THE DEVELOPMENT OF THE RIGHT TO STRIKE IN INTERNATIONAL INSTRUMENTS
- The Viking and Laval Cases Revisited

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Part 1: The Introduction to the Essay

1. Introduction

1.1. Summary

Freedom of association and collective bargaining has been recognized, not only by most of the national legislation, but also by a few international organs. Among these, the leading standard setter is the United Nation organ the International Labour Organization. By setting standards, especially by the Conventions No. 87 and 98, which the Member who has ratified the Convention has to follow, the ILO has been able to make a difference. However, the ILO is not autocratic ruler in the field of standard setting on the labour market. There is also the Council of Europe, which is the collection of the ministers of foreign affairs in countries in Europe. The Council of Europe is the creator of the European Convention on Human Rights and the European Social Charter, both which are important for the right of workers. They believe that the right to strike is a fundamental right, which needs protection. Another important organ on the field is the European Union, the creator of the European Union Charter on Fundamental Rights where the right to strike is protected, and the supervisory organ of the European Union, the European Court of Justice.

In 2007 the European Court of Justice came with two decisions concerning the right to strike, these are the Viking1 and the Laval2 cases. These two cases have been widely discussed, not only about the restriction on the right to strike but also how the Court could go against the common opinion about the right to strike. The decisions have had great impact on the labour market in Europe. Not only in those countries that the cases concerned, Finland and Sweden, also around Europe. The right to strike has taken a hit, and the future is rather uncertain on the right to strike.

Furthermore, freedom of association and the right to strike is a truly important subject; sadly, the right has through the European Court of Justice judgments been more restricted, almost hollowed. The right to strike is seen as a fundamental right; this means that it is an important

2 Case C-341/05 Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and others [2007] ECR I-11767 (hereafter Laval).
and definite right. What the future holds is unknown and we can only guess what will happen, hopefully the right to strike will be seen as the vital fundamental right as it is.

1.2. Background

The arguments for protection of labour standards in international treaties have been requested since the middle of the 19th century (1838). Since the industrial revolution a number of international conventions have been signed and ratified, however, the right to strike has been neglected. The protection of the right to strike has been proven problematic to include in multilateral instruments, yet, in 1961 it happened. The right is since then protected in the European Social Charter of 1961.

Collective bargaining helps to develop fair rules on the labour market, instead of a market where people have no rules to follow. It protects workers from abuse of economic power, which are their employer. The full respect of the right to organize and collective bargaining, including the right to strike, is a central tool to improve working conditions, and solve labour disputes, as well as, achieving social justice, decent work, economic development, and stability in societies. It is also an important human right for the citizens of the European Community.

1.3. Terminology

This essay is about the scope of the right to strike. With the scope of the right to strike means which meaning the concept of the right has. The scope of the right to strike has been widely discussed through the years and its meaning differs from national, international, and European Community law. I have chosen to limit myself to analyse the scope of the right to strike in international instruments, issued by the International Labour Organization, the Council of Europe, and the European Union. These organs have through charters, conventions, and supervisory bodies been able to develop the scope of the right to strike. I have in my way of finding the scope of the right to strike analysed the judgments, recommendations, conventions, and charters from these instruments.

The focus of the essay has been, except the scope of the right to strike, the judgment by the European Court of Justice in Viking and Laval, due to fact that the discussion on the right to strike began here. Another view that has been discussed is the judgments by the European
Court of Human Rights in Demir and Baykara\(^3\), Enerji\(^4\), and Danilenkov\(^5\). The judgments from the European Court of Justice and the European Court of Human Rights contain two different approaches to the right to strike, which is why I have discussed the relation between the cases, as well as, the different views stated in the international instruments mentioned above.

I have not been analyzing different national legislation that would carry the essay too far. Neither have I analyzed those judgments, conventions, nor charters which contain the right not to join a trade union. I have limited the essay to only the positive right to strike, as well as, the scope of the right.

In some parts of the essay I have used term ‘collective actions’ as a synonym to ‘the right to strike’. This is only an euphuism for the same word and should not be confused with ‘collective bargaining’, which is the discussion to meet a collective agreement.

1.4. The Purpose

The aim of this essay is to investigate the aspect and scope of the right to strike today. The purpose is also to analyze how the scope of the right to strike has developed through the years. This aim has being met by analyzing the development of the right in conventions, charters and judgments derived from the different international instruments. More, the essay also analyzes the concept of the right to strike in the international instruments, in order to sort out the true meaning of the right to strike. Last, the aim of this essay is to find the right to strike in the instruments and see how widely or narrowly the right is recognized. Also, to find in which cases the right is seen as a fundamental right which is worthy protection. This essay also concerns to find how the right to strike is restricted, and in which cases it encounters additional restrictions. I have also tried to make a conclusion in what the future will hold regarding the right to strike, and discussed what will happen if the right to strike will not be protected as a fundamental human right.

1.5. Material and Method

The material that has been used is judgments, conventions, and charters. Most prominent are the ILO Convention No. 87 and 98, the decisions made by the Committee on Freedom of

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\(^3\) Demir and Baykara v. Turkey, (34503/97) ECHR 2008-11-12 (hereafter Demir and Baykara).


\(^5\) Danilenkov and others v. Russia, (733/01) ECHR 2009-07-30 (hereafter Danilenkov).
Association, the European Social Charter, and its supervisory organ the European Committee on Social Rights, as well as, the European Convention on Human Rights and Fundamental Freedoms, and its supervisory organ the European Court of Human Rights. Also, the European Union Charter of Fundamental Rights created by the European Union and last the judgments made by the European Court of Justice. Except these mentioned above a large amount of information has also been found in doctrine, written by prominent professors in employment law and knowledge of the labour market. The material that has been used concerns only international laws and decisions.

The method I have used is to read multiple judgments, decisions, conventions, charters and doctrine. I have tried to find doctrine both before 2007 and after, due to the Viking and Laval cases to get a picture of the development of the right to strike. The same strategy was used with the judgments by the relevant Courts. I did a historical research to see the development and thereby get a better understanding of the discussion of the right to strike.

To find central doctrine on the field I have, to a large extent, gone through one book and by its citations found more books and articles on the subject. I have also systematically been looking for relevant material by searching after doctrine in different databases and on the library.
Part 2: The Right to Strike in Viking and Laval

This part studies to which extent the judgments from the ECJ, Viking and Laval, have impacted on the right to strike. The debate of the right to strike started with these two cases and has developed the last couple of years. In this part the background and the judgments will be given, as well as, a clarification of what the ECJ said in the cases. This is an important step to understand why the discussion about the right to strike is so heated today.

2. The Beginning of the Discussion: The Viking and Laval Cases

2.1. The Background of Viking and Laval

2.1.1. The Viking case

Viking Line (Viking) was a Finnish shipping company, which owned the vessel Rosella. Viking wanted to sell the vessel, and thereby reflag the ship from Finnish to Estonian. To be under Finnish law, Viking had to pay the Finnish wages, which were more costly than Estonian wages. Therefore, wanted the shipping company hire Estonians instead and pay them less. The Finnish Seamen’s Union (FSU) preceded by taking industrial action to prevent the sale, and the union received support from a circular issued by the International Transport Workers’ Federation (ITF), which asked all the members to support the FSU by not entering into negotiations with Viking. The dispute was settled for the duration of a new collective agreement. However, when Estonia was admitted to the EU in 2004, Viking brought action against the ITF in the UK courts, requesting an injunction preventing further industrial action on the basis that it was contrary to the right to free establishment protected under Article 43 (now Article 49 Treaty on the Functioning of the European Union (TFEU)). A judgment was first given in Viking’s favour; however, on appeal the Court of Appeal lifted the injunction, referring a series of questions to the ECJ. These were: first, the application of Article 43 (now Article 49 TFEU), and second, the interpretation of Council Regulation (EEC) No 4055/86, applying the principle of freedom to provide services to maritime transport between member states and between member states and third countries.6

6 Viking.
2.1.2. The Laval Case

A Latvian company, Laval un Partneri Ltd (Laval), hired out workers to a Swedish company, L & P Baltic Bygg AB (Baltic), (Laval and Baltic were owned by the same person, they will hereby be referred to as Laval). The construction work was performed and completed in Sweden. In June 2004 the Swedish Building Workers’ Union (Bygggnads), contacted Laval, with a request that Laval should enter into collective bargaining with the union. Laval concluded an agreement with a Latvian building workers’ union instead, which gave Laval the right to give lower wages and less advantageous terms and conditions for the Latvian workers than the Swedish collective agreement would have. Bygggnads responded by taking industrial actions, including secondary actions by the Swedish Electricians’ Union, in order to convince Laval to sign a collective agreement with the union. The Unions’ goal was to prevent Latvian labour to undercut the cost of Swedish labour. Laval brought an action in the Swedish courts in December 2004, in order to obtain an injunction that the collective action was unlawful. Laval wanted the collective actions to stop and compensation for the losses during the action, the company argued that certain aspects of Swedish law directly discriminated against foreign service providers.7

Laval claimed that the Swedish court should obtain a preliminary ruling from the European Court of Justice (ECJ). Laval also wanted the Swedish court to, in interim, to abolish the industrial actions taken by Bygggnads. The Swedish court found that there was no probable cause that the action taken by Bygggnads was unlawful. In September 2005 the Swedish court decided to request for a preliminary ruling about two questions. These were: first, the interpretation of Article 12 EC and 49 EC (now Article 56 TFEU) and the scope of the right to take industrial actions in potential breach of free movement of services8, and second, the interpretation of Posted Workers Directive 96/71/EC.9

In May 2007 the Advocate Generals Maduro in Viking and Mengozzi in Laval, delivered an opinion on the cases. They stated that the right to take collective actions was a fundamental right, which is protected by the EU laws. However, the right can be limited regarding the freedom of movement. The Advocate Generals also showed an understanding for the

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7 AD 2005 nr 89.
8 Lex Britannia, the rules justify a Swedish trade union to force a collective agreement on a party which already has a foreign agreement.
9 Laval.
Scandinavian labour market model, however, the right to collective actions has to be in proportion to the protection of the workers and the discouragement against social dumping.

In December 2007 the ECJ left its reference on preliminary ruling on both the Viking and Laval case.

2.2. The Judgments of Viking and Laval

2.2.1. The Viking Judgment

Essentially, the Court followed the opinion submitted by the Advocate General regarding the Viking case. The Court recognized, for the first time, the right to take collective actions as a fundamental right within European Community law (EC law). However, the right to strike might not be without restrictions, as reaffirmed by Article 28 of the European Union Charter of Fundamental Rights, which states that the right to strike is protected in accordance with EC law and national law. Furthermore, the right to take collective actions as a fundamental right does not mean that it falls outside the scope of Article 43 EC (now Article 49 TFEU). The court states further that the free movement of establishment in Article 49 TFEU has horizontal direct effect, which means in this case, that employers can take trade unions to national court to get a judgment if the collective action taken is legitimate. In this case the ECJ stated that the collective actions taken by the ITF is a limitation on the free movement in Article 49 TFEU. The limitation on free movement can be accepted if it has a legitimate aim and are motivated by overriding public interest, such as, freedom of expression and freedom of assembly. The restriction on free movement has to meet the needs of the means, and not go beyond what is proportionate. The economic and social aims must be weighed against each other. The ECJ stated that collective actions which restrict free movement can be justified if the purpose is to protect workers’ employment or their working conditions, in this case, the members of the union that are affected by the re-flagging of the vessel. However, if the collective action is justified and within its proportion, and legitimacy is up to the national courts to decide.\(^{10}\)

2.2.2. The Laval Judgment

Interesting is the fact that only a week after the judgement of Laval was released, the Court goes even further and takes the proportionality test itself.

\(^{10}\) Viking, para. 72-74 and 90.
The ECJ continued to develop the right to strike as a fundamental right and the scope of the freedom, which was set out in the Viking case. However, in this case the ECJ applied the proportionality test itself. The Court noted that collective actions, which have been taken to protect workers of the host state against social dumping, may constitute an overriding reason of public interest, which justifies a restriction on one of the fundamental freedoms, in this case the right to strike.

The Court started out by stating that the Swedish collective agreement for the building sector contained specific rules; these rules, however, can depart from the legislative provisions and give better benefits. This was the case regarding the collective agreement from Byggnads and the provisions in Article 3.1 in the Posted Workers Directive (PWD). Thus, certain terms of the collective agreement departed from the provisions in Swedish law, the collective agreement pointed out more favourable terms than the legislation regarding working time and annual leave. According to the Swedish collective agreement in the building sector, parties are also required to undertake come pecuniary obligations, such as, a certain per cent to an insurance company and a specific ‘penny supplement’. However, these obligations are not specifically referred in Article 3.1 of the Directive, yet by signing the collective agreement these obligations have to be followed.11

The Court points out that the right of a trade union to take collective action to force a collective agreement on a Member State, which have more favourable terms than both Article 3.1 of the Directive and national legislative provisions, will make it less attractive, or hard, to carry out construction work in Sweden, and therefore creates a restriction on the freedom to provide services within the purpose of Article 49 EC (now Article 56 TFEU). Furthermore, the Court continues by stating that to ‘ascertain minimum wage rates to be paid to their posted workers, those undertakings may be forced, by way of collective action, into negotiations with the trade unions unspecified duration at the place at which the services in question are to be provided’.12

To conclude, Byggnads tried to force a collective agreement on Laval, which had more favourable terms than the rules in the Article 3.1 PWD and Swedish legislation. This was an unjustified action due to the fact that the posting company should not be forced to follow rules

11 Laval, para. 78 and 19, and 83 and 20.
12 Laval, para. 99-100.
that are more favourable than those in the PWD, due to the difficulties to know which obligations that the company should follow.\textsuperscript{13}

The strike action taken by Byggnads can, according to the Court not be justified. Byggnads and the Swedish government said that the action was taken to protect fundamental rights, which are recognized by Community law. However, the Court stated that ‘if that is the case, it must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it’. Byggnads had according to the Court gone too far and the strike action for the protection of workers was not taken in proportionality with the limitation on free movement.\textsuperscript{14}

The Court also stated that the principle of Lex Britannia, which has had an important role in the Swedish labour law system, was discriminating and, thereby, declared it unlawful.\textsuperscript{15}

\textbf{2.3. Clarification on What the Court Says}

The Viking ruling came on December 11 2007, and the Laval ruling came on December 18 the same year.

