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Restrictions on the right to strike

A legal analysis of limitations on the right to strike in the Republic of Korea.

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List of Acronyms

ECHR	European Convention on the Human Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILO	International Labour Organization
ILO CFA	ILO Committee on Freedom of Association
TULRAA	Trade Union and Labor Relations Adjustment Act
UDHR	Universal Declaration of Human Rights
UN CCPR	UN Human Rights Committee
UN CESCR	UN Committee on Economic, Social and Cultural Rights
UN CHR	UN Economic and Social Council – Commission on Human Rights.
UN GA	UN General Assembly
UN HRC	UN Human Rights Council
UN OHCHR	UN Office of the High Commissioner for Human Rights
VCLT	Vienna Convention on the Law of Treaties

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1 Introduction

1.1 Background

In July 2019, Cecilia Malmstrom, EU commissioner for trade, sent a letter to the Republic of Korea (hereinafter 'Korea') saying that The EU requested a panel to address its concerns on labor standards in Korea' based on the respective provision in the EU-Korea Free Trade Agreement. It is mainly because a number of fundamental international labor standards have not been ratified in Korea, and therefore, labor rights have not been sufficiently protected.[1] This was a follow-up to a letter sent in December 2018.[2]

In 2016, Special Rapporteur on the right to freedom of peaceful assembly and of association, Maina Kiai, reported on his mission to Korea. In his report, the status of freedom of association in Korea, including trade union rights, was heavily criticized, due to limitations on labor rights.[3] These criticisms have many points in common with criticisms mentioned by UN Committee on Economic, Social and Cultural Rights (hereinafter 'CESCR').[4] The Korean government reported that the limitations on labor rights, as pointed out in the criticisms, have relevant justifications.[5]

Labor rights impacts other human rights in modern society, where a large part of the economically active population is wage workers. Labor rights have been considered as the means to further both the economic and social interests of workers.[6] In societies where free education, or free medical care are not implemented, wage is the foundation to realizing the rights to education, health, or even the right to life in some cases. This is the reason why the Sustainable Development Goals contain several targets focusing on income increase.[7] In short, disposable income increase is a matter of human rights. That is why countries have obligations to make increase wages in order to respect, to protect, and to fulfill many kinds of human rights.

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[1] European Commission (2019)

[2] European Commission (2018)

[3] HRC (2016a) paragraph 73

[4] UN CESCR (1995); UN CESCR (2001a); UN CESCR (2009); UN CESCR (2017)

[5] For example, HRC (2016b)

[6] ICESCR article 8.1.(a)

[7] UN General Assembly (2015). For example, target 1.1 is focusing on eradication of extreme poverty, and target 10.1 is focusing on achieving and sustaining income growth of the bottom 40 per cent of the population.

1.2 Methods of wage increase

There are several methods for increasing wage worker's disposable income. One can be robust social welfare system to cut household expenditure. Raising the minimum wage can increase the income of the lowest-paid workers.

In some sense, increasing wage is left to the parties of employment contract, employer and employee. It is because wage is a part of an employment contract, so that increasing wage should be left to the contracting parties. Thus, it should be made through voluntary bargaining and agreement between them, based on principles of freedom of contract.

However, the bargaining power of an individual employee, who does not own the means of production, cannot be as strong as the power of employer, who, as a capitalist, does own the means of production. This is the prime reason why the freedom of association exists. Within a trade union, as a result of exercising the freedom of association, employees have equal bargaining power with employers. Thus, workers bargain collectively with employers, and make collective agreements. However, workers should have one last means of exercising their rights, including freedom of association, when collective bargaining falls apart. It is the right to strike, as collective action.

Ensuring the right to strike, therefore, still matters in the 21st century, because it can be a last resort to make their bargaining power equal to their employer, based on the principle of freedom of contract.

And thus, because of its knock-on effect on other human rights, the right to strike should be respected, protected, and fulfilled.

1.3 Peace in Korea?

Peace has been an important question in Korea after the Korean War in 1950s. The President of Korea, Moon Jae-in and his government have been trying to establish a permanent peace regime in the Korean peninsula, and this effort has resulted in significant achievements. There were two inter-Korean summits and The Panmunjum Declaration with several working-level agreements. However, peace requires more than simply a lack of violence.

Johan Galtung stipulates that peace is not compatible with massive, lethal, and social inequality.[8] This is because there are two types of peace: negative peace and positive peace. Positive peace is not just the absence of violence, but the absence of indirect structural violence, which results from a

[8] Galtung (2015) p.618

system of unequal power.[9] This 'structural violence' is therefore related to equality, and socio-economic rights.[10] Therefore, positive peace can be a situation when equality and socio-economic rights are protected. In this sense, the Korean government has tried to achieve positive peace as well. The government adopted 'income-led growth policies' and has achieved to increase minimum hourly wage from 6,470 Korean won (KRW) as of 2017 to 8,590 KRW in 2020. This can be a step towards the aforementioned positive peace.

However, there are questions of whether labor rights, as one of the tools of increasing income to ensure many human rights, are themselves well-ensured.[11] In particular, the right to collective action should be well-protected, because workers should have a means of last resort to pressure employers to increase wage or to improve working conditions.

That is why it is important to evaluate if and how the right to strike is well-implemented in Korea.

1.4 Research question and sub-questions

This thesis, therefore, will focus on the following research question:

Are restrictions on the right to strike in the Republic of Korea in conformity with principles of the right to strike?

To get a comprehensive picture in answering the research question, the following sub-questions will be answered:

1: Does the right to strike really exist in international human rights law system?

2: If the right to strike exists in the international human rights law system, what are the contents and principles of it?

3: How well protected is the right to strike in the Republic of Korea?

1.5 Theory and methodology

1.5.1 Theory

This thesis will be legal research, and the purpose of this research is to evaluate whether principles of the right to strike under international human rights law are well implemented in Korea.

[9] Galtung (1969) p.183

[10] Barnett (2008) p.78

[11] European Commission (2018)

Thus, this research inevitably will assess domestic legislations and cases in regards to international law. Therefore, legal positivism will be chosen for the research theory, because it focuses on the law as it is, and considers international law as the standard that states have agreed, so that state parties that have ratified the international law have obligations under said international law.[12] Moreover, it considers that there is a specific form that laws ought to take.[13] Therefore, it may serve as the reason why laws regulating the right to strike in Korea should be revised, should they be incompatible with principles of the right to strike.

1.5.2 Methodology

1.5.2.1 Literature review and sources for this thesis

A number of Korean academics have researched on right to strike in Korea. However, most of them are only focusing on the unconstitutionality of specific court decisions[14], or provisions restricting the right to strike.[15] While some touch on the Conventions of the International Labour Organization (hereinafter 'ILO')[16], they are not comprehensive enough to determine if the right to strike is well-implemented in Korea.

Therefore, to find out the answers to the aforementioned questions, this thesis focuses on the International Covenant on Economic, Social and Cultural Rights (hereinafter 'ICESCR') and the International Covenant on Civil and Political Rights (hereinafter 'ICCPR'). They are the center of this inquiry due to their status as the two most important international human rights instruments. Additionally, the Convention of the ILO and cases of Committee on the Freedom of Association at the ILO (hereinafter 'ILO CFA'), as a monitoring body for implementation of international labor standards, will be used. Moreover, relevant laws and cases in Korea, will also be tackled.

1.5.2.2 Interpreting laws

In legal research of international law, the process of interpreting convention has clear guideposts. The rule of interpreting international law is provided by article 31 of the Vienna Convention on the Law of Treaties (hereinafter 'VCLT') which states "a treaty shall be interpreted in good faith in

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[12] Ratner and Slaughter (1999) p.293

[13] Smits (2009) pp.46-47

[14] Jang (2015); Do (2012)

[15] Kim (2002a); Kim (2002b); Woo (2010)

[16] Lee (2008)

accordance with the ordinary meaning to be given to the terms of the treaty in their context in the light of its object and purpose".[17] Although VCLT endeavors for a general rule of interpretation, there are a number of approaches to interpretation, which are the textualist approach , the intentionalist approach, and the teleological approach.[18]

International human rights law should be used as a tool for respecting, protecting, and fulfilling human rights. For that purpose, its interpretation should correspond to what brings about a positive change in society. International human rights law will not serve its purpose if it does not evolve to counteract new threats to human rights. That is why the interpretation should not be fixed to texts of provisions. ILO also mentions that the teleological approach has been used for interpretation of international conventions.[19] Therefore, I choose teleological approach in interpretation of respective provisions of international human rights law.

1.6 Reader's guide

This thesis is structured into six chapters. *Chapter one* sought to provide a research question based on the importance of the right to strike, and reasons to evaluate the limitations in Korea on the right to strike, as well as a methodology to discover answers for the research question. *Chapter two* tries to determine the existence of the right to strike in international human rights law, with interpretation of relevant provisions. Some simple statistics will also be used for the same purpose. The contents of the right to strike are examined in *Chapter three*, and its limitations are illustrated in *Chapter four*. Both chapters will actively use interpretation of provisions of ICCPR, ICESCR, and ILO Convention No. 87. In *Chapter five*, domestic legal instruments regulating the right to strike in Korea are assessed based on contents and limitations of the right to strike as previously discussed. As the end of this thesis, *Chapter six* tries to answer the research question.

[17] VCLT article 31.1

[18] Fitzmaurice (1957) p.204

[19] ILO (2012) p.48 paragraph 118

2 Existence of right to strike in the international human rights law

2.1 The right to strike in the international bill of human rights

Article 23.3 of the Universal Declaration of Human Rights (hereinafter 'UDHR') mentions "the right to form and to join trade unions".[20] However, provisions of UDHR do not impose legal obligations to state parties, because UDHR, as a declaration, is not legally binding.[21]

As international conventions that set legal obligations to state parties, ICCPR, and ICESCR entrench the human rights of UDHR.[22] Article 22.1 of the ICCPR emphasizes that everyone has "the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests".[23] Article 8.1.(a) of the ICESCR provides the same right.[24]

There are arguments regarding whether the right to strike is derived from the right to form and join trade unions, because UDHR and ICCPR are not explicitly mentioning the right to strike. In addition, the Human Rights Committee (hereinafter 'CCPR') had mentioned that the right to strike is not protected under the ICCPR.[25]

However, CCPR acknowledges in its concluding observations that the right to strike is protected under article 22 of the ICCPR. CCPR mentions that limiting the right to strike of public servants, who do not exercise public authority[26], and the prohibition of strikes in non-essential services are a violation of article 22 of the ICCPR.[27] Additionally, CCPR confirmed that the freedom of

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[20] UDHR article 23.3

[21] Rehman (2010) pp.79-82. However, the UDHR has been considered as customary international law, because it is constantly reaffirmed by UN General Assembly. According to Rehman, UDHR was cited at least 75 times by the General Assembly in the first twenty-some years after its adoption. Moreover, it has been referred in many other international conventions.

[22] UN OHCHR (1996); UN OHCHR (2012)

[23] ICCPR article 22.11

[24] ICESCR article 8.1.(a)

[25] For example, CCPR decided that the communication submitted by J. B., P. D., and others against Canada is inadmissible, because 'the right to strike is not *expressis vebis* included in article 22' of the ICCPR. (CCPR Communication No. 118/1982) But at the same time, five of eighteen members of CCPR addressed individual opinion that the right to strike should be considered as the imposed right in the article 22. (annex of the CCPR communication No. 118/1982)

[26] CCPR (2010) CCPR/C/EST/CO/3, paragraph 15

[27] CCPR (2004) CCPR/CO/80/LTU, paragraph 18

association contains the right to strike.[28] Therefore, the right to strike is considered part of the freedom of association, while there is no general comment on article 22 of the ICCPR.

ICESCR has the same provision as ICCPR. Article 8.1.(a) of ICESCR addresses the right of everyone to form and join trade unions.[29] Moreover, Article 8.1.(d) of ICESCR ensures the right to strike.[30] This is the only provision in internationally recognized human rights instruments that explicitly mentions the right to strike. Drafters of the ICESCR decided for the right to strike to be included in the Covenant based on the argument that it is "vital for the protection of the economic and social rights of workers",[31] and "it is meaningless to try to guarantee trade union rights" without guarantee the right to strike.[32]

In short, the right to strike is protected by both the ICCPR and the ICESCR.

