The Right to Strike

By Paul Mackay[1]

INTRODUCTION

New Zealand restricts the right to strike to matters related to collective bargaining and certain health and safety matters. However, in 2012, the International Labour Organisation's Committee of Experts on the Application of Conventions and Recommendations (CEACR) argued that the Freedom of Association and Protection of the Right to Organise Convention 1948 (C87) embodied a right for workers to strike over workplace, economic and social issues. This is despite the fact that C87 contains no reference to strikes whatsoever.[2] Unsurprisingly, the CEACRs view created global concerns, particularly among employers.

SOURCE OF THE RIGHT TO STRIKE

There were several threads to the CEACR's argument.

First, the CEACR said it was mainly on the basis of Articles 3 and 10 of C87 that a number of principles relating to the right to strike were progressively developed."

Then it stated that the absence of specific provisions establishing a right to strike did not prevent such a right from being read into C87.

Next it said, the right to strike was discussed in 1959 by the International Labour Conference Committee on the Application of Standards (CAS) without any objection from any of the constituents.

Somewhat confusingly, the CEACR then highlighted that the right to strike was broadly referred to in the legislation of the great majority of countries, as well as by several international and regional instruments, which the CEACR felt justified its view.

This was confusing because it didn't fit with the preceding two statements. It seemed illogical to cite national practice as a basis for interpreting an international document as providing an otherwise unstated right. The fact that most countries have legislated a right to strike does not make C87 the source of that right. To the contrary, it is more supportive of a view that countries have regulated strikes themselves in the face of a lack of clear guidance from a globally authoritative source.

Finally, the CEACR stated its belief in the idea that C87 supported a right to strike lay within the broader international recognition of this right which, also confusingly, appeared to conflict with its statement that it was mainly on the basis of Articles 3 and 10 of C87 that a number of principles relating to the right to strike were progressively developed.

Overall, in setting out its reasoning for the existence of a right to strike as part of an international treaty, the CEACR gave apparently contradictory primacy to both C87 and international practice.

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[2] https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174846.pdf

FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE CONVENTION 1948 (No 87) - Articles 3 and 10

Article 3 of C87 states:

> *1. Workers' and employers' organisations [emphasis added] shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.*
>
> *2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.*

Article 10 of C87 states:

> *In this Convention the term organisation means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.*

Article 3(1) relates unequivocally to the right of workers *and employers* to set up *organisations* and for those organisations to be able to plan and organise their programmes and activities free from official interference. However, the CEACR chose a limited focus on workers activities only when it said that Article 3 "…sets out the right of workers to organise their activities and to formulate their programmes…".

On face value, Article 3 doesn't extend to individual workers and employers, because the rights in Article 3 are conferred upon organisations. Article 10 emphasises Article 3's focus on "organisations" by defining that term.

The emphasis on organisations is significant, because workers' organisations per se cannot go on strike; only workers employed by employers can strike, even if those workers are also members of a workers' organisation. Likewise, employers' organisations cannot lock out workers but the employers of those workers can.

Clearly, there are no explicit grounds on which the rights conferred by Article 3 can underpin a right to strike by workers, whether or not they are members of workers' organisations. A right to strike therefore can only be inferred from Article 3 through the use of wider rules of interpretation.

However, wider interpretation is difficult because Article 3 relates equally to employers, to whom the right to strike does not apply. The CEACR made no reference to employers at all, let alone addressing the right of employers to lock out (the corollary of the right to strike).

For its part, Article 10 confers no jurisdiction; it merely defines the meaning of the term "organisation".

Consequently, there are no sound grounds to argue that Articles 3 and 10 of C87 support the implication of a right to strike of any nature or scope into C87.

INTERNATIONAL PRACTICE

Notwithstanding citing C87 Articles 3 and 10 as at least partly authoritative, the CEACR relied more on external indicators and custom and practice to interpret a right to strike into C87. It opined that the right to strike lay within a broader international framework, including the International Covenant on Economic, Social and Cultural Rights of the United Nations.

The International Covenant on Economic Social and Cultural Rights of the United Nations

Of several international instruments cited by the CEACR as supporting a right to strike only the International Covenant on Economic, Social and Cultural Rights of the United Nations may be regarded as being global in scope. Inconveniently for the CEACR's argument, the Covenant requires exercise of the right to strike to conform with the laws of the country concerned. The only constraint countries may place on strikes in their national laws is imposed by Covenant Article 8(3) which prohibits nations that have ratified C87 from establishing laws that contravene C87's guarantees.

