

THE RIGHT TO STRIKE IN KUWAIT: INTERNATIONAL AND NATIONAL PERSPECTIVES

El derecho a la huelga en Kuwait: perspectivas internacional y nacional

DOI: <http://dx.doi.org/10.15304/dereito.25.2.3257>

THAQAL S. AL-AJMI
International Law Department
School of Law
Kuwait University
talajmi@hotmail.com

TURKI S. ALMUTARI
Law Department - College of Business Studies
Public Authority for Applied Education and Training

Abstract

This study discusses the most controversial right to strike by discerning its inclusion in public international law, in general, and international labour law, in particular. For the first time, it searches the right to strike in the unclear Kuwaiti laws by trying to prove the existence of such right. It then answers the question of whether such organisation of the right to strike for both workers and employee in Kuwait's national law conforms to the relevant international law.

Keywords: right to strike, Kuwait, international law

Resumen

Este estudio versa sobre del derecho de huelga distinguiendo su inclusión en el derecho internacional público, en general, y en el derecho internacional del trabajo, en particular. Por primera vez, se indaga sobre el derecho a la huelga en las inciertas leyes kuwaitíes tratando de probar su existencia. A continuación, se responde a la cuestión de si tal derecho de huelga, tanto para los trabajadores como para los empleados, en la legislación nacional de Kuwait se ajusta al derecho internacional pertinente.

Palabras clave: derecho a la huelga, Kuwait, derecho internacional

SUMMARY

1. INTRODUCTION.- 2. RELEVANT RULES OF INTERNATIONAL LAW.- 2.1. International Covenant on Civil and Political Rights (ICCPR).- 2.2. International Covenant on Economic, Social and Cultural Rights (ICESCR).- 2.3. ILO Conventions.- 3. KUWAIT'S NATIONAL LAWS.- 3.1. Constitutional Provisions.- 3.2. Old Labour Law (Code No. 38 of 1964).-

3.3. Present Labour Law (Code No. 6 of 2010).- 3.4. Public Civil Service Law (Law Decree No. 15 of 1979).- 4. CONCLUSION.

SUMARIO

1. INTRODUCCIÓN.- 2. NORMAS RELEVANTES DE DERECHO INTERNACIONAL.- 2.1. Pacto Internacional de Derechos Civiles y Políticos.- 2.3. Convenciones ILO.- 3. DERECHO NACIONAL DE KUWAIT.- 3.1. Previsiones constitucionales.- 3.2. Antigo Derecho del Trabajo (Código No. 38 de 1964).- 3.3. Derecho del trabajo actual (Código No. 6 de 2010).- 3.4. Ley de Administración Pública (Decreto Ley No. 15 de 1979.- 4. CONCLUSIÓN.

1. INTRODUCTION

Workers and employees enjoy a verity of rights, generally including fair wages, maximum working hours, leaves and vacations, safe working environment, trade unions, collective bargaining. Many of these are less controversial than the right of strike, which is the most visible and powerful form of collective actions that workers and employees can take in labour dispute. A strike is a deliberate stoppage [totally or partially] by workers [or employees] in order to put pressure on employers to accede to demands. Thus, the right to strike can be seen as the protective cornerstone of all other rights, since it can deter employers from messing with workers' rights if they know that there is a possibility of a strike. This fact explains all controversies that surrounded this right.

The vagueness that is related to workers and employees' right to strike is even more profounder in Kuwait because of the scarcity of studies in this regard and the ambiguity – as will be discussed later – of this right in Kuwait's national laws. Thus, this study will try to analyze this right with respect to the State of Kuwait starting with the relevant rules of international law and then examining Kuwait's domestic laws that may be related to this subject.

2. RELEVANT RULES OF INTERNATIONAL LAW

The discussion in this section focuses on rules of international law imported from all international instruments that are related to the right of strike and are binding on Kuwait by virtue of ratification or accession.

2.1. International Covenant on Civil and Political Rights (ICCPR)¹

One may start with Article 22 of the ICCPR which states that:

- "1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordrepública*), the protection of public health or morals or the protection of

¹ State parties are 168 and entered into force on 23/3/1976 and Kuwait became a State Party in 21/5/1996.

the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning freedom of association and protection of the right to organise to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention".²

There are many indications that Article 22 is intended to include the right to strike. Firstly, the wording of Article 22 of the ICCPR is broad enough to include economic and social rights and a civil right dimension that is to be protected by the "right to form and join trade unions for the protection of everyone's interests". Secondly, restrictions mentioned in Article 22 (2) in relation to specified categories of workers (i.e., members of armed forces and police) imply that the concern is about the right to strike, a concern that could not have arisen if Article 22 (1) did not confer such right requiring such restriction.³ Thirdly, paragraph (3) to the International Labour Organisation (ILO) Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise (Convention no. 87) which, as will be discussed later, is understood to include the right to strike as held by ILO on many occasions.

Notwithstanding the above, the UN Human Rights Committee-HRC's (the supervisory body for the ICCPR-) initial position was to decline jurisdiction – by a majority of votes – in a case concerning the application of the ICCPR brought by Canadian public employees complaining of domestic legislation depriving them of the right to strike. The refusal of jurisdiction was based on the fact that Article 22 of ICCPR made no express provision for the right to strike.⁴

However, since 1999 the HRC has changed its position and it began monitoring States' protection of the right to strike. For examples, in its concluding observations on the report of Estonia in 2010, the Committee stated, "While noting that the present draft Public Service Act presented to Parliament includes a provision restricting the number of public servants not authorized to strike, the Committee is concerned that public servants who do not exercise public authority do not fully enjoy the right to strike (Art. 22). The State party should ensure in its legislation that only the most limited number of public servants is denied the right to strike".⁵

² Article 22 of the ICCPR.