2.2 The right to strike in the ILO framework

While there is no provision on the right to strike in ILO conventions, the supreme source of international labor standards,[33] ILO d'id not think that it does not exist.[34]

Two resolutions adopted by the International Labour Conference, providing guidelines for the ILO, clearly say that the right to strike is part of freedom of association. The '1957 Resolution concerning the abolition of anti-trade union legislation in the states member of the international labour organization' dictates that said states should adopt laws ensuring the exercise of trade union rights, including the right to strike.[35] Additionally, the '1970 Resolution concerning trade union rights and their relation to civil liberties' requests the ILO Director-General to take action to ensure trade union rights, particularly the right to strike.[36]

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[28] CCPR (2017) CCPR/C/DOM/CO/6, paragraph 32

[29] ICESCR article 8.1.(a)

[30] ICESCR article 8.1.(d)

[31] UN CHR (1952) E/CN.4/SR.298, p. 8. Several texts, arguing about the right to strike have mentioned this summary of the meeting and what Morozov from USSR said about the right to strike in this meeting with reference of page 4 of the summary. (for example, Craven (1995) p. 257, and Rehman (2010) p. 153)

[32] Craven (1995) p.257; Rehman (2010) p.153

[33] Okene (2009) p.554

[34] Gernigon, Odero and Guido (2000) p.7

[35] ILO (1957) p.783

[36] ILO (1970) pp.735-736

Moreover, the ILO CFA, established by the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) (hereinafter 'Convention No. 87') to monitor implementation of ILO standards, and to examine complaints related to violations of freedom of association, derives the right to strike from article 3, 8, and 10 of the Convention No. 87.[37]

Article 3 of the Convention No. 87 stresses that workers' organizations shall have the right to organize their administration and activities, and right to formulate their programs. Article 8 of the Convention stipulates that states shall not implement laws which are harmful for the rights provided in the Convention itself. Lastly, Article 10 defines "organisation" as any organizations of workers or employers to further and defend their interests. Based on these provisions, trade unions can organize their activities freely to further and defend the interest of workers. Furthermore, states should refrain from impairing guarantees.[38] The purpose of ILO Convention No. 87 is to improve the conditions of labor and establish peace via recognition of the freedom of association.[39]

Additionally, the right to strike is an appropriate tool to achieve such purposes, as mentioned in chapter 1.2. The ILO, especially CFA, state that the right to strike is for defending the economic and social interests of workers and their organizations.[40] Therefore, the right to strike should be considered as an essential part of freedom of association, and should be included in Convention No. 87, even though there is no provision explicitly addressing it.[41]

The interpretation above has been used in many publications of the CFA, and the Committee of Experts on the Application of Conventions and Recommendations (hereinafter 'CEACR'). The CFA admits that the mandate of CFA is covering cases related to the right to strike, to the extent

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[37] Gernigon, Odero and Guido (2000) p.8

[38] ILO Convention No. 87 article 3, 8, and 10

[39] ILO Convention No. 87 Preamble

[40] ILO (2006) p.109 paragraph 521, 522

[41] Additionally, it is easy for the right to strike to be considered as part of freedom of association with textual interpretation of the terms "activities" and "programmes" used in the article 3 of ILO Convention No. 87. Ordinary meaning of 'activity', based on oxford living dictionary, is a "thing that a person or group does or has done", and a meaning of 'programme' is a "set of related measures or activities with a particular long-term aim". It is easy to derive simple fact that a term 'strike' defined as a "refusal to work organized by a body of employees as a form of protest, typically in an attempt to gain a concession or concessions from their employer" is came under the concept of 'activities', and 'programmes'.

that they concern the exercise of trade union rights.[42] In addition, CFA and CEACR confirm that the right to strike is one of the "essential elements of trade union rights."[43]

In short, ILO considers that the right to strike is an 'intrinsic corollary of the right of association' protected by the Convention No. 87, even though there are no specific provisions of the ILO conventions explicitly mentioning it.

2.3 The right to strike as part of international customary law

Although the right to strike is derived from ICCPR, ILO Convention No. 87, and mentioned in ICESCR, obligations based on it cannot be imposed on states that have not ratified these conventions or relevant provisions of the right to strike. It is one of the weaknesses of international human rights law that states are legally bound to the obligation under specific human rights only when they ratified relevant treaties, conventions, or covenants.[44] In addition, obligations under specific provisions of treaty cannot be imposed to states that have ratified the treaty, but declared their intention to derogate said provisions, or to interpret them differently, or reserve a right not to be bound by them.

However, it is possible to legally bind states that have not ratified them when the norms are considered part of international customary law. Based on article 38.1.(b) of the Statute of the ICJ, "International custom, as evidence of general practice accepted as law" is also considered as a source of international law as well as international conventions.[45] Therefore, it will be possible for obligations under the right to strike to bind states regardless of them ratifying ICCPR, ICESCR or the Convention No. 87, if the right to strike is considered part of international customary law.

2.3.1 ICCPR and ICESCR

To find out whether specific norm is a part of international customary law, state practice and *opinio juris* should exist.[46] There are several ways to confirm their existence. One can be count how

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[42] ILO (1985) paragraph 360

[43] ILO CFA (1952) paragraph 68; Hodges-Aeberhard and Odero De Dios (1987) pp.543-544; Swepston (1998) p.187

[44] Rehman (2010) p.20

[45] ICJ statute article 38.(1).(b)

[46] Rehman (2010) p.22

many countries recognize a specific provision in international conventions containing the norm. The number indicates how universal state obligation to the norm is.[47]

2.3.1.1 ICCPR

As of 5th August 2019, amongst 197 member states of the United Nations, the number of countries that have ratified the ICCPR is 173; the number of signatory states is 6, and 18 have not practiced any action.[48]

Amongst 179 countries, either state parties or signatory to the ICCPR, 15 have made a declaration or reservation on article 22 covering the right to strike. However, reservations made by Austria, Belgium, France, and Germany detail that their governments will implement article 22 in accordance with articles 11 and 16 of the European Convention on Human Rights (hereinafter 'ECHR').[49] Article 11 of ECHR addresses the freedom of assembly and association, and the European Court of Human Rights (hereinafter 'ECtHR') ruled that the right to strike is protected by Article 11 of ECHR.[50] Besides, Article 16 of ECHR says that article 10, 11 and 14 do not prohibit state parties from imposing "restrictions on [the] political activity of aliens."[51] Because the first part of their reservations is actually positive, and the second irrelevant to this inquiry, one can reasonably conclude that this does not constitute a substantive reservation against being bound by article 22 of ICCPR.

Moreover, Australia, and Monaco also each made a reservation, saying that the rights under article 22 can be restricted by imposing requirements, conditions or penalties prescribed by law for the purpose of democratic society, public safety,[52] and "interests of public order (ordre public)".[53] However, these reasons are already explicitly mentioned in the article 22.2. One can conclude that these reservations also are not a substantive reservation against being bound by article 22 of ICCPR.

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[47] UN General Assembly (2014) A/CN.4/672, paragraph 53

[48] Base on Article 10 and 18 of VCLT, signatory states are showing their ambition to ratify this convention (but still need to ratify it domestically). While convention's obligations are not yet legally binding, signatory states try to conduct their practice in conformity with the object and purpose of the treaty until they ratify.

[49] Appendix 1

[50] Enerji Yapi-Yol Sen v. Turkey (application No. 68959/01)

[51] ECHR article 16

[52] Reservation made by Monaco on its ratification. in UN (2001) p.477

[53] Reservation made by Australia on its ratification. in UN (1980) p.412

Then, there are only 9 countries, amongst the 15 countries that have made a reservation or declaration, which have not recognized the right to strike. In short, 170 out of 197 member states have the obligation to respect, protect, and fulfill the right to strike.

2.3.1.2 ICESCR

The number of state parties and signatory countries of the ICESCR is 174. Fourteen among these made a reservation or declaration on article 8.1.(d) addressing the right to strike.

France's declaration was that article 8 including the right to strike will be implemented "in conformity with article 6.4 of the European Social Charter (hereinafter 'ESC') according to the interpretation thereof given in the annex to the Charter."[54] Article 6.4 of ESC elucidates that parties to the Charter recognize the right to collective action, including the right to strike. Additionally, the right to strike under ESC can be restricted by law in a situation where it is necessary for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.[55]

Article 8.1.(d) of ICESCR also ensures the right to strike. Based on article 8.1.(c), the right of trade unions to function freely can be limited by law when the restrictions are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others. As mentioned above, a strike is also an action or a program of trade unions, so that limitations on the right of trade unions to function freely can be applied to the right to strike.[56] Therefore, the declaration made by France about the right to strike is only a reiteration of the limitations on the right to strike that are already mentioned in ICESCR.

The remaining 13 countries state that they will apply 8.1.(d) in conformity with domestic laws, including 4 that declared that they interpret conditions allowing them to restrict the right to strike in a stricter way than what article 8.2 allows.

Therefore, it is clear that 161 out of 197 UN member countries ratified the right to strike under ICESCR.

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[54] Appendix 2

[55] The European social charter article 6.4 (part 2), and appendix about the article 6.4 (part II of the appendix), article G (part V of the European social charter)

[56] This will be addressed in detail in chapter 4.1.1.

Moreover, ICCPR and ICESCR, as a whole, are reaffirmed and repeatedly supported by the enormous majority of states in many other international conventions, resolutions, and declarations.[57] Furthermore, most of states implemented the right to strike in domestic legislation system, including their constitution. This demonstrates the existence of state practice, accepted as law (*opinio juris*). Therefore the conditions for the right to strike to be considered as a part of customary international law are met, and the states' obligation to respect, protect, and fulfill it is binding all the countries.

2.3.2 ILO Convention No. 87

As mentioned above, the right to strike is an "intrinsic corollary" of the freedom of association under the Convention No. 87. Like other international convention, the weakness that it only binds state parties applies here as well. Therefore, some countries argue that they do not have the obligation to observe the right to strike because they have not ratified the Convention No. 87.[58]

However, the right to strike has been automatically recognized by all the member states of the ILO. When a state wants to become a member of the ILO, it has to accept the constitution of the ILO and annexed Declaration of Philadelphia, as well as their fundamental principles, including the freedom of association.[59] The ILO constitution says that the purpose of its establishment is "promotion of the objects set forth in the Preamble" of the constitution, and in the Declaration of Philadelphia of 1944.[60]

A preamble of the constitution contains the freedom of association, and the Declaration of Philadelphia also mentions that ILO is established based on the principle, among other principles, that freedom of association is essential to sustained progress.[61] Ipso facto, all the ILO member countries have recognized the freedom of association of ILO Convention No. 87. As mentioned above, the right to strike is an inextricable part of the freedom of association. Therefore, member states of the ILO have recognized and accepted the right to strike as part of fundamental principles provided by the constitution of the ILO.

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[57] For example, Vienna declaration and programme of action

[58] As of 5th August 2019, number of state parties to the ILO Convention No. 87 is 155.

[59] ILO (2006) paragraph 15; Declaration of Philadelphia; Charnovits (2018) p.92

[60] ILO Constitution article 1.1

[61] Declaration of Philadelphia. article I.(b)

In addition, a mandate of CFA is to examine complaints related to the violation of the freedom of association, regardless of whether the cases are against non-ratifying member states. And those states are expected to reply to the CFA.[62] The CFA has examined over 3,000 cases, and member states have engaged and cooperated in the process. The CFA mentions that it has reviewed cases brought against non-ratifying member states based on the ground that Declaration of Philadelphia, as part of ILO constitution gives "obligations for all member states to protect trade union rights by virtue of membership."[63]

In short, the right to strike is a part of customary international law, because all member states of the ILO have recognized it by acknowledging the Declaration of Philadelphia within ILO constitution, and have responded to CFA as defendant of cases brought to the Committee for longer than 60 years.

2.4 Concluding remark

The right to strike is mentioned in ICESCR, but not in ICCPR. However, CCPR published several concluding observations saying that the freedom of association contains the right to strike. If this view is kept within the CCPR, it is not very hard to assume that general comment about the ICCPR article 22 about freedom of association will be published. The argument of whether the right to strike is an integral part of the freedom of association will be laid to rest when CCPR affirms as much with its pending general comment.

Although there have been a number of countries that have made reservations or declarations against ICCPR article 22 and/or ICESCR article 8.1.(d), a cursory investigation shows that many of them ratify those articles in substance. Therefore, state parties and signatories of either ICCPR or ICESCR have an obligation to respect, protect, and fulfill the right to strike. In addition, the right to strike can be derived from ILO Convention No. 87 regarding the freedom of association and the right to organize. Moreover, countries which have not ratified Convention No. 87 have obligation to protect the fundamental principles of ILO, including the right to strike within the freedom of association, based on the Declaration of Philadelphia within the ILO constitution.

