

STRIKES AS AN INSTRUMENT OF LABOUR PROTEST AND ITS REGULATION: AN ANALYTICAL STUDY OF INTERNATIONAL DEVELOPMENTS

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1.1 INTRODUCTION

The right to strike is an integral part of contemporary labour laws and an important Human Right.¹ It has been widely recognised as an essential element of collective bargaining and one of the most important means through which workers defend their economic and social interests.² The right to strike is also an intrinsic corollary of the fundamental right of freedom of association.³ Today strike is resorted to by every section of the society to express their grievances and to put their demands.⁴ The basic strength of a strike lies in the labour's privilege to quit work and thus brings a forced readjustment of conditions of employment.⁵

The right to strike has been established for decades in International Law, in global and regional instruments, and is also enshrined in the Constitutions of at least ninety countries.⁶ There are International as well as Regional Instruments which protect the right to strike such as the International Labour Organisation, 1919⁷, The International Covenant on Economic, Social and Cultural Rights, 1966⁸, The International Covenant on Civil and Political Rights, 1966⁹, the European Convention on Human Rights, 1950¹⁰, The European Social Charter, 1961¹¹ and The American Convention on Human Rights, 1969.¹² Right to strike is implicitly recognised in all the International documents except European Social Charter, 1961 which provides for expressed

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¹ Gaabriel Tavits, "The Right to Collective Action in Labour Relations in Estonia: Is the Right to Organise a Strike Guaranteed?" 21 *Juridica International Law Review* 218 (2014).

² Bernard Gernigon, Alberto Otero, et al., ILO Principles Concerning the Right to Strike 11 (International Labour Organization, Geneva, 2nd edn., 2000).

³ International Labour Office, Freedom of Association Committee, ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* 109 (523) (International Labour Organisation, Geneva, 5th edn. 2006).

⁴ Srikant Mishra, *Labour and Industrial Relations: New Horizons* 66 (Deep and Deep Publication, New Delhi, edn., 1998).

⁵ G.M. Kothari, *A Study of Industrial Law* 144 (Wadhwa and Company, Nagpur, edn. 2000).

⁶ Keith D. Ewing, Conor A. Gearty et al., (eds.), *Human Rights and Labour Law: Essays for Paul O'Higgins* 2 (Mansell Publishing, New York, 1994).

⁷ Convention No. 87 Freedom of Association and Protection of the Right to Organise Convention, 1948, arts. 3, 8 and 10, available at: <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100INSTRUMENTID:312232> (last visited on September 23, 2020).

⁸ *Id.*, art. 8.

⁹ *Id.*, art. 22.

¹⁰ *Id.*, art. 11.

¹¹ *Id.*, art. 6.

¹² *Supra* note 11., art. 16.

right to strike. It has, in fact, become customary international law.¹³ However for a long time the right to strike was ignored as the protection of the right to strike has been considered problematic to include in multilateral instruments.

1.2. INTERNATIONAL LABOUR ORGANISATION, 1919

International Labour Organisation (ILO) was set up in 1919 under Part XIII of the Treaty of Versailles which for the first time gave recognition to the significance of workers.¹⁴ The preamble to the ILO Constitution contains the freedom of association as its object. Thus, ILO is the leading standard setter with regard to freedom of association and collective bargaining.¹⁵ The right to strike is not expressly mentioned in the ILO Conventions and Recommendations. The word strike appears only incidentally in Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92)¹⁶ and the Abolition of Forced Labour Convention, 1957 (No. 105).¹⁷ Due to various reasons right to strike was never raised as a separate issue and was given protection only as an aspect of the freedom of association which is stated in the ILO Convention No. 87¹⁸ and 98.¹⁹ If a country has ratified either of these Conventions, workers and employers have the right to legal action in order to force their application. If unions and employer organisations feel that the Conventions are not being adhered to they can use the formal supervisory mechanisms of the ILO to complain and have their cases discussed. Moreover, complaints concerning violations of trade union rights by states concerning freedom of

¹³ *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association*, 71st Session, General Assembly, A/71/385 (2016), para 56. available at: <https://www.un.org/en/ga/third/71/documentslist.shtml> (last visited on January 22, 2019).

