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**Implementation of the Core ILO
Standards, the Right to Freedom of
Association and the Right to Collective
Bargaining at the National Level –
Comparative Study of Poland and Georgia**

Master thesis
30 credits (30 ECTS)

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Master's Programme in International Human Rights Law and
International Labour Rights

Spring, 2011

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Summary

By ratifying the ILO Conventions on freedom of association and the right to collective bargaining (Nos. 87 and 98) member states undertake the obligation to bring national legislation and practice into full compliance with these international labour instruments. However, the question is whether the countries actually implement their international commitments.

This comparative paper studies the effectiveness of compliance with Conventions Nos. 87 and 98 in two ILO member states, Poland and Georgia. For this assessment of compliance, the actions of governments and domestic courts are analysed. The ILO Committee of Experts' reports are also examined in order to find out whether the two countries are willing to implement the two conventions more effectively.

The paper intends to show the reader the influence the ratified ILO Conventions have on the national level and reveal the gaps in national legislation and policy that impede effective protection of basic workers' rights. The author further intends to remind national policy makers and legal practitioners of the importance of the principles on freedom of association and the right to collective bargaining and to make recommendations on how to implement these labour standards effectively on the national level. In this way, making a decent life real for all.

Aknowledgments

I offer my regards to all those who have supported me in one way or another during the process of writing this thesis. I owe my deepest gratitude to my supervisor Lee Swepston whose encouragement, supervision and support from the preliminary stages to the concluding level enabled me to believe in myself and finish the thesis on time.

I am grateful to my friend Jackson Oldfield who was always ready to correct my English. I also want to thank my friend Kakha Omarashvili for those friendly conversations that gave me courage and motivation for thesis writing.

Finally, it is my pleasure to thank my sister, Sophio Tatulashvili and my parents whose support I could feel even from this distance. Thank you.

Abbreviations

WWI	World War I
WWII	World War II
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CESCR	International Committee on Economic, Social and Cultural Rights
Convention No. 87	Freedom of Association and Protection of the Right to Organize Convention 1948, (No. 87)
Conventions No. 98	Right to Organize and Collective Bargaining Convention 1949, (No. 98)
ICESCR	International Covenant on Economic, Social and Cultural Rights
ITUC	International Trade Union Confederation
ILC	International Labor Conference
ILO	International Labor Organisation
LILS	Committee on Legal Issues and International Labor Standards
UDHR	Universal Declaration on Human Rights
GTUC	Georgian Trade Union Confederation
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
ESC	European Social Charter
PES	Professional Education Syndicate
ESFTUG	Educators & Scientists Free Trade Union of Georgia

ILC

International Labor Conference

Solidarity

Independent Self-Governing Trade Union in
Poland

1 Introduction

1.1 Statement of the Problem

After WWI, it became clear that there could be no world peace achieved if social injustice is present. In order to achieve social justice and guarantee world peace and security it was necessary to improve the labour conditions of the large masses of people. The International Labour Organization (ILO) was created in 1919 with a purpose to promote decent conditions of work and eventually - peace. According to the Preamble of the ILO Constitution the high contracting parties, “moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world ...,” agree to adopt the Constitution.

While it is agreed that work is central to people’s well-being and security, achievement of the goal stated in the Preamble of the ILO Constitution is not possible through the mere promotion of employment, but only through the employment that is of a certain quality.¹ Therefore, from its early years the ILO started to develop a system of International Labour Standards that aims to give the opportunities to men and women to obtain decent and productive work and to live in freedom, equity, security and dignity. Recently, the ILO developed the Decent Work Agenda², which is a restatement of the ILO agenda for the last 90 years. The respect to the principle of the freedom of association and the right to collective bargaining constitute an important part of the Agenda.

Even though the role of the ILO to put the Decent Work Agenda in practice is very important, the main responsibility still lies with the member states. The ILO *Declaration on Social Justice for a Fair Globalization 2008* emphasises the need for mobilization of all available means of action from the ILO as well as from the member states. It further states, “Members have a key responsibility to contribute, through their social and economic policy, to the realization of a global and integrated strategy for the implementation of the strategic objectives, which encompass the Decent Work Agenda”.³

However, looking at the reports of the ILO supervisory bodies it becomes clear that the member states, even though they ratify the ILO conventions on

¹ In this regard, the ILO Employment Policy Convention No. 122 is interesting to note, article 1 of which promotes “full, productive and freely chosen employment”

² ILO, *Decent Work Agenda*, available at <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm>

³ The ILO Declaration on Social Justice for a Fair Globalization 2008

Freedom of Association (No. 87) and the Right to Collective Bargaining (No. 98) often fail to put them into practice. The violations of the rights guaranteed by these conventions are still happening even in the countries with relatively strong rule of law system.

1.2 Research Questions

The following research questions are asked: is the implementation of the ILO conventions about freedom of association (No. 87) and the right to collective bargaining (No. 98) effective in Georgia and Poland? How can they improve compliance with the two ratified conventions?

1.3 Methodology and Scope

Both countries have ratified the two conventions Nos. 87 and 98 and both share the same obligations to ensure their effective implementation in law and in practice. Thus, this comparative study measures the national compliance of Poland and Georgia with those ILO conventions.

In order to measure if the applications of the ILO standards are effective in law and in practice, the national labour legislation of the member states and the decisions of the domestic courts are examined. References are also made to the additional circumstances that might hinder the proper application of the ILO standards in Poland and Georgia. Thus, two components are used in order to assess the effectiveness of the implementation of the ILO standards in Poland and Georgia: legislation and the court decisions. Additionally, reference is also made to the circumstances that influence the application in practice.

The Soviet ideology has strongly influenced the labour legislation of Poland and Georgia and the major changes in terms of labour legislation have taken place after the dissolution of the Soviet Union in both countries. Therefore, I take the dissolution of the Soviet Union as a dividing line and compare the implementation of the ILO standards on national level before and after the dissolution.

The research ends with the findings of the comparative study. The recommendations will be made for the both countries in order to improve their compliance with the ILO conventions and implement its provisions effectively.

2 The Right to Freedom of Association and the Right to Collective Bargaining from an International Perspective

2.1 The Universal Declaration on Human Rights

Article 20 of the Universal Declaration on Human Rights (UDHR) declares that:

- (1) *Everyone has the right to freedom of peaceful assembly and association.*
- (2) *No one may be compelled to belong to an association.*

Article 23 of UDHR includes the elements of the right to decent work, including the right to form and join trade unions:

- (1) *Everyone has the right to work, to free choice of employment, to **just and favorable conditions of work** and to protection against unemployment.*
- (2) *Everyone, without any discrimination, has the right to **equal pay for equal work**.*
- (3) *Everyone who works has the right to **just and favorable remuneration** ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.*
- (4) *Everyone has the right to **form and to join trade unions** for the protection of his interests.*

2.2 The International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes everyone's right to form and join trade unions and the right to strike. It also recognizes the right of trade unions to function freely and establish national federations, confederations or join international trade-union organizations following their will (article 8).

Article 2 (1) of the ICESCR proclaims:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

In its General Comment No. 3 on the Nature of States Parties Obligations the Committee on Economic, Social and Cultural Rights (CESCR) clarifies that state parties have an obligation "to take steps" and that such steps should be "deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant". The Committee further states that even if the available resources are demonstrably inadequate, the state parties still have an obligation "to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances".^{4 5}

⁴ CESCR, *General Comment No. 3: the nature of State Parties' Obligations*, 1991, Para. 2, 9, 11

⁵ The position is shared by some commentators according to which the trade union rights guaranteed by article 8 ICESCR are such that are not dependant on "available resources" and that "no plausible reason exists which could explain why under the ICESCR the freedom to form and join trade unions should not be a right susceptible of immediate application", Christian Tomuschat, *Human Rights: Between Idealism and Realism*, Second Edition, Oxford University Press, 2008, p. 42

In its general comment No. 18 about the Right to Work the CESCR further emphasizes the trade union's "fundamental role in ensuring respect for the right to work at the local and national levels"⁶ and imposes obligation on state parties to "respect and protect the work of human rights defenders and other members of civil society, in particular the trade unions".⁷

2.3 Jurisprudence of the European Court of Human Rights

2.3.1 The Right to Bargain Collectively and the Right to Conclude Collective Agreement

In the case of *Swedish Engine Drivers' Union v. Sweden* the European Court of Human Rights (ECtHR) determining the content of the right stated that the right to freedom of association protected by article 11 of the European Convention on Human Rights (ECHR) can also include the right to engage in collective bargaining and conclude collective agreement in the interest of their members.⁸ However, the Court in the following paragraph embraces the idea that the right to conclude a collective agreement is not an inherent element of the right guaranteed in the first part of article 11, further stating that even though trade union freedom is acknowledged as a special aspect of freedom of association the article does not secure any particular treatment of trade unions or their members by the state, including the right to conclude a collective agreement.

The Court in the *Swedish Engine Drivers' case* concludes that trade unions have the right to be heard in order to be able to protect the interests of the members, however the Court gives the states free choice in choosing the means to this end, stating that "while the concluding of collective agreements is one of these means, there are others".⁹

⁶ CESCR, *General Comment No. 18: the Right to Work*, 2005, Para. 54

⁷ *Ibid.* Para. 51

⁸ *Swedish Engine Drivers' Union v. Sweden*, Para. 38, 1976, ECtHR

⁹ *Ibid.* Para. 40

The same conclusions were reached by the Court in the case of *National Union of Belgian Police v. Belgium*¹⁰ decided by the Court one year before the *Swedish Engine Drivers' case* and also in the case of *Schmidt and Dahlström v Sweden*¹¹ decided by the Court on the same day as the *Swedish Engine Drivers' case*.

The course taken by the ECtHR in the 1970's was followed by the Court until very recently. The case originated in Turkey, when the collective agreement between a trade union and local authorities was annulled and the right of the applicants, as municipal civil servants, to form a trade union was challenged in national courts. The case was referred to the ECtHR and in 2006 the Court by a decision of the Chamber decided that article 11 of the convention was violated by Turkey. The Turkish government not satisfied with the decision of the Chamber decided to refer the case to the Grand Chamber. The decision of the Grand Chamber was delivered in 2008. The Court stated that there had been a violation of article 11 on account of the interference with the right of the applicants to form a trade union and on account of the annulment of the collective agreement entered into by the trade union following collective bargaining with the employing authority.¹²

The Court held that the right to bargain collectively and the right to enter into collective agreement constitute an inherent element of the right to freedom of association guaranteed by article 11 ECHR¹³ and in deciding so relied on general practice of the European states, the European Social Charter (ESC) and notably on practice of the ILO and its conventions.¹⁴ The Court makes clear that even though the states must remain free to develop their own systems, all such systems must be consistent with the requirements of the ILO and the ESC.¹⁵

¹⁰ *National Union of Belgian Police v. Belgium*, Para. 38-39, 1975, ECtHR

¹¹ *Schmidt and Dahlström v. Sweden*, Para. 34-36, 1976, ECHR

¹² *Demir and Baykara v. Turkey*, Grand Chamber, 2008, ECHR

¹³ *Ibid.* Para. 153-154

¹⁴ *Ibid.* Para. 147 and 154

¹⁵ *Ibid.* Para. 147-149

The Court in *Demir and Baykara* also determines the scope for permitted restrictions on the rights under article 11.2 of the Convention. The Court refused that the restriction was necessary in a democratic society for the purposes permitted by article 11.2, further stating that the restriction was not proportional according to the ILO standards and the European instruments.¹⁶

It is also important to mention that the Court in *Demir and Baykara* referring much to the ILO standards also considers them as living instruments stating that the decisions of the ILO supervisory bodies are as important as the texts of the ILO conventions.¹⁷

2.3.2 Right to Strike

Demir and Baykara has set an interesting trend for other trade union rights and namely for the right to strike. Before *Demir and Baykara* the Court in the case of *Schmidt and Dahlström v. Sweden* held that even though only the wages of those trade union members were not raised who participated in the strike actions, there was no evidence suggesting that the trade union was deprived of the capacity to protect the interests of its members as it is guaranteed by article 11. According to the Court there must be a possibility to protect occupational interests of trade unionists by trade union action but each state is free to choose the means towards this end.¹⁸

One more important case from the pre - *Demir and Baykara* jurisprudence of the ECtHR was the case of *UNISON v. UK*. Here the Court held that even though the prohibition on the strike is considered as restriction on the applicant's power to protect the interests of the members the restriction was justified by reference to article 11.2 as a necessary in a democratic society for the protection of the economic interest of the employer. The major flow of this decision is that it presents an argument which is capable to legitimize

¹⁶ *Ibid.* Para. 147 and 165

¹⁷ K.D. Ewing and John Hendy QC, *The Dramatic Implications of Demir and Baykara*, *Industrial Law Journal*, Vol. 39, No. 1, March 2010, p. 8

¹⁸ *Supra* note 11, Para. 34-36

almost any restriction on strike action, since the later will almost always interfere with the economic interests of an employer.¹⁹

After the *Demir and Baykara* the position of the Court has changed. In case of *Enerji Yapi-Yol Sen v. Turkey* the Court emphasizing the importance of the right to strike for the protection of trade union members, further refers to the ILO practice and the ESC stating that the supervisory bodies of the ILO recognize the right to strike as an indissociable corollary of the right to freedom of association, while ESC recognizes the right to strike as a means to effective exercise of the right of collective bargaining. It was no longer stressed by the Court that Turkey was free to choose the means for the protection of trade union members. Instead, relying on the ILO and the ESC the Court stressed that Turkey violated the applicant's right to strike and therefore violated article 11.1 of the Convention.²⁰

In another post-*Demir and Baykara* case decided against Russia trade union members were discriminated against because of the collective action they took against the employer. The Court found that “the totality of the measures implemented to safeguard the guarantees of Article 11 should include protection against discrimination on the ground of the trade union membership”.²¹ The Court further held that while discrimination on the ground of trade union membership is so serious that it can jeopardize the very existence of the trade union, the member states have an obligation to set up a judicial system capable to protect against anti-union discrimination.²² The Court again largely relied on the decisions of the ILO supervisory bodies and the ESC.

¹⁹ *Supra* note 17, p. 12

²⁰ *Ibid.* p. 14-15

²¹ *Danilenkov v. Russia*, Para. 123, 2009, ECHR

²² *Ibid.* Para. 124, 2009, ECHR

2.4 Conclusion

Thus, the review of the international instruments shows that the provisions on freedom of association are consistent with the ILO definitions.²³ The recent jurisprudence of the ECtHR further promotes the trade union rights in line with the ILO supervisory bodies and recognizes the right to collective bargaining and the right to conclude collective agreement as rights protected under article 11, while at the same time, underlining the importance of the right to strike for the realization of those rights.

²³ Lee Swebston, *Human Rights Law and Freedom of Association: Development through ILO Supervision*, *International Labor Review*, Vol. 137, 1998, No. 2, p. 173

3 The Right to Freedom of Association and the Right to Collective Bargaining from an ILO Perspective

3.1 The Declarations on Freedom of Association and the Right to Collective Bargaining

The Declaration concerning the aims and purposes of the International Labor Organization (the Declaration of Philadelphia) was adopted in 1944 and was incorporated into the ILO Constitution in 1946.²⁴ The Declaration of Philadelphia, speaking about the fundamental principles on which the ILO is based, states that freedom of association and expression are essential to sustained progress. The Declaration also recognizes the importance of the right to collective bargaining and puts an obligation on the ILO to further promote this right.