³ John Hendy, "The Human Rights Act, Article 11, and The Right to Strike", 5 *European Human Rights Law Review* (1998), at 597-598.

⁴ *Alberta Union of Provincial Employees v. Canada*, No. 118/1982, reprinted in 1986. The Committee partially justified its conclusion in the Canadian case by relying on the fact that the UN Declaration (Art. 23 "4") likewise contained no express reference to the right to strike. Some commentators criticized the decision, see for examples: Nowark, U.N. Covenant on Civil and Political Rights, *CCPR Commentary*, 1993, p. 392.

⁵ Human Rights Committee, Ninety-ninth session, Geneva, 12-30 July 2010, UN Doc, CCPR/EST/CO/3.

Thus, the HRC developed its own understanding when supervising the application of rights enshrined in the ICCPR that it must not restrict itself to the existence of these rights, e.g., the freedom of association, but also to the conditions under which these rights are exercised.

2.2. International Covenant on Economic, Social and Cultural Rights (ICESCR)⁶

Unlike the ICCPR, which left the door open for different interpretations with the regard the right to strike, the ICESCR is more straightforward in this matter. Article 8 states that:

- "1. The States Parties to the present Covenant undertake to ensure:
- (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
 - (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organisations;
 - (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
 - (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.
2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention".⁷

As clearly stated in Article (1) (d) of the ICESCR, while the right to strike is assured, it must be exercised in conformity with the laws of the particular country. Therefore, the "laws of the particular country" cannot prevent the exercise of the right to strike in general, but can regulate it in terms of procedures and reasonable limitations. This understanding was clearly indicated by the supervisory body of the ICESCR the Committee on Economic, Social and Cultural Rights (CESCR) in its "General Comments", which constitutes an authoritative interpretation of the text of the ICESCR.

For examples, in its 2011 "Concluding Observations", the Committee maintained the following positions: firstly, with regard to the State of Estonia, the CESCR held that "The Committee notes with concern that the

⁶ State parties to the ICESCR are 164 and entered into force in 3/1/1976.

⁷ It should be noted that Kuwait made a reservation on Article 8 (1) (d), when acceding to the ICESCR in 1996.

legislation in force in the State Party prohibits civil servants from participating in strikes ... The Committee calls on the State Party to ensure that the provisions on civil servants' right to strike in the Public Service Act comply with Article 8 of the Covenant by restricting the prohibition of strike to those discharging essential services".⁸ Secondly, with regard to Germany, the Committee reiterated its above-mentioned concern and added that "the prohibition by the State Party of strikes by public servants other than those who provides essential services constitutes a restriction of the activities of trade unions that is beyond the purview of the restrictions allowed under Article 8 (2) of the Covenant".⁹

2.3. ILO Conventions

The ILO is the UN Agency that is responsible for upholding global labour standards. It is the most important source of international labour law with a long established tradition and rich jurisprudence. With respect to the right to strike, it refer to two ILO conventions: Convention on Freedom of Association and Protection of the Right to Organise, 1948 (Convention no. 87) and Convention on Right to Organise and Collective Bargaining, 1949 (Convention no. 98).

Despite the absence of any explicit reference to the right to strike in these conventions,¹⁰ there is a consensus that the right to strike is encompassed in their provisions. Thus, the ILO supervisory bodies, the Committee on the Freedom of Association (CFA) and Committee of Experts on the Application of Conventions and Resolutions (CEACR), have always maintained the position that the right to strike is a fundamental right of workers or employees, and constitutes an essential part of their ability to enforce their legitimate interests.

Following are some of the observations made by the CFA with regard the right to strike that show a persistent appreciation of this right:

- In 1952, the CFA held that the right to strike is an "essential [element] of trade unions rights".¹¹
- In 1988, the CFA held that "respect for the principle of freedom of association requires that workers should not be dismissed or refused re-employment on account of they having participated in a strike or

⁸ UN Doc. E/C.12/EST/CO/2, 16 Dec. 2011.

⁹ UN Doc. E/C.12/DEU/CO/5, 12 July 2011.

¹⁰ It should be noted that the ILO in two of its conferences had adopted resolutions that made explicit mention to the right to strike that are:

1- The Resolution Concerning the Abolition of Anti-Trade Union Legislation in the States Members to the International Labour Organisation, which called for the adoption of "laws ... to ensure the effective and unrestricted exercise of trade union rights, including the right to strike by workers"..

2- The Resolution Concerning Trade Union Rights and Their Relation to Civil Liberties, which called for action in a number of ways "with a view to considering further measures to ensure full and universal respect for trade unions rights in their broadest sense".

See; International Labour Office, (1957), p. 783. See also: B. Gernigon, A. Odero and H. Guido, ILO Principles Concerning the Right to Strike, 137 (4) International Labour Review (1996), p. 1.

