TRACING THE RIGHT TO STRIKE UNDER THE INDIAN CONSTITUTION

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ABSTRACT

This paper highlights the loopholes in T. K. Rangarajan case, reevaluates it from a comparative perspective and presents the uncertainty in judicial approach towards this sensitive issue of strike. In doing so, it also revisits the previous judgments of Indian constitutional courts and uses Kameshwar Prasad and B. R. Singh and others v. Union of India to conclude that there is a fundamental right to strike under the Indian Constitution.

Although there have been pronouncements by the Indian judiciary on the validity of the right to strike and its nature, if as a fundamental right and in context of government employees there needs to be greater unanimity in its constitutional status. It is in this context that a comparative analysis is drawn from the judiciary trends in South Africa, US & Canada.

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In pursuance of understanding & comparing the cogent and clear reasoning propounded by the constitutional courts in the said countries an appraisal of the 'comparative constitutional' approach is attempted. The imbibing of the significance of equality, individual autonomy, and dignity in human life as seen in the mentioned countries is argued for to be incorporated in the Indian approach so that it is not at loggerheads or asynchronous to international norms and standards on the right to strike.

I. INTRODUCTION

No political party or organization can claim the exercise of their fundamental, legal, or moral rights which, in effect, results into an illegitimate encroachment on other peoples' rights. [1] Also, fundamental rights of the people as a whole cannot be subservient to the claim of fundamental right of an individual or only a section of people.[2] The underlying principle is that while it is constitutionally permissible to be 'rights-conscious', it is equally important to be aware of one's duties towards others.[3] However, there are stray cases where it becomes impossible to adhere to a particular set of absolute rules that would reconcile competing interests harmoniously. This comment is a glaring example of such stray cases i.e. suspension of economic relations by the working people with management in the pursuit of their self-interests and apparently in sheer non-observance of the interest of their employers.

[1]Communist Party of India (M) v. Bharat Kumar and others, (1998) SCC 1201.
[2]Ibid.
[3]See generally, infra note 9.

By its very nature, strike has the competence of breaking down the contract of employment for the fulfillment of certain long terms objectives.[4] In addition, it is a tool in the hands of employees against the economically dominant management enterprises who have traditionally been conceived to possess soaring bargaining powers and skills. [5] This clash of interest between the employers and the employees, we argue, can be reconciled through a harmonious construction of the competing rights and duties of people involved, in accordance with, and not in derogation of, the underlying spirit behind rule of law and embodied in the Indian Constitution.

In order to achieve economic independence and enjoy cordial working environment[6] the authors posit that the legal right to strike of workers should be constitutionalised and made free from deprivation except in accordance with the 'procedure established by law'. In this context, it is only imperative to ask this question: Is there a fundamental right to strike under the Indian Constitution?

The use of expression 'employed' in Chapter V of the Industrial Disputes Act, 1947 ("**I.D. Act**") is largely understood to include within its ambit, self-employed persons who do not necessarily satisfy the definition of 'workmen' as provided in the Act.[7] Hence, it can be argued that a statutory right to strike is limited not only to workmen working in an industry but also extends to any employer-employee relationship. To argue for a citizen's right to strike as opposed to

[4]O. P. MALHAOTRA, THE LAW OF INDUSTRIAL DISPUTES 385 (1998).
[5]Andhra Pradesh State Road Transport Corporation Employees Union v. Andhra Pradesh State Road Transport Corporation, [1970] Lab I. C. 1225; Bangalore Water Supply v. A Rajappa, [1978] Lab. I. C. 467.
[6]See, Articles 41 – 43, THE CONSTITUTION OF INDIA.
[7] "22. Prohibition of Strikes and lock-outs – No person employed in a public utility service shall go strike in breach of contract…" Also, section 23 which provides; "No workman who is employed in any industrial establishment shall go on strike in breach of contract and no employer of any such workman shall declare a lock-out…"

worker's right to strike, one of the public law commentators went ahead to address this issue from a 'duty' perspective and in a thought-provoking article persuasively concluded that there exists a fundamental duty to strike under the Indian Constitution.[8]

While conceding to the fact that even if right to strike assumes a fundamental status in the Constitution, the difference would be insignificant in terms of 'availability' of such a right given its statutory existence, the authors argue for a fundamental right to strike for the following two reasons. *First* and the most obvious, fundamental rights are more sacrosanct and are put on a higher pedestal than other legal or statutory rights and as a consequence, ensure minimum institutional interference and maximum judicial review on grounds of 'reasonableness' of State action. *Secondly*, it shall minimize economic abuse of workmen by the management since the actions taken have to be justified from the parameters of 'reasonable restrictions' and 'procedure established by law' enumerated in Part III of Constitution.