The global changes that the world faced in the 1990s provided the impetus for a global debate on international labor standards. Globalization, technological change and democratization have led to uneven economic growth and well-being.²⁵ Therefore, the ILO decided to restate its long-standing commitment and adopted the new *Declaration of Fundamental Principles and Rights at Work* in 1998. The Declaration further mobilized international support for the principle of freedom of association and the effective recognition of the right to collective bargaining. It recognizes freedom of association and the right to collective bargaining as fundamental

²⁴ Lee Swepston, *Adoption of Standards by the International Labor Organization: Lessons and Limitations*, Standard-Setting: Lessons Learned, International Council on Human Rights Policy and International Commission of Jurists Workshop, 13-14 February, 2005, p.4

²⁵ ILO, *ILO Declaration for Fundamental Principles and Rights at Work, Background*, available at <http://www.ilo.org/declaration/thedeclaration/background/lang--en/index.htm>

principles and puts an obligation on states “to respect, to promote and to realize” them in good faith, in accordance with the ILO Constitution.

Increased unemployment and insufficient social protection once again became the major concern in the beginning of the 21st century. Therefore, governments, workers and employers, inspired with the aim to strengthen the ILO’s capacity to promote its Decent Work Agenda, adopted the *Declaration on Social Justice for a Fair Globalization* in 2008. The Declaration emphasizes the important role of the Declaration of Philadelphia and the principles mentioned in it. It stresses the importance of the four strategic objectives through which the Decent Work Agenda is expressed: promoting employment; developing and enhancing measures of social protection; promoting social dialogue and tripartism; respecting, promoting and realizing the fundamental principles and rights at work. The Declaration clearly states that “freedom of association and the effective recognition of the right to collective bargaining are particularly important to enable the attainment of the four strategic objectives”.

3.2 Freedom of Association and Protection of the Right to Organize Convention (No. 87)

Freedom of Association and Protection of the Right to Organize Convention sets the rights of the workers and employers to establish and join organizations of their own choosing without previous authorization. Workers and employers organizations must be able to organize freely without undue interference from authorities, including the right not to be dissolved or suspended by administrative authority. Workers and employers organizations shall also have the right to establish and join federations and confederation, which may affiliate with the international organizations of workers and employers.

Article 2 of the Convention No. 87 guarantees rights of workers and employers **to establish and join** organizations **of their own choosing** and **without distinction whatsoever**. There is **no previous authorization** required for the establishment of the organization.

The term “**without distinction whatsoever**” in the article means that the right to organize should be guaranteed without distinction or discrimination of any kind as to occupation, sex, color, race, creed, nationality or political opinion. It underlines the universal character of freedom of association the only exception to which is mentioned in article 9 of the same Convention according to which it is up to states to determine the extent to which the guarantees provided in the Convention No. 87 shall apply to armed forces and the police. This exception was justified by the internal and external security issues of the state. Any other provisions, prohibiting the right to organize for other categories of workers (public servants, managerial staff, domestic staff or agricultural workers) are incompatible with the Convention.²⁶

Workers and employers have right to establish an organization **without previous authorization**. States are free to provide such formalities in the legislation which is necessary for normal functioning of the organization, but these formalities must not impair the rights guaranteed by the Convention No. 87 and it must not be as complex or lengthy as to give the authorities in practice discretionary power to refuse the establishment of organizations. It is of a vital importance that such formalities are prescribed by law and that they do not in fact create obstacle for the establishment of the organization.²⁷ In case a violation happens, the workers and employers

²⁶ *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 4B) of the CEACR, ILC, 81st Session, 1994, p. 23-24, 27, 47

²⁷ ILO (ed), *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th revised edition, ILO, Geneva 2006, Para. 272

must have remedy to appeal against any administrative decision to an independent and impartial body.²⁸

Workers and employers shall have the right to establish and join organizations **of their own choosing**. It implies a possibility of forming an independent organization in a climate of full security. It includes the right of workers and employers to freely determine the structure of the organization and membership of the trade unions, to freely choose the establishment of one or more organizations in any one enterprise, to choose occupation or branch of activity and the establishment of federations and confederations. Excessive restrictions, such as minimum number of members, system of trade union unity or trade union monopoly, imposed by law is not in conformity with article 2 of the Convention.²⁹ It is also prohibited to establish a limited list of occupations with a view to recognizing the right to associate. Workers are allowed to establish more than one organization in the same occupation if they so wish.³⁰

It is important to mention that where law makes a distinction between different trade unions this might have influence on the right of the workers to join the organization of their own choosing. In other words, by placing a trade union in an unfair advantage or disadvantage to other trade unions the government, intentionally or unintentionally, influences the decision of the worker, while it is undeniable that everyone wants to belong to a trade union which serves them better. Therefore such favoritism is not compatible with the provisions of the Convention No. 87.³¹

Article 3 of the Convention guarantees the right of workers and employers organizations to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and

²⁸ *Supra* note 26, p. 34, 47

²⁹ *Ibid.* p. 38, 48

³⁰ *Supra* note 27, Para. 217, 313, 315

³¹ *Ibid.* Para. 339

formulate their program. There shall be no interference from public authorities.

This article aims to avoid legislative provisions which regulate in detail internal functioning of the workers and employers organizations. Governments are only allowed to establish the overall framework where the organizations will have wide autonomy to administer their organizations according to their will. Furthermore, if this right is violated organizations must have a possibility to appeal to an independent and impartial judicial body.³² In other words, the mere existence of law about trade union does not constitute violation of trade union rights, since the state might want to ensure that the constitutions and rules of the organization are in conformity with the law. However, this law might not be such as to impede the right of freedom of association of trade unions.³³

Workers, employers and their organizations should have the right to freely elect their representatives who later will speak in their name. It is up to the organizations to determine the conditions of the election and the government should not interfere in this process.³⁴ They shall also be able to organize their administration without interference from the government. This includes the right to decide themselves on the rules which should govern the administration of their organization and the elections. They must also be free to resolve dispute, between each other by themselves, without governmental interference.³⁵

Workers and employers not only have the right to establish organizations freely but these organizations also have a right to pursue lawful activities for the defense of occupational interests of their members. Any interference from the government which restricts the right of organizations to pursue such activities is considered as violation of the freedom of association.

³² *Supra* note 26, p. 49, 60

³³ *Supra* note 27, Para. 370

³⁴ *Ibid.* Para. 389-390

³⁵ *Ibid.* Para. 454-460

Furthermore, general prohibition on trade unions' participation in political activities is not in conformity with article 3. The workers and employers organizations are allowed to participate in political activities and publicly express their opinions on government's economic or social policy.³⁶

Article 4 of the Convention states that workers and employers organizations shall not be dissolved or suspended by administrative authority. Suspension and dissolution of an organization constitutes the extreme form of interference of public authorities in the activities of an organization and puts an end to the exercise of trade union activities. However, arbitrary interference by authorities must be distinguished from the interference which is allowed by law and which aims to avoid the existence of organizations which seek to undermine the internal or external security of the state. This approach derives from article 8.1 of the Convention No. 87 according to which organizations shall respect the law of the land. However, the second paragraph of the same article states that the law shall not impair the guarantees provided of this convention.³⁷

The ILO supervisory bodies clarify that suspension and/or dissolution does not solve any problems in the country and if there are social or economic problems they are better solved through the development of free and independent trade unions. In any case, such extreme actions as suspension and dissolution of the organizations can only be taken as the last resort, after exhausting all possibilities with less serious effects.³⁸

Article 5 of the Convention guarantees the right of workers and employers organizations to establish and join federations and confederations. These federations and confederations have a right to affiliate with international organizations of workers and employers.

³⁶ *Ibid.* Para. 495, 496, 503

³⁷ *Supra* note 26, p. 79

³⁸ *Supra* note 27, Para. 677-678

The rights guaranteed by article 5 helps organizations to better protect the interests of their members. It is up to the workers organizations only to decide if there is a need to join federations and confederations and it is up to federations and confederation only to decide whether or not to accept the affiliation of trade unions.³⁹

The rights guaranteed to workers and employers organizations are equally applicable to federations and confederations of workers and employers organizations. Article 6 of the convention states that, the provisions of articles 2, 3 and 4 also apply to federations and confederations.

3.2.1 The Right to strike

The right to strike is one of the essential means for workers and employers organizations for the promotion and protection of the interests of their members. These interests might not only be occupational but also connected to social and economic policy issues or any kind of labor problems which directly affect the workers.⁴⁰

The right to strike is not explicitly stated in the ILO Constitution or the Declaration of Philadelphia. The two main conventions (Nos. 87 and 98) about freedom of association and the right to collective bargaining also say nothing about the right to strike. However, the right to strike seems to be taken for granted in the report prepared for the first discussion of Convention No. 87.⁴¹ Later it was also mentioned in a number of ILO resolutions. According to article 15 of the *Resolution of 1970 Concerning Trade Union Rights and their Relation to Civil Liberties* for full and universal respect of trade union rights, particular attention should be given to number of issues, including the right to strike.

³⁹ *Ibid.* Para. 713, 722

⁴⁰ *Supra* note 26, p. 65

⁴¹ *Ibid.* p. 62

The right to strike is further defined by the ILO bodies. According to the Committee on Freedom of Association right to strike is an essential element of the trade union rights which is often used as a legitimate weapon for the protection of the interests of trade unionists. The Committee of Experts stated that, prohibition on strikes may sometimes constitute a considerable restriction of the potential activities of trade unions. The Committee stresses that strike action is part of the activities protected under article 3.1 of the Convention No. 87. This is a collective right exercised by group of people who decide to make demands by not working and therefore it is an activity of the workers organization protected under article 3. The Committee of Experts characterizes the right to strike as an “intrinsic corollary of the right to organize” protected by the Convention No. 87.⁴²

Even though the right to strike is recognized as an important element for full realization of the trade union rights, this right is still not absolute. Certain category of workers (public servants and essential services) might not be allowed to refer to strike action. However, states have an obligation to elaborate an exhaustive list of categories of workers who are not allowed to refer to strike action.⁴³ The Committee on Freedom of Association further noted that a general prohibition on strikes may only be justified in case of acute national emergency and only for limited time. As for the public servants and essential services the Committee on Freedom of Association states that right to strike can be restricted or even prohibited in relation to these categories only in case of “serious hardship to the national community” and only if accompanied by compensatory guarantees. In order to determine the situation where the right to strike can be restricted or prohibited the Committee on Freedom of Association introduces the following tests: clear and imminent threat to life, personal safety or health of the whole or part of the population.⁴⁴

⁴² *Ibid.* p. 64-67

⁴³ *Ibid.* p. 77-78

⁴⁴ *Supra* note 27, Para. 528, 570, 573, 581

Legislative provisions that require from parties to exhaust mediation or conciliation remedies before they refer to strike action can be justified only if these provisions are not such that result in a wide restriction of the right to strike in fact. The exercise of the right to strike should not result in discrimination or dismissal of those workers who participated in strike. It must also be noted that strikes that are of a purely political character are not protected by the principle of freedom of association.⁴⁵

3.3 The Right to Organize and Collective Bargaining Convention (No. 98)

The Convention deals with two different aspects of freedom of association, firstly, it protects the right of workers and employers organizations against anti-union discrimination and secondly, in order to ensure the promotion of the collective bargaining the Convention stresses the autonomy of the parties and the voluntary character of negotiations. Similar to the Convention No. 87, the Convention No. 98 also gives the states opportunity to decide whether the standards apply to the armed forces and police or not. But unlike the Convention No. 87, the Convention No. 98 excludes some categories of public servants from its protection, namely, “public servants engaged in the administration of the state”. It is important to be noted that the right to organize and the right to bargain collectively are recognized as two separate issues - while it is possible to apply certain restrictions to the right to bargain collectively, this is absolutely prohibited in relation to the right to organize.⁴⁶

According to Article 1 of the Convention workers shall enjoy adequate protection against acts of anti-union discrimination. The following paragraph of the same article specifies the acts that need to be protected against; acts calculated to make the employment of the worker such that

⁴⁵ *Supra* note 26, p. 77-78

⁴⁶ *Ibid.* p. 91-92

he/she do not join the union or relinquish trade union membership and acts calculated to cause the dismissal by reason of union membership or because of participation in union activities outside working hours or with the consent of the employer within the working hours.

Anti-union dismissal must be treated differently from other types of dismissals since it might result in denial of the rights mentioned in the Convention No. 87 and eventually jeopardize the very existence of the trade unions. Workers shall enjoy protection against measures of anti-union discrimination at the time of taking up employment, in the course and during the termination of employment. In order the provisions of this article to be effectively applicable in practice it is desirable that certain machinery for preventive protection exists in the country, such as for instance, prior authorization of the labor inspectorate in case of workers dismissal. To place onus on the employer to prove that dismissal is not connected to trade union activities of the worker is another way to ensure effective protection of the workers against anti-union discriminations.

All acts of anti-union discrimination in respect of employment shall be forbidden and penalized in practice. Legislative provisions prohibiting acts of anti-union discrimination must be broad enough to cover all the possible types of such discrimination such as refusal to hire, dismissal, transfer, demotion, or refusal to train.⁴⁷ The legislation should further provide effective means for the dismissed worker to get compensation and to be reinstated.⁴⁸

Article 2 of the Convention states, that workers' and employers organizations shall enjoy adequate protection against any acts of interference by each other. The second paragraph of the same article clarifies that these acts of interference might be designed to promote the

⁴⁷ David Tajgman And Karen Curtis, *Freedom of Association: A user's guide, Standards, principles and procedures of the International Labor Organization*, ILO, Geneva, 2000, p. 33

⁴⁸ *Supra* note 26, p. 93, 100-101

establishment of workers' organizations under the domination of employers or employers' organizations or to support workers' organizations by financial or other means, with the object of placing such organizations under the control of employers or employers' organizations. Governments are not only required to exercise great restraint in relation to intervention in the internal affairs of trade unions but also in case these rights are not sufficiently protected governments have an obligation to take specific actions, for instance, through the legislative means, to ensure that guarantees provided by this article are effective in practice.⁴⁹

Article 3 of the Convention speaks about establishment of the machinery appropriate to national conditions in order to respect the right to organize. This article covers protection of workers against acts of anti-union discrimination as well as protection of organizations against acts of interference.⁵⁰

According to article 4 of the Convention measures appropriate to national conditions must be taken in order to encourage and promote machinery for voluntary negotiations between workers and employers organizations with a view to regulate terms and conditions of employment by means of collective agreements. This article consists of two essential elements: one is action by the public authorities to promote collective bargaining and the other is the voluntary nature of the negotiations which implies autonomy of the parties.