¹¹ Second Report, 1952, Case No. 28 (Jamaica), para. 68.

other industrial action. It is irrelevant for these purposes whether the dismissal occurs during or after the strike".¹²

- In 2006, the CFA ruled that strikes are part and parcel of trade union activities.¹³
- In 2006, the CFA held that the right to strike is one of the essential means available to workers and their organisation for the promotion and protection of their economic and social interests.¹⁴

The CEACR's position with regard the right to strike follows along the same line:

- In 1983, the CEACR held that the right to strike is "one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests. These interests not only have to do with better working conditions and pursuing collective demands of an occupational nature, but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers".¹⁵
- In 1988, the CEACR held that "the common law renders virtually all forms of strikes or other industrial actions unlawful as a matter of civil law. This means that workers and unions who engage in such action are liable to be sued for damages by employers (or other parties) who suffer loss as a consequence, and (more importantly in practical terms) may be restrained from committing unlawful acts by means of injunctions (issued on both an interlocutory and a permanent basis). It appears to the Committee that unrestricted access to such remedies would deny workers the right to take strike or other industrial action to protect and to promote their economic and social interests. It is most

¹² 277th Report, para. 444.

¹³ ILO Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee Fifth (Revised) edition, Geneva: International Labour Office (2006), para. 521.

¹⁴ *Ibid.*, para. 522.

Article 3 of the Convention No. 87 states that "1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof".

It should be noted that in approximately 500 cases dealt with by the CFA since 1951, the CFA relied upon a three-dimensional concept to infer from Article of the Convention that workers organisations shall have the right to organise their administration and activities and to formulate their programs without the interference of public authorities which might restrict this right or impede the lawful exercise thereof. The CFA recognized the right to strike as being included within these activities, and determined its limits. See: Ruth Ben Israel, *International Labour Standards: The Case of Freedom to Strike* (Deventer: Kluwer, 1988), p. 66.

¹⁵ ILO Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations, Report 111 (4B), International Labour Conference 69th Session, Geneva 1983, para. 200.

important, therefore, that workers should have some measures of protection against civil liability".¹⁶

Furthermore, in relation to Kuwait (the case study of this article) the CEACR had, made a number of observations (or direct requests) over time to the State of Kuwait with respect to the application of Convention no. 87 that Kuwait joined in 1961.¹⁷ Following are some examples of the these observations and direct requests:

- 1- In 1989, the CEACR noted a number of inconsistencies between the Kuwaiti Labour Code (Law no. 38 of 1964) and Convention no. 87 that, *enter alia*, the restriction on the free exercise of the right to strike (Article 88 of the Labour Code) is in infringement of the Convention, and added that the right to strike is "one of the essential means available to workers' organisation for the promotion and protection of the interests of their members".¹⁸
- 2- In 1994, upon examining information supplied by the Government of Kuwait regarding the application of Convention No. 87, the CEACR held that "the restriction on the free exercise of the right to strike (Article 88 of the Labour Code) is contrary to the principle that workers and their organisations should be able to organise their activities and formulate their programs in defence of their economic, social and

¹⁶ Report 111, Part 4A, to the International Labour Conference, 1989, p. 238.

¹⁷ Kuwait is a State Party to 19 ILO Conventions:

- Hours of Work (Industry) Convention, 1919 (No. 1), ratified in 21/9/1961.
- Forced Labour Convention, 1930 (No. 29), ratified in 23/9/1968.
- Hours of Work (Commerce and Offices) Convention, 1930 (No. 30), ratified in 21/9/1961.
- Holidays with Pay Convention, 1936 (No. 52), ratified in 21/9/1961.
- Labour Inspection Convention, 1947 (No. 81), ratified in 23/11/1964.
- Freedom of Association and Protection of the Right to Organise Convention, 1948 (NO. 87), ratified in 21/9/1961.
- Night Work (Women) Convention (Revised), 1948 (No. 89). Ratified in 21/9/1961.
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98), ratified in 9/8/2007.
- Abolition of Forced Labour Convention, 1957 (No. 105), ratified in 21/9/1961.
- Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106), ratified in 21/9/1961.
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111), ratified in 1/12/1966.
- Final Articles Revision Convention, 1961 (No. 116), ratified in 23/4/1963.
- Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117), ratified in 23/4/1963.
- Guarding of Machinery Convention, 1963 (No. 119), ratified in 23/11/1964.
- Benzene Convention, 1971 (No. 136), ratified in 29/3/1974.
- Minimum Age Convention, 1973 (No. 138), ratified in 15/11/1999.
- Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), ratified in 15/8/2000.
- Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159), ratified in 26/6/1998.
- Worst Forms of Child Labour Convention, 1999 (No. 182), ratified in 15/8/2000.

¹⁸ Observation (CEACR) – Adopted 1989, Published 76th ILC Session (1989) (Kuwait) <<http://www.ilo.org/dyn/normlex/en>> (visited in 19/4/2015).

occupational interest, which may include calling a strike, without interference by the public authorities.¹⁹