¹⁴ Meenu Paul, *Labour & Industrial Laws* 211 (Allahabad Law Agency, Faridabad, Haryana) 10th edn., 2017).

¹⁵ Sandra Tenggren, “*The Development of Right to Strike in International Instruments*” 17, available at: <http://www.jurfak.su.se/english/search?q=the+development+of+strike+in+international+instruments.pdf> (last visited on October 5, 2019).

¹⁶ Voluntary Conciliation and Arbitration Recommendation, 1951 (No.92), para 4, 6, 7. available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R092 (last visited on May 1, 2020).

¹⁷ Abolition of Forced Labour Convention, 1957 (No.105), art. 1(d), available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C105 (last visited on May 2, 2019).

¹⁸ Convention No. 87 on Freedom of Association and Protection of the Right to Organise, 1948, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENTID:312232 (last visited on September 23, 2020).

¹⁹ Convention No. 98 on the Application of the Principles of the Right to Organise and to Bargain Collectively, 1949, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C098 (last visited on May 2, 2020).

association can be brought to the ILO even if the country is not a member of the organisation²⁰ or, if it is a member, even if it has not ratified the relevant Conventions.

1.2.1 SUPERVISORY BODIES OF INTERNATIONAL LABOUR ORGANISATION AND THE RIGHT TO STRIKE

To monitor the observance of Convention No. 87 and Convention No. 98 two supervisory bodies namely Committee on Freedom of Association (CFA) and the Fact Finding and Conciliation Commission on Freedom of Association (FFCC) were established. On the basis of the provisions of the Convention No. 87²¹ these two bodies defining the limits of the right to strike have acknowledge it as the fundamental right of workers and their organisations.²²

The FFCC was created by the ILO after the adoption of Convention No. 87 and 98, with the support of the Economic and Social Council of the United Nations (ECOSOC) to examine allegations of infringement of freedom of association.²³ The jurisdiction of FFCC is based on consensus and handles the matter only with the consent of the government concerned.²⁴ The FFCC have however examined only six cases in the course of its existence.²⁵

Following the establishment of the Fact Finding and Conciliation Commission on Freedom of Association (FFCC) in 1950, the CFA was set up in 1951 which was created to make preliminary examinations of allegations concerning violation of freedom of association, which would then refer the complaint to the Fact Finding and Conciliation Commission on Freedom of Association (FFCA).²⁶ The CFA did not need a country's consent to deal with the complaints

²⁰ The country should be, however, a member of the United Nations. In this case, the complaint is examined by the Fact Finding and Conciliation Commission on Freedom of Association and the consent of the government concerned is required.

²¹ *Supra* note 18, arts. 3 and 10.

²² Bernard Gernigon, Alberto Odero, et al., "International Labour Organisation Principles Concerning the Right to Strike" 8 *International Labour Review* 7 (1998) available at: http://ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_087987.pdf (last visited on December 2, 2019).

²³ The Standards Initiative: Joint report of the Chairpersons of the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association Governing Body, 326th Session, Geneva, (March 10-24, 2016), para 58, available at: https://www.ilo.org/gb/GBSessions/previous-sessions/GB326/lils/WCMS_456451/lang--en/index.htm (last visited on February 2, 2019).

²⁴ Lee Swepton, "Human Rights Law and Freedom of Association: Development through ILO Supervision" 137:2 *International Labour Review* 175 (1998) available at: <http://www.ilo.int/public/english/revue/download/pdf/swepston.pdf> (last visited on December 4, 2019).

²⁵ Robert G. Patman, Chris Rudd (eds.), *Sovereignty under Siege?: Globalization and New Zealand* 76 (Routledge, New York, USA 2017).

²⁶ The Right to Strike and The ILO: The Legal Foundations, International Trade Union Confederation, 24, available at: https://www.ituc-csi.org/IMG/pdf/ituc_final_brief_on_the_right_to_strike.pdf (last visited on February 11, 2019).

against it and it has investigated about 2,000 complaints since its establishment.²⁷ CFA in its reports²⁸ protected the right to strike and courageously affirm that right to strike is an important part of trade union rights. CFA also provides for certain preconditions for calling strike.

