the procedural requirements are 'onerous' and the consequences of unions liability for unlawful strikes are 'serious'.[126] Nearly two decades after the European Social Charter's review,[127] the UK still does not guarantee the right to strike. The precedent in *Metrobus* still stands.

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[116] ibid, 251.
[117] Ford and Novitz (n 63), 282.
[118] Ewing and Bogg (n 99), 223.
[119] Thomas and Smith (n 77), 737.
[120] Ewing and Bogg (n 99), 223.
[121] Ministry of Justice, 'Government Launches Independent Review of the Human Rights Act' (*Gov.uk*, 7 December 2020) <https://www.gov.uk/government/news/government-launches-independent-review-of-the-human-rights-act> accessed 15 December 2020.
[122] ibid.
[123] Jamie Susskind, 'Jamie Susskind Comments on Sir Peter Gross' Lecture on Judicial Leadership' (*Littleton Chambers*) <https://littletonchambers.com/jamie-susskind-comments-on-on-sir-peter-gross-lecture-on-judicial-leadership/> accessed 15 December 2020.
[124] ibid.
[125] ECHR Art 11.
[126] Ruth Dukes, The Right to Strike Under UK Law: Something More Than A Slogan? *Metrobus v Unite The Union* [2009] EWCA Civ 829' (2010) 39 ILJ 1, 7.
[127] ESC, Report of the Committee of Experts 2002.

There continues to be a 'poorly reasoned and barely consistent' series of judgments 'by what looks like a weak, timid'[128] and politically influenced[129] judiciary. The enactment of the 'Human Rights Act and the evolving jurisprudence of the ECtHR'[130] will not prescribe a right to strike in the UK until the Supreme Court or ECtHR rule UK's current provisions as incompatible with Article 11.

In truth, 'the right to strike [in the UK] has never been much more than a slogan or a legal metaphor'.[131] This 'slogan' is a regime of immunities that are purposely designed upon an overly complex and expensive statutory system.[132] These immunities are not adequately or proportionately protecting workers, unions, and one in nine vulnerable, precarious workers against the 'pitfalls'[133] of damages, injunctions, and unfair dismissals.[134] This system was successfully underlined with the political agenda of deterring trade disputes; the UK's worker strike total has fallen to its 'lowest level since 1893'.[135] The 'unanimous and hostile'[136] approach of the legislature and the judiciary towards industrial action exhibits the UK's covert 'culture of routinely disregarding'[137] social legitimacy in favour of profits.

[128] Ewing and Bogg (n 99), 251.
[129] Thomas and Smith (n 77), 737.
[130] Bogg and Dukes (n 1), 478.
[131] *Metrobus* (n 23) (Maurice Kay LJ)..
[132] Bogg and Dukes (n 1), 478.
[133] Dukes (n 125), 9.
[134] ibid, 7.
[135] Richard Partington, 'UK Worker Strike Total Falls to Lowest Level Since 1893' (*The Guardian*, 30 May 2018) <www.theguardian.com/uk-news/2018/may/30/strikes-in-uk-fall-to-lowest-level-since-records-began-in-1893#:~:text=The%20number%20of%20workers%20who,Victoria%20was%20on%20the%20throne.> accessed 15 December 2020
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[137] ibid.

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