- 3- In 2008, while reviewing Kuwait's report and its reply to a comment made by the International Trade Union Confederation (ITUC), the CEACR noted that the provisions of the draft labour code appear to resolve a number of discrepancies between domestic legislation and the provisions of Convention No. 87. However, with regard to the right to strike, the Committee maintained that "as far as compulsory arbitration prevents strike action, it is contrary to the right of trade unions to freely organise their activities. Compulsory arbitration to end a collective labour dispute and a strike is acceptable if it is at the request of both parties involved in the dispute..". Therefore, the Committee requested that the Government of Kuwait amend these provisions of the draft labour code to ensure full conformity with the principles enshrined in Convention No. 87.²⁰
- 4- In 2010, after the issuance of a new labour code in February of that year (Law 6/2010), the CEACR made many observations on the new law: one of the observations was regarding the right to strike, in which the Committee noted that Article 132 of the Law 6/2010 prohibits the parties to the dispute to stop work, totally or partially, when direct negotiations are ongoing or if the Ministry has referred the dispute to the Reconciliation Committee or the Arbitration Board. The Committee "understands accordingly that the intervention by the Ministry in a labour dispute may lead to an arbitration procedure being mandatory and the work stoppage being prohibited, i.e. strike. The Committee recalls that in as far as compulsory arbitration prevents strike action, it is contrary to the right of trade unions to freely organise their activities...". Therefore, the Committee requested that the Government of Kuwait amend this Article in the new labour code.²¹

Even more significantly, the ILO Commissions of Inquiry, which decide complaints under Article 26 of the ILO Constitution²² and

¹⁹ Observation (CEACR) – Adopted 1994, Published 81st ILC Session (1994) (Kuwait) <<http://www.ilo.org/dyn/normlex/en>> (visited in 19/4/2015).

²⁰ Observation (CEACR) – Adopted 2008, Published 98th ILC Session (2009) (Kuwait) <<http://www.ilo.org/dyn/normlex/en>> (visited in 19/4/2015).

²¹ Observation (CEACR) – Adopted 2010, Published 100th ILC Session (2011) (Kuwait) <<http://www.ilo.org/dyn/normlex/en>> (visited in 19/4/2015).

²² Article 26 of the ILO Constitution states that:

1. Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles.
2. The Governing Body may, if it thinks fit, before referring such a complaint to a Commission of Inquiry, as hereinafter provided for, communicate with the government in question in the manner described in article 24.
3. If the Governing Body does not think it necessary to communicate the complaint to the government in question, or if, when it has made such communication, no statement in reply has been received within a reasonable time which the Governing Body considers to be satisfactory, the Governing Body may appoint a Commission of Inquiry to consider the complaint and to report thereon.

constitutes an authoritative interpretative body made many conclusions that shared the views of the CFA and CEACR. For examples in the complaint against Poland in 1984, the Commission of Inquiry held that "Convention No. 87 provides no specific guarantee concerning strikes. The supervisory bodies of the ILO, however, have always taken the view – which is shared by the Commission – that the right to strike constitutes one of the essential means that should be available to trade union organisations for, in accordance with Article 10 of the Convention, furthering and defending the interests of their members. An absolute prohibition of strikes thus constitutes, in the view of the Commission, a serious restriction on the right of trade unions to organise their activities (Article 3 of the Convention) and, moreover, is in conflict with Article 8, paragraph 2, under which the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for (by the Convention)".²³

Importantly, in a complaint against Zimbabwe in 2010, the Commission confirmed that "the right to strike is an intrinsic corollary of the right to organise protected by Convention No. 87."²⁴

Nonetheless, it must be emphasized that the right to strike is not absolute and is subject to specific restrictions (or exceptions) as established by ILO practice and jurisprudence. These restrictions or exceptions can be the following:

Firstly, a purely political strike is prohibited, unless the government's policies that workers or employees are standing against have some impact on their interests. In this case, a strike against these policies is legitimate in principle.²⁵

4. The Governing Body may adopt the same procedure either of its own motion or on receipt of a complaint from a delegate to the Conference.

5. When any matter arising out of article 25 or 26 is being considered by the Governing Body, the government in question shall, if not already represented thereon, be entitled to send a representative to take part in the proceedings of the Governing Body while the matter is under consideration. Adequate notice of the date on which the matter will be considered shall be given to the government in question.

²³ Report of the Commission of Inquiry instituted under Article 26 of the Constitution of the ILO to examine the complaint on the observance by Poland of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) (Vol. LXVII, 1984, Series B, Special Supplement), para. 517.

²⁴ Report of the Commission of Inquiry instituted under Article 26 of the Constitution of the ILO to examine the complaint on the observance by Poland of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) (Vol. XCIII, 2010, Series B, Special Supplement), para. 575.

²⁵ See:

- Breen Creighton, Freedom of Association, in *Comparative Labour Law and Industrial Relations in Industrialized Marks Economies* (Roger Blanpain ed., 2007), at 315.
- Zoe Hutchinson, The Right to Freedom of Association in the Workplace: Austria's Compliance with International Human Rights Law, 27 *UCLA Pacific Basin Law Journal* (Spring 2010), at 138.

Secondly, members of the police and armed forces do not have the right to strike and excluded from the ambit of Convention No. 87.²⁶

Thirdly, restriction or even total prohibition of the right to strike is acceptable with regard to public servants exercising authority in the name of the State.²⁷

Fourthly, restriction or even total prohibition of the right to strike is acceptable with regard to workers in essential services in the strict sense of the term, that is services where an interruption would endanger the life, personal safety or health of the whole or part of the population.²⁸

Fifthly and finally, a restriction or limitation on the right to strike is understandable in the events of an acute national crisis.²⁹

Last but not the least, it must be noted that imposing some procedures on trade unions before they can resort to strike is generally recognized as acceptable as long as these procedures are reasonable, objectively justifiable and are not intended, in indirect way, to prohibit the right to strike. As the CFA and CEACR have held on a number of occasions, restrictions that place substantial limitation on the right to strike, such as the imposition of legal procedures that require trade unions to comply with complicated balloting requirement prior to the declaration of a strike, are unreasonable and contrary to the ILO Convention No. 87.³⁰

²⁶ O.V.C. Okene, *The Status of the Right to Strike in Nigeria: A Perspective for International Comparative Law*, 15 (1) *African Journal of International and Comparative Law* (2007), at 33.