The other supervisory body of ILO is Committee of Experts on Application of Conventions and Recommendations (CEACR), which monitors state reports regarding ratified conventions.²⁹ It analyses the legislation of the ratifying state to determine whether it is in compliance with the convention and also give technical advice to achieve compliance.³⁰

1.2.2. THE CRITICISM OF THE ILO COMMITTEE OF EXPERTS BY REPRESENTATIVES OF THE EMPLOYERS

The development of the principles underlying the right to strike by the Committee of Experts and the Committee on Freedom of Association remains unchallenged by the representatives of the employers for many decades.³¹ But in 2012, General Survey the employers group criticised the ILO Committee of Experts and refused to participate in the selection and discussion of cases. The employers contended that the Convention did not contain any specific provision on right to strike and even the inclusion of this right was never intended during its preparatory stage. They also argued that the Committee of Experts has exceeded its mandate by interpreting the right to strike and considered the right to strike as an unjustified extension of the Convention No. 87.³² Meetings were held in 2014 and 2015 dealing with the question of mandate of the Committee of Experts. The dispute appears to have been settled in 2015 after informal meetings and discussions at Governing Body level.³³

²⁷ *Supra* note 25 at 54.

²⁸ First, Second, Sixth, Twenty Seventh, Twenty Eighth, Forty First, Forty Sixth, Forty Seventh, Three Hundred Twenty Seventh Report of the Committee on the Freedom of Association.

²⁹ AA. VV., Bob Hepple, et al., (eds.), *Laws Against Strike: The South African Experience in an international and Comparative Perspective* 47 (Franco Angeli, Milano, Italy, 2019).

³⁰ John Grunert, *Striking! The Sources and Treatment of the Right to Strike in the United States and Europe*, Justice Action Center Student Capstone Journal Project No. 11/12-05, p 8 (2012) available at: <https://www.nyls.edu/capstone> (last visited on January 17, 2019).

³¹ Claudia Hofmann, Norbert Schuster, *It ain't over 'til it's over: the right to strike and the mandate of the ILO Committee of Experts revisited*, International Labour Office; Global Labour University (GLU), Geneva: ILO, working paper; No. 40, February 2016, available at: https://www.global-labour-university.org/fileadmin/GLU_Working_Papers/GLU_WP_No40.pdf (last visited on May 1, 2019). page 9.

³² Lars Thomann, *Steps to Compliance with International Labour Standards: The International Labour Organization (ILO) and the Abolition of Forced Labour*, 198 (Springer Science & Business Media, Berlin, Germany, 2011).

³³ *Supra* note 31 at 3.



1.2.3 RESOLUTIONS AND OBSERVATIONS OF INTERNATIONAL LABOUR ORGANISATION

The right to strike has also been affirmed in two resolutions³⁴ of the International Labour Organisations. The resolutions provide guidelines for International Labour Organisation policy and emphasised recognition of the right to strike in member States.

In addition to the resolutions and there are specific observations of Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations established by the International Labour Organisation Governing body which have emphasized recognition of the right to strike in member states.³⁵

1.3 UNITED NATIONS ORGANISATION AND THE LEGAL REGULATION OF STRIKES

The most important international legal instruments of the United Nations which regulate the right to strike are: the Universal Declaration of Human Rights (1948), International Covenant on Economic, Social and Cultural Rights (1966), International Covenant on Civil and Political Rights, 1966.

1.3.1 UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948

The Universal Declaration of Human Rights, which was adopted a few months after the adoption of Convention No. 87 and a few months before the adoption of Convention No. 98, contains a brief but strong statement on trade union rights.³⁶ Universal Declaration of Human Rights, 1948 supports the idea of freedom of association, but is silent on the issue of whether workers, having organised, can legally undertake industrial action.³⁷ As membership in a trade union is often connected with the right to organise collective actions, including the organisation of a strike, we may state that the Universal Declaration of Human Rights has indirectly recognised the right to strike.³⁸

³⁴ The Resolution Concerning the Abolition of Anti-Trade Union Legislation in the States Members of the International Labour Organisation Adopted in 1957, 40th Session (Geneva) and The Resolution Concerning Trade Union Rights and their Relation to Civil Liberties Adopted in 1970, 54th Session (Geneva) quoted in Bernard Gernigon, Alberto Odero, et al., "International Labour Organisation Principles Concerning the Right to Strike" 137 *International Labour Review* 7 (1998).