It is prohibited to make a collective agreement subject to prior approval before it can enter into force or to cancel it on the ground that it runs against economic policy of the government. Governments, however, can endeavor to convince the parties to voluntarily have regard to major economic and social policy considerations of the country. Public authorities can intervene

⁴⁹ *Ibid.* p. 106

⁵⁰ *Ibid.* p. 103

if the collective bargaining takes place in public or semi-public sector but even in this case they should leave enough space for collective bargaining.⁵¹

Voluntary character of negotiations emphasizes the significance of the autonomy that the negotiating partners have and constitutes fundamental aspect of freedom of association. Therefore, any interference from authorities which impedes the exercise of this right shall be prohibited. Preliminary work for the adoption of the Convention No. 87 stresses the importance of independent organizations capable to freely conclude collective agreements. It is also of utmost importance that employers and trade unions bargain in good faith and make every effort to come to an agreement. Constructive negotiations are a necessary prerequisite for friendly and trustful relationships between negotiating parties in the future.⁵²

The Conventions Nos. 87 and 98 (like most of the other international labor standards) include flexibility clauses. As it was already mentioned, both of the conventions give the state the freedom to decide on the extent to which the provisions are applicable to the armed forces and police. Furthermore, the soft language such as “where necessary” used in articles 3 and 4 of the Convention No. 98 gives the states greater leeway of giving effect to the content of the instrument.⁵³ The idea behind introduction of flexibility clauses is that different countries have different cultural and historical backgrounds, legal systems, and levels of economic development and therefore standards must be flexible enough to be translated into national law and practice.⁵⁴

3.4 Conclusion

⁵¹ *Ibid.* p. 118

⁵² *Supra* note 27, Para. 881, 882, 884, 925, 935

⁵³ Jean-Michel Servais, *Universal Labor Standards and National Cultures*, 26 *Comp. Lab. L. & Pol’y J.* 35, 2004, p. 38

⁵⁴ International Labor Office, *Rules of the Game, a brief Introduction to International Labor Standards*, revised edition 2009, p. 18

The right to collective bargaining is linked to the right to freedom of association which is a major prerequisite for collective bargaining and social dialogue. Together they constitute enabling rights that make possible to promote and realize decent conditions at work. The exercise of these rights requires a conducive and enabling environment the main elements of which are legislative framework, institutions to facilitate collective bargaining, efficient labor administrations and strong workers and employers organizations. Governments have a major responsibility in providing for such an environment.⁵⁵

⁵⁵ *Freedom of Association in Practice: Lessons Learned*, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report of the Director-General, ILC, 97th Session, 2008, p. 5

4 Ensuring Compliance with the ILO Standards at the National Level

4.1 Role of the ILO

4.1.1 The ILO Supervisory Mechanism

The international labor standards are backed by the unique supervisory system of the ILO. By regularly examining the application of the standards in member states and by pointing out the areas where they can be better applied, the ILO ensures that gaps are highlighted and pressures the countries to implement the conventions they ratify. The ILO has developed two types of supervisory mechanisms: regular system of supervision and special procedures, which includes procedure for representation, procedure for complaints and special procedure for complaints regarding freedom of association.

4.1.1.1 The Regular System for Supervising the Application of Standards

In the early years of the ILO, the annual International Labor Conference (ILC) was dealing with both, adoption of the ILO standards and its supervision. However, because of increase in the number of ratifications of the conventions which subsequently led to increase in the number of the submitted reports, plenary of the Conference was not able to deal with both tasks alone. Therefore, in 1926 the ILC adopted resolution establishing the Conference Committee on the Application of Standards, at the same time requesting the Governing Body to appoint a technical committee subsequently named as the Committee of Experts on the Application of Conventions and Recommendations, responsible for drawing up a report for the Conference. These two bodies, together with the ILC, constitute the ILO

regular supervisory system, the main task of which is to supervise the observance by member states of their standards-related obligations.⁵⁶

4.1.1.1.1 The Committee of Experts on the Application of Conventions and Recommendations

The Committee of Experts examines the reports of member states on the application of the labor standards in law and in practice, submitted in accordance with articles 19, 22 and 35 of the ILO Constitution and issues two types of documents: individual observations and direct requests. Individual observations are generally used in serious violations of ratified conventions and are published in the annual report of the Committee. The direct requests are sent to governments, employers and workers organizations and usually cover matters of secondary importance or technical questions.⁵⁷

If the state concerned does not follow the recommendations mentioned in the comments, the Committee continues to mention the case unless the state makes the necessary changes in law and in practice. Where some years go without a change it is a big chance that the Conference Committee on the Application of Standards will select the case for the discussion at the ILC in June.⁵⁸

In 1964 the Committee of Experts started to list the cases where governments have made changes in law and in practice. These are called *cases of progress*. The Committee of Experts identifies such cases in its annual Report by noting “*with satisfaction*” that the government concerned has followed its previous comment. Since 2000 the Committee also started

⁵⁶ *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A) of the CEACR, ILC 100th Session, 2011, p. 2

⁵⁷ International Labor Standards Department, *Handbook of the Procedures relating to International Labor Conventions and Recommendations*, International Labor Office, Geneva 2006, p. 35-38

⁵⁸ *Supra* note 47, p. 54-55

to apply another term - “*with interest*”, which is used in relation to cases where some measures have been taken by the states to improve the compliance to the conventions.⁵⁹ Where, the Committee “*notes with concern*” or “*notes with regret*” that a government has or has not taken particular action it shows that the problem of states non-compliance with its obligations is serious.

The use of diplomatic language by the Committee of Experts is explained by the intention to avoid embarrassing particular countries in order to maintain the dialogue and cooperation that may be required to improve a problematic situation.⁶⁰ The fact that the number of cases of progress has been increased during recent decades shows undoubtedly positive evolution in the implementation of the Committee of Experts’ observations and proves the usefulness of diplomatic approach.⁶¹

4.1.1.1.2 The Conference Committee on the Application of Standards

The Conference Committee selects the cases of utmost importance from the observations of the Committee of Experts Report. These selected observations are submitted to the Conference which discusses and adopts the report in plenary. The Report is sent to the governments in order to draw their attention to any particular points raised by the Conference Committee. Governments are expected to take this information into account while preparing subsequent reports.⁶²

It is important to note that during the discussion in the Conference Committee, as well as during plenary discussions, representatives of the

⁵⁹ Gravel, Eric and Chloé Charbonneau-Jobin, *The Committee of Experts on the Application of Conventions and Recommendations: It’s Dynamic and Impact*, ILO, Geneva 2003, p. 23-24

⁶⁰ Rigby Crispin (ed), *Monitoring International Labor Standards: National Legal Frameworks, Summary of a Workshop*, National Academies Press, Washington 2003, p. 32

⁶¹ *Supra* note 59, p. 23-24

⁶² *Supra* note 57, p. 38-40

governments, employers and workers have possibilities to take part in the discussions as delegates to the Conference. During the individual discussion of the selected cases, governments are asked to publicly explain the situation in regard to a particular convention. This gives the Conference Committee members, including workers' and employers' delegates, possibility to publicly comment on a case and ask questions. Such discussions heighten the public awareness of the situation and put more pressure on states to comply with their obligations.⁶³

4.1.1.2 Procedure for Representations on the Application of Ratified Conventions

According to articles 24 and 25 of the ILO Constitution any industrial association of employers or of workers have right to present to the ILO Governing Body a representation against any member state which they think "has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party".⁶⁴ If the case is not one about freedom of association (in case it is, the case is referred to the Committee on Freedom of Association, see below) and the Governing Body decides that the case is receivable, it usually sets up a tripartite committee of three of its members for the examination of the representation together with the government's response. The tripartite committee issues a report with recommendations⁶⁵ and submits it to the Governing Body. In case the representation is substantiated, the Governing Body may publish it together with the government's responses. The Governing Body also has competence to use the complaint procedure (see below) or to refer the issues, concerning any follow-up to the recommendations it has adopted, to the Committee of Experts.⁶⁶

⁶³ *Supra* note 47, p. 55

⁶⁴ Article 24 of the ILO Constitution

⁶⁵ *Supra* note 54, p. 84

⁶⁶ International Labor Standards Department and International Training Centre of the ILO, *Guide to International Labor Standards*, Turin, 2008, p. 265

4.1.1.3 Procedure for Complaints on the Application of Ratified Conventions

The complaint procedure is governed by articles 26 to 34 of the ILO Constitution. Any member can lodge a complaint against another member if there is a reason to believe that the conventions that they have both ratified are not satisfactorily implemented in that state. The complaint is submitted to the Governing Body, which may also use this procedure against any state on its own initiative or as a response to a complaint submitted by a delegate during the International Labor Conference.

After receiving the complaint the Governing Body invites the state against which the allegations are lodged to respond on the subject matter. In case the state does not respond within a reasonable time the Governing Body may appoint a Commission of Inquiry which prepares a report on the basis of a thorough examination of the case, including sometimes on-the-spot investigations. The report is communicated to the concerned government. The government can either accept the recommendations mentioned in the report or refer the case to the International Court of Justice⁶⁷ (ICJ), the decision of which is final.⁶⁸ If the concerned state still fails to follow the recommendations of the Commission or that of the ICJ the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance.⁶⁹ In case the state takes some measures for the improvement of compliance the Governing Body may recommend discontinuing any actions taken against the state.⁷⁰

It has to be noted that the Commission of Inquiry is the ILO's highest level investigative procedure. The commission is set up only in the cases of flagrant violations of the international labor standards and only when a member state has repeatedly refused to address them.⁷¹

⁶⁷ This in fact has never been done

⁶⁸ *Supra* note 66, p. 268

⁶⁹ Article 33 of the ILO Constitution

⁷⁰ *Supra* note 66, p. 268

⁷¹ *Supra* note 23, p. 86

4.1.1.4 Special Procedure for Complaints Regarding Freedom of Association

After adoption of the Conventions Nos. 87 and 98 about freedom of association and the right to collective bargaining it soon became clear that the regular supervisory system was not enough to ensure the compliance of states to the freedom of association principles and that there was a need for a special procedure. Therefore, the Fact-Finding and Conciliation Commission on Freedom of Association was created in 1950 by the Governing Body which was followed by the creation of the Committee on Freedom of Association, the major task of which originally was to carry out the prior examination of the cases submitted to the Commission on Freedom of Association.⁷²

4.1.1.4.1 The Fact-Finding and Conciliation Commission on Freedom of Association

The Fact-Finding and Conciliation Commission on Freedom of Association examines complaints about the infringement of the trade union rights referred to it by the Governing Body. The governments, employers' organizations or workers' organizations can also refer an issue to the Commission. It is interesting to note that the Commission can examine cases about violation of freedom of association principles even against the states which are not members of the ILO but are members of the United Nations.⁷³

The complaints to the Fact-Finding and Conciliation Commission on Freedom of Association may be referred in respect of the countries that have not ratified the two conventions Nos. 87 and 98. However, in such cases the complaint can only be examined if states agree to such examination. The past experience shows that the governments against whom the procedure was first invoked were not eager to give such consent. For that reason, the

⁷² *Ibid.* p. 175

⁷³ *Supra* note 66, p. 273-274

work of the Commission was blocked for more than a decade. Meanwhile, the Committee on Freedom of Association, which required no such consent⁷⁴ from the states, evolved from a body with secondary function to filter the cases for the Commission, into an independent body, able to examine complaints.⁷⁵

4.1.1.4.2 The Committee on Freedom of Association

The Committee on Freedom of Association may receive complaints from a government, employers' and workers' organizations if the provisions of the two conventions (Nos. 87 and 98) are infringed. After the Committee receives complaints it asks the government concerned to submit its comments. In case a government does not respond, the Committee can examine the case by default and submit its report to the Governing Body for wider publicity.⁷⁶

The Committee can also investigate the case on spot and/or take oral evidence. This kind of direct contact however is only possible in case of invitation or prior consent of the country concerned. Once the Committee determines that there is sufficient information it examines the case and drafts a report with recommendations and conclusions.⁷⁷

The report of the Committee is submitted to the Governing Body for approval. The Governing Body communicates the report to the parties concerned and publishes it. In case, the country concerned has ratified the two conventions (Nos. 87 and 98) the case can further be referred to the Committee of Experts on the Application of Conventions and

⁷⁴ According to Committee of Experts "the legal basis for this concept resides in the Constitution of the ILO and the Declaration of Philadelphia, according to which member States, by virtue of their membership in the Organization, are bound to respect the fundamental principles contained in its Constitution, particularly those concerning freedom of association ...", *Supra* note 26, p. 7-8

⁷⁵ *Supra* note 23, p. 175

⁷⁶ *Supra* note 66, p. 272-273

⁷⁷ *Supra* note 47, p. 65

Recommendations. If the country concerned has not ratified the conventions and there is no reply from the government or if the reply is not sufficient the Committee may bring the matter to the attention of concerned states at appropriate intervals.⁷⁸

4.1.2 Strengthening ILO's Capacity to Support its Member States Compliance with the ILO Standards

Besides the supervisory mechanism described above, the ILO promotes the effective implementation of the labor standards through technical cooperation. Since the early 1950's the ILO has been providing technical assistance for all its member states. The purpose of this cooperation is to assist the member states to implement the decent work agenda and make it real for everyone.⁷⁹

The International Training Center of the ILO also plays an important role in the promotion of the international labor standards. The training center is designed to support the economic and social development of states through a wide variety of programs in areas of priority of the ILO and with that purpose offers training/learning opportunities to government officials and representatives of workers' and employers' organizations.

The Declaration on the Social Justice for a Fair Globalization 2008 restates the ILO's commitment to strengthen the capacity of the organization to promote the decent work agenda. In order to better assist the member states the ILO commits itself to improve its work in four directions: administration, resources and external relations; understanding and responding to Member's realities and needs; technical assistance and advisory services; research, information, collection and sharing.