By Viking and Laval, the ECJ stated for the first time an explicit recognition of the right to strike as a fundamental right. It stated that collective actions were taken for the protection of workers, which implies that the right to strike has to be a fundamental right.\textsuperscript{16} In Laval, the Court stated that the right to strike did not only aim for the improvement of the Latvian workers condition, but also as a protection of Swedish workers from social dumping.\textsuperscript{17}

However, the recognition of a right to collective actions was far from definitive in either case. The ECJ rejected arguments that industrial action should be excluded from examination under Articles 43 and 49 in the EC Treaty (now Articles 49 and 56 in TFEU), which had been made by analogy with the treatment of collective agreements under competition law. Instead, the Court considered that when human rights are at issue, such as freedom of expression and freedom of assembly; the exercise of right to strike does not fall outside the scope of EC

\textsuperscript{13} Laval, para. 99, 109-111.
\textsuperscript{14} Laval, para. 101-102.
\textsuperscript{15} Laval, para. 120.
\textsuperscript{16} Viking, para. 42-44, and Laval, para. 89-91.
\textsuperscript{17} Laval, para. 102-103.
Treaty provisions regarding free movement. However, the limitation on free movement can be justified so far as the collective action is proportionate. 18

Furthermore, the ECJ found that trade unions could be liable under EU law for limitation of an employer’s freedom of movement. It was therefore not only the labour laws of EU Member States that were subjected to scrutiny, but also the actual action taken by trade unions. 19 It would consequently seem that whenever industrial action is called by a trade union in any member state, which is a threat to free movement of goods, services, establishment, or of workers between EU member states, that union can be required to defend its conduct under EU law.

The ECJ can by summary, be stating four important and almost revolutionary facts when it comes to the right to strike. First, the right to strike is recognized as a fundamental right, which means that even blockades are possible.20 Second, when a cross-border strike has an effect that is limiting the free movement of service, the limitation has to be capable of being justified. 21 Third, the limitations can in principle be justified by a convincing reason of general interest, such as the protection of workers, on the condition that it is found that they are appropriate to assure the achievement of the legitimate objective being aimed at and do not go further than is necessary for achieving this objective.22 Last, with regard to the question of whether the collective action does not go further than is necessary to achieve the objective being sought, the referring judge must in particular examine whether, firstly, by virtue of the national legislation and the law concerning collective agreements that applies to this action, those who conduct the collective action do not possess other means which have a less restrictive impact on the freedom of establishment in order to bring the collective negotiation with Viking to a successful conclusion, and, secondly, whether these are exhausted before commencing this action. 23

To conclude, due to the judgments in Viking and Laval, the right for trade unions to take collective actions is restricted. A question is if the Court has in Laval, at all, looked at national legislation or the custom at the labour market, does the ECJ have any knowledge on how it

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19 Viking, para. 62, and Laval, para. 98.
20 Laval, para. 92.
21 Laval, para. 97.
22 Viking, para. 90.
23 Viking, para. 87.
works? The Court stripped the trade union of all its rights to negotiate and to call an action. A trade union has in Sweden a minimum, stated in law, right to negotiate. Also, the right to strike is stated in the Swedish constitution. However, the ECJ made it really clear with both Viking and Laval that free movement of establishment and services, which are fundamental rights in European law, have to prevail over another fundamental right, i.e. the right to strike.
**To Conclude Part 1**

The ECJ stated as written above, that the right to strike is a fundamental right, however, not without restriction. It continues by saying that the right to strike has to be weighed against other interest, such as, the right of free movement. Therefore, the strike action has to be in proportion to the interests that needs protection, and the limitation on free movement cannot be bigger than the protected interest. The proportionality test was in Viking forwarded to the national Court, yet in Laval the ECJ made the test itself.

With these new facts in mind it is interesting to see where it came from. There has been a wish from multiple international instruments that the right to strike should be explicitly stated as a fundamental right. The development regarding the right to strike has its origin in labour standard and the protection of these standards. From a wish to give the right to strike a fundamental role in the labour market, the ECJ has nearly hollowed this right. The Court stated that the right to strike has to fall when it comes to the four freedoms.

The discussion is heated, were the reasons and decisions in Viking and Laval right or wrong, good or bad? The effects of the cases can have great impact on the labour market and for the workers in it. How are the workers’ rights protected, and in which instruments? To know why the development and the discussion is what it is, we shall go back to see what multiple international instruments say about the right to strike and the judgement from Viking and Laval.

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24 Novitz, the Right to Strike, p. 91-91, and Herzfeld Olsson, Facklig föreningsfrihet, p. 117-119.
Part 3: The Right to Strike in International Instruments

This part studies to which extent the International Labour Organization, the Council of Europe, and the European Union, and its Member States, have adopted international instruments which are containing a right to strike. As we will see, a stark discrepancy between the instruments exists.

It all started around World War 1 with the International Labour Organisation (ILO), which is the oldest of the specialized agencies of the United Nations system. ILO is the premier standard-setting system in the world; its Conventions and Recommendation is the root of most worldwide labour and social legislation implemented over the past years. ILO came to life to cure the harsh working condition and to decrease the poverty of workers that dominated during the industrial revolution. The development on the employment field continued after World War 2 with the Council of Europe (CoE), ten European states came together to found the Council of Europe. Their goal was to put an end to the dictatorship, safeguard peace, and uphold human rights, democracy, and the rule of law throughout Europe. Another European community was established, almost simultaneously, the Organisation for European Economic Cooperation (OEEC), which also has delivered peace, stability, and prosperity. This is the organization which today is called the European Union (EU). It has helped raise living standards, as well as, progressively build a single European market, where people, goods, services, and capital can move freely across Member States. The goal of the European Union is to create unity between the countries that earlier had been in war with each other. This is being done by building a common market for the European countries.

These instruments have, in their own way, been trying to set standards for the labour market. Through multiple organs, both executive and supervisory, the instruments have grown and become more important throughout the years, and is now vital for the workers’ rights.
3. The Right to Strike in the ILO

3.1. The Beginning and the Constitutional Objectives of the ILO

The idea of a global organization with the purpose to protect workers started in the beginning of the 20th century, when the industry was developing in an increasing scale. The idea came through at the end of World War 1. In October 1919 delegates gathered in Washington DC to open the first International Labour Conference. With hope and anticipation, they were about to set in motion elements of the Treaty of Versailles. One month later the Conference had adopted six Conventions, six Recommendations, and nineteen Resolutions to the International Labour Organization (ILO).

In the Preamble to the ILO Constitution there are three basic reasons stated, for which the ILO was created, it states ‘last universal peace can be established only if it is based upon social justice; it was urgent to improve the working conditions of large numbers of people, as injustices, hardship and privation produced such unrest that the peace and harmony of the world were imperiled; and the failure by any nation to adopt humane conditions of labour was an obstacle in the way of other nations which desired to improve conditions in their own countries.’

These three basic reasons, also called the three constitutional objectives, can be shortened to, social justice, fair competition, and freedom of association. The first objective is social justice, which is the political dimension of the Constitution and was viewed as a means to ensure global stability and universal peace. The new world order, that successfully had been established in Versailles, was now secure and would not be undermined by social unhappiness and cause political instability. This was the first step towards protection of labour standard and the security of the dignity of workers. The second objective is fair competition, which is

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27 They were called the workers clause formed the basic principles of international labour law. These principles are highly important and special, they say: ‘that labour is not simply a commodity; freedom of association for employers and workers; payment of wages which ensure a decent living wage; eight hour work day or 48-hour work week; weekly rest; elimination of child labour and regulation of the work of young persons; equal pay for work of equal value; equivalent economic treatment for foreign workers; and organization of inspection services’.
29 Bartolomei, Potosky, Sweeney, The International Labour Organization, p. 5. Also see the Preamble of Declaration of Philadelphia.
30 Novitz, the Right to Strike, p. 96.
the economic dimension of the ILO and the prevention of falling protection of labour standards through international cooperation. The ILO was the first international organization which tried to arrange the terms of free trade so countries would not engage in unfair competition on the basis of lower labour standards. The third objective is freedom of association, which is the social dimension of the ILO and is the right for workers and employers to organize. This theme is an important link between trade union and employer representation, which is an essential factor to sustain the progress that is being made. \(^{31}\)

In conclusion, social justice in the form of the right to decent work remains at the heart of ILO objectives. The prevention of unfair competition in trade also remains as an important theme of current ILO debates. Lastly, the principle of freedom of association seems to have withstood the challenges of the latter part of the twentieth century and emerged as almost universally recognized core labour standards. This has enabled the tripartite structure of the ILO to survive. Furthermore, pressure is still placed on Member States to implement ILO standards on national level.\(^{32}\)

### 3.2. The Structure of the ILO

#### 3.2.1. Tripartism

As written above, ILO is a global organization with a power of setting standards on the labour market. The power and success has come from the unique and characteristics of the structure of the organization. ILO has a tripartite nature, which is a peculiar feature. While the Member States have the ultimate power to ratify international conventions, the voting, drafting, monitoring, and enforcement of labour standards within the ILO is a joint responsibility of employer, worker, and State representatives. This means that within the organization these three groups mutually precede the labour standards.\(^{33}\) Tripartism is based on the idea of unity and solidarity between the productive forces of a nation. They are working together in a climate of social peace to improve life and work within the nation. Such a philosophy, with its democratic undertones, stresses conciliation and its diverse attitude, entailed two main fundamental thoughts: an equally separation between the three components of tripartism, and a fairly homogeneous socio-economic system among the Member States.\(^{34}\) This is why the decisions made by the ILO have a unique authority. Of course, it also implies that

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\(^{31}\) Novitz, the Right to Strike, p. 96.

\(^{32}\) ibid., p. 106.

\(^{33}\) ibid., p. 107.

\(^{34}\) Ghebali, The International Labour Organisation, p. 29.
compromises have been made for the three different groups, not forgetting different ideologies and regional interests making the decisions take a longer time.\textsuperscript{35}

### 3.2.2. Executive Organ

The executive organ of the ILO is the Governing Body, which has the general responsibility for coordinating the activities for the Organization. What it does is to set the agenda for the annual International Labour Conference (ILC), which has the key role of standard setting, such as, conclude Conventions and adopt Recommendations. The Governing Body also appoints the Director-General, who provides strategic guidelines for the Organization in the form of policy proposals. The Governing Body also elects and creates Committees which deal with particular matters that are up for question. These are, as well as the ILO itself, of tripartite nature. These Committees are the Drafting Committee for Conventions and Recommendations, the Resolutions Committee, the Selections Committee, and the vital Credentials Committee. These Committees’ tasks are to report back to the plenary meeting of the Conference, which then votes on the proposals they make.\textsuperscript{36}

### 3.2.3. Supervisory Organ

The supervisory organ of the ILO is an overlapping multiple machinery, which is working to reinforce one another. When a State ratifies a Convention an obligation to send a report and to become subjected to observation is implied. This supervision and technical examination is made by the Committee of Experts on the Application of Conventions and Recommendations (CEACR). After the CEACR has provided its comments the Conference Committee on Application of Standard (CCAS) select a matter to publicly discuss. Cases of serious breach are then identified, and are published in the ‘special paragraph’.\textsuperscript{37}

In recent times, two special procedures have been created in respect of freedom of association. These are the Fact Finding and Conciliation Commission on Freedom of Association (FFCC), and the Governing Body on Freedom of Association (CFA). These were created mainly to monitor the compliance of Conventions No. 87 and 98. The CFA would make preliminary examinations of allegations concerning trade unions rights submitted by the ILO. The CFA would be required to decide whether the Governing Body should attempt to

\textsuperscript{35} Bartolomei, Potobsky, Swepston, The International Labour Organization, p. 10.
\textsuperscript{36} Novitz, the Right to Strike, p. 106-108.
\textsuperscript{37} Bartolomei, Potobsky, Swepston, The International Labour Organization, p. 67, and Novitz, the Right to Strike, p. 186.
secure the consent of the government subjected to refer the case to the FFCC, which would screen the complaints.\textsuperscript{38}

In addition, any question or dispute relating to the interpretation of the Constitution of the ILO can be submitted to the International Court of Justice (ICJ). The ICJ has only been giving judgments on the matter of the ILO a few times and never about freedom of association or the right to strike. \textsuperscript{39}

3.3. The ILO on the Right to Strike

3.3.1. The Right to Strike in ILO Conventions No. 87 and 98

There is no clear guarantee of the right to strike in the ILO Constitution or Conventions. The basic protection of a right to strike is therefore developed by the ILO Supervisory bodies such as the Fact Finding and Conciliation Commission on Freedom of Association (FFCC) and the Committee on Freedom of Association (CFA). Freedom of association is, on the other hand, stated in the ILO Conventions No. 87 and 98.

These two core ILO Conventions concerning freedom of association, Convention No. 87 on Freedom of Association and Protection of the Right to Organize 1948, and Convention No. 98 on the Application of the Principles of the Right to Organize and to Bargain Collectively 1949. These two are now seen as the fundamental conventions regarding human rights. As stated above the right to strike is not explicitly mentioned in these Conventions, yet in 2000 there was a suggestion made by the International Trade Union Rights (ICTUR), that it was time to revise and modernize the content of the Conventions. The aim was to clarify the workers’ rights, including the right to strike.\textsuperscript{40}

In Article 10 of Convention No. 87, the basis of a right to strike is set down. The Article defines what a worker organization is and it can be any organization that ‘for furthering and defending the interests of workers’. This definition is of clear fundamental importance, defining the boundaries where the rights and guarantees are recognized and where they are applicable, and consequently protected by the Conventions, in so far as they achieve the stated objectives.\textsuperscript{41}

\textsuperscript{38} Novitz, the Right to Strike, p. 189.
\textsuperscript{39} ibid., p. 187.
\textsuperscript{40} ibid., p. 122.
\textsuperscript{41} Gernigon, Odero, Guido, ILO, p. 12.
3.3.2. Jurisprudence by the Committee on Freedom of Association

The jurisprudence of the CFA shows an explicit wish for a right to strike to be acknowledged in the ILO Convention and/or Recommendation. As early as 1952, CFA declared strike actions to be a right and it laid down the basic principles underlying this right. Over the years, the CFA has recognized that strike action is a right and not simply a social act. Also, the CFA made it clear that the right to strike is a right which workers and their organizations are entitled to enjoy. The Committee reduced the number of categories of workers who may be deprived of the right to strike, as well as, the legal restriction on its exercise, which should not be excessive. Finally, CFA linked the exercise of the right to strike to the objective of promoting and defending the economic and social interests of workers; last, the CFA stated that the legitimate exercise of the right to strike should not entail prejudicial penalties of any sort, which would imply acts of anti-union discrimination.42

The first report of the CFA mentioned two cases which concerned strike activity. Unfortunately no principle was formulated according the legitimacy of the right to strike. Case No. 2 (Venezuela), concerned the dissolution of 46 petroleum unions, following a strike which broke out on oil fields following the end of a collective agreement. The CFA noted only that the dissolution of these trade unions had not been submitted to the proper courts, and not about the right to strike.43 In the second report made by the CFA, Case No. 28 (UK-Jamaica) Jamaican police had used troops to break strikes and prevent public meetings; CFA stated that ‘[t]he right to strike and that of organising union meetings are essential elements of trade union rights, and measures taken by the authorities to ensure the observance of the law should not, therefore, result in preventing unions from organising meetings during labour disputes’.44 In this Case the CFA boldly propounded a principle, containing the essence of organizing.