³⁵ Swadesh Dev Roye, "Capitalist Crisis, Right to Strike, and Teachings of Lenin", *People's Democracy*, September 14-20 (2015).

³⁶ The Universal Declaration of Human Rights, 1948, art. 23(4) which states that "everyone has the right to form and to join trade unions for the protection of his interests *available at: <https://www.un.org/en/universal-declaration-human-rights/>* (last visited on August 11, 2020)

³⁷ Natale G.S. Corthesy and Carla-Anne-Harris-Roper, *Commonwealth Caribbean Employment and Labour Law* 297 (Routledge Publisher, New York, 2014).

³⁸ Bill Meulemans, *How the Left and Right Think: The Roots of Division in American Politics*, 219 (Mcfarland and Company, Inc., Publishers, Jefferson, North Carolina, 2019).

1.3.2. INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 1966

The International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) is one of the nine core United Nations (UN) human rights treaties forming part of the International Bill of Human Rights besides the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.³⁹ It explicitly regulates the right to strike.⁴⁰ The Covenant provides for the right to strike provided it is exercised in conformity with the laws of the particular country.⁴¹ The original proposal for Article 8 was limited to the right to form and join trade unions. Following a 'three power amendment by Bolivia, Peru and Uruguay further rights like right to strike and right of trade unions to function freely and various limitations on those rights were recognised.⁴² This provision of the Covenant is closely based on the International Labour Organisation Convention No. 87 and paragraph 3 is found in both Covenants.⁴³ This further attests the close relationship between the International Labour Organisation and United Nation's standards.⁴⁴

The Committee on Economic, Social and Cultural Rights (CESR) supervise the working of International Covenant of Economic, Social and Cultural Rights (ICESCR) and monitor its implementation by the ratifying states. The member states are under obligation to submit their reports regularly regarding the implementation of the rights. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations." The Committee also publishes its interpretation of the provisions of the Covenant, known as "[general comments](#)".⁴⁵

³⁹ Mary Dowell Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights* 1 (Martinus Nijhoff Publishers, Netherlands, 2004).

⁴⁰ The International Covenant on Economic, Social and Cultural Rights, 1966, art. 8, available at: <https://www.ohchr.org/EN/professionalinterest/pages/cescr.aspx> (last visited on September 13, 2020)

⁴¹ *Id.*, art. 8 (1)(d).

⁴² Ben Saul, David Kinley, et al., *The International Covenant on Economic, Social and Cultural Rights: Cases, Materials, and Commentary* 488 (Oxford University Press, UK, 2014).

⁴³ The International Covenant on Economic, Social and Cultural Rights, 1966 and Convention No. 87 on Freedom of Association and Protection of the Right to Organize, 1948.

⁴⁴ Keith Ewing, "Myth and Reality of the Right to Strike as a Fundamental Labour Right", 29 :2 *The International Journal of Comparative Labour Law and Industrial Relations* 146 (2013) available at: <https://www.kluwerlawonline.com/abstract.php?area =Journals&id=IJCL2013011> (last visited on Sep 13, 2019).

⁴⁵ The Committee on Economic, Social and Cultural Rights, Monitoring the Economic, Social and Cultural Rights, available at: https://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCR_Intro.aspx (last visited on 4 April, 2020).

In addition to Concluding Observations, the CESCR also issues General Comments, which are considered “authoritative statements” of its opinions. While they are not formally binding, they are considered “highly influential” in establishing the scope and meaning of rights in the ICESCR.⁴⁶

1.3.3 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966

The Covenant on Civil and Political Rights (ICCPR) was adopted at the same time as the ICESCR. In particular, it does not provide for the right to strike but it provides for the freedom of association, right to form and join trade unions for the protection of his interests.⁴⁷

The Human Rights Committee that supervises the implementation of this Covenant applies the same basic methodology as the Committee on Economic, Social and Cultural Rights. Originally the Human Rights Committee did not consider that the International Covenant on Civil and Political Rights protected the right to strike.