⁷⁸ *Supra* note 66, p. 272-273

⁷⁹ ILO, *ILO Information Leaflet*, available at http://www.ilo.org/global/about-the-ilo/WCMS_082361/lang--en/index.htm

4.1.2.1 Pilot Project on Freedom of Association and the Collective Bargaining

Monitoring progress towards decent work is a long-standing concern for the ILO and its constituents. The General Report to the 17th International Conference of Labor Statisticians contained a detailed chapter on measurement and monitoring decent work. It has identified 29 core indicators for decent work. Freedom of association was mentioned as a “difficult topic” that could be added to the list of indicators later.⁸⁰

The Declaration on Social Justice for a Fair Globalization highlights the importance of the national and regional strategies towards decent work. The declaration requests states to consider “the establishment of appropriate indicators or statistics, if necessary with the assistance of the ILO, to monitor and evaluate progress made”.⁸¹

The Governing Body referred to the issue on several occasions. As a result, it was agreed that in order to attain meaningful assessment there was a need to move to integrated approach, meaning that fundamental rights at work should be an integral part of the ILO’s framework for measuring decent work.⁸² The Governing Body requested the International Labor Office to elaborate the methodology for the measurement of progress towards the implementation of fundamental rights and principles at work. It was agreed to develop a standard coding framework and to start with the rights of freedom of association and the right to collective bargaining.⁸³

⁸⁰ *General Report: Report I*, ICLS/17/2003/1, 17th International Conference of Labor Statisticians, Geneva, 2003, p. 21-25

⁸¹ The ILO Declaration on Social Justice for a Fair Globalization 2008

⁸² *Second Supplementary Report: Measuring Decent Work*, GB.309/18/2, Report of the Director-General, 309th Session, November 2010, p. 1

⁸³ Dora Sari and David Kucera, *Measuring Progress towards the Application of Freedom of Association and Collective Bargaining Rights: a Tabular Presentation of the Findings of the ILO Supervisory System*, Working Paper No. 99, ILO, Geneva 2011, p. 2

A pilot project was undertaken by the Office in 2009 the main goal of which was to construct a methodology for measuring the progress towards compliance with the freedom of association and collective bargaining rights on the country level. For that purpose 168 evaluation criteria were developed. They assess the rights of workers' organizations as well as employers' organizations by measuring both, the compliance of national legislation (*de jure*) with the ILO freedom of association and collective bargaining standards and their application in practice (*de facto*).⁸⁴

The method does not constitute a forum for “naming and shaming” or for ranking the states according to their performance. It aims to present the findings of the ILO supervisory bodies in an easy format, at the same time not creating additional supervisory instrument.⁸⁵

The methodology developed by the ILO aims to support states in monitoring progress and identifying gaps towards the application of fundamental rights and principles at work on the one hand, while on the other hand ensures that the Office has all the necessary data at its disposal in order to be able to make well-founded policy decisions and support states to achieve continued and sustained progress in the implementation of fundamental principles and rights at work.⁸⁶

The fact that the work for the measurement of progress has started with the freedom of association and collective bargaining rights emphasizes the importance of these rights once again. The methodology developed in relation to freedom of association and the collective bargaining can serve as an example for elaboration of evaluation criteria for the other rights and principles mentioned in the ILO Declaration on Fundamental Rights and Principles at Work.⁸⁷

⁸⁴ *Supra* note 82, p. 2-3

⁸⁵ *Supra* note 83, p. 2

⁸⁶ *Supra* note 82, p. 2

⁸⁷ *Supra* note 83, p. 2

4.2 Role of the ILO Member States

4.2.1 State Obligations after the Adoption of the ILO Standards

The ILO member states have an obligation to submit the international labor standards (conventions, recommendations, protocols) adopted during the ILC to the competent authorities (usually parliament) for the enactment of legislation or other action. This submission must take place during one year after the closing of the Conference. This period can be extended to a maximum of 18 months. Member states commit themselves to inform the Director-General of the International Labor Office of the measures taken by the competent authorities. The copy of the information sent to the Director-General shall also be sent to the employers' and workers' organizations.⁸⁸

4.2.2 State Obligation after the Ratification of the ILO Conventions

After the ratification of the convention states commit themselves to two types of obligations derived from articles 19 and 22 of the ILO Constitution. According to article 19 (d):

*if the Member obtains the consent of the authority or authorities within whose competence the matter lies, it will communicate the formal ratification of the Convention to the Director-General and will **take such action as may be necessary to make effective the provisions of such Convention.***

The obligation on states to make the provisions effective means “ensuring their **implementation in practice** as well as giving them **effect in law** or other means that are in accordance with national practice (such as court decisions, arbitration awards and collective agreements)”.⁸⁹ Thus, article 19

⁸⁸ Article 19 5 (b) (c), 6 (b) (c), 23.2 of the ILO Constitution

⁸⁹ *Supra* note 57, p. 18

(d) requests states to ensure the application of convention provisions in law and in practice.

Another type of obligation that states face after the ratification of the ILO convention stems from article 22 of the ILO Constitution according to which:

Each of the Members agrees to make an annual report to the International Labor Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request.

The obligation of the ILO member states to submit annual reports has been changed a number of times by the ILO Governing Body.⁹⁰ The recent change took place during the 306th session of the Governing Body where it was decided that the length of the reporting cycles for fundamental and governance conventions should be three years, while for other conventions – six years.⁹¹ The extension of the reporting periods is explained by the necessity to alleviate workload of the governments, the Office and the Committee of Experts for the Application of Conventions and Recommendations. In case of serious matters, states can be asked to submit report outside the regular reporting cycle.⁹²

4.2.3 Role of the Domestic Courts

⁹⁰ Before recent change has taken place states had an obligation to report in every two years on eight core conventions (No. 87, 98, 29, 105, 138, 182, 100, 111) and four priority conventions (No. 81, 129, 144, 122) and in every five years on other conventions. See, *Supra* note 54, p. 80

⁹¹ *Second Report: International Labor Standards and Human Rights*, ILO GB.306/10/2 (Rev.), Report of the LILS, 306th Session, November 2009, p. 7 and 13

⁹² *Second Report: International Labor Standards and Human Rights*, ILO GB.307/10/2 (Rev.), Report of the LILS, 307th Session, March 2010, p. 4

The decisions of the national courts are important means to ensure compliance with international labor standards. The extent to which national courts apply international provision (including labor standards⁹³) depends on whether a country belongs to a dualistic or monistic legal system. Even though it is acknowledged that the lines between these two systems are often blurred in practice⁹⁴ it is still useful to give some description of these two legal systems.

In dualist legal systems the treaty provisions cannot be applied on national level directly. States have to enact special legislation in order to incorporate international treaty provisions into national law. The idea behind it is that the national and international legal orders are considered as “two distinct spheres of law, each functioning according to its own rules and conditions”⁹⁵. Thus, the national courts cannot apply international provisions if they are not incorporated in national legal system by a specific legislation.

Unlike dualists system, monist theory considers national and international law as parts of single legal order. Therefore, treaties made in accordance with constitution and ratified by states become part of the national legal system and can be directly applied by courts. Even though there is no requirement to adopt specific legislation for international provisions to acquire the force of domestic law, states with monistic legal systems often have to enact legislation in order to give effect to the provisions of an international treaty that require additional measures to be implemented.^{96 97}

⁹³ C Thomas, M Oelz, X Beaudonnet, *The Use of International Labour Law in Domestic Courts: Theory, Recent Jurisprudence, and Practical Implications*, in ILO, *Les normes internationales du travail, un patrimoine pour l'avenir, Mélanges en l'honneur de Nicolas Valticos*, ILO, Geneva 2004, p. 253 and 256

⁹⁴ *Ibid.* p. 257

⁹⁵ *Ibid.* p. 259

⁹⁶ *Ibid.* p. 258

⁹⁷ *Supra* note 57, p. 18

When the provisions of the ratified international labor conventions are directly applicable the national courts may apply them in the absence of precise domestic legal rules. The national courts can also set aside the national legislation and apply international labor law if the latter one offers more favorable conditions for workers or strike down the domestic legal provisions because of inconsistency with international labor law.⁹⁸

Other than direct application, national courts can also rely on international labor standards as a source for interpretation of unclear or ambiguous domestic law. This can be considered as an indirect use of international labor standards. Another type of such indirect use is when domestic courts draw inspiration from international labor standards that are not ratified by a state or is not a subject of ratification, in order to figure out a jurisprudential principle that can be used to resolve the case.⁹⁹

4.3 Conclusion

Ensuring compliance with international labor standards is a task that has to be dealt with in cooperation of the ILO bodies and the governments of the member states. The ILO constantly restates its commitment to help the member states to achieve the objective of the conventions they ratify. Such a recent restatement was the adoption of the Declaration on Social Justice for a Fair Globalization, according to which the ILO commits itself to undertake certain measures to help the member states to implement the international labor standards effectively. On the other hand, the Declaration also underlines the crucial role of the member states in ensuring compliance with the ILO standards. The member states must show strong political will in order to ensure that the ILO standards are applicable in law and in practice.

⁹⁸ Xavier Beaudonnet, *How domestic jurisdictions use universal sources of international law in Globalization and the Sectors, Labor Education*, 2006/1, No. 142

⁹⁹ *Ibid.*

5 Comparative Study on the Implementation of the ILO Conventions Nos. 87 and 98 in Poland and Georgia

5.1 Tracing back to Soviet Era

Both countries, Poland¹⁰⁰ and Georgia¹⁰¹ were under influence of the Soviet Union during the 20th century. Therefore, this part starts with a short introduction of Soviet theories about work and trade unions in that period. Even though these theories lost their relevance in today's Poland and Georgia, it will still help the reader to make comparisons between the past and present and understand how these two countries came to the point where they are now.

The theory of the German philosopher Karl Heinrich Marx was used as bases for industrial relations in socialist countries. Marx defined “work” as fundamental need of a human being imposed by nature constituting a “necessary condition for effecting exchanges of matter between man and nature”¹⁰². For Marx it is work that creates social use-values and helps human race to transform the nature “to a world of its own making”.¹⁰³ Production and consumption are considered as necessary aspects for the fulfillment of needs of man.¹⁰⁴

Inspired by the Marxist theory, the socialist states of the 20th century developed plans the main goal of which was the growth of the class of wage laborers and in this way reach the full employment. Unlike capitalism, in

¹⁰⁰ U.S. Library of Congress, *Soviet Union and Russia*, available at <http://countrystudies.us/poland/89.htm>

¹⁰¹ About Georgia, *the History of Georgia, Georgia under the Soviet Union (1921-1990)*, available at <http://www.aboutgeorgia.ge/history/index.html?page=11>

¹⁰² David Lane, *Marxist-Leninism: An Ideology for Full Employment in Socialist States?* in David Lane (ed), *Labor and Employment in the USSR*, 1986, p. 3

¹⁰³ *Ibid.* p. 3

¹⁰⁴ *Ibid.* p. 4

socialism, states had a duty to provide employment and citizens had a right and a duty to work.¹⁰⁵ As a result of this policy, the Soviet states reached the point of full employment where “vacancies outnumbered unemployed job-seekers”¹⁰⁶.

Increase in the number of wage laborers subsequently led to the increase in the number of trade union members in Soviet Union. In the beginning of the 1960s the number of trade unionists reached 68 million workers (94% of all wage and salary workers) starting with 2.6 million in 1918. Even though the role of trade unions during the Soviet era was often highlighted as “great”, it was considered by many in the West that “soviet trade unions have so little in common with traditional trade unions that they should not be given the name”.¹⁰⁷

The main concern of the West was that soviet trade unions carried all the work under the leadership of the Communist Party with the central task to carry out the principles of the Soviet ideology. The defense of the interests of the workers which is central in western world was only a secondary function of the soviet trade unions.¹⁰⁸

5.2 Trade Union Rights in the Period of Great Recession

The year of 2007 will go in the history as the beginning of great financial crisis in the world. The Global GDP has been significantly reduced and the average fiscal deficit in the G20 countries went up.¹⁰⁹

¹⁰⁵ *Ibid.* p. 7-8

¹⁰⁶ *Ibid.* p. 83 and 94

¹⁰⁷ Emily Clark Brown, *Soviet Trade Unions and Labor Relations*, Harvard University Press, Cambridge, Massachusetts 1966, p. 1 and 48

¹⁰⁸ *Ibid.* p. 48 - 49

¹⁰⁹ Frank Hoffer, *the Great Recession: a Turning Point for Labor*, International Journal of Labor Research, 2010/Volume 2/ Issue 1, ILO, p. 100

As a result of the crisis, millions of people around the world lost their jobs. Deregulation of the labor market, widened income differentials and indecent employment became common phenomenon among states. In order to avoid further deterioration of the situation, governments started to cut public expenditures on health, pensions, education, infrastructure and public services, leaving millions of people without sufficient social protection.¹¹⁰

In addition, significant weakening of the rules and regulations that had limited the freedom of capital and had provided protection for workers has guaranteed for employers better legal and economic opportunities and more favorable political and societal environment to circumvent trade unions through outsourcing, relocation, contract labor, precarious employment etc. As a matter of fact, traditional workplace organizing and collective bargaining capacities were weakened and trade unions started to reduce in numbers.¹¹¹

The crisis badly influenced the industrial relations of all the countries in the world, including Poland and Georgia. The results of the crisis are still present.

5.3 Poland

5.3.1 Historical Background

Trade unions have a special place in the history of Poland. In the early decades of the 20th century trade unions were officially recognized and new legislation was enacted providing better working conditions for Polish workers. However, the WWII and its aftermath had considerable influence on trade union rights. During the Nazi occupation, trade unions could not act freely. The situation did not change much after WWII when Communism came to Poland and when primary task of labor organizations

¹¹⁰ *Ibid.* p. 100-105

¹¹¹ *Ibid.* p. 109

was “to aid the authorities in implementing directives handed down the chain of command from the Minister of Industry - to above all maintain and increase production”. Trade unions were operating under the Communist Party rule. The members of the Communist party enjoyed significant privileges compared to those who were out of the party. This kind of differentiation created the elite of the bureaucracy called “*the Nomenklatura*” who became the *de facto* owners of the Polish state. As time went on, the gap between the Party elite and the Polish people continued to grow.¹¹²

Growing gap resulted in growing dissatisfaction and all together in large scale social movement as a result of which the independent, self-governing trade union *Solidarity* was established in 1980. *Solidarity* played very important role in the economic, social and political life of Poland. Created for the purpose of representation of the ordinary workers, *Solidarity* also assumed the role of a large social movement with intention to change the Communist regime and transform “Poland’s political system into a system founded on democratic principles and universal moral values”.¹¹³

Concerned with number of industrial actions the social government of Poland, banned *Solidarity* in 1981 by introducing the martial law decree. The government, however, allowed employee councils activities which had limited power and low level of independence.¹¹⁴

¹¹² Martin Comack, *Comrades and Citizens: the Effect of Militant Labor Organizations upon the Processes of Democratization in Communist Poland and Corporate Mexico*, Northeastern University, 2010, p. 13-19

¹¹³ Umberto Carabelli and Silvana Sciarra (ed), *New Patterns of Collective Labor Law in Central Europe, Czech and Slovak Republics, Hungary, Poland*, book review, *Comparative Labor Law and Policy Journal*, 1997

¹¹⁴ Mark Weinstein, *Solidarity’s Abandonment of Worker Councils: Redefining Employee Stakeholder Rights in Post-Socialist Poland*, *British Journal of Industrial Relations*, 2000, p. 53

Solidarity went underground and continued its fight against the communist regime until the year 1989 when the free elections were held in the country and the Communist party lost. *Solidarity* regained its legal status.¹¹⁵

It is important to note that during the years of the underground activities, *Solidarity* leaders were under permanent pressure¹¹⁶ but the organization still continued its activities. According to some scholars this was possible because of the decentralized structure of the organization – it was not organized in vertical industrial units, but rather horizontally, encompassing all enterprises and workplaces within a given area. In sum, “allied to the intelligentsia, the lower clergy, the peasantry, *Solidarnosc* fashioned the new society within the shell of the old”.¹¹⁷

The ILO always supported a free trade union movement in Poland and became an international platform for *Solidarity*. When the head of the *Solidarity*, Lech Walesa was imprisoned in 1981 an ILO representative was sent to Poland where he met with Walesa and encouraged him to continue his fight. In June 1983 the Commission of Inquiry was requested by the Conference to examine the situation of *Solidarity* in Poland. The hearings at the ILO headquarters, even though not very effective, were the only way possible to conduct the investigation. As a result of its work the Commission issued a report, where Poland was found in violation of certain conventions and notably regarding the freedom of association. As a response to the report, Poland gave official notice to withdraw from the ILO, however, revoked its intention in 1987 as a result of the changed political situation in the country.¹¹⁸