However, the CEACR did not cite Covenant Article 8(3), possibly because C87 does not mention the word strike let alone guarantee a right to strike. Nor did the CEACR cite Article 8 of C87, which is couched in exactly the same terms as Covenant Article 8, i.e. that the exercise of the rights in C87 is subject to national laws which in turn must protect C87's guarantees.

A "guarantee" is a *"promise or assurance, especially one in writing, that something is of specified quality, content, benefit, etc."*[3] Since C87 does not make promises or assurances of a right to strike, and since all other international instruments that do provide a right to strike require exercise of that right to conform to national laws and practices, there is arguably no legal basis for the CEACR to find national restrictions on the right to strike to be in breach of C87.

This left the CEACR with limited grounds to argue that international practice justified interpretation of a right to strike into C87.

The Vienna Convention on the Law of Treaties

The apparent heart of the CEACR's interpretation of C87 as providing a right to strike is that *"subsequent practice over a period of 52 years"* justifies such an interpretation. In support of its argument, the CEACR cited Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("the Vienna Convention"), which provide:

Custom and practice

Article 31 provides that a departure from the plain meaning of the words of the treaty is possible, inter alia, because of *"any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."*

However, as mentioned there is strong evidence that there has been no agreement on the issue since the right to strike was first discussed in 1948. Indeed, the CEACR devoted a whole page of its 2012 report to recalling employers' objections to the notion that a right to strike could be read into C87.

Surrounding circumstances and intent of the parties

Without support from C87 itself, the International Covenant on Economic, Social and Cultural Rights or Article 31 of the Vienna Convention the CEACR was left with only Article 32 of the Vienna Convention to justify implying a right to strike into C87. Article 32 permits the use of extraneous information to validate the prevailing circumstances and the parties' intent leading up to the establishment of the convention.

[3] www.http://Dictionary.com. This definition would cover outcomes as well

However, the CEACR did not rely heavily on this perspective, possibly because the preparatory work and records of the discussion in 1948 both supported the view that the omission of a right to strike was deliberate.

WHAT IS A STRIKE?

Having discussed its justification for implying a right to strike into C87, the CEACR examined the scope of that right, stating that strikes relating to economic and social policies, including general strikes, were legitimate and therefore should not be regarded as purely political strikes which were not covered by C87.

Interestingly, in asserting that non-political strikes were legal strikes the CEACR effectively interpreted a document silent on the right to strike on any ground as permitting strike action on specified grounds. This is shaky ground indeed. Nonetheless, the CEACR opined that strikes were a basic right "*which must be enjoyed by workers*".

But, rights have real meaning only when considered in the context in which real events and situations give life to the right. If the right to strike is indeed a basic right, it is at the practical level that it must be examined.

The practical level

The CEACR, in distinguishing between political (unlawful) and other (lawful) strikes in an international *labour* standard, implicitly recognised that strikes involve a withdrawal of labour.

By extension, since withdrawal of labour requires a workplace from which to withdraw, it can be inferred that strikes are workplace issues, whereas political strikes and, arguably, strikes over economic and social policies, are not.

While workers join together for the general purposes of protecting and advancing their collective employment interests, they typically join a particular workers' organisation because it covers their work, i.e. the nature of their work is the common denominator between workers who associate with each. It follows that it is the worker's work that creates the practical context of freedom of association for any given worker.

Thus, if, as argued by the CEACR, the right to strike is a corollary of the right to freedom of association[4] and the worker's work is the practical context for the worker's right to freedom of association, then the worker's work must also be the practical context for the right to strike. Furthermore, as strikes are inextricably linked to the work the worker does, strikes arguably are similarly linked to where the worker works.

However, this interpretation undermines the CEACR's attempt to imply into C87 a right to strike beyond the workplace (e.g., sympathy strikes and strikes on economic or social grounds) because this idea is inconsistent with the facts that Article 3 of C87 gives equal rights to workers' and employers' *organisations.* An employer can only exercise the right to lock out in the workplace context. Nor can an employer lock out employees because the employer feels strongly about economic and social issues created by governments.

[4] This the basic premise on which the CEACR has articulated its views.

Overall, none of the grounds cited by the CEACR as underpinning its belief that a right to strike can be implied into C87 had merit.

WHEREIN REALLY LIES THE RIGHT TO STRIKE?