In short, the principle of the right to strike is almost universally recognized in many ways. Moreover, "in a very large number of countries, the right to strike is now explicitly recognized,

[62] Charnovits (2008) p.92

[63] Kang (2012) p.52

including at the constitutional level."[64] It makes obligations under the right to strike bind states regardless of whether they have ratified relevant conventions, as a part of customary international law.

3 Normative content of the right to strike

3.1 Defining 'strike', and the subject of the right to strike

To discover contents of the right to strike, what has to be done first is to look into provisions of international conventions, as primary source of international law.

While ICESCR article 8.1.(d) clearly addresses that the states parties have an obligation to ensure the right to strike, it does not say much about what a definition of a word 'strike' is. Therefore, it should be defined within "ordinary meaning to be given to the terms of the treaty in their context in the light of its object and purpose".[65] Because it is not specifically defined in the primary source of the international law, the ICESCR or the ILO Convention No. 87. Based on Oxford living dictionary, a 'strike' is defined as "refusal to work organized by a body of employees as a form of protest, typically in an attempt to gain a concession or concessions from their employer".[66]

Besides, ILO, specifically the ILO CFA, also defines a 'strike'. It defines that strike is 'any work stoppage'[67] to further and defend workers' interests by giving pressure on employers.[68] And it contains various types including work stoppage, such as wild-cat strike, tools-down, go-slow, working to rule, and sit-down strike.[69]

Considering purpose of the ILO Convention No. 87, and purpose of trade union, mentioned in the Convention which is for "furthering and defending the interests of workers"[70], any trade union activities to give pressure to employers through work stoppage, and etc. to further and defend workers' social and economic interests should be considered as a "strike".

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[64] ILO (2012) paragraph 123

[65] VCLT. article 31

[66] Oxford living dictionary

[67] ILO. (2008) p.51

[68] Saul, Kinley and Mowbray. (2014) p.578

[69] ILO CFA (2011c) paragraph 1370; ILO (1983) paragraph 218

[70] ILO Convention No. 87 article 10

Employers can easily affect workers' interests. On the other hand, workers should sell their labor to live their life, because workers do not have any other means of production. Therefore, workers should inevitably rely on remuneration they received from their employers for selling labor. Thus, there are no other ways than stoppage or delaying of selling labor for employees to be able to give employers pressure for furthering and defending the interests of workers. Accordingly, workers' activities related to stoppage or delaying of selling workforce is a strike, so that the definition of the term 'strike' by both oxford living dictionary and ILO are reasonable.

Now, it is necessary to figure out whether the right to strike is individual right or collective right, because it is a criterion to find out whether only individual worker is under the protection of the right to strike, or trade union as a group of workers is also under the right.

Whole article 8 of the ICESCR has to be looked into, since article 8.1.(d) says nothing about who is a subject of the right to strike. The article 8 addressing so-called trade union rights contains both individual rights and collective rights. The article 8.1.(a) mentions that right to form and join the trade union is the "right of everyone", so that it is an individual right. The right to establish national federations or confederations and the right to form or join international trade union organizations, addressed in article 8.1.(b) is self-evidently a collective right, because it is "the right of trade unions". And the right to function freely, addressed in article 8.1.(c) is also a collective right.[71]

As it is a part of an article 8 of the ICESCR containing both individual and collective rights, and is not clearly defined whether it is individual or collective, the right to strike mentioned in article 8.1.(d) should be considered as both individual and collective rights.

A characteristic of the right to strike as both individual and collective rights can also be derived from aspects of strikes. There are some strikes which are decided by certain procedures for members of trade union to accord legitimacy to make their strikes legitimate, and representative. In this case, there is no doubt that such strikes are protected by the right to strike as collective rights. However, there are some other strikes which are decided by individual or small group of workers in specific undertaking where trade union is not yet established, or which are not decided by particular procedures of the trade union, so-called wild-cat strike. The right to strike is protecting wild-cat strike as well as other types of strike.[72] Moreover, it is not in conformity with the right to strike when individual workers are accused or prosecuted because of mere fact that they participated in a

[71] ICESCR article 8.1.(a), 8.1.(b), and 8.1.(c)

[72] ILO CFA (2011c) paragraph 1370

strike.[73] This shows that the right to strike protects individuals as well. Therefore, the right to strike does, of course, have a nature as individual and collective rights.[74]

3.2 States obligations under the right to strike

3.2.1 Obligation to respect

States' obligation to respect is for state parties not to violate particular rights.[75] Therefore, state parties to the right to strike should refrain from being obstacles for enjoyment of the right to strike. However, the right is largely perpetrated by many states. One example of the violations is penal code of many countries that considers strikes as criminal offence.[76] Based on these laws, leaders of trade union or workers who participated in the strike are accused or prosecuted, because of the mere fact that the right to strike is practiced. These legislations should be abolished, because they are not compatible with states' obligations to respect the right to strike.

As mentioned above, states parties should ensure everyone and trade unions a right to strike as both individual and collective rights. To set legal procedures which trade unions should carry out before to declare strike is possible, because the ICESCR and ILO Convention No. 87 mention that the right to strike should be "exercised in conformity with the laws of the particular country".[77] In other words, workers and trade unions should "respect the law of the land".[78] Even if imposing such procedure is not a violation, it should not be too complicated to make strike almost impossible in order to completely impede the enjoyment of the right to strike.[79]

3.2.2 Obligation to protect

States parties also have an obligation to prevent for the right to strike to be violated by third parties, mainly employers in the right to strike related cases. Employers have several means for

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[73] ILO CFA (2015a) paragraph 217; ILO CFA (2015b) paragraph 1002

[74] Saul, Kinley and Mowbray (2014) p.575; Craven (1995) p.278

[75] Eide (2001) p.23

[76] CESCR (1997c) E/C.12/1/Add.17, paragraph 16; CESCR (1999) E/C.12/1/Add.36, paragraph 25; CESCR (2000a) E/C.12/1/Add.44, paragraph 18; CESCR (2000b) E/C.12/1/Add.55, paragraph 46; CESCR (2001a) E/C.12/1/Add.59, paragraph 20 and 39

[77] ICESCR article 8.1.(d)

[78] ILO Convention No. 87 article 8.1

[79] ILO CFA (2011a) paragraph 524

setting up difficulties for trade union hard to plan and to carry out its activities including strike. Those difficulties are undermining pressure from strike to further and defend interests of workers, and are violation of the principles of the right to strike of workers and trade unions.

In short, States should take necessary means to stop employers perpetrating the right to strike by conducting violations mentioned above.

3.2.3 Obligation to fulfill

Last, but not least, states parties have to take proper measures for realization and furtherance of the right to strike.

The right to strike has to be recognized within domestic legal system.[80] To address the right in the constitutional law, and to adopt relevant laws to realize the right to strike are good examples for that.[81] Mentioning the right to strike only in the constitution is meaningless for workers and trade unions to enjoy it. It is because employers can dismiss strikers due to a breach of contract or even file a court case against them, unless the right to strike itself, and workers who participated in a strike are protected from being accused by the prosecutor, or being dismissed by their employer.[82] Additionally, states have to take measures to improve the awareness of employers, judges and the police to guarantee the implementation of the right to strike.[83]

4 Limitations on the right to strike

Like other human rights, the right to strike cannot be practiced without any limitations. While provisions, mentioning the right to strike, do not address limitations on it, the limitations can be derived from the ICCPR, ICESCR and the ILO Convention No. 87.

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[80] CESCR (1997b) E/C.12/1/Add.21, paragraph 18; CESCR (1997d) E/C.12/1/Add.19, paragraph 11; CESCR (1998) E/C.12/1/Add.24, paragraph 17; CESCR (2003b) E/C.12/1/Add.95, paragraph 16; CESCR (2006a) E/C.12/UZB/CO/1, paragraph 51; CESCR (2006c) E/C.12/LIE/CO/1, paragraph 16; CESCR (2008) E/C.12/UNK/CO/1, paragraph 20; CESCR (2010) E/C.12/AFG/CO/2-4, paragraph 25

[81] CESCR (1994) E/C.12/1994/7, paragraph 12; CESCR (2003b) E/C.12/1/Add.95, paragraph 36

[82] CESCR (1997d) E/C.12/1/Add.19, paragraph 11 and 23

[83] CESCR (1996) E/C.12/1/Add.1, paragraph 25; CESCR (1997a) E/C.12/1/Add.14, paragraph 33

4.1 Limitations in ICCPR, ICESCR, and ILO Convention No. 87

4.1.1 ICCPR, and ICESCR

There are similar but slightly different provisions useful to draw limitations on the right to strike. Those are article 8.1, 8.2 of the ICESCR, and article 22.2 of the ICCPR. These provisions are containing limitations on relevant human rights, and there are arguments regarding which one could be applied as limitations on the right to strike. This question is mainly resulted from that the ICESCR article 8.1.(d) only says that the right to strike "is exercised in conformity with the laws of the particular country."[84] If this is the only limitation, the right to strike is not exercisable, because then it is only up to states in question to decide how far the right to strike can be limited, or even to decide whether the right can be limited or not.[85] That is not acceptable based on the whole idea of "international human rights law". Therefore, an answer for the question which provisions will be applied as limitations on the right to strike matters.

Article 22.2 of the ICCPR is a bit more specific than article 8.2 of the ICESCR. The former enumerates limitations on the right to freedom of association, including the right to form and join trade unions, as article 8.1.(a) second sentence of the ICESCR does. First of all, the limitations mentioned in article 22 of the ICCPR are on a freedom of association. The CCPR has recognized that the freedom of association contains the right to strike for only last 15 years.[86] Therefore, the limitations in the article 22 cannot be considered that it was drafted and adopted as limitations on the right to strike. Thus, it is not easy for article 22.2 of the ICCPR to be directly considered as limitations on the right to strike.

Similarly, second sentence of the article 8.1.(a) of the ICESCR, addressing the limitations on a right to form and join trade union, also is not a limitation on the right to strike. The sentence is almost the same with the article 22.2 of the ICCPR. The only difference between those two provisions are the one in the ICESCR does not enumerate public safety, and the protection of public health or morals as requirements for legitimate limitation on the right to strike.[87]

The right to form and join trade union, and the right to strike are provided by two separate paragraphs. So that limitations on the right to form and join trade union cannot be applied to the

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[84] ICESCR article 8.1.(d)

[85] Craven (1995) pp.258-259

[86] Chapter 2.1

[87] ICESCR article 8.1.(a); ICCPR article 22.2

right to strike. Consequently, it is prima facie reasonable to see limitations in an article 8.2 of the ICESCR, on all the rights addressed in the article 8, as limitations on the right to strike.

On the other hand, it is also reasonable for limitations in article 8.1.(c), on the right of trade unions to function freely, to be seen as limitations on the right to strike.[88] It is because enjoyment of the right to strike, as one of internationally recognized human rights for counterbalancing a bargaining power imbalance between employer and employee, is impossible, when there is an excessive restriction on the right of trade unions to function freely. Then limitations on trade unions' right to function freely can be considered as limitations on the right to strike.

Additionally, it is because 'right to organize activities', and 'right to formulate programmes' used in article 3 of the ILO Convention No. 87, are not different with the right in Article 8.1.(c). It is not hard to consider that limitations on the rights mentioned in the ILO Convention No. 87 as limitations on the right to strike, since the right to strike is derived from the ILO Convention No. 87 as well. In addition to that, simply the word 'strike' is encompassed within words 'activities' and 'programmes' of trade union. Therefore, an argument, saying that limitations 'prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others'[89] are the limitations on the right to strike, is reasonable.

Although each of these claims are based on reasonable ground, requirements for limitations on the right to strike have to be a combination of every provisions mentioned above, including article 22.2 of the ICCPR, second sentence of article 8.1.(a), and article 8.1.(c) of the ICESCR. The reason is that more of the workers and trade unions will be able to enjoy the right to strike, when more requirements should be met for legitimate restriction, and when those requirements are interpreted stricter.