Right to strike was included by an amendment by the third committee of the General Assembly but no such amendment was made in Article 22 of the draft Covenant of Civil and Political Rights. In recent years, therefore the Human Rights Committee seems to have accepted the right to strike.⁴⁸

1.4 COUNCIL OF EUROPE, 1949

The Council of Europe is a regional organisation, which not only affect labour rights but also cover broader social and political objectives. The Council of Europe (COE) therefore is not specialist in labour relations but it has developed an expertise in human rights, as well as, broad competence in a range of political, economic, social and cultural matters.⁴⁹

The Council of Europe has the capacity to influence the labour standards via two key instruments, the European Convention on Human Rights and Fundamental Freedoms (ECHR) and European Social Charter (ESC). The European Convention on Human Rights contains the fundamental human rights, while the European Social Charter contains the socio-economic rights. These both recognise the freedom of association and the right to join and act as a member

⁴⁶ Diane F. Frey, "Conflict over Conflict: The Right to Strike in International Law" 8:1 *Global Labour Journal* 22 (2017), available at: <https://www.researchgate.net/publication/313233456> Conflict over Conflict The Right to Strike in International Law (last visited on December 21, 2020)

⁴⁷ The International Covenant on Civil and Political Rights, 1966, art. 22(1), available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (last visited on August 10, 2020).

⁴⁸ Axel Marx, Jan Wouters *et.al.* (eds.), *Global Governance of Labour Rights: Assessing the effectiveness of Transnational Public and Private Policy Initiatives* 173 (Edward Elgar Publishing, UK, 2015).

⁴⁹ *Supra* note 15 at 20.

of a trade union. However, the right to strike is expressly recognised only in the European Social Charter.⁵⁰ The supervisory organs over these two instruments are the European Court of Human Rights (ECtHR) and European Committee of Social Rights (ECSR) respectively. These organs were created to supervise that member States follow the treaties. Both European Social Charter and European Committee of Social Rights provides that right to strike is a fundamental human right which is important to secure the rights of workers.

1.4.1 THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN COURT ON HUMAN RIGHTS

The European Convention on Human Rights (ECHR) which formed in 1950, is an instrument primarily ensuring civil and political rights. Being a classic civil and political rights text, it does not contain any reference to the right to strike which is usually considered as socio-economic right.⁵¹ The European Convention on Human Rights and Fundamental Freedoms indirectly provides for right to strike.⁵²

The recognition of the right to strike as a fundamental human right in the context of the ECHR has been achieved through the evolution of the case-law of the European Court of Human Rights.⁵³

1.4.2 THE EUROPEAN SOCIAL CHARTER AND THE EUROPEAN COMMITTEE ON SOCIAL RIGHTS

The European Social Charter (ESC) was adopted in 1961 by the member states of the Council of Europe which provides for the protection of socio-economic rights. The ESC is the first multilateral instrument which expressly provides for the right to strike.⁵⁴ ESC was revised in

⁵⁰ The European Social Charter, 1961, art. 6, available at: <https://rm.coe.int/168006b642> (last visited on January 12, 2020).

⁵¹ Jorge Andrés Leyton García, "The Right to Strike as a Fundamental Human Right: Recognition and Limitations in International Law" 44:3 *Revista Chilena de Derecho* 788 (2017), available at: <https://www.redalyc.org/pdf/1770/177054481008.pdf> (last visited on February 7, 2019).

⁵² The European Convention on Human Rights, 1950, art. 11(1), (2), available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf (last visited on January 12, 2020).