Article 9 of the Convention No. 87 states that "1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations. 2. In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention".

²⁷ See: Observation (CEACR) – Adopted 1989, Published 76th ILC Session (1989) (Kuwait) <<http://www.ilo.org/dyn/normlex/en>> (visited in 19/4/2015), Observation (CEACR) – Adopted 1994, Published 81st ILC Session (1994) (Kuwait) <<http://www.ilo.org/dyn/normlex/en>> (visited in 19/4/2015), and ILO Freedom of Association and Collective Bargaining: Report of the Committee of Experts in the Application of Conventions and Recommendations, International Labour Conference, 81st Session, 1994, Geneva, Report 111 (Part 4B), p. 68, para. 158.

²⁸ ILO Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee Fifth (Revised) edition, Geneva: International Labour Office (2006), para. 576. See also: Official Bulletin, Vol. XLIV No. 3, 54th Report, Case No. 179 (1961) para. 55, ILO Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee Third edition, Geneva: International Labour Office (1985), para. 393, and ILO Freedom of Association and Collective Bargaining: Report of the Committee of Experts in the Application of Conventions and Recommendations, International Labour Conference, 81st Session, 1994, Geneva, Report 111 (Part 4B), para. 159.

²⁹ Observation (CEACR) – Adopted 1989, Published 76th ILC Session (1989) (Kuwait) <<http://www.ilo.org/dyn/normlex/en>> (visited in 19/4/2015).

³⁰ Report of the Committee of Experts in the Application of Conventions and Recommendations (2009), p. 189.

3. KUWAIT'S NATIONAL LAWS

The focus here will be on Kuwait national laws that may have link with the right to strike. The discussion will involve the existence of this right, its parameters, and effectiveness. The question is whether domestic regulation of the right of strike in Kuwait complies with the relevant rules of international law as pointed out above.

3.1. Constitutional Provisions

Article 43 in the Kuwait Constitution may have reference to the right to strike, as it states that "Freedom to form associations and unions on a national basis and by peaceful means shall be guaranteed in accordance with the conditions and manner specified by law. No one may be compelled to join any association or union".³¹ Thus, although this provision is silent on the right to strike, one may argue that it is an outcome of freedom that employees and workers be able to form unions and associations and the latter roles in protecting members' social and economic interests, since a strike is one of the essential means in carrying out these interests.

3.2. Old Labour Law (Code No. 38 of 1964)

The Old Labour Code was the first regulation to come into force that related to workers since the independence of the State of Kuwait in 1961. It consisted of 110 Articles regulating various subjects of interests to workers such as working conditions, duties of workers in private sectors, and private sector workers' rights. Thus, it excluded from its scope State and public service workers, fixed-term workers employed by the State under the regulations concerning the employment of Indian and Pakistani citizens, domestic workers and employees holding similar positions, and seafarers.³²

With respect the right to strike, the Code devoted Chapter 12 to workers' and employers' organisations and provided in Article 70 that workers have the right "to establish trade unions to pursue their interests, protect their rights, work on promotion of their social and economic status, and represent them in all matters that concern them".³³ Nevertheless, Article 88 prescribed the means that workers must resort to in order to settle labour disputes, of which the right to strike was not included. Under Article 88, when labour dispute arise between workers and their employers, the parties must consider the following procedures to settle that dispute: 1- A direct negotiation must be conducted between employer – or his representative – and workers – or their representatives, and register any agreement they come to at the Ministry of Social Affairs and Labour; 2- if the direct negotiation failed, either party, or both, may

See also: Charles Barrow, Trade Union Rights in the United Kingdom and Article 11 of the European Convention: Past Failures and Future Possibilities, 1 European Human Rights Law Review (2013), p. 64.

³¹ Article 43 of Kuwait's Constitution.

³² Article 2 of Code No. 38 of 1964.

³³ Article 70 of Code No. 38 of 1964.

ask the Ministry of Social Affairs and Labour to settle the dispute; 3- if the Ministry failed to settle the dispute within 15 days from the request, the dispute will be referred to Arbitration Committee on Labour Dispute, which is composed of a circuit of the Court of Appeal established annually by the General Assembly of this Court, a chief prosecutor delegated by the Attorney General, and a representative from the Ministry of Social Affairs and Labour appointed by the Minister. The representatives of the disputing parties may appear before the Committee and the decision of this Committee is final and binding on all parties.³⁴

Thus, even if the Labour Code No. 38 of 1964 did not prohibit a strike per se, the procedures incorporated in Article 88 including compulsory arbitration, which may be imposed at the request of one party (the employer in this case), will end any strike. That why the CEACR had severely criticized the then Kuwait's Labour Code, especially Article 88, and asked the Government of Kuwait to amend it.³⁵

3.3. Present Labour Law (Code No. 6 of 2010)

Because of the intense criticism by the CEACR and ICFTU regarding the past labour law's discrepancies between that law and ILO Conventions, especially Convention No. 87 as discussed earlier, Kuwait's National Assembly (the Parliament) issued a new labour law in 2010 that consists of 150 articles and regulates all matters that concern labour.