In addition to that, neither the CESCR, nor state parties to the ICESCR made an objection or negative comments when Monaco was making a reservation on the article 8, especially on the right to strike.[90] The reservation says that it will implement the right to strike with "requirements, conditions, limitations and restrictions which are prescribed by law and which are necessary in a

[88] Craven (1995) p.258

[89] ICESCR article 8.1.(c)

[90] Saul, Kinley and Mowbray (2014) p.581

democratic society in order to guarantee the rights and freedoms of others or to protect public order (ordre public), national security, public health or morals".[91]

Moreover, CESCR clearly said that the restrictions on the right to strike should be "strictly necessary for the promotion of the general welfare in a democratic society, for the protection of the interests of national security or public safety, public order, public health or the protection of the rights and freedoms of others, and where no other alternative can be found."[92]

It is clear that CESCR also considers that keywords for the limitation on the right to strike are 'necessity to democratic society', 'protection of rights and freedoms of others', 'national security', 'public safety', 'public order', and 'public health or morals'. Therefore, all three provisions, article 22.2 of the ICCPR, article 8.1.(a), and article 8.1.(c) of the ICESCR should be combined to find out whether particular restrictions are violations of the principles of the right to strike.

Besides, the right to strike of members of armed forces, police, or administration of the state can be limited by national laws or regulations, based on article 8.2 of the ICESCR, and article 9.1 of the ILO Convention No. 87. Japan and Monaco declared an interpretative declaration on these provisions. Japan said that 'the police' in both article 9 of the ILO Convention No. 87 and article 8.2 of the ICESCR is interpreted to include fire service personnel. And declaration made by Monaco says that article 8.2 of the ICESCR is applied to not only the members of the police, but also agents of the state, the commune and public enterprises.[93] Such interpretations are internationally recognized as well, because there are no objections on those declarations. Even if there are particular workers, whose right to strike can be restricted, limitations on their right to strike should met requirements mentioned in this chapter, such as necessity in a democratic society, protection of public safety, national security and etc. The ILO CFA also has mentioned this for decades through cases.

4.1.2 ILO Convention No. 87

Both the ICCPR and the ICESCR explicitly emphasize that state parties of the ILO Convention No. 87 should not misuse provisions in the Covenants "to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice" the right to strike derived from the

[91] UN Treaty Collection; Appendix 2

[92] CESCR (2006b) E/C.12/CAN/CO/4 and 5, paragraph 51

[93] UN Treaty Collection; Appendix 2

ILO Convention No. 87.[94] Therefore, requirements mentioned in the Convention No. 87 should be minimum for the limitations on the right to strike.

The ILO Convention No. 87 has several provisions containing limitations on the right to strike. The right to strike should be exercised in conformity with laws of the land,[95] but such laws should not impair, nor be applied to impair the right to strike guaranteed by the Convention No. 87.[96] The Convention No. 87 specifically mentions that the right to strike of armed forces and the police also should be practiced within the scope of relevant national laws or regulations.[97]

These requirements are broader than the requirements derived from the two Covenants. And it is still hard to concretely determine whether particular limitations are violation of the right to strike even with requirements from chapter 4.1.1. In that sense, cases examined by the ILO CFA have to be assessed in combination with concluding observations by the ICESCR.

4.2 Limitations by the ILO CFA and CESCR

4.2.1 Procedural limitations

State parties to the right to strike can impose certain procedural limitations on practicing the right.[98] Mediation, conciliation, or voluntary arbitration could be demanded prior to strike.[99] But these processes should have impartiality and immediacy.[100] If these conditions are not satisfied within above mentioned mechanisms, it is violation of the right to strike.[101] The reason is that slow or biased procedures are an obstacle to practicing the right to strike. A purpose of implementing these procedures is to encourage both parties of labor dispute making peaceful resolution by themselves. If it functions as an impediment for the purpose, for trade union, and for workers to

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[94] Article 22.3 of the ICCPR; article 8.3 of the ICESCR

[95] ILO Convention No. 87 article 8.1

[96] ILO Convention No. 87 article 8.2

[97] ILO Convention No. 87 article 9.1

[98] ILO CFA (2011a) paragraph 524

[99] ILO CFA (2014a) paragraph 853

[100] ILO (2012) p.58; CESCR (2001b) E/C.12/1/Add.60, paragraph 18; ILO CFA (2014a) paragraph 534

[101] For example, when the entitled bodies for arbitration consist of experts who are well-known as their pro-employer opinions on labor dispute related issues, as well as the bodies are entrusted by only one party of dispute, or when the procedures take too long to finish up a case in question, such procedures are not in conformity with the right to strike.

further and protect their economic and social interests, it is obvious that imposing such process is violation of the right to strike.

Besides, setting up particular voting requirement is allowed. However, the procedures should not be too hard to achieve, because it is only an obstacle, and abuse of procedural limitation on the right to strike.[102]

In addition, unions can be asked to give prior notification to employers before strike.[103] But trade unions should not be asked to notify their strike to employers too early. It is because such notification period should be one of the measures "to encourage and promote the development of voluntary bargaining." If the notification period is used as another obstacle to do so, it is also obvious that establishing such notice period is violation of the right to strike.[104]

In addition to that, there are states having legislations that limit duration of strike. However, the duration of strike should be voluntarily and democratically decided only by trade union and its members, not by such legislation.[105] Therefore, a legislation, giving limitation on duration of strike, is violation of the right to strike.

4.2.2 Substantive limitations

4.2.2.1 General principles

The ILO CFA has repeatedly mentioned that "strikes of a purely political nature" are not protected by the right to strike.[106] Therefore, all strikes that are to further and protect economic and social interest of workers, in short, not purely political strikes, are basically protected by the right to strike. Specifically, non-occupational strikes, or strikes coercing a government with a political matter can be prohibited. Moreover, strikes that are about difference in interpretation of a legal text can also be prohibited.[107]

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[102] CESCR (2000a) E/C.12/1/Add.44, paragraph 18; CESCR (2003a) E/C.12/1/Add.94, paragraph 21; ILO CFA (2014a) paragraph 850

[103] ILO (2012) p.58; ILO CFA (2015b) paragraph 1002

[104] ILO (2012) p.58

[105] ILO (2012) p.59; ILO CFA (2015b) paragraph 1002

[106] ILO CFA (2014b) paragraph 646

[107] ILO CFA (2014c) paragraph 192

Strikes for an increase of wages or for payment of wage arrears,[108] and strikes not only for better working conditions, but also for "seeking solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers" are protected by the right to strike.[109] Strikes to ask recognition of trade union,[110] to ask recognition for collective bargaining purposes addressed to the subcontracting company[111], and strikes in support of workers or trade unions of multiple enterprises[112] are also within the scope of the right to strike. So-called sympathy strikes are protected as well, unless initial strike which sympathy strike is supporting for is unlawful.[113] Even strikes to ask an end of murders or disappearance of union leaders and unionists are also fall within the scope of the right to strike.[114]

However, act of violence should not be committed while above mentioned strikes are practiced, for them to fall within the scope of the right to strike, and to be protected by the right to strike.[115]

4.2.2.2 Essential or public services

Exercise of the right to strike of workers in essential or public service can be restricted or prohibited, even if the strike is only for furtherance and protection of workers' social and economic interests.[116]

Particular work can be considered as 'essential' in the strict sense of term, only when its stoppage is 'endangering life, personal safety or health of the whole or part of the population' (hereinafter 'endangering life').[117] Therefore, a strike in question cannot be considered as the strike in an 'essential service' with mere facts that it affects or interferes trade and commerce.[118]

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[108] ILO CFA (2009) paragraph 573

[109] ILO CFA (2016b) paragraph 712

[110] ILO CFA (2012) paragraph 118

[111] ILO CFA (2008b) paragraph 681

[112] ILO CFA (2010) paragraph 220

[113] ILO CFA (2007b) paragraph 1543

[114] ILO CFA (1989) paragraph 495

[115] ILO CFA (2000) paragraph 324

[116] ILO CFA (2016b) paragraph 715

[117] ILO CFA (2016b) paragraph 715; Based on this definition, the ILO CFA mentions that the hospital sector, electricity services, water supply services, the telephone service, the police and the armed forces, the fire-

Besides, the right to strike of some workers, within essential service in the strict sense of term, should not be restricted or prohibited, because their strike does not meet above mentioned 'endangering life' requirement.[119] On the contrary, restriction on the right to strike of workers in non-essential service can be compatible with the principles of the right to strike,[120] when their prolonged strike is 'endangering life'.[121] In short, limitation on practice of the right to strike of workers, due to essential nature of service, should be interpreted in very strict sense of term. In addition, workers in state-owned company are not automatically restricted their enjoyment of the right to strike, unless their strike causes 'endangering life' problems.[122] While many services operated by state-owned companies are related to infrastructure for the whole community, workers in those companies should be ensured enjoyment of their right to strike, unless stoppage of them causes 'endangering life' situation.

As workers in essential service should be interpreted in very strict sense of term, the workers in public service whose right to strike can be restricted or prohibited should be minimized as workers "exercising authority in the name of the State".[123]

Rules to define 'essential service' in a very strict sense should be applied to define public service for narrowing down the range of workers whose right to strike can be limited. And exercise of right to strike of workers who are not working in the area of essential service or public service should not be restricted or prohibited.

Besides, if there is restrictions or prohibitions on the right to strike of workers in essential or public service, adequate protection should be accompanied as a compensation for those limitations.[124] Conciliation or arbitration process, which could be asked prior to strike, can also be

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fighting services, public or private prison services, the provision of food to pupils of school age and the cleaning of schools, and air traffic control may be considered as essential services.

[118] ILO CFA (2014b) paragraph 469

[119] ILO CFA (2015a) paragraph 215

[120] ILO CFA (2008c) paragraph 639

[121] ILO CFA (2014b) paragraph 469

[122] ILO CFA (2015a) paragraph 214

[123] ILO CFA (2016b) paragraph 715; Based on the definition, officials working in the administration of justice, in audit and collection of internal revenue, and customs officer are considered as workers in public service of which right to strike can be restricted.

[124] ILO CFA (2016b) paragraph 570

used as this compensation. Therefore, such procedure should be impartial, independent, speedy, and should be initiated by both parties of dispute, neither by only employer, nor authorities. Likewise, these mechanisms should guarantee that both parties of labor dispute are able to participate in every states of the procedure. In addition to that, the procedures should ensure that results from the procedure are binding on both parties, and that the result should be fully and promptly implemented.[125] Moreover, both parties of dispute in question should be allowed to voluntarily return to the bargaining table, even though above mentioned compensational procedure is underway.[126] These mechanisms are a compensation for a limitation on the right to strike, and the reason why the right to strike is practiced before it is limited is a collective bargaining between parties is broken-down. Then, the bargaining has to be re-started when there is a joint consent of both parties, even though the compensational process is already started.

4.2.2.3 Minimum service

Even within non-essential work, the right to strike of some workers can be restricted when it is necessary for them to continue working for compliance with statutory safety requirements, for the safety of persons, machinery and equipment, and for the prevention of accidents. In this case, minimum service can be established.[127] Moreover, minimum service can be set where the strike might cause irreversible damages, an acute national crisis which is 'endangering life', or where the workers are in public service of fundamental importance.[128]

When such restriction or prohibition is compatible with the principles of the right to strike, establishment of minimum service, including scope and duration of the service, should be decided within tripartite mechanism, in which worker's organizations should be able to participate. It should not be unilaterally defined by employer. If there is a disagreement in defining minimum service within the tripartite mechanism, the minimum service should be set by independent body. The establishment of minimum service, as well as its scope and duration should be clear and be applied strictly. In addition to that, the establishment itself should be notified to workers whose right to

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[125] ILO CFA (2014a) paragraph 534; CESCR (2001b) E/C.12/1/Add.60, paragraph 18

[126] ILO CFA (2007a) paragraph 1095

[127] ILO CFA (2016a) paragraph 240

[128] ILO CFA (2014a) paragraph 851; The ILO CFA considers that the right to strike of workers in ferry service, services in ports, underground transport, railway service, postal service, refuse collection, mint, petroleum sector, banking service, and meteorology and geophysics for air traffic control can be restricted.

strike is limited.[129] When workers, requested to continue working, do not respect the establishment of the minimum service with all these requirements being fulfilled, those workers can be requisitioned by government.[130]

4.2.2.4 National emergency situation and police intervention

It is in conformity with the principles of the right to strike for the restrictions on the right under national emergency situation. If normal life of the community is disturbed by work stoppage in particular areas considered as important, it is not enough to declare it a national emergency. To consider such disturbance as a national crisis, and to restrict the right to strike, the area of work where the strike in action should be an essential service in a strict sense of terms.[131] The body, which is entitled to decide whether it is national emergency situation, so that the restriction on the right to strike can be established, should be independent, and has the confidence of all parties concerned.[132]

States have obligations to protect people from 'endangering life' problems. When there is a strike in essential services defined as above, it is 'endangering life' situation. Therefore, requisitioning of workers, hiring of non-strikers, using of the military to stop such danger is not a violation of principles of the right to strike when there is strike in essential service, or when an excessive strike in non-essential service is 'endangering life', in other words, national emergency.[133] But such hiring or requisitioning should be limited only in a national crisis. Otherwise, it is a violation of the right to strike.[134]

In short, ILO CFA says that the right to strike can be restricted only when the strike is placed in essential service, and only when the strike causes a national crisis. In other words, enjoyment of the right to strike cannot be restricted, even in essential service, unless national emergency situation is resulted from such enjoyment.