In India, *T.K.Rangarajan v. Government of Tamil Nadu and others*[9] is the latest division bench judgment delivered by the Supreme Court ("**SC**") on the constitutionality of the legislation restricting right to strike of government employees in India. Here, the SC validated the dismissal of government employees by the Tamil Nadu Government and echoed *All India Bank Employees' Association v. National Industrial Tribunal and others*[10] and *Kameshwar Prasad v. State of*

[8]Shubhankar Dam, Strikes through the Prism of Duties: Is there a Duty to Strike under the Indian Constitution?, 5 (1) ASIA PACIFIC JOURNAL ON HUMAN RIGHTS & THE LAW 68-82 (2004); available online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=953787 (Last visited on March 19, 2010). (Dam argues that the citizens would be failing in their constitutional duty (to cherish and follow the noble ideas which inspired our national struggle for freedom) by not striking as a means to fulfill their legitimate demands. In doing so, he successfully creates a linkage between Directive Principles, Fundamental Duties and the Gandhian notion of 'ahimsa' and 'Satyagraha').

[9]A.I.R. 2003 SC 3032.

[10]A.I.R. 1962 SC 171.

Bihar[11] to say that there is no fundamental right to strike under the Indian Constitution. The SC went on to say that so far as the government employees are concerned – there is no moral, legal or fundamental right to strike.[12] This paper highlights the patent loopholes in *T. K. Rangarajan*, reassesses it from a comparative perspective and presents the uncertainty in judicial approach towards this sensitive issue of strike. In doing so, it also revisits the previous judgments of Indian constitutional courts and uses *Kameshwar Prasad* and *B. R. Singh and others v. Union of India*[13] to conclude that there is a fundamental right to strike under the Indian Constitution.

Needless to say, on several occasions the superior courts in India had sought for a uniform constitutional answer to the question whether right to strike is at all a right, if not a fundamental right and if yes, where does it derive its validity from.[14] Although the recognition of right to strike as a statutory right for non-government employees' is well settled,[15] there still lacks patent unanimity[16] in judicial reasoning

[11] A.I.R. 1962 SC 1166.

[12] Supra note 9 at ¶ 14 – 21.

[13] A.I.R. 1990 SC 1.

[14] Supra note 11 (Although this case limits itself to deciding the constitutionality of right to 'demonstrate' since right to strike was not unfortunately argued, the author posits that "strike" is essentially a form of "demonstration" and similar laws should be applied mutatis mutandis); supra note 10 (Where the discussion was when article 19(1)(c) guarantees the right to form associations, is a guarantee also implied that the fulfillment of every object of an association so formed is also a protected right), Radhey Shyam Sharma v. Post Master General Central Circle Nagpur, A.I.R. 1965 SC 311; Dharam Dutt v. Union of India, AIR 2004 SC 1895; Ex-Capt. Harish Uppal v. Union of India and Anr, 2002 Supp 5 S.C.R. 186 (While deciding the legitimacy of strikes by lawyers, Court ruled that for just or unjust cause, strike cannot ever be justified given its adverse impact on the society at large). Also, supra note 9 (Although, it concerned itself primarily with the determination of a right (fundamental, legal, moral or equitable) to strike applicable in cases of government employees).

[15] §§ 22-25 of the I.D. Act, 1947 by differentiating between 'legal and 'illegal' strikes, have implicitly recognized the statutory nature of this right. Besides, §§ 18 and 19 of the Trade Unions Act, 1926 confer immunity from civil actions on (legal and justified) strikes called upon by trade unions. The word 'employee' includes not only workmen but also people working in other establishments. However,

over its constitutional status. The dilemma over according right to strike a fundamental status had also troubled the constitutional courts in South Africa, [17] U.S., [18] Canada, [19] among others'. The only difference is that while Indian judiciary is still struggling to come up with a constitutionally sound response, or at least seems to be doing so, some of its foreign counterparts have not only recognized and accepted this right but have also read it into the core principles of an ideal democracy through their comparative discourse on the significance of equality, individual autonomy, and dignity in human life.[20]

In addressing the above issues, the paper is divided into four small parts. The authors here *first*, emphasize upon the different international human rights covenants and conventions, particularly the

T.K.Rangarajan categorically upheld the dismissal of government employees for calling strike, on reasons that there is no legal/statutory, fundamental, or moral right to strike for government servants carrying out public utility services.