⁵³ *National Union of Belgian Police v. Belgium*, App no. 4464/70, ECHR, (October 27, 1975), *Swedish Engine Drivers' Union v. Sweden*, App no. 5614/72, ECHR 2, (February 6, 1976), *Schmidt and Dahlstrom v. Sweden*, App. no. 5589/72, ECHR, *UNISON v. United Kingdom* App no. 53574/99, ECHR, (January 10, 2002), *Demir and Baykara v. Turkey*, App no 34503/97, ECHR, (November 12, 2008) and *Enerji Yapi-Yol Sen v. Turkey*, App no 68959/01, ECHR, (April 21, 2009). *Danilenkov and others v. Russia*, App No. 67336/01, ECtHR (July, 2009), *Saime Özcan v. Turkey*, App No. 22943/04, ECtHR (September 15, 2009), *Kaya and Seyhan v. Turkey*, App No. 30946/04, ECtHR (September 15, 2009) Cited in Catherine Barnard, *EU Employment Law* 764 (Oxford University Press, UK, 4th edn., 2012),

⁵⁴ The European Social Charter, 1961 and The European Social Charter (Revised), 1996, art. 6, para. 4 available at: <https://rm.coe.int/168007cf93> (last visited on February, 2 2016).



1996 as “Revised European Social Charter.” Both the, original and revised ESC, contain an explicit guarantee of the right to collective action, including to strike, in the same wording.⁵⁵ The ESC has been largely overshadowed by the ECHR. In comparison to the ECHR, the Charter has been little known, rarely referred to and often ignored in practice.⁵⁶ The rights under ESC are not protected as minimum standards.

The European Committee of Social Rights monitors compliance with the Charter under two complementary mechanisms: through **collective complaints** lodged by the social partners and other non-governmental organisations (Collective Complaint Procedure), and through **national reports** drawn up by Contracting Parties (Reporting System).⁵⁷ In respect of national reports, it adopts "conclusions" and in respect of collective complaints, it adopts "decisions".⁵⁸

1.5 THE EUROPEAN UNION ON THE RIGHT TO STRIKE

The European Union is a unique economic and political partnership between twenty-eight European countries. The current European Union has its origins in the Treaty of Rome of 1957, since renamed the Treaty on the Functioning of the European Union (TFEU), which created the European Economic Community (EEC).⁵⁹ The TFEU specifically states that European Union does not have competence i.e. jurisdiction to legislate on right to strike.⁶⁰ In 1989 at a summit in Strasbourg members of the EU proposed the Community Charter of the Fundamental Social Rights of Workers to be incorporated into EU Law which included articles on the rights of freedom of association and collective bargaining, but the Charter never became legally binding because of opposition of the United Kingdom.⁶¹ The Charter was later revised and renamed as the Charter of Fundamental Rights of the European Union and entered into force with the Lisbon Treaty in 2007, where the right to strike is now found.⁶²

⁵⁵ *Id.*, Article 6 –The right to bargain collectively: With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake: ... and recognise: the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

⁵⁶ *Supra* note 15 at 37.

⁵⁷ The European Committee of Social Rights, *available at: <https://www.coe.int/en/web/european-social-charter/european-committee-of-social-rights>* (last visited on May 2, 2019).

⁵⁸ Council of Europe, *The Council of Europe, European Social Charter - European Committee of Social Rights - Conclusions 73* (Council of Europe, 2008).

⁵⁹ John Grunert, “Striking! The Sources and Treatment Of The Right to Strike in the United States and Europe” Justice Action Center Student Capstone Journal Project No. 11/12-05, 44, *available at: www.nyls.edu/capstones.com* (last visited on March 25, 2019).

⁶⁰ The Treaty on the Functioning of the European Union (TFEU), art. 153 *available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF>* (last visited on May 25, 2020).

⁶¹ Community Charter on the Fundamental Social Rights of Workers, EUROFOUND, *available at: <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/communitycharterofthefundamentalsocialrightsofworkers.htm>* (last visited on Jan 13, 2020)

⁶² The Charter of Fundamental Rights of the European Union, 2007, art. 28 states, “workers and employers, or

1.5.1 EUROPEAN COURT OF JUSTICE AND RIGHT TO STRIKE

The European Court of Justice is one of the three courts that make up the Court of Justice of the European Communities and is responsible for both determining whether European Community (EC) measures are legal, and assuring the uniform interpretation and application of Community law⁶³ by the Member States. Regardless of the new development following the Lisbon Treaty, the European Court of Justice had already recognised the right to take collective action as a fundamental right.⁶⁴

The fundamental rights were firstly recognised in the *Stauder* case,⁶⁵ and later developed in the International *Handelsgesellschaft*⁶⁶ case. The Court has discussed the status of the right to strike in two cases i.e *Viking*⁶⁷ and *Laval*.⁶⁸ Thereafter, the discussion if the right to strike should be a fundamental right has been established and progressed.