Meanwhile, ILO CFA says that intervention by police or security forces for strike-breaking purposes, basically, is an infringement of the right to strike. Such intervention can, however, be

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[129] ILO CFA (2007a) paragraph 313; ILO CFA (2015b) paragraph 890

[130] ILO CFA (2008a) paragraph 560

[131] ILO CFA (2014a) paragraph 211

[132] ILO CFA (2011d) paragraph 1078

[133] ILO CFA (2004) paragraph 831; ILO CFA (2015b) paragraph 893

[134] ILO CFA (2005) paragraph 1478

justified when it is only for maintenance of public order, or only in situations where the law and order, or public freedom is seriously threatened.[135] If the intervention is limited for the maintenance of public order, it should be in proportion to the threat to public order, and should be instructed not to use excessive violence in trying to control strike undermining public order.[136]

4.2.2.5 Penal sanctions

Legislations imposing penal sanction, such as arrest, imprisonment, and deportation on account of organizing or participating in peaceful and legitimate strike, are not in conformity with principles of the right to strike.[137] Penal sanctions against the act of strike can only be possible when there is violence against persons and property, or there are other serious violations of the ordinary criminal law while exercising the right to strike.[138]

In other words, penal sanction on specific strikes that violate restrictions mentioned in laws in question is legitimate, if the laws with restrictions on the right to strike are in conformity with the principles of the right. However, some sanctions, such as imprisonment for the fact of participating in or organizing a peaceful strike is not allowed, because penalties should be proportionate to the offences committed.[139] Imprisonment for participating in peaceful strike is too excessive, even if the strike is in essential service. Even if the penalty for strike action is fine, it should not be excessive as it can undermine trade union activities.[140]

Although penalties on trade union leader who instigates illegal or illegitimate strike are justified with proportionality and legitimacy, the union leader should have adequate judicial safeguard without delay.[141] This safeguard should be provided, even if strike action in question is illegitimate, since it is without a doubt mentioned in article 14 of the ICCPR.

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[135] ILO CFA (2011b) paragraph 841; ILO CFA (2013) paragraph 227

[136] ILO CFA (2014b) paragraph 650

[137] ILO CFA (2015a) paragraph 217; ILO CFA (2015b) paragraph 1002

[138] ILO CFA (2015a) paragraph 536

[139] ILO CFA (2014b) paragraph 616

[140] ILO CFA (2014b) paragraph 649

[141] ILO CFA (1982) paragraph 123

Moreover, arbitrarily conducted detention of trade union leaders or participants to strike should not be allowed.[142] This is not only a violation of the right to strike, but also a violation of the right to liberty and security of person, mentioned in the article 9 of the ICCPR.

4.2.2.6 Other sanctions

It is violation of the right to strike, when trade unionists or union leaders are dismissed, or refused to be re-employed on account of participating in lawful strike.[143] These dismissal, or refusal should not occur during, after, or before the strike, to diminish the effect of strike.[144]

Employment contract should not have provisions considering a participating in strike as a breach of contract, making union or unionists who instigate such breaches be responsible for damages for any losses resulted from their actions, and making employers be able to obtain an injunction to prevent the commencement or continuation of strike.[145]

Besides, salary of workers who have participated in the strike can be deducted for days of strike.[146] However deduction, higher than the amount of corresponding to the period of the strike is not in conformity with the principles of the right.[147] The deduction should not be applied only to strikers who are active in trade union activities, and not to strikers who are not active.[148] Likewise, employer should not grant salary increase for workers not to participate in the strike.[149]

4.3 State obligations re-visited

Simply, states obligations under the right to strike are obligations to respect, protect and fulfill the right of workers and trade union to do work stoppage, or delaying of work to further and defend their economic and social interest. While there are some restrictions on it, the right to strike should be ensured to the greatest number of workers and trade unions.

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[142] Saul, Kinley and Mowbray (2014) p.575

[143] ILO CFA (2014a) paragraph 653; ILO CFA (2016c) paragraph 140

[144] ILO CFA (2014a) paragraph 653

[145] ILO CFA (1991) paragraph 236

[146] ILO CFA (2016b) paragraph 242

[147] ILO CFA (2016b) paragraph 242

[148] ILO CFA (2015a) paragraph 558

[149] ILO CFA (2013a) paragraph 861

4.3.1 Obligation to respect

The right to strike of workers in essential or public service can be restricted or prohibited, but such service should be defined in a very strict manner. The reason is that it is the way how the scope of the right to strike is widened, and the way it is in conformity with the ICESCR, the ICCPR, and the ILO Convention No. 87, where the right to strike is based on. Also, it falls within the 'object and purpose' of recognizing international human rights, to make human rights protect as many people as possible.

Workers and trade unions, that are in non-essential service, but are able to cause 'endangering life' problem after some period of strike, can be restricted to practice their right to strike, by establishing minimum service. This, minimum service, can be established, only when prolonged strike cause 'endangering life'. It is not enough for the strike to harm a normal life of community.

Besides, penal sanctions should not be imposed on workers or trade unions, who participated in or organized a strike, to make them accountable for a mere fact that they exercised their right to strike. If there were violence against persons or properties which can be prosecuted under criminal law, it is a different story. However, workers or trade unions who practiced their right to strike in peaceful and legitimate way, such strike should not be prosecutable. Additionally, the right to strike can be restricted by police intervention when the law and order is threatened. This intervention should be conducted with proportionality for preventive purpose only.

In short, restrictions on the right to strike of workers is possible only when their strike results in 'national crisis'. If work stoppage of particular work causes 'endangering life' situation, in other words, national crisis, it is essential service, and workers therein can be restricted their right to strike. If prolonged strike in non-essential service, can cause national crisis, the strike can be restricted. These restrictions can be establishment of 'minimum service', and can be determined by conciliation, arbitration, or mediation procedures with certain requirements.[150] Additionally, proportional 'police intervention' is justified, only when the strike makes law and order being threatened. This shows that concluding remark of chapter 4.1.1 of this research is right.[151]

It is an obligation of states to respect the right to strike, but it is also an obligation of states to prevent 'endangering life' situation. Therefore, this interpretation of limitation on the right to strike by CFA is right, as a balance between the two obligations, as well as it is compatible with

[150] This will be mentioned in chapter 4.3.3.

[151] Chapter 4.1.1 of this thesis addresses that more requirements for legitimate limitation, and stricter interpretation of the requirements make more workers and trade unions can enjoy the right to strike.

provisions of the ICESCR, and the ILO Convention No. 87 addressing limitations on the right to strike.

4.3.2 Obligation to protect

Employers should not be allowed to dismiss workers or members of trade union because they participated in or organize a strike. However, part of their salary corresponding to the period of the strike can be deducted. But it should be conducted only to the participants of a strike. The deduction higher than the amount for days of strike is not allowed. Moreover, obstructing trade union activities, including disturb union members to approach trade union office, should be prohibited. In short, states should implement laws to prohibit these sanctions, as their obligation to protect the right to strike.

4.3.3 Obligation to fulfill

Conciliation, mediation, or arbitration process that are entitled to determine whether a strike causes national crisis, or might cause the crisis after particular period of work stoppage, should be established with impartiality, independence, speed, and guarantee that both parties of labor dispute can participate in. Through this determination, the mechanisms can minimize number of workers whose right to strike is restricted. Obviously, it can maximize number of workers who can enjoy their right to strike. This is an obligation to fulfill the right to strike as well as an obligation to respect the right.

5 Evaluating limitations on the right to strike in the Republic of Korea

5.1 Legal framework

5.1.1 Recognition of the right to strike

Despite of an active discussion within Economic, Social and Labor Council, tripartite body for social dialogue in Korea, the ILO Convention No. 87, which is one of the fundamental conventions of the ILO, has not yet been ratified in Korea. This makes many international and regional labor organizations, such as International Trade Union Confederation (ITUC), the European Trade Union Confederation (ETUC), and many others, have criticized Korea for not ratifying fundamental conventions of the ILO.[152] However, Korea, as a member of the ILO, declared its will to accept the

[152] International Trade Union Confederation (2019); European Trade Union Confederation (2019)

constitution of the ILO and the annexed Declaration of Philadelphia, as well as their fundamental principles, including the right to strike.[153] Therefore, Korea has obligations under the right to strike.

Besides, Korea ratified article 8.1.d of the ICESCR without any reservation or declaration, so that it has obligations under the provision. However, it made a declaration saying that article 22 of the ICCPR shall be applied in conformity with its domestic laws.

Regardless of ratification status of Korea mentioned above, it has states' obligations under the right to strike. The reason is that the right to strike is a part of customary international law, so that all the states are legally bound by it.[154] Therefore, government of Korea also has obligations under the right to strike as state party of article 8.1.d of the ICESCR, and as state that is bound by customary international law.

5.1.2 Legal system of the Republic of Korea to ensure the right to strike

5.1.2.1 Constitution of the Republic of Korea

In Constitution of the Republic of Korea (hereinafter 'the Constitution'), there are number of provisions on labor rights. Article 33 is about the right to association, collective bargaining and collective action. Even though it does not say the right to strike, a concept of 'strike' normally is considered as one encompassed with 'collective action'.[155] Therefore, 'right to collective action' stressed in article 33 can be read as 'right to strike'. In addition to that, Trade Union and Labor Relations Adjustment Act (hereinafter 'TULRAA'), regulating collective action, also gives a strike as one of examples of collective action.[156] Therefore, collective action in relevant provisions of laws will be read strike in this research.

Article 33.1 of the Constitution says that "to enhance working conditions, workers shall have to right to independent association, collective bargaining and collective action", article 33.2 mentions that "only those public officials who are designated by Act, shall have the right to association, collective bargaining and collective action", and article 33.3 addresses that "the right to collective action of workers employed by important defense industries may be either restricted or denied under the conditions as prescribed by Act".[157]

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[153] Chapter 2.3.2

[154] Chapter 2.3.2

[155] European Social Charter article 6.4; Kaya and Guler (2017)

[156] Trade Union and Labor Relations Adjustment Act article 2.6

[157] Constitution of the Republic of Korea article 33.3

Amongst article 33.2 and 33.3, limitations on the rights mentioned are provided. Article 33.2 says that only public officials designated by relevant act can have the right to association, collective bargaining and collective action. Moreover, the right to collective action of workers in particular industries is restricted or banned by relevant act, according to the article 33.3.

Apart from whether these provisions are within the scope of the right to strike, they do not provide general limitations on the right to collective action. Therefore, a general provision for the limitations on human rights mentioned in the Constitution is applied to the right to collective action, which is article 37.2, saying "the freedoms and rights of citizens may be restricted by Act only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated."[158] These requirements for just limitations on the rights acknowledged in the Constitution, such as 'necessary for national security', 'maintenance of law and order', and 'public welfare' are not that different than the requirements for legitimate limitations on the right to strike.[159]

In short, the right to strike is recognized by the article 33.1 of the Constitution, and it can be limited because of national security, maintaining law and order, and etc, as mentioned in the article 37.2.

5.1.2.2 Trade union and labor relations adjustment act

A law in Korea regulating strike is TULRAA. One of purposes of this act "is to maintain and improve the working conditions or workers and enhance their economic and social status by guaranteeing the rights of association, collective bargaining, and collective action".[160]

To realize such purposes, TULRAA provides number of provisions for strikes to be immune from civil and criminal liability. According to article 3 of TULRAA, damages, that employer has suffered, resulted from a strike cannot be claimed, if the action is conducted under TULRAA.[161] Additionally, article 20 of Criminal Act, saying that particular activities conducted in accordance with acts shall not be punishable, is applied to justifiable strike, which is exercised to achieve the

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[158] Constitution of the Republic of Korea article 37.2

[159] Chapter 4.1.1

[160] TULRAA article 1

[161] Article 3 is mentioning industrial action instead of collective action in English translated version of act, but in Korean original version addresses the same thing, 'collective action'.

purpose of TULRAA, improving working conditions, and enhancing economic and social status of workers, unless the act of violence or destruction appears during the strike in question.[162]

As mentioned in chapter 3.1 of this thesis, strike is a way of workers to give pressure to their employer(s), and to further their economic and social interests by stoppage of work, and by damages or possible damages resulted from the stoppage. Therefore, employers should not be allowed to claim their damages resulted from strikes, because it is inevitable that the strike causes damages to employers. It will be excessive restriction on the right to strike, if legal rights to demand recompense for damages from legal strike is allowed to employers. On the other hand, it is also reasonable that justifiable strikes, which are conducted in accordance with relevant law, TULRAA, should be exempt from criminal prosecution. The reason is that it will be serious limitation on the right to strike, if the strike, started and carried out with all the requirements in TULRAA satisfied, is prosecutable. Therefore, these provisions making justifiable strikes immune from civil and criminal liability is in conformity with principles of the right to strike.