Most workplace strikes are, in fact, linked to collective bargaining. Arguably, the CEACR's views on the right to strike are more consistent with the principles of the Right to Organise and Collective Bargaining Convention 1949 (C98) than they are with C87. The association of the right to strike with collective bargaining was in fact raised in the discussions at the ILC in 1949. At that meeting, two specific attempts were made to introduce a right to strike into the proposed C98. Both were rejected. This remains the case today.

All this supports an argument that any nexus between freedom of association and the right to strike can only be weak. Certainly, this appears to be the view of the parties to other international instruments cited by the CEACR; for instance, the Charter of the Organisation of American States, the Charter of Fundamental Rights of the European Union and the European Social Charter and European Social Charter (Revised). All clearly link the right to strike with the ability to bargain collectively, subject to national laws. No examples cited by the CEACR contain references linking the right to strike to freedom of association.

Strike or Protest?

Taking all the above into account, the CEACR seems to have confused the right to *strike* with the general right to *protest*, one of the most precious rights in any democracy.

Socio-economic issues transcend workplaces and may indeed have nothing to do with conditions of work. Protest is the democratically available response to such issues, whereas strikes, by definition, connote the withdrawal of labour from a workplace.

As mentioned earlier, the corollary of the right to strike is an employers' ability to lock employees out. Protests per se are not part of an employer's armoury in terms of bringing pressure to bear on employees. It is unheard of, nor is there supporting logic, for employers to protest government actions or policies by locking out their employees.

Sympathy strikes

Having espoused the right to the broadest form of protest for workers (general strikes), the CEACR, paradoxically, also supported the notion of sympathy strikes.[5]

This was paradoxical because supporting sympathy strikes tacitly also supported the workplace context of strikes rather than the broader civil right to protest exercised outside the workplace context.

Restrictions and guarantees around the right to strike

The idea that the right to strike is more appropriately associated with collective bargaining than with freedom of association is still further strengthened by the CEACR's views of permitted restrictions and compensatory guarantees.

[5] Sympathy strikes may be defined as the withdrawal of labour by workers at a workplace or workplaces not involved in the dispute causing the strike, in solidarity with the striking workers at the workplace(s) directly affected by the dispute.

Despite implying a right to strike into C87 in the most general terms, the CEACR then recognised that the right to strike may be constrained; e.g.,

> *"States may restrict or prohibit the right to strike of public servants 'exercising authority in the name of the state."*

The important point here is that the ability to restrict public servants' right to strike is *not* derived from the deliberations of the CEACR or anywhere else for that matter. It is in fact sourced directly from Article 6 of the Right to Organise and Collective Bargaining Convention 1949 (C98). This permits states to exclude public servants engaged in the administration of the state from the right to bargain collectively.[6]

The absence of a right to strike for these public servants therefore stems directly from the nationally determined restriction of their right to bargain collectively, not from any internationally defined restriction on freedom of association.

At the same time the CEACR was open to the right to strike being restricted with respect to essential services. Importantly, the CEACR tacitly accepted the right of member states to restrict the right to strike in circumstances where striking would endanger the lives, safety or health of the *whole or part* of the population. This of itself would suggest that, in practice, only member states are in a position to determine the extent and nature of a right to strike applicable to workers in their country.

IS THERE A NEED FOR GLOBAL LABOUR STANDARD ON THE RIGHT TO STRIKE?

At least since 1948, countries have explicitly regulated the right to strike themselves. They have not needed the sort of guidance a globally applicable labour standard would provide. The few international instruments that do recognise a right to strike all make that right subject to national laws and regulations and almost all link that right with collective bargaining. None link the right to strike directly to the concept of freedom of association.

The reasons why it was not possible to agree on the nature and scope of the right to strike in 1948 were much the same as they are today. The negotiations necessary for resolving this conflict risk a compromise that pleases no one and leads to the conclusion that it may be better to let sleeping dogs lie.

CONCLUSION

Many, if not most, states have adopted regulations on the right to strike because the global position is deliberately silent on the matter. The fact so many have done so also suggests that the need for a global labour standard on the right to strike has passed. It is telling that no globally applicable international instrument is explicit about the existence and nature of a right to strike and even more telling that all international instruments establishing a right to strike explicitly restrict its exercise by means of national laws and regulations.

Ultimately, the right to strike arguably is not a corollary of the universal principle of freedom of association but instead is a nationally governed workplace issue mostly but not uniquely linked to collective bargaining and should be confined to the workplace(s) where the motivating dispute exists.

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[6] C98 Article 6- "This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way."