Section (Collective Work Dispute – Articles 123 to 132) regulated the right to strike, albeit in an indirect and complex manner. Firstly, it defines a collective work dispute as a dispute that "arises between one or more employers and all his or their workers or a group thereof due relevant to the work or the working conditions".³⁶ Secondly, in the event of collective disputes, the involved parties shall [mandatory clause] resort to direct negotiation between them or their representatives.³⁷ Thirdly, if the direct negotiation failed, either party to the dispute may [optional clause] submit to the competent Ministry a request to settle the dispute amicably through the Work Dispute Reconciliation Committee established by a decision of the Minister.³⁸ The competent Ministry may interfere [optional clause] in the event of collective dispute, if necessary, without a request from any of

³⁴ Article 88 of Code No. 38 of 1964.

³⁵ For examples see: Observation (CEACR) – Adopted 1989, Published 76th ILC Session (1989) (Kuwait)

<<http://www.ilo.org/dyn/normlex/en>> (visited in 19/4/2015). Observation (CEACR) – Adopted 1992, Published 79th ILC Session (1992) (Kuwait)

³⁶ Article 123 of Code No. 6 of 2010.

³⁷ Article 124 of Code No. 6 of 2010.

³⁸ Article 125 of Code No. 6 of 2010.

The Work Dispute Reconciliation Committee shall consist of the following:

- a- Two representatives designated by the syndicate of the disputing workers.
- b- Two representatives designated by the employer or the disputing employers.
- c- The chairman of the Committee and representatives from the competent ministry appointed by the competent minister that shall specify the number of representatives of the disputing parties (Art. 126).

the disputing parties in order to settle the dispute amicably. The Ministry can also refer the case to the Reconciliation Committee or the Arbitration Panel, as it may deem appropriate.³⁹ Thirdly, the Reconciliation Committee shall hear the dispute within one month after the submittal of the application whether from any of the disputing parties or the competent authority. The settlement of dispute by this Committee shall be final and binding upon all parties. If settlement was unreachable during the time limitation, the Committee shall refer [mandatory clause] the dispute within a week after its last meeting to the Arbitration Panel.⁴⁰ It should be noted that referral to Arbitration Panel is an optional choice left to the competent Ministry.

The Arbitration Panel should hear the dispute within 20 days from the date of the submittal of the disputing documents to the Clerk Department and the dispute shall be settled within three months after the date of the first session.⁴¹ The Arbitration Panel shall have all the powers of the Court of Appeal and the verdicts rendered by it shall be final and binding.⁴²

Finally, suspension of work (i.e. strike), whether entirely or partially, shall be prohibited during direct negotiation or when the dispute is pending before the Reconciliation Committee or the Arbitration Panel or upon interference by the competent Ministry.⁴³

Therefore, even if the right to strike is generally guaranteed under the new labour law, it could, in effect, be prohibited in all cases of collective labour disputes. This is because direct negotiation is obligatory when a labour dispute arises, and during which total or partial stoppage of work (i.e. strike) is not allowed as Article 132 prescribes. And if direct negotiations fail for any reasons, like an employer's refusal to accept workers' demands, either party (or the competent Ministry) may turn to reconciliation procedures. Hence, it is in the hands of the employer to prevent a strike by resorting the reconciliation process, since a strike (either total or partial) is absolutely prohibited by virtue of Article 132 during this process. Even more peculiarly, parties must arbitrate when the reconciliation process failed or did not reach agreement in the prescribed time, and must end with a final and a binding decision. Thus, a strike is clearly prohibited during this process as mandated by Article 132 and when the process is finished as implied by the nature of its arbitral verdict as final and binding. It therefore leaves workers with no other options but to comply with that verdict. It should be noted that arbitration, along with

³⁹ Article 131 of Code No. 6 of 2010.

⁴⁰ Article 127 of Code No. 6 of 2010.

The Arbitration Panel shall consist of the following:

- a- A circuit of the Court of Appeal established annually by the General Assembly of this Court;
- b- A chief prosecutor delegated by the Attorney General; and
- c- A representative from the competent Ministry appointed by the Minister. The disputing parties or their legal representatives shall appear before the Panel.

⁴¹ Article 129 of Code No. 6 of 2010.

⁴² Article 130 of Code No. 6 of 2010.

⁴³ Article 132 of Code No. 6 of 2010.

all of its legal consequences with regard to a strike, can occur by optional request by the competent Ministry.

For all these reasons, the CEACR had criticised Kuwait's labour law compulsory arbitration and regarded it as a contravention of Convention No. 87, as it is contrary to the right of trade unions to freely organise their activities, especially to strike. According to the CEACR the compulsory arbitration is only acceptable if it is at the request of both parties to the dispute.⁴⁴

Needless to say, that the Kuwait's regulations of strikes in its new labour law (Code No. 6 of 2010) is contrary to other relevant rules of international law, such as the ICCPR.

3.4. Public Civil Service Law (Law Decree No. 15 of 1979)

As mentioned earlier, Kuwait's labour laws - both the old and the present ones - have generally excluded public servants (i.e. workers in the public sector) from their scope of application. Therefore, the question here is whether such workers (employees as may be called) enjoy the right strike under Kuwait's laws?