From 1954 to 1956, the CFA’s guidance in the right to strike varied greatly from case to case. In some cases, the Committee would merely state that it is not called upon to give an opinion on the question as to how far the right to strike in general should be regarded as constituting a trade union right.45

42 ibid., p. 11.
43 Case No. 2 Venezuela, 1st report of the CFA (1952), para. 119.
44 Case No. 28 (UK-Jamaica), 2nd report of the CFA (1952), para. 68.
45 Case No. 60 (Japan), 12th Report (1954), para. 53.
In the 23rd Report from the CFA, the Committee became more committed to the protection of the right to strike. In Case No. 111 (USSR), the CFA stated that ‘the right to strike, subject to any partial and temporary restrictions laid down by law, is generally regarded as an integral part of the general right of workers and their organisations to defend their economic interests’. The case concerned the Soviet Government which gave the information that the workers would get a penalty if they participated in the strike. In the aftermath of Case No. 111, the CFA began to claim its right to address complaints relating to the right to strike. In Case No. 163 (Burma) and Case No. 169 (Turkey), the CFA suggested that freedom of association and the right to strike were linked together. The CFA stated that ‘allegations relating to the right to strike are not outside its competence when the question of freedom of association is involved’. The Committee was disappointed at the Government of Turkey for not making the changes to its legislation, which the CFA had requested. This decision showed that the CFA was willing to take a more proactive approach regarding freedom of association and the right to strike.

More cases followed and the result was that the CFA has ever since 1961 been willing to criticize any state which has not taken sufficient steps to ensure protection of the right to strike. In Case No. 1581 (Thailand) from 2002, the CFA stated that the right to strike is ‘one of the essential means through which workers and their organizations may promote and defend their economic and social interests.’

To conclude, according to these statements the right to strike is a protected right, and a vital element of freedom of association, although subjected to certain restrictions, such as, limited to those economic and social interests. The right to strike is therefore seen as a socio-economic right, due to the fact that it improves workers’ economic and social rights, also the right to strike is recognized as being connected to workers’ civil liberties and right to democratic participation.

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48 Novitz, the Right to Strike, p. 196.
51 Novitz, the Right to Strike, p. 196, 290.
3.3.3. The Committee on Freedom of Associations’ Interpretation of the Right to Strike

The development of the principle that the right to strike is a vital element of freedom of association can be explained through other international instruments such as the European Social Charter. The right to strike is stated in Article 6 of the Charter, and also in Article 8 of the International Covenant on Economic and Social Rights of Workers. The desire to follow the trend was strong in the world; however, the ILO preceded these developments.

Yet, freedom of association can be interpreted in two rather different ways. One view is that freedom of association should be regarded as a civil liberty, which means that it is an individual right, and not a collective entitlement. Consequently, the actions of the collective action are not themselves protected and strike actions are not regarded as a legitimate extension of the liberty of freedom of association. However, the CFA has taken another approach when it interpreted freedom of association. CFA recognized that the right to organize is a function of individual liberty, but, if the workers were unable to pursue their own interest within the organization, the liberty would have no meaning. In the absence of a right to strike, it would be (almost) impossible for workers to achieve fair working conditions. Therefore, the CFA recognizes that within freedom of association, there is not only a right of workers and employers to freely form organizations, but also the right to pursue collective activities for the defense of workers’ occupational, social, and economic interests.52

Important to remember is that the primary goal of the ILO is social justice, which is prioritized over other economic goals. Social justice involves the improvement of working conditions, as well as, the ability of workers to participate in making the decisions which affect their working lives. The CFA states that it has made direct reference to these constitutional goals when it has interpreting the constitutional terms for freedom of association and the right to strike.53

3.3.4. Acceptance of the Principle; the Right to Strike is Included in Freedom of Association

Within the ILO, the Governing Body has routinely endorsed the CFA’s findings. Also the FFCC has applied CFA’s principles to its investigations. The CEACR has, in its findings, reached the same conclusion as the CFA. However, the CEACR’s adoption of CFA

52 ibid., p. 197.
53 ibid., p. 198, and the ILO Convention No. 87 and 98.
jurisprudence has been criticized by employer delegates in the ILO Conference Committee. The employer representatives say that the ILO Conventions No. 87 and 98 cannot give the right to strike a global, detailed, precise, absolute, and unlimited right based on the text in the Conventions. When the workers’ group, on the other hand, has responded by criticizing the employers’ group change in opinion since 1989, when it before fully supported this principle. The workers’ group endorses the CFA for confirming the right to strike as a right within freedom of association.

In the last two years this debate has become more heated. In 2001, Conference Committee on the Application of Standards, the employers’ group declined to support the recommendations of the Committee of Experts on the subject of the protection of the right to strike in Belarus and Colombia. The employers’ group continues to criticize the CFA jurisprudence by saying that the Committee is ‘a conciliation, mediation and fact-finding body’, with no legal mandate; its sole role is to inform the Governing Body of reported infringements of freedom of association. 54

3.3.5. Recent Developments

3.3.5.1. Your Voice at Work

One of the latest addition to the existing ILO supervisory procedures on the right to strike was the follow-up mechanism set up in 1998, ILO Declaration on Fundamental Principles and Rights of Workers. The first is an annual review of the extent to which those Member States which have not ratified one of the core Conventions No. 87 and 98, and have not fulfilled the standards contained in them. The second is called Your Voice at Work which is a global report, concentrating on the core labour standards, Conventions No. 87 and 98. Your Voice at Work stressed that the right to strike was only a narrow right, which is to be exercised as a last resort, subject to certain restrictions. However, the view taken of the legitimate scope of industrial action is potentially more limited than what the CFA considers. The same global report also connected freedom of association and the effectiveness of the right to strike to workers’ participation in workplace decision making and freedom of speech. It claimed that ‘good governance of the labour market based on respect for these principles and rights can contribute to stable economic, social, and political development’. 55

54 Novitz, the Right to Strike, p. 199-203.
55 Novitz, the Right to Strike, p. 205.
3.3.5.2. Global Jobs Pact

When the financial crisis struck the world in 2008 the global unemployment, poverty and continued distress for enterprises increased. The ILO decided in June 2009 at the annual Conference, with the participation of government, employers’ and workers’ delegates from ILO Member States to unanimously adopt a Global Jobs Pact. This global policy instrument addresses the social and employment impact of the international financial and economic crisis. It promotes a productive recovery centered on investment, employment and social protection.

The Pact is designed to guide national and international policies aimed at stimulating economic recovery, generating new jobs and providing protection to working people and their families. As well as the importance of the respect of freedom of association, the right to organize and the effective recognition of the right to collective bargaining, which leads to enable a mechanism for a productive social dialogue.

The Pact has gained continued recognition and is sustained by both global and regional organizations. The Economic and Social Council of the UN (ECOSOC) endorses the Pact, as well as, at the G20 summit in Pittsburg\textsuperscript{56} in November 2009.\textsuperscript{57}

The Pacts states how important collective bargaining is for the development of fair rules at the labour market. Further, how vital collective bargaining is for the protection of workers against abuse from the power of economics.\textsuperscript{58} Recovery requires a wage-led increase in social protection, social dialogue, and collective bargaining.

3.4. Restrictions on the Right to Strike in the ILO

3.4.1. A Peaceful Strike Action

The basic principle of the right to strike is that it is a right and not simply a social act. As said above, the CFA declared strike action to be a right and laid down the basic principle underlying this right. ILO recognized the right to strike to be one of the principal means

\textsuperscript{56} World leaders welcomed it as an ‘an employment-oriented framework for future economic growth’.


\textsuperscript{58} Workers’ meeting on the 60th Anniversary of Convention No. 98 - The Right to Organize and Bargain Collectively in the 21st Century, Geneva, 12-15 October 2009, p. 4.
which workers and their associations may legitimately promote and defend their economic and social interests. The right to strike is, according to the ILO, a fundamental human right.59

However, the ILO’s supervisory bodies contain no definition of the right to strike, which allow a definitive conclusion to be drawn about the legality of the different ways in which the right to strike may be exercised. Moreover, some types of strike actions, which are not merely typical work stoppages, have been accepted by the CFA, provided that they are conducted in a peaceful manner. The Committee has stated that ‘[w]hen the right to strike is guaranteed by national legislation, a question that frequently arises is whether the action undertaken by workers constitutes a strike under the law. Any stoppage, however brief and limited, may generally be considered as a strike. This is more difficult to determine when there is no work stoppage as such but a slowdown in work (go-slow strike) or when work rules are applied to the letter (work-to-rule); these forms of strike action are often just paralyzing as a total stoppage. Noting that national law and practice vary widely in this respect, the Committee is of the opinion that restrictions as to the forms of strike action can only be justified if the action ceases to be peaceful. The Committee considers… that restrictions on strike pickets and workplace occupations should be limited to cases where the action ceases to be peaceful’. 60

The ILO’s opinion is, therefore, that a collective action is justified if it is peaceful. However, there are a few other restrictions on the right to strike, which have been worked out by the supervisory bodies of the ILO throughout its being, which puts restriction on the strike action even though it is peaceful.

3.4.2. Restrictions Developed by the Committee on Freedom of Association

A strike action is not, according to the CFA an absolute right; it has its restrictions, which has been developed by the CFA throughout the years.

First, the strike actions’ aim has to be to improve and secure workers’ rights. Therefore, the underlying aim for the strike must be consistent with the ambition of workers’ rights. The significant question is if the aim of the action is connected to workers’ rights. The Committee of Experts has decided that it is justified for trade unions to express its opinion about questions in general, which concern the trade unions members, as well as, the workers. A

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59Gernigon, Odero, Guido, ILO, p. 11.
60 ibid., p 12.
strike action which is directed against political decisions, must concern political questions that
directly affect members of the trade union, as well as, workers in general which concern
economic and social conditions. However, a strike action which is strictly political is not
protected under the Conventions No. 87 and 98. Strictly political strikes are strike actions
which are directed through political decisions or questions which do not concern workers’
social and economic situation.\(^{61}\)

Moreover, another action which is on the boarder of legitimate or not is sympathy strikes. The
core of the issue is to decide whether workers may declare a strike for occupational, trade
union or social and economic motives which do not affect them in a direct or immediate way.
The CFA stated that ‘a general prohibition on sympathy strikes could lead to abuse and that
workers should be able to take such action, provided the initial strike they are supporting itself
is lawful’.\(^{62}\)

Other restrictions on the right to strike is the general prohibition which means that a
prohibition against trade unions is being limited in its opportunities to secure and protect its
members interests, and to organize, which is contrary to Articles 3, 8, and 10 in Convention
No. 87. A general restriction on the right to strike can, therefore, only be in line with the
Convention under exceptional circumstances, for example, when an acute emergency occurs,
which only happens during a limited time, and only to that extent required to meet current
needs. The acute emergency, to be justified as acute, has to bring a severe national crisis.
Justified examples are serious armed conflict, rebellion or a natural disaster, where the normal
conditions for a state to function do not occur.\(^{63}\)

Further, the right to strike can be limited, or in some cases denied for certain categories of
workers, such as, public officials and workers within essential services. The Committee has
gradually reduced the scope for the availability of these restrictions. According to the
Committee of Experts a prohibition on the right to strike cannot be introduced for others in
the public sector, which does not exercise authority in the name of the state. For example,
even though teachers are employed by the state they are not included in this limitation, as well
as, workers for state-owned companies are not included either. Workers within essential
services can also be included in the private sector. Professions that have been accepted in this
category of workers within essential services are, included but not limited to, firefighters,

\(^{61}\) Herzfeld Olsson, Facklig föreningsfrihet, p. 150-154.
\(^{62}\) Gernigon, Odero, Guido, ILO, p. 16.
\(^{63}\) Herzfeld Olsson, Facklig föreningsfrihet, p. 158.
doctors, and nurses. Professions which are not included in this category, yet not limited to, are teachers, aviation, and banking service.  

Moreover, another restriction is the imposition of minimum service, which means that workers can be forced to work a minimum, if it is crucial for the working sectors’ survival, also which could be crucial for others’ life or health or to national security. A state can impose minimum service in those situations when the working sector is crucial to prevent national crisis, which a strike could contribute to. And last, a minimum service can be established, instead of a strike, within those community services with fundamental importance.

It is important to secure that the minimum service represents a real and exclusive minimum service. This means that the extent of the minimum service shall develop from what is necessary to meet the fundamental needs from the citizens of the nation.

To conclude, according to the ILO, strike action is legitimate if the action is followed by a few prerequisites: first, the obligation to give prior notice of the action; second, the obligation to have recourse to conciliation, mediation, and (voluntary) arbitration procedures in industrial disputes as a prior condition to declaring a strike, provided that the proceedings are adequate, impartial and speedy and that the parties concerned can take part at every stage; third, the obligation to observe a certain quorum and to obtain the agreement of a specified majority; fourth, the obligation to take strike decisions by secret ballot; fifth, the adoption of measures to comply with safety requirements and for the prevention of accidents; sixth, the establishment of a minimum service in particular cases; and last, the guarantee of the freedom to work for non-strikers.

Last, the CFA has emphasized that the responsibility for declaring a strike illegal should not lie with the government of a Member State, but with an independent body which has the confidence of the parties involved, especially in those cases which the government is a party of the dispute.

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64 Herzfeld Olsson, Facklig föreningsfrihet, p. 160.
65 ibid., p. 163, also Gernigon, Odero, Guido, ILO, p. 20-21.
66 Bartolomei, Potobsky, Sweepston, The International Labour Organization, p. 197-200.
67 Gernigon, Odero, Guido, ILO, p. 25.
68 Gernigon, Odero, Guido, ILO, p. 32.
3.5. The ILO on Viking and Laval

In 2010 the right to organize and collective bargaining Convention No. 98, had its 60th anniversary, and with that, the Convention is more relevant than ever due to the growing need for a labour market in a globalized environment. The Convention is of fundamental importance to the realization of decent work and social justice in the world. It is important that a dialogue is being established, and in particular about collective bargaining, which is a useful tool to reach economic recovery, since the financial crisis in 2007-08. Collective bargaining gives the workers a voice, which enables a way to innovate the decision making process and can maximize the impact of crisis response to the needs of real economy, while ensuring meaningful protection of workers’ rights.69

Further, the Committee states, on one hand, the importance of the development of collective agreements between employers and their organizations and on the other hand, workers’ organizations, whose very reason are to bargain collectively on behalf of the workers they represent. The Committee stresses the fact that the right to organize and to bargain collectively is linked. By regulating terms and conditions of work through social dialogue, and to conclude collective agreements and bargaining, makes an invaluable contribution to social and economic progress, peaceful industrial relation, and social justice, especially in times of crisis. 70

The Committee of Experts stated in 2010, that the principles that have been expressed in Viking and Laval are a limitation of the right to take collective actions. The Committee continues to state that the kind of limitation on the right to strike which was stated in Viking and Laval goes against the Convention No. 87, which contains the right of freedom of association and the protection of the right to organize. 71

This statement can be found in the International Labour Conference 99th Session in 2010, when the British Airline Pilots’ Association referred to the Committee to give an opinion concerning also the restrictions on the right to strike in Viking and Laval.