1.6 THE INTER-AMERICAN SYSTEM AND RIGHT TO STRIKE

The Inter-American System for the protection of human rights is a regional human rights system, and is responsible for monitoring, promoting, and protecting human rights in the 35 independent countries of the Americas that are members of the Organisation of American States (OAS).⁶⁹ The Inter-American System is composed of two principal entities: the Inter-American Commission on Human Rights (IACHR) and Inter-American Court of Human Rights (IACtHR).⁷⁰

The Inter-American Court of Human Rights protected the right to strike in *Baena-*

their respective organizations, have, in accordance with union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.”

⁶³ Directives and regulations established by the European Commission which take precedence over the laws of member states.

⁶⁴ Mia Rönnmar (ed.), *Labour Law, Fundamental Rights and Social Europe: Swedish Studies in European Law* 69 (Hart Publishing, USA, 2011).

⁶⁵ *Stauder v. City of Ulm* [1969] ECR 419, Cited in Rudolf Bernhardt, *Decisions of International Courts and Tribunals and International Arbitration* 141 (North Holland Publishing Company, New York, 1981).

⁶⁶ *International Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, Cited in Alaxender H.Turk, *Judicial Review in EU Law* 138 (Edward Elgar Publishing Limited, 2009).

⁶⁷ *International Transport Workers Federation v. Viking Line ABP*, (2007) C-438/05, available at: <https://www.etui.org/content/download/2237/24592/file/zahn3.pdf> (last visited on May 7, 2019).

⁶⁸ *Ibid.*

⁶⁹ Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* 2 (Cambridge University Press, USA, 2013).

⁷⁰ Inter American Human Rights System, available at: <https://ijrcenter.org/regional/inter-american-system/> (last visited on May 13, 2019).

Ricardo et.al. v. Panama.⁷¹ The Court expressed the view that freedom of association falls under the human rights and is of the utmost importance for the defence of the legitimate interests of the workers. The Court affirmed that only such restrictions⁷² should be imposed on the freedom of association as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.⁷³

The Organisation has promulgated a series of instruments governing human rights in the region.⁷⁴ These protect the right to freedom of association, including the right to collective bargaining and the right of workers to strike.⁷⁵ These instruments are:-

- The Charter of the Organisation of American States, 1948.⁷⁶
- The American Declaration of the Rights and Duties of Man, 1948.⁷⁷
- The American Convention on Human Rights, 1969.⁷⁸
- The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”, 1988.⁷⁹

1.7 PROTECTION OF RIGHT TO STRIKE UNDER LAWS OF DIFFERENT COUNTRIES

This right is also recognised in the national legislations of many countries. In some countries like United Kingdom and Ireland, it is in the form of freedom *i.e.* work stoppage does not result in criminal penalties, fine or prison. In others like Belgium Italy and France, only trade unions are authorised to take the strike action or is recognised only for individual workers. In countries like

⁷¹ *Ricardo et al v. Panama*, (2001), IACtHR, Series C, No. 72, available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_72_ing.pdf (last visited on March 11, 2019).

⁷² The American Convention on Human Rights, 1969, art. 16, Freedom of Association, available at: <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm> (last visited on June 3, 2020).

⁷³ *Supra* note 70, para. 168.

⁷⁴ *Supra* note 69.

⁷⁵ The Right to Strike and The ILO: The Legal Foundations, available at: https://www.ilo.org/actrav/WCMS_245669/lang--en/index.htm (last visited on February 11, 2020).

⁷⁶ The Charter of the Organisation of American States, 1948, art. 45 (2)(c) and 45 (2)(g), available at: http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS.asp (last visited on June 3, 2020).

⁷⁷ The American Declaration of the Rights and Duties of Man, 1948, art. 22, available at: https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf (last visited on June 3, 2020).