5.1.3 Concluding remark

The right to strike is prima facie acknowledged and ensured in Korea with the Constitution, and TULRAA. Then, it can be considered that a part of obligation to fulfill is satisfied in Korea, even if it is also possible to be limited with reasons mentioned in article 37.2 of the Constitution. However, Korea, which has obligations under the right to strike, has to respect and to protect the right as well. Therefore, it is important for this research to assess whether limitations implemented on the right to strike in Korea are in conformity with principles enriched by the ILO CFA.

5.2 Limitations on the right to strike

5.2.1 Penal sanction – Obstruction of business

Article 314.1 of criminal act of Korea is about ‘obstruction of business’. It says that “A person who interferes with the business of another by the methods of article 313 or by the threat of force, shall be punished by imprisonment for not more than five years or by a fine not exceeding 15 million won.’[163] Methods of article 313 is to circulate false facts or to use fraudulent means.[164] In

[162] TULRAA article 4

[163] Criminal Act article 314.1. A fine is approximately 15,000 USD.

[164] Criminal Act article 313

short, a person who interferes with the business by circulating false facts or by threat of force will be punished by this article.

In Korea, police and the prosecution has been using this provision to prosecute workers and trade unions for their practice of right to strike. Until 2011, the court also had considered that strikes, basically, constitute criminal act, 'obstruction of business'. Only some strikes, which have justifications, in terms of subject, purpose, procedure, and methods of strike, are excused from being penalized.[165] This is based on a premise that strikes are harmful for society. Moreover, it is unconstitutional because this judicial custom makes every practice of right to strike, under article 33.1 of the Constitution illegal. Therefore, there have been many dissenting opinions from academics.

After all, Constitutional Court of Korea decided that strikes should not automatically be considered violation of article 314.1 of criminal act, because disturbance of business of employer is intrinsic essential of practicing right to strike, one of constitutional human rights.[166] Moreover, Supreme Court of Korea decided, with same intention with the Constitutional Court, that not all the strikes constitute obstruction of business under article 314.1 of criminal act. However, it also decided that strikes with suddenness, which result in suppression of employers' free will to continuance of business by causing profound confusion or tremendous damage to employers, are correspondent with a notion of 'force'. Therefore, the lightning strikes can be penalized as obstruction of business.[167]

Although, these decisions are somewhat embracing criticisms regarding general application of article 314.1 of criminal act on strikes, 2007Do482 decision still has problems. It draws illegal strikes with three new elements; suddenness of strikes, damages of employer, and causality between suddenness and damages. However, it is not in conformity with the principles of the right to strike. Strikes can be considered illegal only when there is violence, or there are other serious violations of criminal law, which should fall within the principles of the right to strike.[168] Based on the 2007Do482 decision, it is possible for a peaceful strike being considered as illegal due to its 'suddenness'.

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[165] 90Do2771; 91Do326; 2004Do689; 2002Do3450; 2002Do5577

[166] 2009HunBa168

[167] 2007Do482

[168] Chapter 4.2.2.5

Moreover, prosecutor's office of Korea still prosecutes workers and trade unionists for their enjoyment of the right to strike, with same previous principle, or appeals against court decisions made in line with the new principle.[169] Moreover some of Supreme Court rulings mention that a strike in question is obstruction of business because purpose of strike is not compatible with TULRAA, so that the strike was carried out suddenly enough to make employers free will to continue their business suppressed, although the strike had been notified to employers and had followed procedures of strike.[170]

Therefore, it is still necessary to analyze previous principle of justification,[171] to clarify whether prosecuting certain strikes lacking justification for obstruction of business is incompatible with the Constitution, and principles of the right to strike.

5.2.2 Analyzing elements of justification to make strikes legal

Elements of justification are provided by article 37 of TULRAA. Article 37.1 says that strikes should be consistent with laws and other social order with respect to purpose, methods, and procedures. And article 37.2 mentions that only member of trade union should participate in strikes led by the trade union.

It is true that exercising the right to strike should be in conformity with relevant laws. This is mentioned in the ICESCR, and the ILO Convention No. 87, as one of limitations. Even though the term 'other social order' in the article 37.1 is somewhat vague and broad, it does not totally fall outside of principles of the right to strike. One reason is that 'social order' can be read as 'public order' which is one of many purposes of legitimate limitation on the right to strike.[172] Therefore, it is reasonable to restrict enjoyment of the right to strike with 'social order'. The other reason is that the right can be limited or prohibited when it results in acute national crisis or 'endangering life' problem, and it is obvious that enjoyment of right is against 'social order', when the enjoyment causes 'endangering life' situation. However, the 'social order' should be interpreted in a very strict sense of term for protecting the right to strike from being restricted excessively, because anything

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[169] After 2007Do482, there have been at least 13 cases that have been decided by the Supreme Court because prosecutors appealed against judgement of the court below saying that strikes in question does not constitute obstruction of business.

[170] 2012Do14654; 2013Do875; 2013Do876

[171] With four elements, including subject, purpose, procedure, and methods of strike

[172] Chapter 4.1.1

can be included within its boundary unless the interpretation is narrowed down to the order, of which 'endangering life' situation can be resulted from violation.

5.2.2.1 Subject

As mentioned in chapter 3.1, the right to strike is both collective right and individual right. Then individual workers should be allowed to enjoy their right to strike as individual right-holders. The rights of individual workers to form and join trade union, and rights of trade union to function freely are introduced because of imbalance of bargaining power between individual workers and employers.[173] Therefore, there is no reason for individual workers to be prohibited enjoying their right to strike, when they choose to practice their right to strike individually, as part of their bargaining strategy. However, based on article 37.2 of TULRAA, only trade union members can participate in strike led by the trade union. Workers who are not members of union cannot enjoy their right to strike, and no workers can participate in strikes which are not led by trade union. If individual worker or group of workers initiate strike without collective decision procedure within trade union, they will be prosecuted, and might get maximum three years of imprisonment or maximum 30 million won, approximately 30,000 USD of fine.[174]

The Constitution clearly says that individual workers have the right to strike.[175] The ILO CFA has the same idea, since it considers that wild-cat strikes are also under the protection of the right to strike. So, article 37.2 and 89 of TULRAA is unconstitutional, and is against the principles of the right to strike. Therefore, strikes should not be prosecuted as illegal strike, or as obstruction of business, because they are not initiated by trade union.

5.2.2.2 Purpose

Article 2.5 of TULRAA mentions 'conditions of employment as wages, working hours, welfare, dismissal, and other treatments' as subjects of labor dispute. Supreme Court had considered strikes that have other than them as their purpose are not justifiable, so they are punishable as criminal conduct of 'obstruction of business'. Even though strikes are against employers' decision to have massive layoff, which 'inevitably entails changes in status of workers or their working conditions', Supreme Court had judged that such decision is 'high-level management decision', and is not a

[173] Chapter 4.1.1

[174] TULRAA article 37.2 and article 89

[175] Article 33.1 of the Constitution considers 'workers' as right-holder of the right to strike.

subject of collective bargaining, nor a subject of labor dispute. Therefore, strikes against layoff decision are not justifiable, and constitute a criminal offence as 'obstruction of business'.[176]

After 2007Do482 decision in 2011, there have been some cases in lower instance mentioning that strikes, against employers' decision which falls within 'high-level management decision', are justifiable, and not constituting 'obstruction of business', if the decision of employers enormously affects conditions of employment.[177] However, prosecutors appealed against these decisions to the Supreme Court based on the same reason they have used, and the Supreme Court reversed an original verdict. Even though the most important requirement for obstruction of business, mentioned in 2007Do482, 'suddenness of strike' was applied to this case, the Court decided that the strikes against decisions in high-level management level are criminal act, because employers cannot expect that workers will initiate strikes with the illegal purpose. Therefore, the Court decided that it is sudden enough.[178]

Based on many cases of ILO CFA, only strikes with pure political purposes are restricted, because such strikes are not related to furtherance of economic and social interests of workers. In other words, any strikes to further and protect workers' economic and social interest should not be prohibited. Then, prosecutions, appeals, and decisions, saying that strikes against 'high-level management decision' are illegal, and constitute a crime of 'obstruction of business', are against principles of the right to strike.

5.2.2.3 Methods

For strikes to be considered justifiable, violence, destruction, or other high-level antisocial behavior should not be accompanied with the strikes.[179] This is in conformity with the principles of the right to strike.[180]

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[176] 99Do5380; 2001Do3429

[177] For example, 2011No369

[178] For example, 2012Do14654, which is the final ruling for 2011No369

[179] 90Nu4006; 91Nu5204

[180] ILO CFA (2000) paragraph 324

5.2.2.4 Procedures

Setting up procedural requirements is not incompatible with the principles of the right to strike, because the ILO CFA has mentioned that relevant level of procedural limitations is possible, unless it is too excessive for workers and trade unions not to be able to enjoy their right to strike.

Article 41.1 of TULRAA defines voting requirement, as one of procedural limitations. Strikes cannot be conducted without a vote "of a majority of the union members by a direct, secret, and unsigned ballot".[181] Based on this article, exercising the right to strike should be decided with certain voting requirements. If trade union initiated strike without majority vote of its members by direct, secret, and unsinged ballot, union leaders will be prosecuted for violation of article 41.1 of TULRAA, and might get maximum one year of imprisonment or maximum 10 million won, 10,000 USD of fine.[182]

Simply, it is allowed for state parties to set up voting requirement, unless the requirement is not too hard to be achieved.[183] The ILO CFA has mentioned that simple majority vote can be required for trade union to decide whether they will start strike. While trade union has a right to function freely, its democratic operation should be guaranteed. In that sense, majority votes of members 'by a direct, secret, and unsigned ballot' is a way of making decision democratically. Therefore, it seems prima facie that these articles are in conformity with principles of the right to strike, because it is not too difficult to be achieved, and it is a way to ensure democratic decision-making.

However, individual workers or group of workers who are not members of union should also be protected under the right to strike.[184] Therefore, the provision mentioning only union members as eligible persons to vote must be amended. Moreover, the prosecutors prosecuted trade unions for obstruction of business, because they initiated strike without the vote required by TULRAA article 41.1. The Supreme Court decided for these cases that strikes constituted obstruction of business because they were initiated without the vote, and the suddenness of them was acknowledged from it.[185]

While 'Suddenness' mentioned in 2007Do482 should be assessed with the fact whether employers could predict the initiation of strikes, the Supreme Court jumped to a decision that the

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[181] TULRAA article 41.1

[182] TULRAA article 91

[183] Chapter 4.2.1; ILO CFA (2011a) paragraph 524

[184] Chapter 3.1

[185] 2009Do3972; 2009Do4083

employers could not foresee strikes because trade unions neglected the vote procedure, so that they committed obstruction of business. This argument restricts the right to strike excessively with too broad definition of suddenness of strike.

Additionally, article 45.2 of TULRAA says that strikes cannot be initiated without 'adjustment procedures' including arbitration, and mediation, either by completing the procedures within particular days provided in relevant provisions, or by elapse of the period provided.[186] Penalty for violation of this provision is maximum one year of imprisonment or 10 million won, approximately 10,000 USD.[187] In other words, strikes which initiated without completing 'adjustment procedures' will be considered as illegal and illegitimate. And workers or trade union leaders who initiated the illegal and illegitimate strike will be prosecuted for obstruction of business.