[16] For instance, in B R Singh a division bench of the SC argued for the right to strike as a form of demonstration in freedom of association guaranteed under article 19(1)(c). Also, See, Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha, 1980 S.C.C. 2 593.

[17]National Union of Metal Workers of South Africa v. Bader BOP (Pty) Ltd and the Minister of Labour, 2003 (2) B.C.L.R. 182; National Education Health and Allied Workers Union v. The University of Cape Town and others, 2003 (3) SA 1.

[18]Charles Wolf Packing Company v. Court of Industrial Relations, 262 U.S. 522 (1923); Dorchy v. Kansas, 272 U.S. 306 (1926) Lyng v. Autoworkers, 485 U.S. 360 (1988).

[19] Health Services and Support Facilities Sub-sector Bargaining Association v. British Columbia, 2007 2 S.C.R. 391.

[20] For instance, Health Services and Support Facilities Sub-sector Bargaining Association (Although this case does not concern right to strike, the argumentation favoring collective bargaining is indeed helpful in building a strong case towards a right to strike in the Indian context. Here the SC of Canada while arguing on grounds of liberty and equality held that 'collective bargaining' complements and indeed promotes the values enshrined in § 2(d) of the Canadian Charter. Influenced by Wallace v. United Grain Growers Ltd, [1997] 3 S.C.R. 701, Judge McLachlin reiterated; "the right to bargain collectively…enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over…work"); supra note 18 (on liberty grounds); supra note 17 (on dignity grounds).

International Labour Organization to argue for international recognition of a fundamental right to strike and *secondly* attempt to compare and analyze different constitutional provisions among the selected countries viz. U.S., Canada and South Africa to elaborate upon the reasoning the constitutional courts have advanced in the conclusive determination of the issues surrounding right to strike. *Thirdly*, we argue for the constitutionalisation of right to strike by employing the comparative constitutional analysis which is to act as a guiding course of action for the Indian constitutional courts. *Fourthly*, as a part of the conclusion we also underscore the inadequate appraisal and replication of these foreign decisions by Indian courts and argue in favour of the incorporation of "comparative constitutionalism" in the adjudication of issues of "constitutional importance" so that our principles do not conflict with the international norms and standards so far as the examination of the validity of the right to go on a strike is concerned.

II. INTERNATIONAL NORMS AND STANDARDS

The International Labour Organization ("**I.L.O**."), [21] largely considered to be the 'Magna Carta' of the rights of the working people, in a stream of Conventions, Resolutions, and Recommendations has established a fundamental basis for right to strike [22] and demands universal obedience under the 'customary

[21]Post World War I, on April 11, 1919, I.L.O. was established by the Paris Peace Conference under the Treaty of Versailles as an autonomous organization associated with the League of Nations which also, later in 1946, became the first specialized agency of the United Nations.

[22]Resolution Concerning the Abolition of Anti-trade Union Legislation in the State Members of the I.L.O. on (Adopted by the International Labour Conference at its 40th Session in 26 June, 1957) (Calling upon Member States to abolish all laws and administrative regulations hampering or restricting the free exercise of union rights and adoption of laws which ensure the effective and unrestricted exercise of union rights, including the right to strike) (emphasis on the original). The text of this Resolution is available at http://www.ilo.org/public/libdoc/ilo/P/09734/09734(1957-40).pdf (Last visited on April 22, 2010); See also, article 15 of the Resolution Concerning Trade Union Rights and their Relation to Civil Liberties (Adopted by

international law'. Other international human rights instruments have also accepted right to strike as being fundamental, although not absolute.[23] The sole aim and objective behind the creation of I.L.O. is to protect internationally recognized fundamental rights of the working people.

Although, the I.L.O. Constitution does not explicitly mention about right to strike, the Committee of Experts on the Application of Conventions and Recommendations ("**C.E.A.C.R**.") had removed the ambiguity[24] by according right to strike a fundamental status on an interpretation of Convention 87[25] which concerns itself primarily with the Freedom of Association and Protection of the Right to Organize. Several concerns have been raised over the blind appreciation of the reasoning given by the C.E.A.C.R. on the issues of the fundamentality of right to strike. The most significant of them is the difficulty in the adaptation of non-binding guidelines for national policy and action advanced by a Member Committee which does not hold the authority

the General Conference of the I.L.O. in 1970) which, among others, sought for comprehensive studies and preparation of reports on law and practice relating to inter alia right to strike, with a view to considering further action to ensure full and universal respect for trade union rights in their broader sense. Also, article 1(d) of Convention (105) Concerning Abolition of Forced Labour Convention (Adopted on 25 June, 1957) which implicitly acknowledges the importance of right to strike by providing that each ratifying Member State of the I.L.O. undertakes to suppress and not to make use of any form of forced or compulsory labour as a punishment for having participated in strikes. Also, See article 7 of Recommendation (92) on Voluntary Conciliation and Arbitration, 1951 which explicitly acknowledges this right by stating that "no provision of this Recommendation may be interpreted as limiting, in any way whatsoever, the right to strike".