¹¹⁵ *Supra* note 112, p. 49-50

¹¹⁶ The leader of *Solidarity*, Lech Walesa was imprisoned, as well as other members of the organization

¹¹⁷ *Supra* note 112, p. 49-50

¹¹⁸ Jaci Eisenberg, *Seeking Peace by Cultivating Justice: A photographic history of the ILO*, ILO, 2008, p. 31-32

The two ILO conventions about freedom of association and the right to collective bargaining (Nos. 87 and 98) were ratified by Poland in 1956. However, they were not followed much until the 1980's when *Solidarity* was established. *Solidarity* activists could not rely on national labor law for two main reasons, first, the legislation did not offer any protection to independent trade unions and second, the activists did not trust the Polish domestic legal system which could easily be manipulated by the communist authorities. Therefore, from the very beginning *Solidarity* used the ILO conventions (No. 87 and No. 98) as a legal framework for its activities.¹¹⁹

5.3.2 Implementation of the ILO Standards in Legislation

Solidarity started its legislative activities outside the framework of the 1974 Labor Code of Poland and eventually forced the government to enact the new Trade Union Act in 1982. For the first time in the Polish labor legislation, the new Act of 1982 contained provisions on settlement of collective labor disputes and the right to strike.¹²⁰

The 1982 Act on Trade Unions brought Poland collective labor provisions closer to the ILO conventions Nos. 87 and 98. Particularly, the 1982 Act specified that trade unions are self-managing entities where membership is voluntary; trade unions represent and protect the interests of employees regarding working conditions, wages, social and cultural facilities while dealing with management, state and economic administrative bodies and social organizations; trade unions have a right to express their opinions on the legislative acts and decisions of the authorities involving the interests of the working people and their families.¹²¹ The Act further stated that, “trade unions are independent of state administration and economic administration

¹¹⁹ Ludwik Florek, *Labor Law* in Stanislaw Frankowski (ed), *Introduction to Polish Labor Law*, Kluwer Law International, 2005, p. 296-297

¹²⁰ *Ibid.* p. 290

¹²¹ Michael Albright, *Poland's 1991 Labor Statutes: a Refinement of Earlier Legislation rather than a Liberalization of Union Rights and Powers*, Case Western Reserve Journal of International Law, 1993, p. 5-6

bodies and are not subject to supervision or control by the state administration bodies”.¹²²

The 1982 Act included provisions regulating collective disputes. The dispute procedure, however, was strictly defined and the right to strike was restricted. For instance, in case of collective dispute the conciliatory proceedings were optional but by saying no to this proceeding trade unions prevented themselves the right to strike because it was considered that legal mechanisms for settling the dispute were not exhausted. Another precondition for strike was social arbitration. Only after meeting these two requirements trade unions were allowed to call a strike. In order for the strike to be considered legal there was also a need for strike ballot, the approval of a superior union agency and a seven day notice to the employer. Participation in the wild cat strikes was a subject to imprisonment up to one year, limitation of freedom or fine up to 50,000 zlotys.¹²³

Extremely complicated procedure for the strike action resulted in *de facto* ban on strikes.¹²⁴ However, it was not the only flaw of the 1982 legislation. Another major concern was that according to the 1982 Act the collective agreement should not be in divergence with social and economic policies of the state.

After the so-called Round Table debates held in 1989 between *Solidarity* and the governing political authorities the prohibition on trade union pluralism introduced by martial law in 1981 was repealed and *Solidarity* regained a legal status. The agreement signed by the negotiating partners led to the revival of trade union freedom. The need for new labor legislation, in conformity with the ILO conventions, was evident.¹²⁵ Therefore, in 1991 the three new statutes were enacted that still regulate the Polish collective labor law.

¹²² *Ibid.* p. 4-6

¹²³ *Ibid.* p. 7

¹²⁴ *Ibid.* p. 6

¹²⁵ *Supra* note 113, p. 3

The text of the 1991 Act on Trade Unions is similar to the ILO conventions Nos. 87 and 98. The 1991 Act does not require the prior consent of the state authorities for a formation of a trade union. Employees are free to form trade unions at their discretion or to join already existing ones. In accordance with article 21 of the Act, trade unions have right to conduct collective negotiations and enter into collective agreements. Collective negotiations must be held without intervention of the state bodies or other institutions.¹²⁶

Trade unions need to be registered with the court. The court may grant or refuse registration but it is not allowed to make any changes to trade union charter which is adopted by at least ten founding members.¹²⁷

According to the 1991 Act the independence of trade unions mean independence from the state administrative authorities, from employer and from organizations such as political parties, vocational or religious organizations. Furthermore, discrimination against trade union related activities is prohibited. Membership in a trade union should not entail negative consequences as well as non-membership.¹²⁸

Even though the two acts of 1982 and 1991 on trade unions contain similar provisions, there are still some new elements that the 1991 Act introduces. According to the 1991 Act members of the police force, prison services and government employees can now establish and join trade unions;¹²⁹ according to article 9 of the 1991 Act trade unions are now officially allowed to own property.¹³⁰

Another major piece of legislation enacted in 1991 is the Settlement of Collective Labor Dispute Act which introduced a number of changes. The

¹²⁶ *Supra* note 119, p. 294

¹²⁷ *Ibid.* p. 290-291

¹²⁸ *Ibid.* p. 292

¹²⁹ *Supra* note 121, p. 10

¹³⁰ *Ibid.* p. 10

Act provides a list of employees who cannot enjoy the right to strike. According to article 19 of the Act employees of Agency of Internal Security, the Intelligence Agency, the Police, Armed Forces of the Republic of Poland, Prison Service, Frontier Guard, Custom Service as well as units of the fire brigades are prohibited from strike. Also, persons employed in the state authorities, government and self-government administration, courts and public prosecutor's offices do not enjoy the right either.

The 1991 Act requires trade unions to exhaust legally imposed dispute resolution mechanism (articles 7-14 of the 1991 Act) before a strike. However, trade unions are allowed to call a strike without exhaustion of the negotiation-mediation procedure if the employer illegally hinders the negotiation process or fires the trade union activists. Besides, unlike the 1982 Act, social arbitration is not a necessary precondition to the right to strike but an alternative. In case parties cannot agree after negotiation/mediation procedure trade unions can directly call strike without referring the case to the arbitration. The new 1991 Act introduces the right to engage in “protest actions” (social or other) other than strike which gives employees without a right to strike possibility to protect their interests. According to the 1991 Act anyone who violates the conditions mentioned in the Act is subject to a fine, however, the new Act discards the penal sanction introduced by the 1982 Act.¹³¹

The third piece of legislation enacted in 1991 is the Organization of Employers Act. According to this Act employers enjoy similar freedom to form associations among themselves as employees.

Significant amendments were also made to the Polish Labor Code 1974. One of the most important changes is that the provision of the 1982 Act, according to which collective agreement could not be registered if it diverged from the states social and economic policies, was repealed. Instead, the Labor Code only requires trade unions to register the agreement

¹³¹ *Ibid.* p. 15-16

with the Minister of Labor and Social Policy. The registration can only be refused if the by-laws of the union are inconsistent with the relevant statutory provisions. The decision of refusal can be appealed by parties.¹³²

Employers and employees freedom of association was also recognized by the 1997 Constitution of Poland. Article 59 of the Constitution recognizes the right of trade unions to associate freely, to bargain collectively for the purpose to resolve collective disputes and also to conclude collective agreements. Article 20 of the Constitution formulates the principle of social partners' dialogue and cooperation as the bases of economic system of the Republic of Poland. Moreover, article 59.4 makes clear reference to the international instruments stating that "the scope of freedom of association in trade unions and in employers' organizations may only be the subject to such statutory limitations as are permissible in accordance with international agreements to which the Republic of Poland is a party".

5.3.2.1 The Committee of Experts on the Application of Conventions and Recommendations

The Committee of Experts has followed the development of the collective labor legislation in Poland. By issuing the comments, the Committee helped the Polish Government to make its labor legislation in conformity with the ILO conventions Nos. 87 and 98.

In its individual observation concerning convention No. 87 published in 1992 the Committee welcomes the legislative changes that have taken place in the beginning of 1990's and notes **with satisfaction** that new legislation enacted in 1991 corresponds to the convention No. 87 to a large extent, namely, the possibility of trade union pluralism is set out in the law; workers have the right to strike; trade unions no longer exercise function related to labor discipline and the number of persons excluded from the

¹³² Article 241¹¹, Act of 26 June 1974, The Labor Code of Poland

right to establish trade union has been reduced in comparison with what was before.

Later in its individual observation concerning convention No. 87 published in 1999 the Committee notes **with satisfaction** that as a response to its previous comments and the comments of *Solidarity* the government amended the Trade Union Act 1991. According to this amendment the employees of the Supreme Chamber of Control, with exception of president, deputy president, director-general, directors and deputy directors of organizational unit now enjoy the right to form and join trade unions.

In its early individual observation concerning convention No. 87 published in 1993 the Committee notes the concern of *Solidarity* about the inadequacy of the provisions of Trade Union Act 1991 and Act of 25 October 1990 on the restitution of property and assets expropriated from trade union and social institutions after introduction of martial law in 1981. According to *Solidarity*, All-Poland Trade Union Alliance was engaged in obstructive conduct to prevent the return of assets that it had acquired after re-establishment of trade union monopoly in 1982. The assets belonged to *Solidarity* before. The Committee required the government to settle the dispute in a way to ensure that all trade unions are able effectively to exercise their activities in full freedom. In its individual observation concerning convention No. 87 in 2009 the Committee notes **with interest** the governments' indication that the Social Revendication Commission ruled in favor of *Solidarity* and that state treasury will pay the trade union organization.

In its 2001 Individual Observation concerning convention No. 87, the Committee requested the government to repeal the provisions of the Civil Service Act prohibiting civil servants to manifest political beliefs publicly; to participate in strikes and to perform function within trade unions. In its 2005 observation the Committee took **due note** of the governments' statement that public employees performing a trade union function are free

to express their opinions regarding politics and governmental policies in the economic and social sphere. The government explained that the provision has to be interpreted in a way as to avoid the situation when opinion of the government employee could be mistaken as the official position of the concerned public authority.

In its 2011 report the Committee recalls that it had previously requested the Polish government to specify categories of employees who's right to strike is restricted. In this respect the Committee **notes** the new provisions of the Civil Service Act and Annex 1 to the Ordinance of the Prime Minister of 2009 concerning civil service. The Committee reiterates that those public servants who do not exercise authority in the name of the state should enjoy the right to strike and requests the government to provide information on the practical application of the right to strike of these employees.¹³³

However, the issue concerning civil servants' right to perform trade union functions remains open. According to the new 2008 Act on Civil Service those members of the civil service that occupy senior positions cannot exercise trade union functions. The committee reminds that "the right to elect representatives in full freedom as well as the right to perform trade union function, should be guaranteed to all workers in the public service in their respective trade union organizations" and therefore requests the government to take necessary measures to amend section 78.6 of the Civil Service Act.¹³⁴

In the Individual Observation concerning convention No. 98 published in 1990 the Committee notes **with satisfaction** the adoption of Amnesty Act in 1989 that completely annuls convictions on ground of strikes or other protest action which occurred after 1980. The Committee also notes **with satisfaction** that under the terms of Act No. 172 of 1989 all persons including secondary school teachers and university professors who were

¹³³ *Supra* note 56, p. 145

¹³⁴ *Ibid.* p. 145

dismissed because of trade union activities will be able to apply for reinstatement.

In its Individual Observation published in 2009 concerning convention No. 98 the Committee focuses on anti-union discrimination and requests the government to establish prompt and impartial procedure in order to ensure that “trade union officials and members have the right to an effective remedy by the competent national tribunals for acts of anti-union discrimination”. The Committee further refers to the International Trade Union Confederation (ITUC) report of 2008 according to which judicial order for reinstatement of trade unionists is often ignored by employers. In this regard the Committee notes the response of the government that the issue has been discussed by the Tripartite Commission and draft amendment of the Code of Civil Procedure containing rules aiming to facilitate access for parties to proceedings are prepared. The Committee requests the government to further evaluate the results of the amendments and provide information about the measures taken to improve the situation.

In its 2011 report the Committee notes the governments’ indication that one of the ways to reduce excessive length of the court proceedings is the supervisory action by the Minister of Justice with regard to the activities of the presidents of district and appeal courts. The government also refers to the draft Act amending the Law on Common Courts according to which periodic assessment of the judges’ work is possible. The government also speaks about the possibility to establish new measures in the Code of Civil Procedure according to which trade union activists would be granted the right not to be dismissed, until the proceedings in the labor court are completed. The Committee welcomes this information and requests the government further to provide information on the measures taken to ensure that trade union activists enjoy the right to protection in practice.

In its 2011 report the Committee notes its **concern** that between 2008 and 2010 there was no conviction for the acts of anti-union discrimination under

the Trade Union Act 1991. The Committee requests the government to ensure effective application of the legal sanctions for all cases of anti-union discrimination. Furthermore, the Committee notes the information confirmed by the government that according to section 47 of the Labor Code the compensation provided for an illegal dismissal of trade union activist is limited to a maximum three months salary. The Committee considers that excessive length of compensation proceedings and the amount of the compensation are insufficient and have no dissuasive character. The Committee requests the government to ensure the full compensation of dismissed workers.

5.3.2.2 Conclusion

Clear recognition of the freedom of association means that the Polish legislation is generally adjusted to the ILO standards. However, some questions remain open. The problem still remains with farmers' right to associate¹³⁵; subjects of the collective dispute are not clear¹³⁶; registration procedure of trade unions raises some doubts¹³⁷; selection of representative trade union is also a reason for concern¹³⁸; limitations on the right to strike is considered too broad¹³⁹; the organization of collective labor law also raises certain criticism¹⁴⁰.

As a response to the criticism the Codification Commission on the Labor Law was appointed by the Polish government in 2002 which recently presented draft changes of the Labor Code as two separate bills: individual labor code and collective labor code. The draft was critically evaluated by the social partners. According to *Solidarity*, the draft significantly reduces the influence of trade unions and there is a danger that unclear provisions of

¹³⁵ *Supra* note 121, p. 11

¹³⁶ *Ibid.* p. 13

¹³⁷ Michał Seweryński, *Toward a New Codification of Polish Labour Law*, Comparative Labor Law and Policy Journal, 2004, p.12

¹³⁸ *Ibid.* p.14

¹³⁹ *Ibid.* p.18

¹⁴⁰ *Ibid.* p.3

the draft might be interpreted and used against the trade unions.¹⁴¹ However, the criticized provisions are not enacted yet and we have to hope that Polish government will take into consideration the above mentioned criticism and amend the bill in full conformity with the ILO conventions.