It can be said that this 'adjustment procedure' is to resolve labor disputes in voluntary and peaceful manner, not to restrict exercise of right to strike, because; i) TULRAA does not prevent parties of labor dispute to resolve it through direct consultation between workers and employer, or through collective bargaining[188]; ii) parties of dispute have an obligation to resolve labor dispute voluntarily[189]; and iii) parties of dispute can choose to resolve the dispute through private mediation and arbitration as they want by their mutual agreement or by collective agreement.[190]

However, it is inevitable to say that adjustment procedures prohibit workers from practicing their right to strike, even if the purpose of the procedures is peaceful and voluntary labor dispute resolution. If trade union and workers democratically and independently decided to begin strike, as a way of increase their bargaining power, it is not only a practice of right to strike, but a practice of rights of trade union to function freely. Therefore, it is entirely up to trade union and its members to choose whether they begin strike or choose mediation, unless it is within essential service.

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[186] Based on TULRAA article 54, period for mediation for 'general business' is 10 days, and for 'public-service business' defined in article 71 is 15 days. And based on article 63, period for arbitration procedures is 15 days. 'Public-service business' is defined as businesses that are 'closely related to daily life of the public at large' or that 'have enormous effect on the economy of a nation'. Some businesses of this 'public-service business' are categorized as 'essential public-service businesses' of which right to strike can be restricted with other means. This will be tackled by chapter 5.2.3.2.

[187] TULRAA article 91

[188] TULRAA article 47

[189] TULRAA article 48

[190] TULRAA article 52

So that, provisions, saying that ‘adjustment procedures’ must be completed prior to strike, are violation on the right to strike.

In this sense, there are some cases, which are within the principles of the right to strike. Some cases have addressed that strike does not lose its legitimacy only because of mere fact that adjustment procedures were not completed beforehand. The reason was that purpose of adjustment procedures is to promote voluntary resolution of labor dispute, not to restrict exercise of the right to strike. Therefore, only strikes, resulted in unlawful damages, such as unexpected turmoil in normal life of population or business of the employer, can be considered illegal and illegitimate.[191]

However, other cases have decided the opposite. They say that strikes, without completing mediation procedures before initiating strikes, cause unexpected damages to employers, unless they have special circumstances making lack of adjustment procedures justifiable. Therefore, the strikes in question, are accountable for the damages.[192]

After 2007Do482 decision, courts have decided that the mere fact, that strikes were started before adjustment procedures were completed, cannot be a reason for the strikes to be penalized as obstruction of business. However, prosecutors have appealed to higher courts against such decisions, even after the 2007Do482 decision.[193]

Trade unions have right to function freely, so the unions can choose the strategy including strike, to achieve their goal. There is no reason for exercise of right to strike to be restricted, prosecuted, or even penalized as obstruction of business, due to absence of certain procedures, unless such strike causes ‘endangering life’ problems. Moreover, it is essence of strike to make bargaining power of workers stronger by causing possible damages to employers. It is unfair to consider the nature of something as a reason to deny its legitimacy, and make it prosecuted, and even penalized.

Therefore, all these prosecutions, and decisions that consider strikes illegal owing to lack of adjustment procedures, are against the principles of the right to strike as well as the right of trade union to function freely. And from this, it is not necessary for procedures to be assessed whether

[191] 92Nu1094, 98No1147; 99Do4812

[192] 99Do4779

[193] For example, 2012No280, as second instance of 2009GoJeong4213 decision, and 2012Do6626 as final decision of the same case. Courts for both instances rejected prosecutors’ appeals.

they promise independence, impartiality, and speed, with guaranteeing participation of both parties of dispute in every step.[194]

5.2.2.5 Concluding remark

2007Do482 is reasonable decision in terms of setting limits on all the strikes being accused as crime as obstruction of business. From this decision, only strikes with suddenness making employers suffered serious damages are considered as the crime. It accords with principles of the right to strike, because it is a way to allow the right being applied wider than before. However, there still are many strikes has been considered as crime, prosecuted, and even judged as the obstruction of business, because of they violated four elements of justification to make strikes not accountable for damages.[195] These should be stopped because they are not compatible with the right to strike and freedom of association.[196]

5.2.3 Limitations on workers in specific businesses

5.2.3.1 National defense industry, teachers, and public officials

Workers, producing electricity, water, or mainly producing national defense goods in major business of the national defense industry, cannot exercise their right to strike.[197] Additionally, teachers and public officials also cannot enjoy their right to strike.[198] The provisions regulating strikes in above mentioned businesses are materializing article 33.2, and 33.3 of the Constitution.[199] Therefore, these restrictions are not seemed unconstitutional.

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[194] Based on TULRAA article 50, 55, 58, 64, and 66, structure and procedures of committee for mediation prima facie satisfy requirements for justifiable procedures as complimentary mechanism for restriction on the right to strike provided by ILO CFA.

[195] HRC (2016b) pp.72-73

[196] CESCR (2001) E/C.12/1/Add.59, paragraph 20 and 39; CESCR (2009) E/C.12/KOR/CO/3, paragraph 20; CESCR (2017) E/C.12/KOR/CO/4, paragraph 38 and 39

[197] TULRAA article 41.2

[198] Article 8 of Act on the establishment, operation, etc of teachers' unions, and article 11 of Act on the establishment, operation, etc of public officials' unions.

[199] Article 33.2 of the Constitution says that only those public officials designated by Act shall have the right to collective action, and article 33.3 of the Constitution says that the right to strike of workers in important defense industries can be restricted or denied.

However, there is no reason for the right to strike of workers in those enterprises to be restricted, because not all the work stoppages of teachers, public officials, and stoppages in enterprises manufacturing 'defense materials' result in 'endangering life' situation. Prohibiting strikes of workers in manufacturing defense materials might be justifiable, only if in wartime. Thus, above mentioned provisions limiting exercise of the right to strike in specific businesses, and article 33.2, and 33.3 of the Constitution should be revised.

In this sense, CESCR has been criticizing Korea for its excessive limitation on the right to strike of teachers and public officials.[200]

5.2.3.2 Public-service business

There are other businesses that exercise of the right to strike of workers therein is restricted by TULRAA. One of them is 'public-service business' defined by article 71.1 as businesses that are 'closely related to daily life of the public', or that 'have enormous effect on the economy of a nation'.[201] Another one is 'essential public-service businesses' defined by article 71.2 as businesses of which work stoppage shall cause noticeable threats 'to daily life of the public' or 'the national economy', and of which replacement is not easy, amongst 'public-service business' defined by article 71.1.

Exercise of the right to strike of workers in public-service business including essential public-service business is, firstly, restricted by article 76 and 77 of TULRAA. Based on these articles, 'the Minister of employment and labor can make a decision to conduct an emergency adjustment', when the strike 'is related to a public-service business or is likely to impair the national economy or endanger citizens' daily lives because of its large scale and specific nature', and parties of the strike concerned should immediately stop their collective actions for thirty days.[202]

These provisions are serious violation against the principles of the right to strike. First reason is that it is limiting strikes in 'public-service business' containing 'essential public-service business' because of its impact on national economy. The ILO CFA clearly says that impact of strike on national economy is not a reason for limitation on the right to strike.[203] Secondly, 'threats to daily

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[200] CESCR (1995) E/C.12/1995/3, paragraph 17; CESCR (2001) E/C.12/1/Add.59, paragraph 19 and 39; CESCR (2009) E/C.12/KOR/CO/3, paragraph 19

[201] TULRAA article 71.1

[202] TULRAA article 76.1 and 76.3

[203] Chapter 4.2.2.2; ILO CFA (2014b) paragraph 469

life of the public', which is mentioned in article 71.1 and 71.2, neither make particular businesses considered as essential service, nor make the right to strike of workers in the businesses restricted, unless stoppage of the business causes 'endangering life' situation, or national crisis. Then, the businesses such as railway, electricity, petroleum refinery, mint, and banking business, enumerated in the article 71.1 and 71.2, except public sanitation business, medical service business, and blood supply business, should not be considered as essential service.

On the other hand, some of 'essential public-service business' is considered 'essential business' which not all the workers therein can enjoy their right to strike by article 42-2.2 of TULRAA. And the particular works amongst 'essential public-service business' are defined as 'essential business' when stoppage of them may "endanger safety of the lives, health or bodies of the public", and daily life of the public.[204] Types of work considered as 'essential business' are listed in presidential decree of TULRAA.[205] While its name is 'essential business', it is a 'minimum service' which ILO CFA addresses. It is because designated workers should continue working during other workers are in strike, so that they cannot enjoy their right to strike, when the business is considered as 'essential business'.[206] This definition of 'essential business' of TULRAA falls within the requirements for setting up minimum service. Based on ILO CFA, the minimum service can be established when the strike might cause irreversible damages, an acute crisis, or where the workers are in public service of fundamental importance.[207] Moreover, this 'essential business' is more labor rights friendly than before. It is because there was 'compulsory arbitration procedure' in Korea until 2007. The decisions to submit strikes concerned to the compulsory arbitration were made by labor relations commission, when the strikes were in 'essential public-service business'. And when there was the decision by labor relations commission, strikes in 'essential public-service business' were prohibited for fifteen days. Additionally, arbitration decisions were binding parties of the dispute as collective agreement. This compulsory arbitration mechanism was changed into the 'essential

[204] TULRAA article 42-2.1

[205] Enforcement Decree of TULRAA article 22-2

[206] Based on TULRAA article 42-3, and 42-4, workers are designated by agreement between parties, or decision made by labor relations commission when both parties or one of the parties applied to make a decision because agreement between parties were not concluded.

[207] Chapter 4.2.2.3

business' after ILO CFA clearly criticized about it.[208] It is true that range of workers whose right to strike is restricted by 'essential business' can be much narrower than the 'compulsory arbitration'.

However, types of work designated as 'essential business' by the presidential decree is still too broad.[209] Many of the essential businesses, including railway, electricity, gas, petroleum refinery, and banking service mentioned in the enforcement decree of TULRAA do not make endangering life situation, or acute national crisis. It is hard to see them public services of fundamental importance. Then, provisions establishing 'essential business' are serious infringement of principles of the right to strike that minimum service should only be set up when stoppage of the work in question causes 'endangering life' problem.

5.2.4 Police intervention

Police intervention for strike-breaking purpose can be justified only when there is situation where the law and order, or public freedom is significantly threatened, or when it is necessary for maintenance of public order. Even when the intervention is justified, it should be limited to control strike undermining public order, and not to use excessive violence.[210]

In Korea, however, police intervention has been frequently used to break strikes, even though there were not serious threats to public order, or public freedom.[211] Most well-known case is the one in a strike at Ssangyong Motors, against massive layoff in 2009. Police mobilized over 3,000 riot police, tremendous volume of instruments including water cannons, liquified tear gas, electric shock tasers, and helicopters for breaking the strike in which only about 500 workers were participating. In the end, those policemen, and vehicles were served their purpose.[212] During the 'operation' excessive violence was conducted by police, at least 150 workers were injured.[213]

While the strike in Ssangyong Motors were not just a stoppage of work, but a stoppage of work with occupying factory's facility, used police forces were significantly unproportionate. Workers in strike, had been weakened in the course of 2 months of strike, because water, electricity, food, and

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[208] ILO CFA (2002) paragraph 506 on Case No. 1865 (Korea, Republic of)

[209] HRC (2016b) paragraph 71; CESCR (2017) E/C.12/KOR/CO/4, paragraph 38 and 39

[210] Chapter 4.2.2.4

[211] CESCR (2001) E/C.12/1/Add.59, paragraph 20 and 39; CESCR (2009) E/C.12/KOR/CO/3, paragraph 20

[212] The Korea Herald (2018)

[213] Choe (2009)

medical care were cut off by employers and police.[214] Therefore, it was not necessary to deploy riot police, and to use anti-terrorist weapons.[215]

This type of police intervention is often used to break strikes, even though the strikes do not result in 'endangering life' situation. Law enforcing authorities have, mindlessly, judged strikes as illegal or obstruction of business, based on the reasoning of the four elements for justifying strikes. Then they have thought that their 'operation' to break strikes and arrest workers therein, is justified as practice of their duty. However, the measures mentioned above should not be taken, even if the strikes are illegal, or the strikes cause 'endangering life' problems. It is because the measures are not only a violation of the right to strike, but also violation of the freedom from inhuman and degrading treatment.

5.3 Concluding remarks

In Korea, restrictions on the right to strike have been piled up on each restriction. And broad application of 'obstruction of business' to strikes is the most important key of the restrictions. Strikes that lack one of the four elements for justification are considered as illegal strike. Next steps are sending police to break the strikes due to their illegality, prosecuting union leaders and workers for initiating an illegal strike and participating in it. Final step is to make leaders and workers accountable for 'loss of revenue or other damages arising from work stoppage'. UN special rapporteur Maina Kiai stressed that the strike is 'by its nature designed to interrupt the normal operations of a business or employer', so 'it is inherently disruptive'.[216] Moreover, there are several businesses, of which work stoppage does not endanger life, personal safety or health of the whole or part of the population, that are defined as 'essential public-service business' and 'essential business', so that enjoyment of the right to strike of the workers therein is seriously limited.