It should be noted that strikes among public civil servants have received attention and discussion and there are two different school of thoughts, one opposing and one supporting public sector employees' right to strike.⁴⁵ The opposing view stands on the following rationales:

- 1- Strikes contradict with the principle of the continuous uses of public utilities;
- 2- Strikes contradict with the duty of employees to respect orders from their administrative employers (i.e. respect hierarchy instructions);
- 3- Strikes contract with the privilege of the administration to solely regulates employment;
- 4- Strikes constitute a kind of defiance and insolence for the State represented by the administrative authority;
- 5- Strikes contradict with the principle of neutrality of public services, because -if otherwise- it can be abused for political or ideological ideas;
- 6- Strikes may have devastating impacts on the economy because of their possible enormous effect on productive tools that may harm the economic stability;
- 7- Strikes may lead to dissatisfaction of public needs, therefore may cause public instability;
- 8- Accepting demands of striking employees may encourage all employees to make more demands by threatening to resort to strike even at the expense of public service; and
- 9- Strikes conflict with the principle of a government's political responsibility, since government may be forced to make some

⁴⁴ Observation (CEACR) – Adopted 2010, Published 100th ILC Session (2011) (Kuwait) <<http://www.ilo.org/dyn/normlex/en>> (visited in 19/4/2015).

⁴⁵ Ali A. S. Ahmed, *The Right to Strike in Public Utilities*, Dar AlKotab: Kuwait (2nd., 1997).

decisions under the fierce of strike and may, therefore, be free of political responsibility in these cases.⁴⁶

On the other hand, there is another school of thought that support the notion that public employees should be able to strike, this argument relies on the following:

- 1- The principle of absolute obedience by employees is becoming less stringent because employees are becoming more active participants in determining working conditions and in the administration of the public utility;
- 2- The close similarity between the status of employees in public sector and workers in private sector calls for equality across the sectors with regard to rights, including the right to strike. Hence, it is no longer acceptable to only recognize the right to strike for private-sector workers;
- 3- The recognition of the employees' trade union rights requires the recognition of the right to strike as one the essential means for trade unions to realize their purpose;
- 4- A strike in the public sector may be less detriment on public interests when compared with some strikes that occur in the private sector;
- 5- A strike is not taken defiance and revolution, but is a part of the freedom of expression that is constitutionally guaranteed and constitutes a means in the participation of administration of public affairs of the State;
- 6- When employees stop performing some of their duties during a strike is in countenance with the State's stoppage of performing its duties in paying proportionate salaries; and
- 7- A strike is one of the most effective means that employees can possess facing the powerful authority of State when the State enacts legislation and makes decisions that severely affect their working conditions.⁴⁷

In Kuwait the law on public service is considered a general law that applies to public employment and which must be referred to with respect to all matters that are not regulated by any special law. Thus, the question here is whether employees who work in public sector have the right to strike in accordance with the law on public service?

To answer this question one must begin with the fact that neither the law on public service (Law Decree No. 15 of 1979) nor any of its executive rules contain a provision clearly permitting or prohibiting strikes, or punishing those who strike. This is in contrast with , for example, one of the special laws that applies to employees in the Public Authority on Industry, which states clearly that "an employee is banned from... participation in organisation on unlawful meetings or strikes...".

Nonetheless, a strike in public employment seems to conflict with Article 23 of the Law Decree No. 15 of 1979, which states that "an

⁴⁶ Abdullah Hanafi, *Trade Unions Role in Constitutional Life*, Dar Alnahda AlArabia (1998), pp. 485, 493.

⁴⁷ Ibid.

employee must not absent himself from work except within the authorized periods of leave"⁴⁸ and Article 24 of the same law that "An employee shall: 1- Personally undertake the task assigned to him, in good faith and efficiently he shall deal properly with citizens. 2- He shall use official working hours to discharge the duties of his post. He may be required in addition to work outside official hours of work if the interests of his work or its nature so require. 3- An employee shall faithfully and honestly execute orders issued to him within the bounds of the law, regulations and rules in force. 4- He shall abide by the terms of the law and regulations and shall preserve State property; furthermore, in dispensing with funds, he shall do so while respecting the dictates of honesty and care. 5- He shall uphold the dignity of his post, and conduct himself with a due respect".⁴⁹ Since a strike is equivalent to an absence from work and necessarily entails a refusal of work assignments and duties, one may conclude that a strike violates these articles.

However, a broad reading of Kuwait's laws may lead to the opposite conclusion - that is, that employees have the right to strike. This position is supported by Article 98 of Labour Law (Code No. 15 of 2010), which states that "The right to establish unions for employers and the right to syndicate organisations for workers is guaranteed in accordance with the provisions of this Law. The provisions of this Chapter shall apply to workers in the public and oil sectors to the extent they do not conflict with the provisions of other laws regulating their affairs".⁵⁰

The "Chapter" of the Labour Law that Article 98 refers to is Chapter Five, which includes Section Three (Collective Work Dispute), which – as discussed earlier gives workers the right to strike, although only generally and restricted in a complex way. That means that employees in the public sector enjoy the same rights as workers in the private sector as articulated by Article 98 in cases of labour disputes.

Nevertheless, it could be argued that Article 98 of Labour Law gives priority with regard to employees to Law on Public Service by the virtue of the closing clause of it, which states that "The provisions of this Chapter shall apply to workers in the public and oil sectors to the extent they do not conflict with the provisions of other laws regulating their affairs". Thus, arguably one may claim that since Law on Public Service regulates employees' affairs and applies only when it conflicts with the Labour Law with regard to the right to strike, since the latter allows what the former prevents.