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3.5.1. British Airline Pilots’ Association against the UK Government

3.5.1.1. The BALPA Comment and the UK Governments Replay

In October 22th 2008 the British Airline Pilots’ Association (BALPA) supported by the International Transportation Federation (ITF), and the Unite the Union on hand, as well as, the Government’s replay on the other, sent a comment to the Committee. BALPA refers to two recent decisions made by the European Court of Justice (ECJ), Viking and Laval, which held that the right to strike was subject to restrictions under EU law. The decision in the ECJ cases would according to BALPA affect them in a negative way; it would limit their right stated under the convention.

Furthermore, the reason for this statement was that BALPA decided to go on strike, following a decision made by its employer, British Airways (BA), to set up a subsidiary company in other EU States. BALPA and BA started to negotiate, however, all the attempts to meet an agreement about the terms and conditions of employment were unsuccessful and the members of BALPA voted to go on strike. Though, the strike action was effectively hindered by the BA’s decision to request an injunction, based upon the argument that the action would be illegal under Viking and Laval. BA said that, if the work stopped, the damages claimed were 100 million pound per day. Under these circumstances, BALPA did not go through with the strike, stating that it would risk bankruptcy if it were required to pay the damages claimed by the BA.

Moreover, the concern expressed by BALPA was that if the UK courts would apply the Viking and Laval decisions, the result would be an injunction against the industrial action.72

The reply from the Government did, however, indicate that the BALPA’s application was misdirected and misconceived. Any adverse impact of Viking and Laval would be important because of the EU law, rather than of any unilateral action by the UK itself. The Government stated further that BALPA’s application was premature since it remained unclear what, and if any, impact Viking and Laval would have on the application of trade union legislation in the UK. Additionally, the Government stated that these judgments would not likely have much effect on trade unions rights since they are only applicable where the freedom of establishment and freedom of movement of services between Member States are at issue.

3.5.1.2. The Committee’s Statement

The Committee started by stating the fact that its task is not to judge on the correctness of the ECJ’s grounds in Viking and Laval, as it set out an interpretation of EU law, based on the right in the Treaty of the European Community, but rather to examine whether the impact of these decisions at national level are such as to reject workers’ freedom of association rights under Convention No. 87.  

However, with serious concern, the Committee saw the practical limitations on the exercise of the right to strike of the BALPA workers in this case. The Committee recognized that the universal threat of an action for damages that could bankrupt the union, possible now in the light of the Viking and Laval cases, creates a situation where the rights under the Convention cannot be exercised. While taking note of the Government’s statement that it is premature to presume what the impact would be of Viking and Laval, the Committee took another view. Since BALPA withdrew its strike action, the Committee considered that there was a real threat to the union’s existence, and that the application for the injunction made by the BA, would likely make the action irrelevant and meaningless. Moreover, the Committee noted the Government’s statement about the impact of the ECJ judgment would only be limited to those cases where freedom of establishment and freedom of movement of service between Member States are at issue, however, in this current globalization, the vast majority of trade disputes today are cross-border. It is important for the workers to effectively negotiate about the conditions and terms that are affecting them, and it would be devastating if this right would be restricted. Finally, the Committee does consider that ‘the doctrine that is being articulated in these ECJ judgments is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention’. The Committee requests that the Government of the UK should review its national legislation and consider appropriate measures for the protection of workers and their organizations to engage in industrial action.

3.6. Conclusion of the ILO

It is interesting to note that, with a few exceptions, until the late nineteenth century, strikes were in generally considered to be unlawful. It is therefore remarkable that the right to strike successively has become a fundamental right which is recognized by a large majority of

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74 ibid., p. 209.
countries bound by the ILO. According to the CFA the right to strike is closely linked with freedom of association, therefore, is the right to strike a part of ILO Conventions No. 87 and 98. The ILO sees the right to strike as a fundamental right which is entitled all workers. The right to strike is, however, restricted to only occur peacefully. The restrictions also include certain categories of workers and the need to protect the society.

Moreover, the ILO supervisory bodies also find the judgments in Viking in Laval to limit the right to strike too much. The ILO believe that the judgments have an impact on the right to strike, which would create a situation where the right cannot be exercised as it should be under the Conventions. The ILO’s opinion is that the right to strike is an important right that is crucial for the protection of workers, and cannot be limited in the way ECJ did. As the prominent standard setter on the labour field, the ILO notes the importance of the right to strike, which should be followed by all Member States.
4. The Right to Strike in the Council of Europe

4.1. The Beginning and Constitutional Objectives

The Council of Europe (CoE) is a regional organization, which does not only affect workers right; it concerns broader social and political objectives. The CoE is therefore not a specialist in labour relations but it has developed an expertise in human rights, as well as, broad competence in a range of political, economic, social, and cultural matters. The CoE developed as a desire to create peace in Europe after World War 2. Winston Churchill was one of the first leaders to point out that Europe needed to, once again, become ‘a European family’. He first spoke in Zurich 1946, setting out his vision. The first step that needed to be taken was the creation of the Council of Europe. At the Hague Congress of Europe in 1948, Churchill was the President of Honour and before candidates from nineteen European States, he said that a European democratic culture could be secured through international cooperation and that this was vital, even at the potential sacrifice of national sovereignty. He also requested for a European Assembly and a Charter of Human Rights as an essential creation for peace in Europe.75

Churchill’s vision of European unity came even further when five more states signed the Brussels Treaty in 1948. The same year in Paris the Convention for the European Economic Cooperation (OEEC), was signed, establishing a united Western Europe. The treaty, which establishes the fundamentals of the Council of Europe, was signed by ten states in May 1949. In this treaty the new order of the organization was settled, which is still the case.

The preamble to the founding document reflects the concerns Churchill laid down in Hague, these were: the pursuit of peace; through international cooperation; and the moral heritage of Europe which is the true source of individual freedom, political liberty and the rule of law. With these objectives in mind, and with the social and economic progress at interest, it was necessary to form a closer association between European States.76 This is stressed again in Article 1 in the Statute of the Council of Europe (Statute), which says that the aim of the Council of Europe is ‘to achieve unity between its members for the purposes of safeguarding and realizing the ideal and principles which are their common heritage and facilitating their economic and social progress’.

75 Novitz, the Right to Strike, p. 126.
76 ibid., p. 127.
The Statute laid down three constitutional objectives called the rule of law, human rights, and fundamental freedoms. These are the three objectives or goals that the Council of Europe has. In Article 3 of the Statute, all Member States has to accept these principles and the Member States has to actively cooperate for these aims to be met.77

The European Convention on Human Rights and Fundamental Freedoms (ECHR) was drafted and signed in 1950 by the Council of Europe. This meaning that the Member States of the Council was bound by the Treaty. The ECHR guarantees civil and political human rights and is the most important instrument of international law coming from the CoE.

In 1951 the Council of Europe and the ILO agreed to cooperate, this meant that all the Member States of the Council of Europe had to meet the standards of the ILO. This was possible due to the obligation set in the Statute. It says that the European States shall participate in the work of the United Nations and other organizations or unions. Therefore, it was now possible for the Council of Europe to ask the ILO Governing Body for advice and to create an organization with tripartite nature.78

There are now 47 79 Member States in the Council of Europe. To be considered a candidate for a membership the state has to be European, accept the constitutional objectives, and collaborate in the realization of the Council’s aims.

4.2. The Structure of the Council of Europe

4.2.1. Executive Organ

The Council of Europe has three main organs: The Parliamentary Assembly with a consultative role, the Committee of Ministers with the power of decision making, and the Secretariat which provides administrative support.

The first organ is the Parliamentary Assembly, originally called the Consultative Assembly, and is a deliberative organ. It can discuss everything within the scope of the Statute. The Assembly makes Recommendations to the Committee of Ministers, and it adopts Resolutions and Opinions, which makes the Parliamentary Assembly the driving force of the Council of Europe. The members of the Assembly are elected by the parliaments of the Member States. The Assembly has no legislative power, but it can invite the Committee of Ministers, as well

77 Statute of the Council of Europe 1949, Article 1.
78 Novitz, the Right to Strike, p.128, for more info ibid., p. 131-147.
as, the Member States to undertake action.\textsuperscript{80} Therefore, different subject areas are dealt with by specialist committees, which are lobbied by NGOs. There are also loose coalitions between political parties present within the Assembly. Right now there are five political groups present.\textsuperscript{81}

The second organ is the Committee of Ministers, which is a traditional intergovernmental body. The members are representatives of their own government, and according to Article 14 of the Statute, they are the Ministers of Foreign Affairs in their home country. The Committee makes binding decisions on the internal organization and arrangements of the Council of Europe. The Committee of Ministers also has the power to set up advisory and technical committees and to make a range of resolutions and recommendations to Member States.\textsuperscript{82} Additionally, the most important function of the Committee of Ministers is the power to consider the ‘conclusion of conventions or agreements’ and ‘the adoption by governments of a common policy with regard to particular matters’.\textsuperscript{83}

The third organ is the Secretariat, which is providing administrative assistance to the Parliamentary Assembly and the Committee of Ministers. The role of the Secretariat is similar to the International Labour Office of the ILO. The Secretary-General, which is the head of the Secretariat, is primarily responsible to the Committee of Ministers.\textsuperscript{84}

\textbf{4.2.2. Supervisory Organ}

The Council of Europe has the capacity to influence the labour standards in Europe via two key instruments, the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the European Social Charter (ESC). The supervisory organ over these two is for the latter the European Committee of Social Rights (ECSR) and the first the European Court of Human Rights (ECtHR). These organs were created to supervise that Member States follow the treaties.

The Council of Europe adopted an instrument to protect the social and economic human rights in 1961, which is the ESC. The ESC is also the first multilateral instrument to contain an explicit provision for the protection of the right to strike. The European Social Charter was revised in 1996, which came into force in 1999, gradually replacing the original 1961 Treaty.

\textsuperscript{81} Novitz, the Right to Strike, p. 130.
\textsuperscript{83} Novitz, the Right to Strike, p. 129.
\textsuperscript{84} \textit{ibid.}, p. 130, and Statute of the Council of Europe, Articles 36-38.
The level of protection and recognition of the rights is far more superior in the ECHR than in the ESC, which is a shame when the right to strike is expressly protected only in the ESC. 85 This has its explanation in that the right to strike is only seen as a socio-economic right and not as a civil and political right, which has received greater protection.

There is a stark contrast between the two instruments when it comes to the remedial mechanism. Early on the availability of a complaint procedure was limited to the ECHR; the implementation of the ESC was monitored only by analysis of State reports. Reforms were made to the ESC supervisory mechanisms and improved thereby its efficacy, but it still does not come close to the ECHR. The judgments of the ECtHR prevail over State interests and must therefore be sent to the Committee of Ministers, which is responsible for overseeing its execution. The conclusions and reports made by the ECSR were on the other hand, less influential. For example, the Governmental Committee and the Committee of Ministers can decide not to follow the recommendation made by the ESC.86

4.2.2.1. The European Court of Human Rights

In 1950, the establishment of a European court, which considered individual complaints was a new phenomenon, and to some, alarming. Earlier, only states had created legitimate subjects of international law and held since then a monopoly on the ability to make complaints before international tribunals. Some compromises had to be made and it took until November 1998 when all the parties accepted the right of an individual petition and the jurisdiction of a single permanent court through Protocol 11. This Protocol established the courts’ judicial system, without any chance of political settlements.87

Moreover, the judgments of the European Court of Human Rights (ECtHR) have, for a long period of time, received respect and attention. The findings of the Court are binding under international law, but do not have direct effect in the courts of the Contracting States. In the last years the Court has made a few decisions in the field of the right to strike, this is a big progress in protecting that right. 88

86 Novitz, the Right to Strike, p. 212.
88 Novitz, the Right to Strike, p. 214.
4.2.2.2. European Committee on Social Rights

When the ESC first was set up, there was no complaints mechanism established. Contracting Parties were only obliged to make reports of their compliance with the Charter, which they had adopted. After this a long and complicated process took place, on average it took between four and six years for a report to be treated. The first reform of the ESC was made in 1989, and the second one in Turin 1991. At this time the procedure was shortened but no significant changes had been made. A more significant change was the Collective Complaints Protocol (CCP) in 1995. It was ratified by the Member States in 1998. In this Protocol, the idea of setting up a system of collective complaints to the ESC similar to the ILO was put into practice. The complaint procedure was to complete the existing reporting mechanism, as well as, increase the participation by worker, employer, and nongovernmental organizations. The organizations would be able to bring complaints, instead of only submitting observations. The process was much shorter and more legitimate.89

The ECSR places legally binding obligations on the Contracting Parties, however, only to the extent that they have adopted provisions contained in the Charter. From the text of the ESC and its additional protocol it shows that the recommendations made by the Committee of Ministers will not be regarded as binding under international law. This is, therefore, a disappointment for the purpose of the right to strike, when it is explicitly secured in this Charter, however, not binding under international law.90

4.3. The Council of Europe on the Right to Strike

The ESC and the ECHR are both recognizing the freedom of association and the right to join and act as a member of a trade union. However, the right to strike is expressly recognized only in the ESC. The ESC has been largely overshadowed by the ECHR. In comparison with the Convention, the Charter has been ‘little known, rarely referred to and often ignored in practice’.91 There are various reasons for this, first is how social-economic rights92 are phrased in the ESC. They are not all guaranteed as minimum standards; instead the Contracting Parties are obliged to promote these rights. However, the ECHR requires a complete guarantee of these rights, which all the Contracting Parties have to follow. Article

89 Additional Protocol to the European Social Charter Providing for a system of Collective Complaints.
90 Novitz, the Right to Strike, p. 223.
91 ibid., p.131.
92 Socio-economic rights mean that the right to strike is of that character. The ability to take a strike action is to improve the workers economic and social welfare, thereby the name, which is protected under the ESC.
20 of the ESC 1996, provides the Contracting Parties to choose which obligations they wish to adopt, therefore, a state can be a part of the Charter without being bound of Article 6(4), which contains the right to strike. The supervisory mechanism which has been created has had an important role in determining its respective status. Individual complaints can be brought before the European Court of Human Rights, while this is not possible under the Charter.93

4.3.1. The European Social Charter and the European Committee on Social Rights

The right to strike is established in Article 6 in the ESC. However, the wording of the Article makes the right to strike narrowly circumscribed. Article 6 concerns the right to bargain collectively, and it seems to only protect workers socio-economic interest. Article 6(4) says that ‘the right of workers to collective action in cases of conflicts of interests, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into’. Yet, despite this apparent limitation on the exercise of industrial actions, the European Committee of Social Rights (ECSR) has adopted a broad interpretation of these terms, ‘[t]here are many circumstances which, apart from any collective agreements, call for ‘collective bargaining’, such as when dismissal have been announced or are contemplated by a firm and a group of employees seeks to prevent them or to serve the reengagement of those dismissed. Any bargaining between one or more employers and a body of employees (whether ‘de jure’ or ‘de facto’) aimed at solving a problem of common interest, whatever its nature may be, should be regarded as ‘collective bargaining’ within the meaning of Article 6’.94 The ECSR considers that strike action may be taken to challenge any decision which could be the subject of collective negotiation. The ECSR sees the right to strike as an individual right, available for all workers.95

4.3.2. The European Convention on Human Rights and the European Court on Human Rights

Freedom of association was viewed as a civil and political right and was therefore included in the ECHR. This right can be found in Article 11(1) of the ECHR ‘everyone has the right to freedom of assembly and to freedom of association with others, including the right to form and join trade unions for protection of his interests’. Therefore, it seems possible to read that the scope of freedom of association is having specific application to workers’ organizations

93 Novitz, the Right to Strike, p. 132.
94 ibid., p. 288.
95 ibid., p. 288.
and their activities. This provision is, however, subject to a second paragraph ‘no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others’.