[23]Article 8(d) of the International Covenant on Economic Social and Cultural Rights ("I.C.E.S.C.R.") (The State parties to the present Covenant undertake to ensure right to strike provided it is exercised in conformity to the laws of the country); Article 22 of the International Covenant on Civil and Political Rights ("I.C.C.P.R.") (Although it does not explicitly provide for a right to strike, the freedom of association guaranteed in the article can be interpreted to include right to strike).

[24]Bernard Gernigon et.al., Principles of the Committee on Freedom of Association Concerning Strikes, 126 INT'L LAB. REV. 543.

[25]Convention 87, adopted by the General Conference of the I.L.O. in its Thirty-first Session on July 09, 1948 is a 'core' Convention and forms part of the I.L.O. Declaration of Fundamental Principles of Right at Work, 1998.

under international law to decide upon the probabilities of domestic constitutions.[26] This argument is bad since having conceded without any issues that I.L.O. Recommendations are only in form of guide to action and shall not be binding upon non-ratifying Member States, it must not be forgotten that it is the duty of each State which is a party to the I.L.O. to comply with the recommendations laid down therein in 'good faith'.[27] As regards the former issue, however, a liberal interpretation of article 3[28] read with article 10[29] of Convention 87 establishes the appreciation of the fundamental character of right to strike since it firmly recognizes the rights of organizations to "organize their administration and activities and to formulate their programmes" in furtherance of the interests of the working people.

Indian Government, however, has not ratified Convention 87 due to problems of "technical nature" relating to prohibitions of certain rights for government employees.[30] However, the author posits that "core" I.L.O. Conventions must be adhered by Member States even if they have not ratified them. The authority for such a conclusion is derived straight away from the I.L.O. Declaration on Fundamental Principles and Rights at Work, 1998, which clearly states that the

[26]See generally, C. E. Landau, Influence of ILO Standards on Australian Labour Law and Practice, 126 INT'L LAB. REV. 669 (1987).

[27]Infra note 31.

[28] Article 3 of Convention 87 reads thus;

Workers' and employers' organization shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities to formulate their programmes (emphasis in the original).

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

[29] Article 10 of Convention 87 provides; "In this Convention the term organization means any organization of workers or of employers for furthering and defending the interests of workers or of employers".

[30] These rights, among others, include the right to strike and criticize openly government policies, the right to accept freely financial contribution, the right to join freely foreign organizations etc. See, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_facb_ind.pdf (Last visited on March 7, 2010).

Member States, from the very fact of their membership in the Organization, "have an obligation to respect, promote and to realize, in good faith and in accordance with the I.L.O. Constitution, the principles concerning the fundamental rights which are subject to those Conventions".[31]

In India, under article 51(c)[32] read with article 37[33] of the Directive Principles' of State Policy ("**D.P.S.P**."), State is obliged to "introduce" and "implement" international laws and instruments and ensure compliance to treaty obligations. Given the presence of such mandates in the Constitution, it is not left to the discretion of constitutional courts whether to harmonize international law and constitutional law because the courts in India are courts of "law" and not of "justice" and are bound by the Indian Constitution.[34] Right to strike, being explicitly enshrined in the I.C.E.S.C.R.[35] and understood to be guaranteed by the I.L.O. Convention 87 is a cardinal principle of

[31]ILO Declaration on Fundamental Principles and Rights at Work, 86th Session, Geneva, June 19th 1998, available online at: www.csmb.unimore.it/on-line/Home/Prova/documento36007698.html(Last visited on March 22, 2010).

[32] "51. The State shall endeavour to – (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another…"

[33] "37. The provisions contained in this Part [Part IV] shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply this principle in making laws".

[34]See generally, Shubhankar Dam,. Vineet Narain v Union of India: "A Court of Law and not of Justice" – Is the Indian Supreme Court beyond the Indian Constitution?, [2005] PUBLIC LAW 239.