From the above mentioned, it is clear that in general the Polish government takes the comments of the Committee of Experts into account and tries to adjust the labor legislation to the ILO standards. We have to hope that the trend continues and the current economic crisis described above and/or constantly changing political climate¹⁴² in the country does not prevent Poland to put its legislation in full conformity with the ILO conventions Nos. 87 and 98.

5.3.3 Implementation of the ILO Standards in Domestic Courts

The period of the 1980's can be described as controversial for the trade union movement in Poland. On the one hand, the Trade Union Act 1982 introduced new notions, such as collective labor dispute settlement and the right to strike for the first time in the Polish legislation, while on the other hand, section 52 of the same Act cancelled the registration of all existing trade unions as a result of which *Solidarity* was dissolved. Furthermore, section 53 of the Act set a time table for the resumption of the trade union activities according to which unions and inter-union organizations were not able to carry out their activities until the beginning of 1985.¹⁴³

Under these circumstances it is difficult to speak about the independence of the domestic courts that are able to effectively apply the ILO standards, namely, conventions No. 87 and No. 98, at national level. In his report the

¹⁴¹ *Report on Violations of Trade Union Rights in Poland 2008*, Report of *Solidarity*, 2009

¹⁴² Juliusz Gardawski, *More Flexible Labor Code Comes into Force*, 2003, available at <http://www.eurofound.europa.eu/eiro/2002/12/feature/pl0212108f.htm>

¹⁴³ Case(s) No(s). 1097, Report No. 221 (Poland): Complaints against the Government of Poland presented by International Confederation of Free Trade Unions and the World Confederation of Labour

former ILO Deputy Director-General Nicolas Valticos refers to only one case when a dismissed provincial leader of *Solidarity* was able to get his previous job back after the labor court issued a decision in his favor.^{144 145}

After round-table negotiation and later the dissolution of the Soviet Union, the situation was changed in Polish courts. The problem was not so much the lack of court decisions in favor of workers anymore but this time - **unjustified delays in the court proceedings**. In a case before the Committee on Freedom of Association, *Solidarity* referred to the unjustified delays in the court proceedings for alleged violation of workers' rights. The government justified such delays by the complexity of the case. The Committee warns the government against the long delays and states that "an excessive delay in processing cases of anti-union discrimination and in particular a lengthy delay in concluding proceedings concerning the reinstatement of the trade union leaders dismissed by an enterprise constitute a denial of justice". The Committee further reminds the government one of the fundamental principles of freedom of association that, workers should enjoy adequate protection against acts of anti-union discrimination and that this protection is particularly desirable in case of trade union officials in order for them to be able to perform their trade union duties in full independence.¹⁴⁶

In another case decided by the Committee part of the allegations from *Solidarity* was again the indulgent attitude of the judicial authorities to acts of anti-union discrimination. The dismissal case of one trade unionist was pending before the court for two and a half years while the other dismissal case of the second trade unionist was still pending by the time the complaint

¹⁴⁴ *Report of Mr. Nicolas Valticos to the Director-General of the International Labor office on his visit to Poland (10-16 May 1982), Geneva, 18 May 1982*

¹⁴⁵ Unfortunately, the court decision itself is not available in English and we don't know if the Court actually referred to the ILO conventions (Nos. 87 & 98) but even if the Court did not mention the ILO conventions, but referred to domestic legislation only, we still have indirect implementation of the ILO standards if that domestic legislation referred by the court is in conformity with the ILO conventions

¹⁴⁶ Case(s) No(s). 2291, Report No. 333 (Poland): Complaint against the Government of Poland presented by NSZZ "Solidarnosc", Para. 914-916

was made to the Committee. The Committee recalls that for the necessary remedies to be effective the cases concerning anti-union discrimination must be examined rapidly, repeating that “lengthy delays in concluding the proceedings concerning the reinstatement of trade union leaders dismissed by the enterprise constitute a denial of justice and therefore a denial of the trade union rights of the persons concerned”.¹⁴⁷

Unjustified delays in the court proceedings was still an issue in case before the Committee in 2007 submitted by *Solidarity* together with International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations. The committee reiterates its statement made in cases before it that one of the fundamental principles of freedom of association is that “workers should enjoy adequate protection against acts of anti-union discrimination in respect with their employment”. According to the Committee “justice delayed is justice denied”.¹⁴⁸

However, it must be noted that in the recent case of anti-union discrimination the unjustified delays in the court proceedings was not an issue any more. In a case presented by *Solidarity*, the Committee welcomes the governments’ indication that a trade union activist has been reinstated in his previous job after the court proceedings.¹⁴⁹ There is a reason to believe that the recommendations of the Freedom of Association Committee mentioned in the previous cases have made positive influence on the domestic courts and therefore in this case the lengthy proceedings are not an issue any more.

¹⁴⁷ Case(s) No(s). 2395, Report No. 337 (Poland): Complaint against the Government of Poland presented by the Independent and Self-Governing Trade Union NSZZ "Solidarnosc", Para. 1992-1994

¹⁴⁸ Case(s) No(s) 2474, Report No. 344, Complaint against the Government of Poland presented by the Independent Self-Governing Trade Union (NSZZ) "Solidarnosc", supported by the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF), Para. 1153, 1155

¹⁴⁹ Case(s) No(s) 2748, Report No. 357, Complaint against the Government of Poland presented by the Independent Self-Governing Trade Union “Solidarnosc” (NSZZ “Solidarnosc”), Para. 1067

One more decision that can be considered as indirect application of the ILO standards was issued by the Constitutional Tribunal in 2008. The case concerned article 35.2 of the Trade Union Act 1991 according to which those trade union activists who run activities contrary to the provisions of the Act shall be punished. The Constitutional Tribunal stated that any legal provision of punitive character must clearly define the forbidden action, sanction and persons responsible for the addressee of the punitive norm to know which act is punishable and why. According to the Tribunal while the provision lacks this clarity it does not comply with the Constitution of Poland.¹⁵⁰ Given that, the constitutional provisions on trade union rights are in full conformity with the conventions No. 87 and No. 98 the referral to these constitutional provisions by the domestic court and its application in practice indirectly amounts to the application of the ILO standards.

5.3.3.1 Conclusion

The decision of the Constitutional Tribunal and the recent case before the Freedom of Association Committee clearly promotes the trade union rights. Even though these decisions might not mention the ILO conventions directly, the fact that they apply domestic legislation which is in conformity with the ILO conventions can be considered as one step forward.

5.3.4 Implementation of the ILO standards in Practice Today

The analysis of the legislation and the domestic court decisions show that the implementation of the ILO standards is mostly effective in Poland. However, even if the collective labor legislation is in conformity with the ILO standards and the domestic courts make decisions in favor of the workers dismissed for a reason of the trade union activity, some problematic

¹⁵⁰ *Supra* note 141

issues still exist when it comes to the implementation of the ILO standards in practice.

From the annual surveys¹⁵¹ conducted by the International Trade Union Confederation (ITUC) we learn that dismissal of the trade union activists is very frequent in Poland. In the annual survey issued in 2010 it is stated that at least 20 men and women were dismissed for their trade union activities.¹⁵² Even though the law prohibits anti-union discrimination it did not prevent employer harassment of unionists for trade union activity.¹⁵³

The problem exists also with reinstatement of the unfairly dismissed workers. The court proceedings can take up to two years and even if the unionist wins the case there might still be a problem with his reinstatement with the employer. The situation is further complicated by the fact that more and more judges believe that employers should not be forced to take back unfairly dismissed worker as it creates conflict.¹⁵⁴

There is also a problem with low fines for violation of trade union rights. Even though the upper limit for the fine was increased from 2 000 PLN to 30 000 PLN, in practice, the highest fine imposed by the court for a fatal accident caused by an employer's negligence in especially hazardous conditions was 10 000 PLN.¹⁵⁵

All the above mentioned conditions, creates for employer advantageous situation. Long court proceedings, problems with enforcement of court decisions and low fines make it easy for employer to disregard the law and the trade union rights.

¹⁵¹ All Annual Surveys from ITUC are available on the following link <http://www.ituc-csi.org/human-and-trade-union-rights.html>

¹⁵² 2010 Annual Survey of Violations of Trade Union Rights: Poland, ITUC

¹⁵³ *2010 Human Rights Report: Poland*, Report of U.S. Department of State, 2011

¹⁵⁴ *Supra* note 152

¹⁵⁵ 2009 Annual Survey of Violations of Trade Union Rights: Poland ITUC

5.3.4.1 Conclusion

I largely share the position taken by the Freedom of Association Committee in a case about the anti-union discrimination. In that particular case the Committee states that the problem is not so much with inadequate legislation applied with an unsatisfactory manner or with inordinate court delays but “rather two isolated instances of bitter industrial relations characterized by permanent conflict and the refusal of individual employers to recognize a workers’ organization and enter in good faith in a collective bargaining relationship with it”.¹⁵⁶ I believe that the position of the court in that particular case applies to Polish industrial relations in general today.

5.4 Georgia

5.4.1 Historical Background

Soon after the dissolution of the Soviet Union in 1991 the newly independent countries started to build pluralist democracies. The former Soviet Union member states started to change their labor legislation, moving towards market economy. Significant changes were made in the field of collective labor relations: the single communist-dominated trade union structure was disclaimed, free collective bargaining was introduced and the right to strike was recognized. These new regulatory frameworks drew inspiration from the ILO conventions Nos. 87 and 98 and the doctrine of freedom of association and collective bargaining developed by the ILO supervisory bodies.¹⁵⁷

In Georgia, the processes went rather slow.¹⁵⁸ Georgia became an ILO member in 1993. It did not recognize the ratification of conventions that had

¹⁵⁶ *Supra* note 146

¹⁵⁷ Arturo Bronstein, *International and Comparative Labor Law, Current Challenges*, International Labor Organization, 2009, p. 215

¹⁵⁸ Slow development of the labor legislation can be explained by the political turmoil that the country has experienced during the 1990’s. The civil war, the coup d’etat and the armed conflicts in the Autonomous Republic of Abkhazia and the Autonomous Region of

been ratified by the Soviet Union and started to examine all the conventions on a case-by-case basis.¹⁵⁹ As a result, the Convention No. 98 on the Right to Organize and Collective Bargaining was ratified by Georgia in 1993, while the Convention No. 87 on Freedom of Association and Protection of the Right to Organize was ratified only in 1999.

5.4.2 Implementation of the ILO Standards in Legislation

The two major pieces of legislation regulating collective labor relations was enacted in Georgia only in the late 1990's. Law on Trade Unions was enacted in 1997, while the law on the Procedure of the Settlement of Collective Labor Disputes in 1998.

The 1997 Law on Trade Unions introduces a new understanding of trade union rights, different from that of the Soviet one. Article 5 guarantees independence to trade unions from “the bodies of state authority and self-governing bodies, employers, associations (unions, federations) of employers, political parties and organizations”. Chapter II of the Law sets forth the basic rights of trade unions, including the right to participate in settling collective labor disputes (including the right to strike) for the protection of the interests of the workers; the right to collective bargaining and implementation of collective agreements. It also gives the right to trade unions to promote employment and to oversee the labor legislation.

The 1998 Law on the Procedure of the Settlement of Collective Labor Disputes (which was later repealed by the new Labor Code, see below) introduced provisions regulating collective labor dispute. It regulated modalities of putting forward demands by workers. The Law contained provisions about the examination of disputes by a Conciliatory Commission,

Southern Ossetia, which resulted in the *de facto* loss of these territories, left Georgia far behind of other former Soviet Union member states in terms of development. The further information is available on the official site of the Government of Georgia - http://www.government.gov.ge/index.php?lang_id=ENG&sec_id=193

¹⁵⁹ *Supra* note 157, p. 221

examination of disputes with participation of intermediaries and examination of disputes by a Labor Arbitration Tribunal.

The new legislation was supported by the Constitution adopted in 1995. Article 26.1 of the Constitution states the right of everyone “to form and join public associations, including trade unions”.

In 2006, the new Labor Code of Georgia came into force. With the enactment of the new Code, the Law on the Procedure for the Settlement of Collective Disputes was abolished. However, the Code itself does not contain the provisions on the settlement of collective disputes.¹⁶⁰ The Code further entailed the repeal of the charter of Labor Inspections, which in practice meant that labor inspectors were laid off across the country due to the abolition of the State Labor Inspectorate.¹⁶¹

5.4.2.1 The Committee of Experts on the Application of Conventions and Recommendations

The Committee of Experts has followed the development of the collective labor legislation in Georgia. In its Individual Direct Request concerning the convention No. 87 submitted in 2003, one of the main concerns of the Committee was the requirement of article 2.9 of the Law on Trade Unions, according to which the initiation of no less than 100 persons is necessary in order to form a trade union. The Committee states that the requirement for minimum membership is in conformity with the convention No. 87, however, the number should be reasonable in order not to hinder the establishment of the organization. The Committee considered that a minimum 100 member requirement for a trade union on an enterprise level is too high and requested the government to take necessary measures to **amend** this provision.

¹⁶⁰ *Internationally Recognized Core Labor Standards in Georgia*, Report of the ITUC for the WTO General Council Review of the Trade Policies of Georgia, Geneva, 2009, p. 3, 6

¹⁶¹ *Ibid.* p.3

In its Individual Direct Request concerning the Convention No. 98 submitted in 2002 the Committee of Experts raised two major problematic issues. The Committee notes the Trade Union Law, the Law on the Procedure for the Settlement of Collective Disputes and the Labor Code provisions that prohibit acts of anti-union discrimination. The Committee, however, states that general prohibition of discrimination does not guarantee adequate protection from acts of anti-union discrimination and that effective and sufficiently dissuasive sanction should be **provided** in law. The Committee further refers to the provision of the Law on Trade Unions according to which acts of interference from employers in trade union activities is prohibited. The Committee states that this provision does not guarantee effective protection of the workers and that there is a need for rapid appeal provisions together with effective and dissuasive sanctions. The Committee requests the government to **indicate** the legislation that provides such procedures and sanctions.

In its individual observations and direct requests the Committee of Experts raised a number of problems connected to the Labor Code 2006. The main concerns of the Committee raised in relation to convention No. 87 was related to insufficient protection of the workers' right to strike and the lack of provisions on the settlement of collective dispute.

In its Individual Direct Request concerning the convention No. 87 submitted in 2007 the Committee notes article 51.4 and 51.5 of the new Labor Code according to which the strike of employees who are informed about the termination of the contract before the dispute arises shall be considered illegal. Also, if the right to strike arises before the termination of the time-based contract the strike shall be considered illegal after the expiration of the term of the contract. The Committee considers that such limitations totally restricts any protest action taken by workers related to what they might consider unjustifiable terminations and therefore request the government to **repeal** the provisions.

The Committee also refers to article 51.2 according to which strikes are prohibited where “work is impossible to suspend due to the technological mode of work”. The Committee reminds the government that the right to strike can be restricted only in relation to public servants, workers in essential services in the strict sense of the term and in the event of the acute national emergency. Therefore, it requests the government to **amend** the section 51.2.