In 2009 the ECtHR gave three decisions regarding the scope of the right to strike. Until these three cases the Court has seems reluctant to establish the scope of the right. With these cases the ECtHR found guidance with the ILO standards and followed its recommendations and jurisprudence. However, as seen below the development in the ECtHR have not been consistent with the ILO or been moving in the same pace as it has either, until very recently.

4.3.2.1. The Right to Strike Before Demir and Baykara, Enerji, and Danilenkov

The development of ILO jurisprudence was arguably open to the European Court of Human Rights (ECtHR) to establish that a right to strike was an entitled element of freedom of association, however, it did not do so. The Court also, from time to time, referred to ILO standards and the decisions of ILO supervisory bodies in its judgments. Though, neither the Commission nor the Court had been prepared to follow the decisions of ILO supervisory organs on the question of the link between freedom of association and the right to strike. For example, in X v. Ireland, the Commission stated that ‘when interpreting the meaning and scope of freedom of association in Article 11 in relation to trade regard should be had to the meaning given to this term in ILO Convention Nos. 87, concerning Freedom of Association and the Right to Organize’. Moreover, it is stated in the Commission’s report on the National Union of Belgian Police case that ILO Conventions were ratified by almost all the parties to the ECHR, therefore, should Article 11 be interpreted in harmony with international law.

The Court started out by making restrictive interpretation of Article 11(1) ECHR, which resulted in relatively few trade union freedoms which the state is obliged to protect. On various occasions, the Court found against trade unions which claimed the right to consultation, the right to collective bargaining, and the right to strike. Further, the Court found some connection between protection of freedom of association and the right to engage in

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96 Demir and Baykara, Enerji, and Danilenkov.
collective bargaining. The leading case for this conclusion was the Swedish Engine Drivers’ Union case. This case concerned the Swedish government’s refusal to enter into collective agreement with the applicant union. The government wanted to reach an agreement with a larger, more representative organization, on the understanding that the agreement would automatically apply to the applicant’s members. The applicant had already agreed to the actual terms included in that agreement. The Court denied on these facts, the applicant’s right to enter into a separate agreement with the government. The Court left open the question whether there could be a positive right to collective bargaining.\textsuperscript{99} In a later case, Schettini v. Italy, the Court confirmed the legitimacy to exclude certain less representative trade unions, as long as, it is not discriminatory.\textsuperscript{100}

The Court cited the Swedish Engine Drivers’ Union case in subsequent judgments as authority for the proposition that Article 11(1) ECHR does not contain a right to collective bargaining or to enter into a collective agreement. This was a stark discrepancy with the opinion of the ILO Conventions and supervisory mechanism. The development for the right to strike rapidly increased. In a later case, Wilson and the National Union of Journalists and others v. UK, which concerned discrimination against trade union members who wanted to participate in collective bargaining, the ILO Committee of Experts and the ECSR (under the ESC) condemned the UK legislation for enabling employers to give bonuses to workers which did not participate in the collective bargaining.\textsuperscript{101} The ECtHR found ‘by permitting employers to use financial incentives to induce employees to surrender important union rights, the [UK had] failed in its positive obligation to secure the enjoyment of rights under Article 11’.\textsuperscript{102} However, the Court also went back to its earlier statement which was that collective bargaining ‘is not indispensable for the effective enjoyment of trade union freedom’ and that ‘the Contracting States enjoy a wide margin of appreciation as to how trade union freedom may be secured’.\textsuperscript{103}

Moreover, this was consistent with the judgment in National Union of Belgian Police. The Court stated that, although trade unions had a right to be heard under Article 11(1) ECHR, this did not mean the same as a right of consultation, as it was for each State ‘in exercise of its

\textsuperscript{99} Swedish Enigne Drivers’ Union v. Sweden, (5614/72) ECHR 1976-02-06.
\textsuperscript{100} Schettini v. Italy, (29592/95) ECHR 2000-12-09.
\textsuperscript{101} Wilson, the National Union of Journalists and others v. UK, (30668/96, 30671/96 & 30678/96) ECHR 2002-07-02, para. 48.
\textsuperscript{102} ibid., para. 44.
\textsuperscript{103} ibid., para. 44.
power of appreciation’, to choose the means by which to achieve that end.\textsuperscript{104} The Court decided that there was no consistent European practice when it came to consultation of workers, and it refused thereby to impose such a requirement upon Contracting States. This wide margin of obligation was justified on the basis of the multiple industrial relations system in Europe. However, this scope should not be contrasted with the narrow margin of obligation allowed to States in certain cases where negative freedom of association has been at issue.\textsuperscript{105}

As seen, the Courts motivation to protect trade union rights was for a long time reluctant, and it was therefore not surprising that the Court hesitated to recognize the right in Article 11(1) ECHR. What was more surprising at the time was the judgment in another Swedish case, Schmidt and Dahlström v. Sweden.\textsuperscript{106} The Court referred in its decision to the standards of ILO and the requirements of the European Social Charter. The two applicants who had participated in the strike, were exempted from a benefit which were given if not participating, claimed that this would ‘discourage them from henceforth availing themselves of their right to strike’, as an ‘organic right’, included in Article 11(1) ECHR. However, the Court stated that Article 11 contained a statement allowing trade union activity to exist. Yet, it stated that the right to strike was not an essential part of the right to freedom of association, therefore, the State was free to restrict the right to strike.\textsuperscript{107}

A few cases followed in the same trail, the Court observed that the right to strike was not expressly protected in Article 11(1) and could be subjected to limitations by national law.\textsuperscript{108} In addition, in UNISON v. UK, the Court argued that the right to strike, and thereby freedom of association, was unjustifiably limited by virtue of the narrowly explained immunities for industrial action provided under UK statute. The ECtHR stated that ‘the proposed strike must be regarded therefore as concerning the occupational interests of the applicant’s member’s in the sense covered by Article 11 of the Convention.’ This decision goes further than any other in term of its recognition that the right to strike is linked to workers’ right to pursue their working interests under Article 11. However, a very broad margin of appreciation was applied in this case, such as the obligation of the measures taken to restrict industrial actions was not questioned.\textsuperscript{109}

\textsuperscript{104} National Union of Belgian Police v. Belgium, (4464/70) ECHR 1975-10-27, para. 39.
\textsuperscript{105} Novitz, the Right to Strike, p. 228.
\textsuperscript{106} Schmidt and Dahlström v. Sweden, (5589/72) ECHR 1976-02-06 .
\textsuperscript{107} Schmidt and Dahlström v. Sweden (5589/72) ECHR 1976-02-06, para. 40-41.
\textsuperscript{108} Novitz, the Right to Strike, p. 228-229.
\textsuperscript{109} UNISON v. UK, (53574/99) ECHR 2002-02-10.
The Court had a limited understanding of the dynamics of industrial relations and ILO standards, for a long time. However, as a response to the ECJ cases, the ECtHR decided to go in a new direction.

4.3.2.2. Demir and Baykara, Enerji, and Danilenkov; the European Court on Human Rights on the Right to Strike in Article 11(1)

As stated above the ECtHR made three recent judgments in the cases of Demir and Baykara v. Turkey (Demir and Baykara), Enerji Yapi-Yol Sen v. Turkey (Enerji), and Danilenkov and others v. Russia (Danilenkov), which show a bigger understanding for the right to strike. These cases declare that Article 11 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) includes a right to collectively bargain and prohibits an absolute ban on the right to strike.\(^{110}\) The Court explicitly says that the exercise of the right to form and join trade unions include the right to collective bargaining and the right to strike. The first case which was delivered in November 2008 concerned the fact if the right to collectively bargaining was contained with Article 11(1) of the ECHR. Demir and Baykara were representing a trade union and its members, and claimed before the Court that the right to collective bargaining was linked with the right in 11(1) ECHR.\(^{111}\)

The ECtHR noted that the declaration of the right in Article 11(1) had to be strictly interpreted and that it could not harm the very meaning of the right to organize. Restrictions imposed by the state have, therefore, been proved to be legitimate and civil servants could not be treated as ‘members of the administration of the state’. The court continued to state that the right to collectively bargain with an employer in principle had become ‘one of the essential elements of the right to form and join trade unions, guaranteed under Article 11’.\(^{112}\)

Moreover, in the second case, Enerji, which was delivered in April 2009, expanded further on the point made in the earlier Demir and Baykara ruling. The case was about a state prohibition on public sector trade unions from taking industrial action. Members of the trade union Enerji Yapi-Yol Sen who ignored the prohibition were disciplined and the union brought the case to

\(^{110}\) Demir and Baykara v. Turkey (34503/97) ECHR 2008-11-12 (hereafter Demir and Baykara), Enerji Yapi-Yol Sen v. Turkey (68959/01) ECHR 2009-07-30 (hereafter Enerji), and Danilenkov and others v. Russia (733/01) ECHR 2009-07-30 (Danilenkov).

\(^{111}\) Demir and Baykara.

\(^{112}\) Demir and Baykara, para. 154.
the ECtHR, alleging that the ban on strikes interfered with their right to form and join trade unions as guaranteed under Article 11(1).\textsuperscript{113}

The Court acknowledged in this case that the right to strike was not absolute, which means that it could be subject to certain conditions and restrictions. However, the Court held that a ban applied to all public servants was a too extensive restriction. The ECtHR held that the disciplinary action was ‘capable of discouraging trade union members and others from exercising their legitimate right to take part in such one-day strikes or other actions aimed at defending their members’ interests’, was to be amounted as a threat to those rights guaranteed under Article 11(1) ECHR. The strike ban was not in response to a ‘pressing social need’, which the state alleged and the Turkish government had therefore failed to justify the need for the contested restriction in a democratic society.\textsuperscript{114}

Last, is the Danilenkov case which was delivered in June 2009. The case concerned the discriminatory treatment of members of the Kaliningrad branch of the Dockers’ Union of Russia (DUR) by their employer, a private company. The company tried, with different methods, to get the employees to withdraw from the union. The union complained to the Court, relying on Articles 11 and 14 of the ECHR, that the Government had tolerated the discriminatory policies of its employer and had refused to examine its discrimination complaint.\textsuperscript{115}

The Court held, unanimously, that there had been a violation of Article 14 (prohibition of discrimination) taken together with Article 11 (freedom of assembly and association) of the ECHR, on account of the authorities ‘failure to provide effective and clear judicial protection against discrimination on the grounds of trade union membership’. The State had, according to the Court, not provided protection against discrimination related to freedom of association. The Court stressed in particular that any employee or worker should be free to join, or not to join, a trade union without being sanctioned. The Court found that individuals that got affected by discriminatory treatment should be able to ‘challenge it and to have the right to take legal action capable of ensuring real and effective relief’. The Russian state had therefore failed in securing the workers from discriminatory treatment due to their trade union

\textsuperscript{113} Enerji.
\textsuperscript{114} European Industrial Relations Observatory on-line, Sonia McKay, \textit{ECHR upholds right to collective bargaining and to strike}, \textit{“http://www.eurofound.europa.eu/eiro/2009/05/articles/cu0905029i.htm”}, downloaded 2011-08-03.
\textsuperscript{115} Danilenkov.
membership; therefore Russia had violated Article 14 (protection against discrimination in the
enjoyment of rights under the Convention) together with Article 11.\footnote{Danilenkov, para. 124, 131, and 134.}

4.3.3. The Restrictions on the Right to Strike

4.3.3.1. The European Social Charter and the European Committee on Social Rights

The right to strike is explicitly stated in the European Social Charter (ESC), which is the only
instrument that clearly secures this right. However, in the ESC, there is an explicit limitation
on the right as well. In Article 5 of the Charter is the right to organize stated and in Article 6
is the right to bargaining collectively put down. However, in Article 31, of the Charter are the
restrictions which can be made on the rights in the ESC established. A restriction is justified,
‘if the restriction or limitation are prescribed by law and are necessary in a democratic society
for the protection of the rights and freedoms of others or the protection of public interest,
national security, public health, or morals’.\footnote{Herzföld Olsson, Facklig föreningsfrihet, p. 250.}

If a government limits the right to strike, trade unions have the right to appeal against the
decision in a judicial body. The restriction can only be justified if the limitation on the right is
taken to meet certain social needs. The Committee tests thereafter the social needs to see if it
falls under Article 31. If it does, the Committee examines the intervention and tests if it can be
in proportionality with the interest that needs protection.

Furthermore, it is possible to limit the right to strike through collective agreements. This can
be read through Article 6(4), which says explicitly that the right to strike can be limited
through an agreement between the parties. The Committee also made a statement on the latter
‘[t]he Committee took the view that in so far as restrictions on collective action are imposed
by mutual consent of the parties concerned for the purpose of limiting recourse to such action
in the interests of the community or of the users of essential services they are not
incompatible with the Article of the Charter under consideration.’\footnote{Herzföld Olsson, Facklig föreningsfrihet, p. 284.}

Moreover, the ESC also protects the workers within public service. However, according to
Article 31 workers called ‘senior officials and those civil servants attached to the main
departments’, can lose their right to strike. Categories under this concept are ambassadors,
firefighter, prison guards, as well as, workers within essential social functions. However, the

\footnote{Herzföld Olsson, Facklig föreningsfrihet, p. 284.}
evaluation taken by the ESC of which workers that can lose their right to strike, are those that are needed to insure ‘the life of the community’.\textsuperscript{119}

Last, is the requirement of minimum service when a strike action within certain sectors is emerging. The restriction needs first of all to be justified by Article 31 ESC. If a regulation about minimum service shall be established, the sectors that can be exposed are those which are essential for the public service, i.e. those sectors which are indispensable to guarantee other liberties or secure the community, national security, public health and morals. Examples of sectors where a requirement for minimum service is justified are the defense, police, and criminal prosecution.\textsuperscript{120}

4.3.3.2. The European Convention on Human Rights and the European Court of Human Rights

In Article 11(1) of the ECHR the right to organize is explicitly stated. The article says that ‘everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests’. However, to be able to restrict this right the limitation has to follow the conditions in Article 11(2) ECHR. The article says that ‘[n]o restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State’.