To solve this apparent paradox, one must refer to Article 70 of Kuwait Constitution, which states that "The Amir shall conclude treaties by decree and shall transmit them immediately to the National Assembly with the appropriate statement. A treaty shall have the force of law after it is signed, ratified and published in the Official Gazette. However, treaties of peace and alliance; treaties concerning the territory of the State, its

⁴⁸ Article 23 of the Law Decree No. 15 of 1979.

⁴⁹ Article 24 of the Law Decree No. 15 of 1979.

⁵⁰ Article 98 of the Code No. 15 of 2010.

natural resources or sovereign rights, or public or private rights of citizens; treaties of commerce, navigation and residence; and treaties which entail additional expenditure not provided for in the budget, or which involve amendment of the laws of Kuwait; shall come into force only when made by a law...".⁵¹ Thus, any treaty, whether ratified by the Amir (the President) or the national Assembly (the Parliament), becomes part of the domestic law by having the force of law equivalent to laws enacted by the National Assembly, and will be subjected in the national sphere to the rule that the "the later law abrogate" when there is a conflict.

Kuwait ratified Convention No. 87 in 1961 and Convention No. 98 in 2007, both of which ILO supervisory bodies consider as including the right to strike for both workers in private sector and employees in public sector. Thus, according to the rule that the later law abrogates the former, the law issued in 2007 to ratify Convention No. 98 will amend the Law on Public Service of 1979 in all conflicting matters, including the right to strike.

Even more important, in 2013 the National Assembly issued Law No. 84 of 2013 on Approval of the Arab Charter on Human Right (2006), which states in Article 35 that "1- Everyone has the freedom to pursue trade union activity for the protection of his interest; 2- No restrictions shall be placed on the exercise of these rights and freedoms except such as are prescribed by the laws in force and that are necessary for the maintenance of national security, public safety or order or for the protection of public health or morals or the rights and freedoms of others; 3-Every State party to the present Charter guarantees the right to strike within the limits laid down by the laws in force".⁵² Therefore, this later law amends all conflicting laws with regard to the right to strike in the Law on Public Service of 1979 and the Labour Law of 2010.

The Egyptian courts of law, which serves as a classic background for Kuwaiti courts of law, followed this approach when the High Court of State Security in 1987 exonerated workers on Public Authority on Realways who were criminally tried for breaching Egyptian Penal Law, which prohibited strikes in public utilities and made the strike a punishable act. The Court cited Article 8 (1) (d) of the ICESCR, which similar to the Arab Charter on Human Rights states that "The right to strike, provided that it is exercised in conformity with the laws of the particular country". The Court held that since Egypt had ratified the ICESCR in 1982, it became – as Article 151 of the Constitution mandates – part of the Egyptian domestic laws and amended all conflicting laws, including the Penal Law.⁵³

⁵¹ Article 70 of Kuwait's Constitution.

⁵² Article 35 of the Arab Charter on Human Right.

⁵³ See: Egyptian Attorneyship Journal, Vol. 8, (June – 1987), p. 12.

4. CONCLUSION

As shown above international law clearly mandates that the right to strike is part of the rights of free organisation and free expression, as the ICCPR and ICESCR state, or as a means for trade unions to protect their members' interests and rights, as implied from the ILO convention (Convention No. 87 and Convention No. 98). This study also uncovered the status of the right to strike for workers in private sector and employees in public sector in the State of Kuwait. It argues that the regulations of this right with regard to both categories, is insufficient and inadequate, contravening the relevant rules of international law.

In conclusion this study suggests that the State of Kuwait must amend the present labour law (Code No. 6 of 2010), so that it clearly gives workers and employees the right to strike and ensures all procedures that must be followed to solve collective labour disputes do not, in effect, entail a total prohibition on the right to strike, as is the current case in the applicable labour law. For example, although arbitration is common procedure in labour disputes, it must not be mandated at the request of one party of the dispute (the employer in this case), which will essentially prohibit all strikes. Rather, arbitration must be agreed upon by both parties (workers and employers).

Nonetheless, the amendment of the present labour law to ensure its conformity with international law does not mean that the right to strike must be absolute and free of any limitations or restrictions. Limitations and restrictions that are acceptable and common include the following:

- Prohibition of purely political strike;
- members of the police and armed forces cannot strike;
- restriction or even total prohibition of the right to strike is acceptable with regard to public servants exercising authority in the name of the State.
- restriction or even total prohibition of the right to strike is acceptable with regard to workers or employees in essential services in the strict sense of the term, that is services the interruption of which would endanger the life, personal safety or health of the whole or part of the population, i.e. any service of this type must continue during a strike. For example, in Brazil there must be at least 30% of essential services continuing during a strike.⁵⁴
- restriction or limitation on the right to strike is acceptable in the events of acute national crisis.
- Imposition of some procedures on trade unions before they can resort to strike is generally recognized as acceptable as long as these procedures are reasonable, objectively justifiable and are not intended to indirectly prohibit the right to strike. For example, under the Australian Fair Work Act a strike is legitimate if it has been authorized by a mandatory secret ballot when -at least- 50% of people on the

⁵⁴ Brazil: Strike Rights Limited by the Federal Supreme Court <http://www.loc.gov/lawweb/servlet/lloc_news?disp3_12054081_text>

role of voters participated and more than 50% vote in favor of the action.⁵⁵



⁵⁵ Zoe Hutchinson, *Op. Cit.*, at 138.