Therefore, laws prescribing above mentioned abuse should be reformed, and cases judging strikes as obstruction of business should be repealed.

[214] IndustriALL (2009)

[215] The Korea Herald (2018)

[216] HRC (2016b) paragraph 73

6 Conclusion

6.1 Research question revisited

My overall research question in this thesis was asking if restrictions on the right to strike in the Republic of Korea is compatible with the right to strike as set out in international human rights law. I specified this question further by asking three related sub-questions, by first asking if the right to strike really exist in international human rights law system; second, if the right to strike exists in international human rights law system, what are the contents, and principles of it; and third how well ensured the right to strike is in the Republic of Korea.

As to the first sub-question, I conclude that the right to strike exist in international human rights law system, because it is clearly mentioned in ICESCR, and can be derived from ICCPR, and ILO Convention No. 87. Moreover, the right to strike should be considered as a part of customary international law. Therefore, all the countries have legal obligations to respect, protect, and fulfill the right to strike, regardless of them ratifying provisions addressing the right to strike.

To the second sub-question, I conclude that every forms of work stoppage to further social and economic interests of workers can be considered as strike. And the act of strike should be protected unless it is endangering life, personal safety or health of the whole or part of the population. If strike in question causes such situations, the business can be considered as essential service, and the right to strike of workers therein can be limited. However, the number of workers whose enjoyment of the right to strike should be minimized. For this purpose, only limited number of workers, that stoppage of their work results in endangering life problem, can be prohibited practice of their right to strike as minimum service set by agreement of both parties of labor dispute. If strikes are initiated within businesses considered as essential service, states will be able to use police force for strike-break purpose to respect rights of the others. But this police intervention should be proportionate to the threats that the strike in concern causes.

As to the third sub-question, there is a crime of ‘obstruction of business’ used to accuse, prosecute, and penalize trade unionists and workers for mere fact that they initiated or participated in the strike. In addition, workers in specific business, considered as essential public-service business, or major business of the national defense industry, cannot practice their right to strike, while those businesses should not be considered as essential service within the principles of the right to strike. Police force has been used disproportionally to break many strikes based on the accusation of the obstruction of business which is incompatible with principles of the right to strike.

In conclusion, the answer for the research question of this thesis is that many restrictions on the right to strike in the Republic of Korea is not in conformity with the principles of the right to strike.

Restrictions on the right to strike is wide, serious, and multilayered in the Republic of Korea. The laws, customs, and cases constituting these violations should be revised and removed, because the Republic of Korea has legal obligations under the right to strike.

Besides unlawful limitations mentioned above, there are many other restrictions in the Republic of Korea. Some fall within the principles of the right to strike, and some do not. This research covers most important and most harmful limitations on exercise of the right to strike, and claims that those should be removed. Not all the problems will be fixed only with revision of them. However, it will be one of the most effective way to protect the right to trike as primary tool for furtherance of social and economic interests of workers.

6.2 Beyond research question

It is necessary to research more about the 'obstruction of business', because it definitely has the greatest influence on practicing the right to strike. The article 314.1 of criminal act of the Republic of Korea is adopted 'from the former Japanese criminal law, which in turn was taken from the former French criminal law'[217]. Historically, the crime of obstruction of business was imposed in the former French, and the former Japanese criminal law 'to forcefully prohibit labor movements.'[218] However, both domestic and international legal system we have now, guarantee collective actions, including strike, as a human right 'to achieve equality in labor management relations'. Therefore, maintaining this provision is not only unnecessary, but also wrong. This is why ILO CFA has recommended many times that the Republic of Korea should take measures to prevent the obstruction of business being misused for strike-breaking purpose.[219]

So that, it will be meaningful to find out why this 'obstruction of business' is still in use in the Republic of Korea for strike-breaking purpose, and why other countries that had such provision in their criminal act changed their regulations.

[217] 2007Do482. Dissenting Opinion

[218] Both were revised in a way that minimizes the scope of respective provisions.

[219] ILO CFA (2017) paragraph 93 on Case No. 1865 (Korea, Republic of)

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ECHR	*European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950.
ESC	*European Social Charter (revised)*, 3 May 1996.
ICCPR	*International Covenant on Civil and Political Rights*, 16 December 1966.
ICESCR	*International Covenant on Economic, Social and Cultural Rights*, 16 December 1966.
ILO Convention No. 87	*Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)*, adopted in 09 July 1948.
ILO Constitution.	*ILO Constitution*, originally established in 1919, modified by the amendment of 1922, 1945, 1946, 1953, 1962, and 1972.
Statute of the ICJ	*Statute of the International Court of Justice*, 24 October 1945.
UDHR	*Universal Declaration of Human Rights*, 10 December 1948.
VCLT	*Vienna Convention on the Law of Treaties*, 23 May 1969.

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Appendices

Appendix 1: Reservations and Declarations on article 22 of the ICCPR

	Country Name	Reservation / Declaration
1	Algeria	The Algerian Government interprets the provisions of article 8 of the Covenant on Economic, Social and Cultural Rights and article 22 of the Covenant on Civil and Political Rights as making the law the framework for action by the State with respect to the organization and exercise of the right to organize.
2	Australia	Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Common wealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interest of public order (*ordre public*), the right is reserved not to introduce any further legislative provision on these matters.
3	Austria	Articles 19, 21 and 22 in connection with article 2 (1) of the Covenant will be applied provided that they are not in conflict with legal restrictions as provided for in article 16 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
4	Belgium	Articles 19, 21 and 22 shall be applied by the Belgian Government in the context of the provisions and restrictions set forth or authorized in articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, by the said Convention.
5	Egypt	... Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it ...
6	France	The Government of the Republic declares that articles 19, 21 and 22 of the Covenant will be implemented in accordance with articles 10, 11 and16 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.
7	Germany	Articles 19, 21 and 22 in conjunction with Article 2 (1) of the Covenant shall be applied within the scope of Article 16 of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms.
8	India	With reference to articles 4 and 8 of the International Covenant on Economic, Social and Cultural Rights, and articles 12, 19 (3), 21 and 22 of the International Covenant on Civil and Political Rights the Government of the Republic of India declares that the provisions of the said [article] shall be so applied as to be in conformity with the provisions of article 19 of the Constitution of India.
9	Japan	Recalling the position taken by the Government of Japan, when ratifying the Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise, that

	Country Name	Reservation / Declaration
		`the police' referred to in article 9 of the said Convention be interpreted to include the fire service of Japan, the Government of Japan declares that `members of the police' referred to in paragraph 2 of article 8 of the International Covenant on Economic, Social and Cultural Rights as well as in paragraph 2 of article 22 of the International Covenant on Civil and Political Rights be interpreted to include fire service personnel of Japan."
10	Lao People's Democratic Republic	The Government of the Lao People's Democratic Republic accepts Article 22 of the Covenant on the basis that Article 22 shall be interpreted in accordance with the right to selfdetermination in Article 1, and shall be so applied as to be in conformity with the Constitution and the relevant laws of the Lao People's Democratic Republic.
11	Malta	The Government of Malta reserves the right not to apply article 22 to the extent that existing legislive measures may not be fully compatible with this article.
12	Monaco	The Princely Government, recalling that the exercise of the rights and freedoms set forth in articles 21 and 22 entails duties and responsibilities, declares that it interprets these articles as not prohibiting the application of requirements, conditions, restrictions or penalties which are prescribed by law and which are necessary in a democratic society to national security, territorial integrity or public safety, the defence of order and the prevenion or crime, the protection of health or morals, and the protection of the reputation of others, or in order to prevent the disclosure of confidential information or to guarantee the authority and impartiality of the judiciary.
13	New Zealand	The Government of New Zealand reserves the right not to apply article 22 as it relates to trade unions to the extent that existing legislative measures, enacted to ensure effective trade union representation and encourage orderly industrial relations, may not be fully compatible with that article.
14	Qatar	The State of Qatar shall interpret that the term "trade unions" and all related matters, as mentioned in Article 22 of the Covenant, are in line with the Labour Law and national legislation. The State of Qatar reserves the right to implement such article in accordance with such understanding.
15	Republic of Korea	The Government of the Republic of Korea [declares] that the provisions of [...], article 22 [...] of the Covenant shall be so applied as to be in conformity with the provisions of the local laws including the Constitution of the Republic of Korea.

Appendix 2: Reservations and Declarations on article 8 paragraph 1 (d) of the ICESCR

	Country Name	Reservation / Declaration
1	Algeria	The Algerian Government interprets the provisions of article 8 of the Covenant on Economic, Social and Cultural Rights and article 22 of the Covenant on Civil and Political Rights as making the law the framework for action by the State with respect to the organization and exercise of the right to organize.
2	Bahrain	The obligation of the Kingdom of Bahrain to implement article 8, paragraph 1 (d), of the Covenant shall not prejudice its right to prohibit strikes at essential utilities.
3	Bangladesh	The Government of the People's Republic of Bangladesh will apply articles 7 and 8 under the conditions and in conformity with the procedures established in the Constitution and the relevant legislation of Bangladesh.
4	Egypt	... Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it ...
5	France	The Government of the Republic declares that it will implement the provisions of article 8 in respect of the right to strike in conformity with article 6, paragraph 4, of the European Social Charter according to the interpretation thereof given in the annex to that Charter.
6	India	With reference to articles 4 and 8 of the International Covenant on Economic, Social and Cultural Rights, and articles 12, 19 (3), 21 and 22 of the International Covenant on Civil and Political Rights the Government of the Republic of India declares that the provisions of the said [article] shall be so applied as to be in conformity with the provisions of article 19 of the Constitution of India.
7	Japan	Japan reserves the right not to be bound by the provisions of sub-paragraph (d) of paragraph 1 of article 8 of the International Covenant on Economic, Social and Cultural Rights, except in relation to the sectors in which the right referred to in the said provisions is accorded in accordance with the laws and regulations of Japan at the time of ratification of the Covenant by the Government of Japan. Recalling the position taken by the Government of Japan, when ratifying the Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise, that `the police' referred to in article 9 of the said Convention be interpreted to include the fire service of Japan, the Government of Japan declares that `members of the police' referred to in paragraph 2 of article 8 of the International Covenant on Economic, Social and Cultural Rights as well as in paragraph 2 of article 22 of the International Covenant on Civil and Political Rights be interpreted to include fire service personnel of Japan.
8	Kuwait	The Government of Kuwait reserves the right not to apply the provisions of article 8, paragraph 1 (d).

9	Mexico	The Government of Mexico accedes to the International Covenant on Economic, Social and Cultural Rights with the understanding that article 8 of the Covenant shall be applied in the Mexican Republic under the conditions and in conformity with the procedure established in the applicable provisions of the Political Constitution of the United Mexican States and the relevant implementing legislation.
10	Monaco	The Princely Government declares that in implementing the provisions of article 8 relating to the exercise of the right to strike, it will take into account the requirements, conditions, limitations and restrictions which are prescribed by law and which are necessary in a democratic society in order to guarantee the rights and freedoms of others or to protect public order (*ordre public*), national security, public health or morals. Article 8, paragraph 2, should be interpreted as applying to the members of the police force and agents of the State, the Commune and public enterprises.
11	New Zealand	The Government of New Zealand reserves the right not [to] apply article 8 to the extent that existing legislative measures, enacted to ensure effective trade union representation and encourage orderly industrial relations, may not be fully compatible with that article.
12	Norway	Subject to reservations to article 8, paragraph 1 (d) "to the effect that the current Norwegian practice of referring labour conflicts to the State Wages Board (a permanent tripartite arbitral commission in matters of wages) by Act of Parliament for the particular conflict, shall not be considered incompatible with the right to strike, this right being fully recognised in Norway."
13	Qatar	The State of Qatar shall interpret that what is meant by “trade unions” and their related issues stated in Article 8 of the International Covenant on Economic, Social and Cultural Right[s], is in line with the provisions of the Labor Law and national legislation. The State of Qatar reserves the right to implement that article in accordance with such understanding.
14	Trinidad and Tobago	The Government of Trinidad and Tobago reserves the right to impose lawful and or reasonable restrictions on the exercise of the aforementioned rights by personnel engaged in essential services under the Industrial Relations Act or under any Statute replacing same which has been passed in accordance with the provisions of the Trinidad and Tobago Constitution.