Moreover, the European Court on Human Rights (ECtHR) has through its jurisprudence concretized the meaning of the article. Yet, some of the rights in the ECHR are absolute and no restriction is possible. For a restriction on the right in Article 11(1) to be possible, the conditions in Article 11(2) have to be followed. A restriction on freedom of association can therefore only be accepted if the limitation is stated by law. The restriction also needs to meet the requirement that secures the interest given in the article, which are state security, public safety, prevention of disorder or crime, health, and protection of morals or of another’s rights

\textsuperscript{119} ibid., p. 290.
\textsuperscript{120} Herzfeld Olsson, Facklig föreningsfrihet, p. 290.
and freedoms. The Court will after these requirements make a proportionality test to see if the restriction on the right in Article 11(1) is necessary in a democratic society.\textsuperscript{121}

As stated above, the main purpose of Article 11 is to protect individuals’ freedom of association and freedom of peaceful assembly from any intrusion by the state. Therefore, the Court has established that the state has to take positive actions to secure the utilization of that right.

Everyone is protected by the ECHR, and no one is excluded from the right to organize. However, few restrictions on the right to strike have been produced by the Court. In Schmidt and Dahlström, the Court stated that the right to strike is one of the most important means a trade union can use. However, in UNISON, the Court responded to the argument that UNISON’s interest to protect its members should prevail over the other party’s economic interests. The intrusion was in this case necessary for a democratic society. The Court stated that ‘enter into, or remain in, any particular collective bargaining arrangement or accede to its requests on behalf of its members. The Court therefore does not find that the respondant State has exceeded the margin of appreciation accorded to it in regulation trade union actions’.\textsuperscript{122}

To conclude, the ECHR have the restriction for the freedom of assembly and freedom of association stated in Article 11(2). However, for those restrictions to be justified they need to pass a proportionality test accounted by the Court. The ECtHR has in its jurisprudence made few decisions clarifying the restrictions. The Court must have the opinion that trade unions should have a right to strike to protect its members from the government.\textsuperscript{123} In assessing the latest cases made by the ECtHR, the right to strike has become more protected, and is now accounted for in the Article 11(1). Furthermore, what can be read from the latest cases is that the right to strike is an important right for trade unions to protect its members and the need for that right to be protected is truly important.\textsuperscript{124}

4.4. Conclusion of the Council of Europe

The Council of Europe created the ESC and the ECHR due to the wish to protect human rights. The ECHR contains the fundamental human rights, while the ESC contains the socio-economic rights. Further, the recognition of the ECHR is far more widespread than the ESC.

\textsuperscript{121} Herzfeld Olsson, Facklig föreningsfrihet, p. 297.
\textsuperscript{122} Herzfeld Olsson, Facklig föreningsfrihet, p. 318-319.
\textsuperscript{123} ibid., p. 320.
\textsuperscript{124} Demir and Baykara, Enerji, and Danienkov.
This is a shame due to the fact that the right to strike is explicitly recognized in the ESC but not in the ECHR. By the creation of the ESC it is not premature to say that the Council of Europe finds the right to strike important. According to the ESC, as well as, the supervisory organ of the Charter, the ECSR, the right to strike is a fundamental human right which is important to secure the right of workers.

In the ECHR the right to strike is not explicitly stated, however, in Article 11(1) the freedom of association is established. This freedom has been developed by the supervisory organ of the ECHR, the ECtHR. In the beginning the ECtHR was reluctant to give the right to strike protection, but almost as an answer of the ECJ cases the ECtHR established the right to strikes’ position as a fundamental right in three cases. They are Demir and Baykara, Enerji, and Danilenkov. In these cases the ECtHR recognizes the importance of the right to strike for the protection of workers. It says that the restriction on freedom of association cannot have the impact which results in the failure of the protection of workers. Freedom of association needs to involve the right to strike; otherwise freedom of association would have no meaning.

Moreover, a legitimate restriction on the right to strike can only be found in the ECHR Article 11(2), and cannot be enlarged to the extent showed in Viking and Laval. It is therefore safe to say that there is a vast difference in opinion on the right to strike between the Council of Europe and the European Union.125

5. The Right to Strike in the European Union

5.1. The Beginning and Constitutional Objectives

The European Union is a unique economic and political partnership between 27 European countries. It all started as an economic union at the end of World War 2. The aim was to end the wars between European Countries and to start working together. At the Hague Conference in 1948 the Economic and Social’ Resolution was adopted, and was prescient of many initiatives that have been taken in the European Union. The resolution that was adopted in Hague contained recommendations for the mobility of labour, unification of currencies, and coordination of social legislation, which would help Europe to reset. 126

In 1951 six countries: France, Germany, Italy, the Netherlands, Belgium, and Luxemburg, formed the European Coal and Steel Community (ECSC). In this supranational organ, countries which a few years earlier had been in war with each other started to cooperate. The goal was to develop a common production and a joint market for coal and steel. Through the Treaty of Rome the same countries formed the European Economic Community (EEC), which had the aim to expand the common market within industry and agriculture, as well as, setting new economic and social goals.127

As early as in the Treaty of Rome, Member States recognized the need to improve the labour standard. Assistance was provided by the ILO, which had already established the mechanism of the European Regional Conference (ERC) to monitor and respond to industrial and social problems. A group of ILO experts, led by Bertil Ohlin, was formed specifically to study the potential social effects of the European Economic integration. The Ohlin Committee considered that social welfare could be promoted by greater economic integration, which would reward efficient production and promote consumer welfare.128 Instead, minimum standards should be set in accordance with basic ILO standards. The ILO recommendation was broadly accepted and signed by the six in 1956. This report, also known as, the Spaak Report set out the essential objectives of the European integration, which is: free movement of goods, services, establishment, and labour. However, the issue of labour standards arose only

126 Novitz, the Right to Strike, p. 149, and Nyström, EU och arbetsrätten, p. 22.
128 Novitz, the Right to Strike, p. 151.
in relation to regulation of the terms of fair competition, as well as, the equal pay principle in Article 119, which were key factors for transnational standard-setting in the social field.129

After the Treaty of Rome the European Union treaty has been amended four times: the Maastricht treaty and the Social Chapter in 1992, the Amsterdam Treaty in 1999, the Nice Treaty and the Charter of Fundamental Rights in 2003, and the latest in 2009 the Lisbon Treaty.130 Further, during these amendments both important and less important changes have been made in the social field and in labour law. But the European Union (EU) has a few objectives, which they keep on trying to meet. They are ‘to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of an economic and monetary union, ultimately including a single currency;

-to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defense policy which might in time lead to a common defense;
-to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union,
-to develop a close co-operation on justice and home affairs;
-to maintain in full the acquis communautaire and build on it’131

The objectives of the Union shall be achieved while respecting the principle of subsidiarity.132 The European Community intend to provide itself with the resources necessary to reach its objectives and carry out its policies, but with two specific limitations: the Union shall have due regard to the national identity of the Member State, whose systems of government are based on democracy, and the Union shall respect the rights and freedoms as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the result from the constitutional traditions common to Member States as general principles of Community law.133

129 Novitz, the Right to Strike, p. 151.
130 Blanpain, European Labour Law, p. 59.
131 Blanpain, Labour Law and Industrial Relations, p. 25.
132 Subsidiarity means that if the objectives of the Union cannot be sufficient achieved by the Member States, and better achieved by the Union, then the Union shall realize the means.
133 Blanpain, European Labour Law, p. 60.
5.2. The Structure of the European Union

The Treaty of Rome established a new form of European governance, since then the organization has been moving forward without any fundamental change. The structure of the European Community and later on the European Union is special. The Union has to have balance between keeping the Member States’ sovereignty, the deepening of the cooperation between the Member States, and to reach the goals set by the Community. However, the European Union got a renewed structure due to the Lisbon Treaty. The new Treaty is called the Treaty on the Functioning of the European Union (TFEU), which is the old Rome Treaty. Also, there is one more treaty within the Lisbon amendment, which is the Treaty of the European Union (TEU).\textsuperscript{134}

In the new Treaty the institutions of the Union are established. A few more exist, which is not accounted for here but the most common ones will be described below.

First, is the European Council, which sets the EU’s general political directions and priorities, and manage complex or sensitive issues that cannot be resolved at an intergovernmental cooperation. The European Council consists of the head of state government of every Member State. With the entry of the Treaty of Lisbon, the European Council became an institution, earlier it was only an informal meeting between Member State leaders.\textsuperscript{135}

Second, is the EU’s decision making process, which is an institutional triangle, consisting of the European Parliament (EP), the Council of the European Union, and the European Commission. This triangle produces the policies and laws that apply throughout the EU. The European Parliament represents the EU’s citizens and is directly elected by them. The Council of the European Union represents the individual Member States, and the European Commission seeks to uphold the interests of the Union as a whole. It is the Commission that proposes new laws, and it is the Parliament and Council that adopts them. However, it is the Commission and the Member States that implement the laws and regulations and the Commission ensure that the laws are implemented properly.\textsuperscript{136} To conclude, the decision-making process is known as codecision, which means that the European Parliament has to

\textsuperscript{134} Nyström, EU och arbetsrätten, p. 25.
\textsuperscript{136} Blanpain, European Labour Law, p. 67-73.
approve the legislation together with the Council. The Commission is the organ which draft
and implement the Union legislation.137

Third, is the European Court of Justice (ECJ), which upholds the rule of European law, and is
the last interpreter of the treaties and laws. The Court consists of one judge per Member
State, and is helped by eight Advocate Generals. To help the Court to cope with the large
number of cases brought before it, and to offer citizens better legal protection, a General
Court deals with cases brought forward by individuals, companies, organizations, and cases
relating to competition law. Individual workers or trade unions, on the other hand, cannot rely
upon hearing before the ECJ. Important is the fact that the judgments are unanimous and are
binding for the Member States, which is crucial for the aims of the Union to advance.138

The EU has a number of other institutions and bodies that play specific roles. One of them is
the European Economic and Social Committee (ECSC), which represents civil society,
employers, and employees. Another is the Committee of the Regions, which is the advisory
body who is representing local and regional authorities in the European Union.139

5.3. Fundamental Rights and the Four Freedoms; Important Principles in
the European Union

First, is the concept about fundamental rights. This was first recognized in the Stauder140 case,
and later developed in the International Handelsgesellschaft141 case. The Court stated that
‘[r]espect for fundamental rights form an integral part of the general principles of law
protected by the ECJ. The protection of such rights, whilst inspired by the constitutional
traditions common to the Member State, must be ensured within the framework of the
structure and objectives of the Community’.142

This was the first recognition of fundamental rights. Thereafter, the discussion if the right to
strike should be a fundamental right has been established and progressed. Further, it was in

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137 ibid., p. 98.
p. 50, and Blanpain, European Labour Law, p. 73-74.
139 http://europa.eu/about-eu/institutions-bodies/index_en.htm, downloaded 2011-07-20, also see Blanpain,
European Labour Law, p. 82 and 89.
140 Case 29/69 Stauder v City of Ulm [1969] ECR 419.
141 Case 11/70 International Handelsgesellschaft v. Einführ- und Vorratsstelle für Getreide und Futtermittel
142 Bercusson, Brian, *European Labour Law*, 2 ed., Cambridge University Press, United Kingdom, Cambridge,
The European Union Charter of Fundamental Rights adopted in Nice 2000 (EUCFR), where collective action first was explicitly stated as a fundamental right.143

The second principle is the concept about the four freedoms. This is as well-known and an important principle of the European Union. This principle is important for the strengthening of the cooperation between the Member States within the Union. The four freedoms are free movement of goods, persons, services, and capital, which are means to meet the economic goals set by the Union. The right of free movement has been an important principle of the Union and is protected in Article 26(2) Treaty on the Functioning of the European Union (TFEU), and the starting point is the prohibition against anti-discrimination due to nationality. It is the opinion of the ECJ that this right needs to be secured. Therefore, the ECJ is letting this right prevail over fundamental rights, such as, the right to collective actions.144

5.4. The European Union on the Right to Strike

The wish to protect the right to strike has been discussed and developed due to the European Unions’ social dialogue. However, the development has proceeded slowly. Moreover, the right was recognized in the Community Charter of the Fundamental Social Rights of Workers 1989 (CCFSRW), yet no initiative was taken to establish this right due to this Charter. The right was recognized in the European Union Charter of Fundamental Rights (EUCFR), which became mandatory with the adoption of the Lisbon Treaty. The right to strike has, before this recent change, been subjected to national law and the judgments of the European Court of Justice (ECJ).145

5.4.1. Protection in the Articles

5.4.1.1. The Rome Treaty and Social Policy

In the beginning of the Treaty of Rome labour rules were only seen as a means to secure the free movement of employment, and to avoid barriers of competition. In the early 1970s changes took place and labour law started to be treated as an important field. Earlier at a meeting in Paris 1952, the European Council said that the social field was as important for the Union as the economic field.

143 European Union Charter of Fundamental Rights, Article 12 and 28.
144 Nyström, EU och arbetsrätten, p. 93.
145 ibid., p. 89.
A ruling from the ECJ, the Defrenne II case, said that equal pay in Article 119 (now 157 in FEUF) had direct effect in all member states. The ECJ recognized that the right of equal pay was an important economic right, as well as, a social goal and right.\textsuperscript{146} This case was the first in the field of labour law that received the attention it needed. Labour law is the core of the social conception of European integration and the social dimension of EU law.

Moreover, the social dimension or the social model and dialogue were important subjects within the EU. In the social dialogue a particularly dominant feature of collective industrial relations was present. The Commission stated that ‘[t]he social dialogue is rooted in the history of the European continent, and this distinguishes the Union from most other regions in the world. Accordingly, in its various forms in the different Member States, the social dialogue is component of democratic government and also of economic and social modernization’.\textsuperscript{147}

5.4.1.2. The 1980s and the European Social Charter

The start of the 1980s was a period of stagnation. The European Social policy began to wane and the 1980s was the time for flexibility and deregulation. Few laws were adopted, which was a result of the conservative government in the UK, led by Margaret Thatcher. However, in 1986 the Single European Act (SEA) and the Single Market programme were adopted. These brought new life to the idea that liberalization of trade would lead to economies of scale and economic growth, which would benefit the greatest number of Community citizens. Through SEA a new article was added, which stated that the Commissions’ obligation to encourage a social dialogue between the parties in the labour field.