The Committee notes article 49.8 of the Code which does not allow strike for more than 90 calendar days. The Committee states that such limitations are not in conformity with the convention No. 87. Therefore, it asks the government to **repeal** the provision and give consideration to appropriate mechanisms of conciliation, mediation and voluntary arbitration instead. In relation to this the Committee further notes the obligation of the parties to participate in the work of the conciliation commission (article 49.5) and states that the Code does not provide the rules or procedure for such a commission. Therefore, the Committee requests the government to **develop** such mechanisms.

The Committee expresses its concern about the article 46.1 and 46.2 according to which the rights of employees’ can be limited by the labor contract due to the importance of the production process and if it may cause direct damage to the interests of the employers. The Committee requested the government to indicate how this provision works in practice. In its Individual Direct Request concerning convention No. 87 submitted in 2008 the Committee notes the governments’ response that no such practice exists and subsequently requests the government to **amend** the provision.

In the same 2008 Direct Request the Committee notes article 48.5 of the Labor Code according to which if during a collective dispute the agreement is not reached in 14 days, one of the parties may refer the case to the court of arbitration. The Committee states that the recourse to the arbitration should be possible only if both parties agree, otherwise it effectively

undermines the right of workers to strike. The Committee asks government to **amend** the article.

In relation to the Convention No. 98 the Committee raises two main concerns. According to the Committee the new Labor Code does not guarantee adequate protection against the acts of anti-union discrimination and also, the Code does not promote the collective bargaining in accordance with the convention requirements.

In its Individual Direct Request concerning the Convention No. 98 submitted in 2007, the Committee notes article 2.3 of the Labor Code which prohibits discrimination based on “membership in an association”. The Committee states that this type of general provision does not provide adequate protection against acts of anti-union discrimination and requests the government to **include** in the Code specific provisions prohibiting anti-union discrimination.

The Committee further notes article 5.8 of the Code according to which the employer is not liable to substantiate his/her decision for not recruiting the applicant. The Committee states that such provision can result in placing on a worker an obstacle when proving that he/she was not recruited because of trade union activity. Therefore, the government is asked to **amend** the provision.

Another important issue raised by the Committee is connected to articles 37(d) and 38(3) according to which an employer has a right to terminate contract at his/her initiative if provides one month’s pay to the employee, unless otherwise envisaged by the contract. The Committee states that there is insufficient protection against anti-union discrimination and requests the government to **amend** the provisions so to ensure that there are truly compensatory measures, including reinstatement, for anti-union dismissals.

In its Individual Observation published concerning the convention No. 98 in 2010 the Committee further expresses its concern about the articles 41-43 which put the collective agreements concluded with trade unions and collective agreements concluded between an employer and non-unionized worker in the same position. The Committee notes that such provision can seriously undermine principles on collective bargaining in case an enterprise offers better working conditions to non-unionized worker. This kind of practice undermines the negotiating capacity of the trade union and gives rise to discriminatory situation. It might further encourage workers to withdraw from trade unions. Therefore, the Committee once again requests the government of Georgia to **amend** its legislation.

Even though the Committee repeats these inconsistencies with conventions Nos. 87 and 98 each year through the individual observations or the direct requests sent to the government, none of the requests of the Committee mentioned above are fulfilled by the Georgian government. It must be noted, however, that in response to other requests of the Committee the government clarified some issues. For instance, in its Direct Request submitted in 2008 concerning convention No. 87 the Committee notes governments' indication that article 5.2 of the Trade Union Law forbids trade unions to belong to a political party, but it does not forbid them to express their opinions and criticism on Governments' economic and social policies. Similarly, in the Individual Observation published in 2010 concerning convention No. 98, the Committee notes governments' indication about the protection of the workers' organizations against acts of interference by employers that the Code of Administrative Violations punishes violation of labor legislation and labor protection rules. In the same Individual Observation the Committee notes governments' indication on the concern raised by the Committee regarding article 13 of the Labor Code which gives an employer the right unilaterally to specify the duration of a business week, the daily schedule, shifts, the duration of breaks, the time and place of remuneration payment, the duration of and the procedure for granting a leave and unpaid leave, the rules for complying with labor

conditions, the type and the procedure for work-related incentives and responsibilities, the procedures for consideration of complaints/applications and other special rules subject to the specifics of the business of the organization. In relation to this, the Georgian government states that an employer can introduce such internal rules only if the issues are not regulated by an individual or collective labor agreement and in case these issues are regulated by a labor agreement, that agreement prevails over any other internal rules. However, these clarifications and small changes cannot outweigh those rigid provisions of Georgian labor legislation which totally ignore international labor standards on freedom of association and the collective bargaining.

5.4.2.2 Conclusion

It is without any doubt that the Georgian labor legislation has made significant progress after the Soviet-era. The fact that the 1997 Law on Trade Unions explicitly refers to the international treaties as a legal basis of trade union activities and gives the international treaties or agreements preference over the law can be considered as a proof that Georgian legislators, at that time took the ILO standards into account while enacting labor legislation. However, this progress has been stopped shortly. The Labor Code 2006 effectively undermines the principles of freedom of association and the collective bargaining enshrined in the conventions Nos. 87 and 98. For that reason, the Committee of Experts each year asks the Georgian government to adjust the legislation to the conventions Nos. 87 and 98, so far unsuccessfully.

5.4.3 Implementation of the ILO Standards in Domestic Courts

During the Soviet era the Supreme Court of Georgia was subordinate to the Supreme Court of the Soviet Union. The Georgian courts in the Soviet Era

were characterized as “powerless, rubber-stump” courts. In the year of 1990 the major steps were taken towards establishment of an independent judiciary. For this purpose, the Supreme Court judges were forbidden to hold communist party membership and the Supreme Court activities were removed from the supervision of the party.¹⁶²

However, the problem with the lack of the independent and impartial judiciary remained after the Soviet Union. The civil war which followed the dissolution of Soviet Union did not help to improve the situation in this regard. Judiciary was always viewed as one of the most corrupted institutions, substantially lacking public trust. The judicial reform in the late 1990’s did not change the situation much; public distrust towards judiciary was still an issue.¹⁶³

After the Rose Revolution the new government succeeded in elimination of the corruption in the judicial system.¹⁶⁴ However, allegations of corruption were replaced by the allegations of curtailment of the freedom of judges to rule according to law and their own discretion.¹⁶⁵

Because of the lack of independent status of the judiciary and the fact that the convention No. 87 was ratified only 12 years ago, it was difficult to speak about the domestic courts that can apply the international labor standards effectively. However, in 1998, when Convention No. 87 was still not ratified, the Constitutional Court of Georgia delivered a judgment that aimed to strengthen the trade union movement in the country. In the complaint against the President of Georgia, the trade union members alleged the unconstitutionality of the acts issued by the Cabinet of Ministers of the Republic of Georgia in the beginning of the 1990’s according to which the

¹⁶² The Library of Congress, *A Country Study: Georgia, the Judicial System*, available at [http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID+ge0073\)](http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+ge0073))

¹⁶³ Transparency International Georgia, *Refreshing Georgia’s Courts, Trial by jury: More democracy or a face-lift for the judiciary?*, p. 1, available at <http://transparency.ge/sites/default/files/Trial%20by%20Jury.pdf>

¹⁶⁴ *Ibid.* p. 2

¹⁶⁵ *Ibid.* p. 2

property owned by the trade unions was transferred to the government agencies. The Constitutional Court stated that the acts are in contradiction with article 22.1¹⁶⁶ of the Constitution and therefore declared them unconstitutional.¹⁶⁷ The Court based its judgment on national legislation, including the provisions of the 1997 Law on Trade Unions which guarantees the independence of trade unions and their financial and property rights.¹⁶⁸

It must be noted with regret that one of the properties (Palace of Culture) mentioned in the judgment had still not been handed over to the trade union in 2003. In a case presented by the Georgian Trade Unions Amalgamation, the ILO Committee on Freedom of Association “requests the government to take the necessary measures so as to ensure that the previously seized building is returned to the trade unions”¹⁶⁹, however, unsuccessfully.

The new Labor Code 2006 significantly influenced the decisions of the domestic courts. One of the major cases often cited in this respect is the case of Poti Sea Port.

The case was initiated in 2007 when the trade union of the Port organized a 45 minute protest action during a lunch break with the demand that manager

¹⁶⁶ According to article 22.1 “*The property and the right to inherit shall be recognized and guaranteed. The abrogation of the universal right to property, of the right to acquire, alienate and inherit property shall be impermissible*”

¹⁶⁷ *Irakli Tughushi, Londa Sikharulidze and Others v. the President of Georgia*, case number: 1/6-58-60-62-67, date: 15.07.1998, The First Board of the Constitutional Court of Georgia. The short description of the judgment in English is available on the website of the Constitutional Court of Georgia http://constcourt.ge/index.php?lang_id=ENG&sec_id=74&id=201&action=show. The full version of the judgment is available on the same website only in Georgian

¹⁶⁸ According to article 5.2 “*a trade union, association (federation) of trade unions shall be independent from the bodies of the state authority and self-governing bodies, employers, associations (unions, federations) of employers, political parties and organizations, and shall not be accountable to and under control of these bodies, with the exception for the cases established by the legislation*”. While according to article 22.1 “*a trade union, association (federation) of trade unions, in accordance with their own statute, shall own and dispose of the property and financial resources, generated by them. The property and financial resources of a trade union shall be inviolable. No one shall be entitled to dispose of, confiscate or transfer its property and financial resources, without the consent by a collective (elected) body, provided for by the Statute, with the exception for the cases, established by the legislation*”

¹⁶⁹ Case(s) No(s). 2144, Report No. 330 (Georgia): Complaint against the Government of Georgia presented by the Georgian Trade Unions Amalgamation

participate in collective bargaining with the union on the issues of labor conditions and the expected privatization of the Port. As a response, the management of the enterprise sealed the office of the union and the employment relationship was terminated with nine trade unionists. The trade union, convinced that it was a case of discrimination on the basis of trade union membership, referred the case to the Poti City Court requesting reinstatement, remuneration for coercive suspension, invalidation of the management's ordinance to seal the office and a decision enabling the trade union to exercise its statutory authority. The trade union further asked the Court to apply the ILO conventions Nos. 87 and 98. The Poti City Court rejected the lawsuit on the bases of the Labor Code 2006 which does not require the employer to substantiate the decision to terminate labor contracts.¹⁷⁰

Not satisfied with the decision the trade union appealed the case to the Kutaisi Court of appeal. The grounds for the appeal were the following: article 2 of the Labor Code prohibits any discrimination on the basis of trade union membership; article 23 on the Law on Trade Unions prohibits dismissal of an employee who is an elected shop steward or a trade union officer without the consent of a trade union. The complainant argued that even though the Labor Code allows employer to terminate the employment relationship on the basis of the termination of the employment contract, the Labor Code's application is limited to regulating the employment relations that are not otherwise regulated by a specific legislation or by the international treaties signed by Georgia. The complainant argued that the Law on Trade Unions is the specific legislation and therefore it must be applied instead of the Labor Code. Furthermore, according to the complainant, the Poti City Court failed to apply national legislation in line with the ILO conventions Nos. 87 and 98.¹⁷¹

¹⁷⁰ Case(s) No(s) 2663, Report No. 356, Complaint against the Government of Georgia presented by the Georgian Trade Unions Confederation (GTUC)

¹⁷¹ *Ibid.*

The Kutaisi Court of Appeal, however, did not take the complainant's arguments into account and upheld the decision of the Poti City Port in 2008. The Appeal Court applied the articles 37 and 38 of the Labor Code which give the employer unrestricted right to terminate an employment contract. The Court explained that the Labor Code is a special and a newer legislation and therefore it must be privileged over the Trade Union Law which was enacted back in 1997. The Court further stated that the Labor Code of Georgia, in conformity with article 30.2¹⁷² of the Georgian Constitution, provides the rights of the owner to employ or dismiss the employees, meaning that the owner shall prolong labor relations with candidates who are agreeable and desirable for him/her.¹⁷³

Another case, where the domestic court relied on the Labor Code while circumventing the trade union rights enshrined in the ILO conventions was the case of Ltd "Tbilisi Metropolitan" originated in 2006. A member of the trade union who was entitled to defend employees' rights during the process of reorganization demanded the information from employer about employees' future employment conditions. As a result he was dismissed in accordance with article 37 (d) of the Labor Code. He challenged this decision in the court but lost the lawsuit in all levels of Georgian courts. In its decision of *Paata Doborjginidze vs LLC "Tbilisi Metropolitan Railway"* the Supreme Court of Georgia refers to article 2.5 of the Labor Code according to which employer has an unrestricted right to dismiss employee if notion, sense and objective goal of employment requests it. The Court adds that such action of the employer cannot be considered as discrimination. The Court further refers to articles 25.2¹⁷⁴ and 26.2¹⁷⁵ of the

¹⁷² According to article 30.2 of the Georgian Constitution "*the state shall be bound to promote the development of free entrepreneurial activity and competition. Monopolistic activity shall be prohibited except for the cases permitted by law. The rights of consumers shall be protected by law*"

¹⁷³ *Supra* note 170

¹⁷⁴ According to article 25.2 "*If normative acts of the same rank in the hierarchy are in conflict, then the norm stipulated by the most recent act shall be applied*", Law of Georgia on Normative Acts, Published in the Gazette of the Parliament of Georgia (November 19, 1996), Translated by IRIS Georgia February 2002, available at http://www.irisprojects.umd.edu/georgia/Laws/English/law_normative_acts.pdf

Law of Georgia on Normative Acts and states that the Labor Code has to be given preference over the Law on Trade Unions since the law on Trade Unions is the older piece of legislation.¹⁷⁶

It is clear that there is a trend that the courts after 2006 started to rely on the provisions of the new Labor Code which, as I described before, is an object of strong criticism of the ILO supervisory organs. Meanwhile the courts ignore the Law on Trade Unions which contains more favorable provisions for the protection of trade union rights.¹⁷⁷ Despite the referrals made by the complainants the courts also ignored the ILO standards. However, there are some positive exceptions. In this regard the decision of the Tbilisi City Court is interesting to mention.