⁷⁸ *Id.* art. 16.

⁷⁹ The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador, 1988, art. 8, available at: <https://www.refworld.org/docid/3ae6b3b90.html> (last visited on June 3, 2020).

Argentina, Brazil, France, Portugal, Romani, Rwanda and South Africa, the right to strike has been specifically recognised by the Constitutions or Statues which have accepted collective bargaining as a method of solving industrial conflicts and in countries like Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg and the Netherland it has been established indirectly through case laws.⁸⁰ Even where right to strike is recognised, certain categories of workers may be excluded from enjoying the right such as members of the police or armed forces, or public servants.⁸¹ The first state to recognise right to strike was France, in 1864.⁸² The Mexican Constitution was the first all over the world that constitutionally guaranteed the right to strike in 1917.⁸³ Thus, at international level there are both implicit and explicit provisions that establish promote and protect the right or freedom to strike.⁸⁴ From this perspective, strike has become a right under international law.⁸⁵

Although with passage of time importance have been given to the right to strike through many international instruments but only The European Social Charter, 1961 provides for expressed right to strike all other international documents implicitly recognised the right to strike. So, this right must be recognised expressly in clear terms at international level. It is also recommended that more states must adopt ILO Convention No. 87 and 98 and also the State parties should review their domestic legislations to bring it in line with the provisions of ILO Covenants. Instead of totally prohibiting right to strike a system of minimum service may also be adopted in strikes in essential services. An independent body in which parties have the confidence should be given the responsibility to declare strike illegal rather than the government which may be biased especially in those cases in which the government is a party to the dispute. It is also suggested that the governments should refrain from using unnecessary force beyond the maintenance of public order. Moreover States must not only avoid direct interference but also

⁸⁰ Jean-Michel Servais, "International Labour Organisation Law and the Freedom to Strike" 15 *Canadian Labour & Employment Law Journal*. 1 (2009-2010), available at: https://www.law.utoronto.ca/documents/conferences2/StrikeSymposium09_Servais.pdf (last visited on December 5, 2015).

⁸¹ Jeanne Mager Stellman (ed.), *Encyclopaedia of Occupational Health and Safety: The Body, Health Care, Management and Policy, Tools and Approaches* 18 (International Labour Organisation, Geneva, 4th edn., 1998).

⁸² Michael Haas, *International Human Rights: A Comprehensive Introduction* 65 (Routledge, USA, 2nd edn., 2014).

⁸³ Iqbal Ahmad, *Industrial Relations and Labour Management of Bangladesh* 474 (Trafford Publishing, USA, 2013).

⁸⁴ Roy Mthombeni, "The Right or Freedom to Strike: An Analysis from an International and Comparative Perspective" 23 (3) *CILJSA* 337 (November, 1990), available at: https://www.jstor.org/stable/23248358?readnow=1&seq=1#page_scan_tab_contents (last visited on September 10, 2015).

⁸⁵ *Id.*, at 338.



indirect attack on the enjoyment of the right *e.g.* on the one hand it provides for right to strike through legislation but on the other hand government arrests strikers. The act of striking without violence, destruction of property, or an independent tort should not carry criminal or civil penalties. All employees private and public should be granted equal protection under right to strike.

1.8 CONCLUSION

The right to strike has become a fundamental right protected by the multiple international instruments. It is recognised impliedly under the right to association by the Conventions, Supervisory Bodies, Resolutions and Observations of International Labour Organisation. Protection of this right by ILO was criticised by the employers groups which was settled later on. It is also impliedly recognised by the Universal Declaration of Human Rights and the Covenants of the United Nations. The Council of Europe is the only institution, which expressly recognises the right to strike through its instrument European Social Charter. In European Union right to strike is impliedly protected but after EU's accession to ECtHR, for which negotiation's are going on, the position of right to strike will change as Council of Europe expressly protect the right to strike. At national level the status of right to strike is different in different countries. Some recognise it as a constitutional right, some statutory right, some impliedly, some through case laws. Therefore, right to strike has been considered as part of freedom of association and as workers tool to protect them from exploitation by the employers in the era of globalisation, privatisation and liberalisation.