Further, in 1989, the Economic and Social Committee argued for ‘certain social rights’ to be recognized. These were to include the right of freedom of association and the right to organize, including recourse to collective actions. The Community Charter of the Fundamental Social Rights of Workers 1989 (CCFSRW), expressly states the significance of freedom of association and the right to strike to be seen as fundamental social rights. The CCFSRW also sets forth the basics for an implementation of the social dimension. Even

\textsuperscript{146} Case 43/75 Defrenne v. Sabena [1976] ECR 455.
though, the right to organize, and the right to strike was seen as central part of the Charter, the Commission took no initiative to establish these rights.148

5.4.1.3. The Maastricht Treaty

When the Maastricht Treaty was adopted, eleven out of twelve Member States (the UK said no) decided to keep develop the social dimension. The social dimension or the social model was the tool to establish rights for citizens in Europe. The goal was to create and form a social dialogue, which was important for the labour market and the workers in it. Through a special agreement called the Agreement on Social Policy (ASP) the Union deepened the cooperation between Member States and developed the social dimension. The ASP set out the competence of the Council to adopt social policy directives which would bind the eleven Member States. Initially, the Commission did not intend to exclude any area of social policy from the field of these provisions and proposed that the right to strike be among the subjects upon which a directive could be adopted unanimously. The ASP stated that the Union cannot support the Member States in their findings of the right to strike (now Article 151 and 153(5) TFEU). It states ‘[t]he provisions of this Article shall not apply to pay, the right to associate, the right to strike, or the right to impose lock-outs’. This was due to the fact that the Union should not have authority over questions relating to e.g. the right to strike.

However, in 1994 the Commission submitted a White Paper on Social Policy, which presented the prospect of a European social model based on ‘democracy and individual rights, free collective bargaining, the market economy, equality of opportunity for all and social welfare and solidarity’.149 Sadly, no great change was being made on the question of freedom of association or the right to strike. The Resolution on Social Policy 1994, which was the Council’s response to the 1994 White Paper on Social Policy, stated that there was no need for freedom of association to be regulated to secure fair competition or to strengthen international competitiveness. This course of action was to be followed with, such bodies as the ILO and the World Trade Organization (WTO), noted that for the future of the right to organize and the right to bargaining collectively, the right needed protection.150

148 Nyström, EU och arbetsrätten, p. 51.
150 Novitz, the Right to Strike, p. 161.
5.4.1.4. *The Treaty of Amsterdam*

The Treaty of Amsterdam was adopted in 1997, a new government in the UK led the country and it decided to ratify the ASP. This led to the ASP became incorporated in Article 137 and 139 of the EC Treaty, (Article 153 and 155 in TFEU). The Treaty of Amsterdam also added an article sanctioning the protection of human right. It says that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms. Furthermore, in this amendment, the pillars that had been the structure of the European Union were altered. The European Community got with the Amsterdam Treaty a structure of entity, and changed name from Community to Union.\(^{151}\)

5.4.1.5. *The Lisbon Strategy*

There is a long history of attempts in the European Union to promote fundamental rights. The political initiative was taken at the Nice Conference in 2000. The result of that initiative was the European Union Charter of Fundamental Rights (EUCFR), where the right to take collective bargaining is explicitly stated. The Conference in Nice was the first step in the so called Lisbon strategy. The Treaty of Nice came into force in 2003. This was the beginning of a constitutional reform of the European Union. When the Nice Treaty came into force, the EUCFR also got adopted. Sadly the Charter did not become binding, it was only a solemn proclamation.\(^{152}\)

Yet, the Charter is important for the recognition of the right to strike. In the Article 12(1) in the EUCFR, states ‘everyone has the right to freedom of peaceful assembly and freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right to everyone to form and to join trade unions for the protection of his or her interests’. Further, in Article 28 of the EUCFR, states that ‘[w]orkers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action’. This establishment of the right to organize and peaceful assembly is comparable with Article 11(1) of the ECHR, which links freedom of association to trade union freedom.\(^{153}\)


\(^{152}\) Nyström, EU och arbetsrätten, p. 54.

\(^{153}\) Novitz, the Right to Strike, p. 166.
Moreover, a new social action scheme for 2000-2005 was adopted at the Conference in Nice. The main idea was to increase jobs, gender equality, and fight discrimination. This was a plan to balance the social and the economic goals of the Union.\(^{154}\)

The Lisbon Treaty was adopted and a lot of changes were accepted, not only new name and numbers of the Treaty, the Governing Body was altered. More significant, the European Union Charter of Fundamentals Rights became binding, and the EU shall, in a near future, join the European Convention. Moreover, the Lisbon strategy’s goal was for the European Union to become ‘the most competitive and dynamic knowledge based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion’\(^{155}\). This is being stated in Article 3.3 TEU, which explain the internal market as a social model, which aims for employment and social development. The model was through the Lisbon Treaty modernized, meaning the European Union gave a system which offered a higher level of social protection, however, not simplified.\(^{156}\)

### 5.4.2. Jurisprudence

There are two alternative ways through which the jurisprudence of the European Court of Justice (ECJ) may affect and shape which level of protection the right to strike is to have. The first is so called staff cases, which are complaints brought before the Court by EU officials who claim that there has been a breach of staff regulations, meaning the basis in their contract of employment. The second is through fundamental rights jurisprudence, which limits the scope of EU law, the activities of EU institutions, and restricts Member States when they implement EU laws. It seems like the Court is unwilling to establish the scope of a right to strike and has provided no legal definition of its content.\(^{157}\) However, the staff cases seem promising; it is possible to detect judicial support at Community level for trade unions, collective actions in defense of the interest of trade union member. For example, in Kotner, the ECJ stated that officials have the freedom to organize collectively, and are free to do anything lawful to protect the interests of their members as employees.\(^{158}\) The same principle

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\(^{154}\) Nyström, EU och arbetsrätten, p. 55.


\(^{157}\) Novitz, the Right to Strike, p. 245.

was laid down in Syndicat Général, in addition the Advocate General Trabucchi indicated that the right for trade unions should be consistent with ILO Convention Nos. 87.\textsuperscript{159}

In the Court’s first case it refused to examine the compatibility of EU actions with fundamental human rights. The origin of this refusal seems to come from the assumption that the European Community was only to preserve economic means. However, in the Nold II case, the Court stated that fundamental rights were consistent with those contained in the European Convention on Human Rights (ECHR), other international instruments, and from constitutional traditions of Member States.\textsuperscript{160} If the EU actions were not in compliance with the International Convention, it would lack validity. It was later established that Member States, when acting within the scope of EU law, must respect fundamental rights. Therefore, in the Bosman case, the ECJ recognized that the principle of freedom of association in Article 11 of the ECHR, was one of the fundamental rights, which was protected under the ‘community legal order’.\textsuperscript{161}

Furthermore, in the case Commission v. France, the ECJ considered that France had failed to take all appropriate measures to meet its Treaty obligations. This case was about farmers from France that through violence and vandalism refused to sell products from outside France. The ECJ said that this action, which affected the free movement of goods, was not acceptable.\textsuperscript{162} In another case, Albany International, which was about a pension scheme and the ability for employers to opt out from it, the ECJ said that ‘certain restrictions of competition are inherent in collective agreements between organizations representing employers and workers’. The Court noted that ‘agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by their very nature and purpose, be regarded as falling outside the scope of Article 86(1) of the Treaty’.\textsuperscript{163}

Advocate General Francis Jacobs analyzed the ECJ jurisprudence up to this date and recognized that no fundamental right to collective bargaining existed. He saw in the Swedish Engine Driver’s Union case from the ECHR, and in the ESC that the right to collective bargaining was recognized in these instruments. Advocate General Francis Jacobs considered that the right to strike and freedom of association were fundamental rights. He stated that ‘[i]n

\textsuperscript{161} Case C-415/93 Union Royale Belge des Sociétés de Football Association and other v. Bosman and others, para. 79.
\textsuperscript{163} Novitz, the Right to Strike, p. 256, the judgment of Case C-67/97 Albany International BV v. Stichting Bedrijfssfonds Textielindustrie [1999] ECR I-5751.
my view, the right to take collective actions in order to protect occupational interests in so far as it is indispensable for the enjoyment of freedom of association is also protected by Community law.¹⁶⁴

Different opinions were given to if freedom of association should be seen as a fundamental right and therefore be protected under EU law. Yet, in 2007, the ECJ released its judgments in Viking and Laval, where the Court explicitly says that the right to strike is a fundamental right, however, not without restrictions. The ECJ determined that free movement has priority before the right to take collective action. The Court continued to state that the right to strike is a fundamental right but it has restrictions, as for example when it collides with the four freedoms.¹⁶⁵

However, the right to strike can also go before free movement if it first, is of public interest, and second, it survives a proportionality test. In Viking the ECJ stated that a collective action can be justified if there is a public interest that has to be protected. However, if the action should be justified or not was up to the national court to decide, with the help of the proportionality test stated by the Court. In Laval, the trade union took the strike action to force a Swedish collective agreement onto Laval, here the ECJ stated that the trade unions’ actions did not pass the proportionality test and declared the action illegal.¹⁶⁶

5.5. The Restriction on the Right to Strike

The European Union (EU) was founded to simplify the economic collaboration between the countries in Europe. The EU established this by creating an internal market, which work for sustainable development. This was implemented by the freedom of movement of goods, people, services, and capital.¹⁶⁷ The starting point for this is the prohibition on discrimination due to nationality. However, this prohibition is not without restrictions. A legitimate restriction on discrimination because of nationality is stated in Cassis de Dijon and in Gebhard, which clarifies that there are a few restrictions that are ok, amongst them the exception of legitimate reason for public interest.¹⁶⁸

¹⁶⁴ Novitz, the Right to Strike, p. 256.
¹⁶⁵ Viking and Laval.
¹⁶⁶ Viking, para. 77-79. and Laval, para. 111.
¹⁶⁷ Article 26.2 Treaty on the Functioning of the European Union (TFEU).
With the freedom of movement on one hand, and the anti-discrimination on one, a problem has been developed, which is social dumping. However, EU notes that with a better internal market, a better welfare amongst the Union’s citizens will occur. Social dumping is another word for unequal competition, which happens when an employer from a Member States comes to another Member State with higher demands for workers. To fight social dumping, different national actions have been made, for example, the Scandinavian model with collective agreements and collective bargaining. The attempt trying to protect a state against social dumping has been tried by the ECJ in two cases, Rüffert and Commission v. Luxemburg, where the aim and action where ruled illegal, even though the government only tried to protect the country against social dumping.

In the case Rush Portuguesa, the ECJ noted that it is an obstacle against free movement to demand working permits from the host state. The ECJ also stated that there is no restriction against the host state to force their legislation or collective agreement on the posting state service provider. After this case the EU issued the Posted Workers Directive (PWD), which states that the host state laws on the ‘core’ of workers condition, such as minimum wage, shall be applied. The Directive was issued to prevent social dumping, and promote free movement by expressly stating which legislation should be used. Since the Viking and Laval judgment, the Member States now know that the meaning of the Directive is narrowed and the entire legislation of the hosting state must not be used; this makes it clear that Rush Portuguesa is obsolete.

5.5.1 The Restriction on the Right to Strike in Article 52 EUCFR

More acceptable restriction on the right to strike, which is established by the European Union Charter on Fundamental Rights (EUCFR) is written down in Article 52. Every restriction on the rights in the EUCFR is justified, as long as, it is established in law and compatible with those rights and freedoms which are recognized by the same Charter. However, the restriction must pass a proportionality test, which is to ensure if the restriction is necessary, as well as, the answer to the aim of public interest, which is recognized by the Union, or the need for protecting of citizens’ rights and freedoms. In Article 52(1) EUCFR, two restrictions are

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172 Article 3.1 Posted Workers Directive 96/71/EC.
173 Nyström, EU och arbetsrätten, p. 111.
justified. First, the restriction is justified if the aim of the restriction is of public interests which are recognized by the Union. Second, if the restriction is made due to the necessity of securing and meeting the need of other people’s rights and freedoms.174

5.6. Conclusion of the European Union

The European Union’s aim is to promote the internal market as well as combine it with a high level of social protection. The Viking and Laval decisions show that there is a deep uncertainty within the EU about the role of the trade union movement. As the ECJ itself recognized, the Community has a social agenda as well as an economic one. The current political climate is that there is less stress on the promotion on the European Social Model, than the aim to promote the economic internal market.

The decisions in Viking and Laval are not surprising, but they are disappointing. Although the ECJ has recognized the existence of a right to strike in EU law, it has subordinated that right to the free movement rights. This reflects the fact that the ECJ regards its own role as one of the protector and promoter of the fundamental principles in Community law. Further, the restriction on the right to strike has through Viking and Laval, made the right to strike to become even more limited. The ECJ acts as if the internal market needs stimulation and therefore must the four freedoms have room to flourish.

However, with the European Charter of Fundamental Rights implemented due to the Lisbon Treaty, the right to strike is now explicitly recognized. In Article 52(3) in the same Charter it is stated that the European Union shall also follow the European Convention on Human Rights. This might open up a discussion on the restriction made on the right to strike. Due to the fact that the supervisory organ of the ECHR, the ECtHR, has decided in three cases that the right to strike shall not be restricted in the way the ECJ has done. Also, in Article 12 EUCFR, an explicit right for freedom of association is established, which has the same meaning as Article 11 of the ECHR. However, a discrepancy has been developed between the ECJ and the ECtHR. The ECJ have taken a more economic approach to the right to strike than other international instruments, such as the ECHR.175

174 Herzfeld Olsson, Facklig föreningsfrihet, p 450.
175 Herzfeld Olsson, Facklig föreningsfrihet, p. 459.
As said above the ECJ has taken a more economic approach to the right to strike and the principle of free movement, than other international instruments, this is clear when analyzing Viking and Laval. The judgments do not conform to the ILO, the ECHR, or the European Charter of Fundamental Rights when it handles the right to strike. However, the ECtHR came with its judgments concerning the right to strike after the cases decided by the ECJ, as well, the EUCFR was implemented and binding for the EU in 2009, when the Lisbon Treaty got adopted. This might be two vital reasons why the ECJ made the restriction on the right to strike which is not consistent with the ECHR and EUCFR.

To conclude, the restriction on the right to strike is more prominent in the EU than those in other instruments. As seen, the ECJ have taken bigger steps in its way of promoting the economic internal market. However, the question remains what will happen since the cases made by the ECtHR in 2009. The two Turkish cases and the Russian case in conjunction with the Viking and Laval cases, as well as, Article 52 EUCFR, will be an interesting comparison.
To Conclude Part 3

Part 3 has examined the conflicting approaches taken by the ILO, the Council of Europe, and the European Union on the protection of the right to strike. A stark discrepancy is present according to the opinion on the right to strike.