The complainant, Educators & Scientists Free Trade Union of Georgia (ESFTUG) argued that the Ministry of Education and Science of Georgia refused to participate in the collective bargaining with the purpose to conclude collective agreement. In its complaint the ESFTUG mentions the international legislation that guarantees trade unions the right to collective bargaining and the right to conclude collective agreement. The referral is made to the Constitution of the ILO which recognizes the rights as fundamental and to the 1998 ILO Declaration which obliges states to promote collective bargaining. The ESFTUG cites the convention No. 98 article 4 of which obliges states “to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements.” Further referral is made to the article 6 of the

¹⁷⁵ According to article 26.2 “*if in the process of application of a normative act a state body or an official finds that the norms of the normative acts of the same rank are in conflict, then this body or official shall be bound to apply the most recent normative act*”, Law of Georgia on Normative Acts, Published in the Gazette of the Parliament of Georgia (November 19, 1996), Translated by IRIS Georgia February 2002, available at http://www.irisprojects.umd.edu/georgia/Laws/English/law_normative_acts.pdf

¹⁷⁶ Investor.Ge, *The Georgian Labor Code: Shining Success or Stunning Failure?* available at http://www.investor.ge/issues/2008_6/03.htm

¹⁷⁷ 2009 Annual Survey of Violations of Trade Union Rights: Georgia, ITUC

European Social Charter which obliges states to “promote joint consultations between workers and employers” and also “to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements”. The ESFTUG also mentions the Collective Agreement Recommendation No. 91 and the Collective Bargaining Convention No. 154 and reminds the state of its obligation to promote collective bargaining.¹⁷⁸

The representative of the Ministry of Education and Science argued that it does not have an obligation to participate in collective bargaining with ESFTUG for the purpose of concluding the collective agreement. However, the Tbilisi City Court found the opposite and requested the Ministry to participate in the collective bargaining with the ESFTUG in order to conclude collective agreement.¹⁷⁹

It has to be noted that in its reasoning part the Court did not mention the ILO standards that the complainant based its complaint on. Nevertheless, the decision can be considered as a big step forward, since the reasoning of the complainant was largely relied on the international labor legislation, mostly, the ILO conventions and recommendations, including convention No. 98. The fact that the ESFTUG won the case suggests that the Court took its reasoning, into account and made decision on that basis. However, it is regrettable that the decision of the court was still not enforced after two years.¹⁸⁰

Another interesting decision for this research is the recent decision of the Supreme Court of Georgia. In the case presented before the Chamber on Civil Cases of the Supreme Court the subject of dispute was dismissal of the

¹⁷⁸ *ESFTUG v. The Ministry of Education and Science of Georgia*, number: 3/3074-06, Tbilisi City Court, 20 February, 2007

¹⁷⁹ *Ibid.*

¹⁸⁰ The Executive Act on *ESFTUG v. The Ministry of Education and Science of Georgia*, number: 3/3074-06, Tbilisi City Court, 13 January 2010

employees on the basis of article 37 (d) of the Labor Code. The complainants challenged the decision of the Tbilisi Court of Appeal according to which the employer is free to choose the employee. The Tbilisi Court of Appeal referred to the articles 2.5 and 37 (d) of the Labor Code and stated that dismissal in accordance with these provisions does not constitute discrimination. The complainants requested the Supreme Court to invalidate the decision of the Tbilisi Court of Appeal.¹⁸¹

In its decision issued in 2010 the Chamber on Civil Cases of the Supreme Court stated that article 37 (d) cannot be defined as giving an employer a unilateral right to dismiss an employee without any reason. According to the Supreme Court article 37 (d) does not regulate the dissolution of employment agreement while it mentions only the result (termination of employment) and not the reasons that must lead to such result. Instead, the Court refers to Civil Code¹⁸² of Georgia as containing the sufficient provisions on the dissolution of employment of the contract.¹⁸³ Therefore, the Supreme Court invalidated the previous decision and referred the case again to the Tbilisi Court of Appeal for reconsideration.¹⁸⁴

In its reasoning part the Supreme Court refers to the international legislation that protects the employees from dismissal without any notice and any reasoning. Article 4.4 of the European Social Charter (ratified by Georgia in 2005) “recognize the right of all workers to a reasonable period of notice for

¹⁸¹ Case # as-864-1150-09, Supreme Court of Georgia, 28 April, 2010

¹⁸² Article 352 about the effects of avoidance of a contract and article 405 about the fixing additional period of time in case of breach of obligation

¹⁸³ Here the Supreme Court strengthens its position by making referral to the ruling of the Constitutional Court of Georgia issued in 2009 about the constitutionality of the article 37(d) and quotes: “*the institute on dissolution of employment agreement, the rule and terms for dissolution of an agreement are not regulated by the challenged norm. The disputed norm represents part of the list of grounds for termination of employment relations and not the norm regulating the dissolution of employment agreement. Stemming from this, it is potentially impossible to discuss about subparagraph “d” of the first part of Article 37 of the Labor Code of Georgia as the norm that might establish arbitrariness from the part of an employer when dissolving an employment agreement*”. *Citizens of Georgia, Vakhtang Tirkia, Sergo Tirkia, Khvicha Gogia and Mamuka Shengelia vs the Parliament of Georgia*, case number: 456, date: 07 -04 -2009, the Constitutional Court of Georgia, the ruling available in English

http://constcourt.ge/index.php?lang_id=ENG&sec_id=23&id=618&action=show

¹⁸⁴ *Supra* note 181

termination of employment”. The Court further refers to the provisions of the International Covenant on Economic, Social and Cultural Rights on the right to work (article 6) and also to the Universal Declaration on Human Rights article 22 which guarantees everyone economic, social and cultural rights indispensable for his dignity and free development of his personality. Finally, the Court refers to the European Social Charter, again article 24 (a), which obliges parties to recognize “the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct, or based on the operational requirements of the undertaking, establishment or service”.¹⁸⁵

Interestingly, neither the complainants nor the Supreme Court cited the ILO conventions. Nevertheless, the decision of the Supreme Court can be considered as one step forward while it limited the application of article 37 (d) by stating that it does not give the right to the employer unilaterally to dismiss the employee without any reasoning. The decision has all the potential to be interpreted in conformity with the ILO conventions in future.

5.4.3.1 Conclusion

On the basis of the decisions discussed above it can be said that the Georgian courts are not yet ready to give full application of the ILO standards and namely conventions Nos. 87 and 98 in their decisions. One major reason for that can be the national labor legislation that the courts rely on. As it was stated by the ILO Committee on Freedom of Association in the light of the courts’ judgments in the Poti Sea Port case, “the current state of the Georgian legislation may not provide the judiciary with sufficient tools to ensure adequate protection against, and remedy for, acts of anti-union discrimination”¹⁸⁶. However, some positive trends are detected and it gives hope that in the future the domestic courts will apply the ILO conventions in a more effective way. Meanwhile, the trade unions have to

¹⁸⁵ *Ibid.*

¹⁸⁶ *Supra* note 170

mention the ILO standards in each and every case presented by them before the domestic courts.

5.4.4 Implementation of the ILO Standards in Practice Today

In practice there are number of cases when the trade unionists are discriminated because of their trade union membership.¹⁸⁷ There are also cases about the government's interference in the trade unions activity. One of the most cited case is the situation in the education sector. The Ministry of Education and Science did not follow the decision of the Tbilisi City Court and did not engage in collective bargaining with ESFTUG but instead started to favor the so called "yellow trade union" – Professional Education Syndicate (PES), formed in 2008. According to the ITUC survey, PES is invited to the meetings between educational professionals and the representatives of the Ministry of Education and Science, even in the cases when employees in question are not PES members. Further, PES instructed all 72 county executives in Georgia, who are directly appointed by the President, to stop transferring the union dues on behalf of ESFTUG members working in county-funded kindergartens.¹⁸⁸ The U.S. Department of State also referred to the case in its annual human rights report stating that because of the acts of government representatives the ESFTUG now has serious problems in collecting the trade union dues from school teachers.¹⁸⁹

The ESFTUG case is not the only one where the government is blamed in anti-union activity. In the complaint presented by the Georgian Trade Union Amalgamation before the Committee on Freedom of Association it is described in details how the trade union was forced to return the property to

¹⁸⁷ *Supra* note 152

¹⁸⁸ *Ibid.*

¹⁸⁹ *2010 Human Rights Report: Georgia*, Report of U.S. Department of State, 2011

the state as a result of intimidation and derogatory statements of government officials.¹⁹⁰

It must be noted with regret that while the ILO tries to convince the government to change the labor legislation and particularly the new Labor Code, the World Bank encourages the government not to do so. In its report “Doing Business 2008” the Labor Code won the praise of the World Bank for its ultra-liberal approach to hiring and firing, for exactly the same reasons the Code was criticized by the Committee of Experts.¹⁹¹

5.4.4.1 Conclusion

Protection of the trade union rights in practice today is very ineffective in Georgia. There are two major circumstances that contribute to this factor. Firstly, the public trust in trade unions is very low. This is caused by the damaged reputation that trade unions have acquired during the Soviet era. While the transformation of the Georgian trade unions into the western type of trade unions takes some time, peoples perception on trade unions is still the Soviet one.¹⁹²

Secondly, the war activities on the territory of Georgia in 2008 has significantly influenced the trade union rights in Georgia in a negative way. In his speech made in 2008 the Georgian Trade Union Confederations’ (GTUC) President emphasized all the efforts that the trade unions in Georgia have taken against the neo liberal ideology of the government, adding that “now all these things run the risk of being postponed for a long

¹⁹⁰ Case(s) No(s). 2387, Report No. 338, Complaint against the Government of Georgia presented by the Georgian Trade Union Amalgamation (GTUA), supported by the International Confederation of Free Trade Unions (ICFTU)

¹⁹¹ Supra note 177

¹⁹² Transparency International Georgia, *The Georgian Trade Union Movement*, available at <http://transparency.ge/sites/default/files/TI%20GEORGIA%20Georgian%20Trade%20Union%20Movement%20ENG.pdf>

time, because not only social partners, but even the Georgian Trade unions have no time to deal with them at the moment”.¹⁹³

¹⁹³ GTUC, *Speech of the Georgian Trade Union Confederation's* president Irakli Petriashvili, Budapest, September 1-3 2008, available at <http://www.gtuc.ge/en/pressandpublications>

6 Concluding Remarks

6.1 Findings of the Comparative Study

The two countries went through clearly different paths of the historical development in terms of the trade union rights. Poland ratified the ILO conventions Nos. 87 and 98 in early 1957. In the beginning of the 1980's the free trade union movement was started in Poland which achieved success with the support of the ILO. Georgia, on the other hand, has become an independent state after the dissolution of the Soviet Union and has ratified the ILO conventions only in 1993 (No. 98) and in 1999 (No. 87). The civil war and armed conflicts that followed the dissolution of the Soviet Union left the government of Georgia with less time for the promotion of human rights, including, trade union rights. It is very important to note that while in Poland *Solidarity* was considered as a movement against the unwanted Soviet Union, in Georgia trade unions were considered as a "remnant" of the Soviet Union which government dislikes. The historical differences of this kind have made a strong mark on the level of the respect of the international labor standards in Georgia.

However, the historical differences do not exactly explain the enactment of the discriminatory Labor Code by Georgia in 2006. Even though the Code has become an object of strong criticism of the Committee of Experts the criticized provisions are still in force. It must be noted that after the dissolution of the Soviet Union the Georgian government enacted the labor legislation that, even though not in full conformity with the ILO standards, still contained the language of the ILO conventions Nos. 87 and 98. It is interesting to note that the labor legislation on trade union rights of that time was developed in Georgia in the same way as it was in Poland in the beginning of 1990's – instead of amending the existing labor code the new laws on trade union rights were enacted. It seems that the track taken by the Georgian government in the 1990's was correct. However, the new Labor

Code, partially abolishing the old legislation on trade union rights, has introduced provisions that are in strong contradiction with the ILO conventions Nos. 87 and 98.

On the other hand, the ILO conventions Nos. 87 and 98 have had much more influence on Polish legislation. Starting in the beginning of the 1980's the labor legislation on trade union rights has started to develop in conformity with the ILO conventions. Even during the hard Soviet times the trade union movement has achieved some success with the support of the ILO. The development reached its peak in the beginning of the 1990's after the dissolution of the Soviet Union. Unlike Georgia, the legislative acts enacted at that time are still in force. Even though the recent world financial crisis and the deregulation of the labor market has weakened the trade union movements all over the world, including Poland, Poland still tries to follow the requests of the Committee of Experts and adjust its legislation to the ILO conventions Nos. 87 and 98. In this regard, there is a huge difference between the responses of the Polish and Georgian governments on the comments of the Committee of Experts.

The poor situation in terms of implementation of the ILO standards into the Georgian legislation has its logical reflection on the application of the ILO standards in the Georgian courts. The Georgian courts do not usually refer to the ILO conventions Nos. 87 and 98 but instead have to apply the Labor Code that is in contradiction with the ILO conventions. Therefore, in the cases before it, the Committee on Freedom of Association often focuses on the violation of substantive trade union rights in Georgia. While, in cases on Poland, the Committee usually makes referral to the procedural delays in the courts and not to the substantive rights.

In practice, the implementation of the ILO standards today is also hindered by the alleged interference of the Georgian government into the trade union activities. The major problem is the generally negative attitude of the Georgian government towards the trade unions. This negative attitude is

detected in many ways, including the enactment of the labor legislation, which as I have already mentioned many times, is in strong contradiction with the ILO conventions. In Poland, on the other hand, the major concern is the willful acts of the employers and the discriminatory treatment of the employees because of their trade union activities. However, unlike the Georgian government, the Polish one tries to implement the ILO standards in practice as well, by taking into account the recommendations of the ILO supervisory bodies.

In general, one of the major problems that are detected in both countries is the problem of the social dialogue. In Poland as well as in Georgia the dialogue between the social partners is very poor. As one of the commentators' states "the practice of collective bargaining presupposes the existence of certain behavioral patterns and of a culture of collective bargaining".¹⁹⁴ This is something that is still missing in the countries formerly influenced by the Soviet ideology.

6.2 Recommendations

For effective implementation of the ILO conventions Nos. 87 and 98 it is necessary to strengthen the social dialogue and raise the culture of collective bargaining in Georgia and Poland. In order for this to happen, both governments should introduce national policies for the effective implementation of the international labor standards and namely, the ILO conventions Nos. 87 and 98. Such policies should aim to change the Soviet mentality about the employment relationships and explain to the large masses of the people the real functions of the trade unions. Such awareness raising will make the implementation of the ILO standards much more effective.

¹⁹⁴ *Supra* note 157, p. 219

In addition, for the effective implementation of the Conventions Nos. 87 and 98 in law and in practice my recommendations for the government of Georgia are the following:

- The government should amend the labor legislation, namely, the Labor Code 2006, in accordance with the requirements of the ILO supervisory bodies. Most attention should be paid to the provisions about the anti-union discrimination. In this regard, specific protection for anti-union discrimination and sufficiently dissuasive sanctions against such acts should be provided in law. It is also important that the provisions about the right to strike are also amended as it is requested by the ILO, so that workers have the possibility to refer to the strike action in order to protect their rights.
- National labor inspectorate, abolished by the Labor Code 2006, should be reintroduced. This way the government will make sure that violations of trade union rights guaranteed by the ILO conventions are properly detected on the places of employment.
- In order for the implementation of the ILO standards to be effective it is important that those who apply these standards are aware of them. Therefore, active measures should be taken to raise the awareness of the civil servants, employers and employees by providing training courses.
- Special attention should be paid to the training of the judges. The decisions they make can positively affect the protection of trade union rights in general in the country. By the same token, it is of utmost importance that the lawyers who argue the case in the courts are aware of the ILO standards and regularly refer to them in the courts. For this to happen, it is important that the international labor standards are included in the law school curriculums.
- Speaking about the judges, I suggest the Georgian government to introduce special labor courts. The introduction of special labor courts can guarantee the existence of small number of judges,

specialized in the labor law, who can be easily trained in the international labor standards.

- Generally, the Georgian government should be more cooperative with the ILO supervisory bodies and make use of the technical assistance that the ILO offers to the member countries.

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