The right to strike means that workers together can take actions against their employer. The right to strike is explicitly recognized in the European Social Charter (ESC). According to the supervisory bodies of the ILO and the Council of Europe, the right to strike is now included in workers’ right of association. Moreover, the right to strike is now seen as one of the most important means a union can use to secure the interests of their members. Yet, the ECJ has not recognized the right to strike as a vital means for the protection of the individual’s freedom of association.

In the ILO, there is no explicit, systematic, or detailed protection of the right to strike in any instruments. However, in the ILO supervisory bodies, such as the Committee on Freedom of Association, the Fact Finding and Conciliation Commission on Freedom of Association, and the Committee of Experts on the Application of Conventions and Recommendations, the establishment of the right to strike as an essential aspect of freedom of association is recognized. This link is also guaranteed under the ILO Constitution, as well as, in the ILO Conventions No. 87 and 98.

Within the Council of Europe, a different view has been taken. Freedom of association is protected in Article 11(1) of the European Convention on Human Rights (ECHR), and the right to strike, just recently is seen as a vital role of that right. In the recent cases decided by the European Court on Human Rights (ECtHR), Demir and Baykara, Enerji, and Danilenkov the Court says that the right to strike is an important right which cannot be restricted anyway one wants. The ECtHR has since 2009 taken a more aggressive approach regarding the protection of the right, which has resulted in a full protection for the right to strike. Of course, not without restriction, which are established in Article 11(2) ECHR. However, the restrictions cannot be invoked without legitimate reasons such as the ones stated in the Article.

The right to strike is, also, protected under the ESC which is also created by the Council of Europe. Further, in this instrument the right is explicitly stated. This is an instrument that is, sadly, inferior in status to the ECHR. The ECHR guarantees civil and political rights, while
the ESC merely promotes the protection of socio-economic rights. Under the ESC the Member States can select which provisions to be obliged to, and therefore be able to opt out the recognition of the right to strike.

The European Union has recognized the importance of the right to strike under the European Union Charter of Fundamental Rights 2000 (EUCFR), which clearly states a right to collective bargaining and to take strike actions. The EUCFR explicitly says that the right to strike is a fundamental right and the right is part of the Lisbon Treaty since 2009. Also, the ECJ recognized, in Viking and Laval, freedom of association as a fundamental right. However, with the current restriction on the right to strike the right is on the verge of being limited to the extent of nonexistent.

To conclude, the right to strike is an important fundamental right, which today is protected in multiple international instruments. The right is seen as workers’ rights which are a tool for workers to protect him/her from being exploited by its employer. The development of the right has progressed in different pace in the instruments, and has now different protection in the instruments. Further, with the adoption of the Lisbon Treaty and thereby the implementation of the European Union Charter of Fundamental Rights the scope of the right to strike might change in EU law. This is due to Article 52(3) EUCFR, which says that the EU should follow the ECHR and the judgment and decisions made by the ECtHR. In addition, the recent cases by the ECtHR will, hopefully, give some guidance.
Part 4: The Prospect for the Right to Strike

This part studies the most prominent professors in the labour fields, as well as, the European Trade Union Confederation, and Advocate Generals, thoughts about the recent cases made by the ECJ and the implication on the right to strike, as well as, the future of the right to strike. As established in Part 3 the right to strike is now seen as a fundamental right, however, with certain extended restriction in some instruments. These restrictions are stated by the ECJ and are not recognized by the other instruments. The discrepancy between the opinions is rather stark and no one really knows what the future holds. Yet, the most common thought is that the right to strike is a fundamental right, which should not be impacted with too huge restrictions.

Furthermore, the implication on the labour market due to the Viking and Laval cases has both positive marks and negative ones. On one hand we have the protected right of free movement which helps the economic growth, and on the other we have the failed right for workers to take collective actions. Whatever the ECJ had decided, one group had been disappointed. In this case it is the trade unions and workers. However, which interest is more important than the other? The ECJ and EU say that the four freedoms need to go before workers’ rights, while the ILO and CoE say the opposite.

6. The Discussion

6.1. The Discussion throughout the European Union

In 2009 the European Court on Human Rights (ECtHR) ruled that the right to strike is a human right, which is recognized and protected in international law. The Court continued to state that this right can only be limited in strictly defined circumstances.176 A month later the European Trade Union Confederation (ETUC) came with a comment on the discrepancy between the ECtHR and the ECJ. The ETUC stated, therefore, that the ruling made by the ECJ in Viking and Laval is out of line, and they have to bring their case-law back in line with essential human rights’ requirements.

In the Enerji case the ECtHR found Turkey guilty for violation of Article 11 of the European Convention on Human Rights (ECHR). Article 11 of the Convention contains the freedom of association including the right to join a trade union. For the first time, the Court has acknowledged that ‘in no uncertain terms that trade union’s ability to defend their members’

interests is inextricably linked to the right to strike. Therefore, the right to strike can only be limited in narrowly defined circumstances which must be provided for by law, have a legitimate aim and be necessary in a democratic society.’

Therefore, the ETUC says that the ECJ needs to, urgently; adapt its case-law so it relates to the right to take collective actions in order to form it in line with essential human rights. In Viking the ECJ ruled that the exercise of the right to collective action is limited in case of conflict with the economic freedoms of companies which move within the internal market. The ETUC states that ‘this would impose on trade unions an unbalanced burden, which can discourage them from using their right to collective actions, since they are unable to predict what the court will say’.

From ETUC’s comment about Viking, Laval, and Enerji it is easy to say that they are negative about the ECJ rulings. The ETUC wants the ECJ to change their case law to be more in line with the ECtHR. However, it is important to remember that the ETUC is a confederation of trade unions and it is thereby biased.\textsuperscript{177}

Further, in the Report of the Chairman of the Governing Body of the Conference for the Year 2009-10, Mr. Monks, a representative from the European Trade Union Confederation, gave his concern about the recent development in the EU and on the Committees ruling about the cases above as well as the Comment sent by BALPA. He states ‘I give notice that we will use the ruling of the Committee of Experts to press the European authorities for decisive action to ensure that the free movement principles of the EU do not dominate the collective right of workers, including the right to strike’.

He continues to express the fact that Laval and Viking are leading into the direction which establishes the economic freedoms to be superior the right of workers. It is a violation of the ILO standard when trade unions have to prove its legitimacy, when the exercise of a fundamental social right conflicts with business interests.\textsuperscript{178}

The ETUC is negative on the ECJ judgment as well as Mr Monk. A professor who also thinks that the ECJ has gone too far regarding the implications on the right to strike is Tonia Novitz. Novitz has stated the importance of the protection of the right to strike. In her book

\begin{footnotesize}
\begin{enumerate}
\item European Trade Union Confederation, \textit{The Right to Strike is a Human Right- ECJ must change its case law}, Patricia Grillo (ed.) “\url{http://www.etuc.org/a/6174}”, downloaded 2011-07-29.
\end{enumerate}
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‘International and European Protection of the Right to Strike’ she analysed the development of the scope of the right to strike. Although, the Viking and Laval cases had not been made yet she could already see the impact of the European Union’s law. She noted that EU law gave priority to economic freedoms before social rights. The discrepancy between the ILO, the Council of Europe, and the European Union were before Viking and Laval, well seen and discussed by Novitz. Novitz has in more recent articles commented on the rulings made by the ECJ, criticising the discrepancy between the ECJ and other instruments. She states that ‘[t]he ECJ should perhaps pay greater attention to the conclusions of the European Committee of Social Rights… and also respond to developments in the jurisprudence on the European Court of Human Rights on the right to strike and freedom of association’. Moreover, a similar thought is found by the professors Charles Woolfson and Jeff Sommers. They also noted that the restriction on the right to strike is too big, and that the right to strike should be protected as a fundamental right. They fear that Laval can, in the future, contribute to social dumping.

Next to Novitz, Woolfson, and Sommers, a similar opinion can be found with professor Ronnie Eklund. In his article ‘A Swedish Perspective on Laval’, he stated that ‘Laval has tipped the balance decisively in favour of economic freedoms’. Eklund continues to state in ‘EG-domstolen i ett nyliberalt hörn’, that the fight for the social dimension within the Community has been neglected for the promotion of the four freedoms. The ECJ has forced the Community back to square one and positioned itself in a libertarian corner, even though the Court proclaimed the right to strike as a fundamental right. The ECJ made in its Viking and Laval judgment an assessment without taking notice of the international instruments such as the ESC and ILO Convention No. 87, and the CFA.

On the other hand, there is the more conciliatory opinion of the Viking and Laval cases. These persons believe that the judgments in these two cases were the only one possible being made. In front of this opinion is Roger Blanpain. According to his article in the volume ‘The Laval Viking Cases: Freedom of Services and Establishment v. Industrial Conflict in the European

179 Novitz, the Right to Strike, p. 339-341.
181 Woolfson, Charles & Sommers, Jeff, Labour Mobility in Construction: European Implications of the Laval un Partneri Dispute with Swedish Labour, European Journal of Industrial Relations, Vol. 12, 2006, p. 64.
183 Eklund, Ronnie, EG-domstolen i ett nyliberalt hörn, Lag & Avtal, nr. 5, 2008, p. 32-34.
Economic Area and Russia’ he argues that the Court could not have made another decision.
He continues to state that ‘[i]t’s time to work for more European solidarity across borders,
because in most cases workers’ pay the price of this lack of solidarity, usually the weakest
ones, like the Laval case showed. The European Court took the right decision.’\textsuperscript{184} It is
interesting that Blanpain took another view than his fellow colleagues. He believes that the
right to strike as well as the fight against social dumping has to fall for the development and
protection of workers from less fortunate countries. Even though, the right to strike is such a
right which is designed to protect the workers against their employers.

A similar thought is found in Tore Sigeman’s article ‘Fackliga stridsåtgärder mot gästande
tjänsteföretag-EG- rätten förtydligad’. He states that the result was not a political aim for
economic freedom, even though it at first look likes it. The result that the right to strike was
restricted is only a coincidence.\textsuperscript{185}

In a report from the late Commissioner Mario Monti, he states his concern about the balance
between the economic freedoms and workers’ right to take collective actions. Monti continues
to state that the Lisbon Treaty with its emphasis on that EU shall promote a social market, as
well as, the incorporation of the European Charter of Fundamental Rights could give rise to a
change in ECJ jurisprudence.\textsuperscript{186}

To conclude, the discussion is heated and diverse, however, the most common opinion is that
the ECJ took freedom of movement too far and the right to strike was overruled in a way
which is not accepted throughout other international instruments.

\textbf{6.2. The Future of the Right to Strike}

After looking at the history of the scope of the right to strike, as well as, the recent
development and thoughts about it, the question that comes up is ‘what will happen next?’

To start, the respect for freedom of association and the right to strike is considered of ultimate
importance. Trade unions can develop good working conditions for their members and play
an important democratic role in their effort to balance the interests between management and
labour. Freedom of association is protected in multiple international instruments, as noted

\textsuperscript{184} Blanpain, Roger, \textit{General Comments; Laval and Viking: Who Pays the Price?}, Roger Blanpain (ed.), The
Laval Viking Cases: Freedom of Services and Establishment v. Industrial Conflict in the European Economic
\textsuperscript{185} Sigeman, Tore, \textit{Fackliga stridsåtgärder mot gästande tjänsteföretag-EG- rätten förtydligad}, SvJT 2008 s.
568
\textsuperscript{186} Nyström, EU och arbetsrätten, p. 165.
above. According to all the Conventions dealt with, all workers should be free, without governmental interference, to choose which union to establish or to join. Also, in the ESC and the ILO Conventions, the freedom to organize and bargaining collectively are protected.

One thing that is certain is the recent judgments made by the ECtHR, Demir and Baykara, Enerji, and Danilenkov, which will have a great positive impact on the right. The ECtHR enlarged by these cases the right to strike. There is no longer a question mark on how the right to strike should be interpreted, according to this instrument.\textsuperscript{187} After these judgments it is clear that the ILO and the Council of Europe have the same opinion.

Furthermore, before Viking and Laval, the ECtHR had not made it clear where the limit was, or how far the scope of the right to strike reached. So, when the ECJ made its decision it did not have big guidance from the Council of Europe. Yet, the ECJ could have looked more for guidance in the standards from the ILO. However, the statement is now clear that the ECJ judgment does not go in line with those guidelines from the ILO as well as the judgments from the ECtHR; rather the ECJ positioned itself in a backward corner.

Moreover, it is interesting that the ECJ cites the EU Charter of Fundamental Rights as one of its sources for the protection of the right to take collective action. This is fascinating because, the ECJ was initially reluctant to make use of the Charter in its judgments. The Charter existed when the ECJ made its judgment, but it was not binding and therefore did the Court not follow it. With the adoption of the Lisbon Treaty the EUCFR is binding upon the Member States, and the Charter should be followed by future judgments by the ECJ.

However, it is stated in Article 28 TEU that if the international situation requires the Union to act, it can do so. In other situation is it up to the Member States to act. The ECJ’s role in this is to interpret the EU legislation. Moreover, it is stated in Article 153(5) TFEU that the Union does not have authority to support the Member States in questions relating to the right to take collective actions. Yet, since the Union has assured to follow the ECHR, the Union has, however indirectly, recognized the right to organize. This is contradictory to what is stated in the TFEU. If the EU is to follow the European Court of Human Rights, the Union has also indirectly recognized the right to strike. Though, since this relatively new alteration, it is hard to know what will happen in the future due to the contradiction in the TFEU and the ECHR.

\textsuperscript{187} Demir and Baykara, para.154, Danilenkov, para.136, and Enerji in http://www.eurofound.europa.eu/eiro/2009/05/articles/eu0905029i.htm, downloaded 2011-08-03.
Additionally, the ECJ decided in Viking and Laval, however, before the promise was being made to be bound by the ECHR, to take a decision on the right to strike. The ECJ could have found authority to interpret questions relating to the right to strike with Article 28 TEU in conjunction with Article 153 TFEU. However, the question is if the Court did go too far away from the meaning of the EU constitution and the EUCFR. One thing that is certain is that the TFEU, ECHR and the EUCFR are contradictory, and the question is if the Union has acted against the meaning of the EU?

As stated above, the European Union wants to be bound by the ECHR and according to the case law from the ECtHR; the ECJ did go too far. If the Union still wants to be bound by the ECHR, it would have to change its case law so it goes hand in hand with the case law by the ECtHR. This would be an interesting and good change for the right to strike; since the right to strike is more protected under the ECHR.

To conclude, the future of the right to strike is uncertain. However, the right is protected according to ILO case law CFA, and explicitly in the ESC. In the light of the recent cases made by the ECtHR and the ECJ it is clear to see that the right to strike has won a status as a fundamental human right and therefore it needs protection. The right to strike in the European Union case-law must therefore change to be more compatible with the prominent human rights court, the ECtHR. According to Article 52(3) EUCFR the EU shall follow the ECHR when making its decisions. Therefore, the most convincing development for the right to strike in the European Union is that the right will become stronger, and follow the other international instruments on the labour field.188

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