[35] Right to strike, essentially being a recognized fundamental right in Article 8(1)(d) of I.C.E.S.C.R. is one such mechanism to bolster the legitimate interests and demands of working people and if exercised in conformity to the domestic laws must be a 'protected activity' under article 3 and 8 of Convention 87. India being one of the signatories to I.C.E.S.C.R. is obliged to ensure bona fide compliance of this mandate under article 2(1) which obligates ratifying States to give effect to the provisions stipulated in the Covenant. Moreover, since right to strike has been given a special mention in article 8 which is designed exclusively for guaranteeing "labour and fair practices" and protecting association and formation of trade union rights in the preceding clauses, it can always be argued that right to strike if not a predecessor to right to form associations, must be understood as a concomitant right that logically follows from right to form association.

international law and must be read, as is else where argued, in freedom of association protected under article 19 of the Indian Constitution. At the same time, it is, however, conceded that constitutional absolutism is impermissible in any democracy and (also in view of the C.E.A.C.R.), while strikes of a "purely political nature" does not fall within the ambit of the principles of freedom of association, there can also be permissible limitations in the exercise of right to "occupational" and "trade union" strikes in the event of an acute national emergency or exercise of such right by government or public servants empowered or authorized to carry forward public utility services.[36]

However, the acknowledgment of a right as a constitutional right is a different enquiry and structuring the exceptions to it is another. In India, surprisingly, Courts have constantly validated the restrictions imposed on right to strike using Constitution as a shield, without actually determining the correctness of the hypothecation of the right as a constitutional right.

III. BORROWING FROM OTHERS

In this section we try and compare constitutional provisions of three important countries viz. South Africa, U.S.A and Australia and highlight the reasoning of courts in an attempt to provide for a constitutional guarantee to the right to strike in India.

A. *South Africa*

The concept of strike in South Africa can be traced to Gandhi's experiment with Satyagraha against the imposition of £3 tax on

[36] Freedom of Association and Collective Bargaining, a General Survey of Conventions No. 87 and 98 conducted by the C.E.A.C.R. in 1994. In the Indian context, the Essential Services Maintenance Act (ESMA), 1981, in § 3 of the Act provides that if the Central government is satisfied that in public interest it is necessary or expedient so to do, it may, by general or special order; prohibit strikes in any essential service. Moreover, the Central Civil Services Rules lay down certain restrictions on "political" enjoyment of the right to strike by government servants who do not fall under the purview of the I.D. Act, 1947.

indentured Indian labourers.[37] In Natal, a Bill was passed in 1985 under which an ex-indentured India was exempted from paying the tax if he "left for India on the termination of the indenture or entered into further indenture".[38] To Gandhi, the indentured labourers were "victims of gold hunger" and "passive resistance" by striking was the primary duty of every Indian in South Africa.[39]

The South African Constitution explicitly guarantees in article 23 inter alia the right of workers to participate in the activities and programmes of a trade union and *to strike*.[40] This right, however, is not absolute and is subject to restrictions on grounds specified in article 36(1).[41] Moreover, the Labour Relations Act was passed in

[37]Supra note 8.
[38]Ibid.
[39] Vol. 13 Interview to Rand Daily Mail at 375 in Vol. 20 Satyagraha in Complete Works of Mahatma Gandhi 39 (New Delhi, Government of India: 2002) as cited in supra note 8 at 76.
[40]"23. Labour relations.---
(1) Everyone has the right to fair labour practices.
(2) Every worker has the right –
to form and join a trade union;
to participate in the activities and programmes of a trade union; and
to strike.
(3) Every employer has the right –
to form and join an employers' organization; and
to participate in the activities and programmes of an employers' organization.
(4) Every trade union and every employers' organization has the right-
to determine its own administration, programmes and activities;
to organize; and
to form and join a federation.
(5) Every trade union, employers' organization and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
(6) National legislation may recognize union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."
[41] Section 36 is titled "Limitation of Rights" and clause 1 provides;
"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open

1995 to give effect to this constitutional provision of right to strike and "protections to strikes in the collective bargaining context and for strikes, defined as protest action in the socio-economic context".[42]

In an unprecedented decision, the constitutional court of South Africa in *National Union of Metal Workers of South Africa v. Bader BOP (Pty) Ltd and the Minister of Labour* [43] elaborated upon the contemporaneous significance of right to strike in terms, both of democratic order and compliance to international standards. The court while emphasizing the importance of collective bargaining, held that right to strike being an intrinsic component of collective bargaining must be held in high esteem so as to promote human dignity of workers and as a consequence, a just and fair working environment free from "economic coercion". [44] In an earlier case, [45] while reiterating right to strike as an essential mechanism to bargain collectively with the employers and emphasizing upon the importance of collective bargaining in any industrial jurisprudence, the court held

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and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
the nature of the right;
the importance of the purpose of the limitation;
the nature and extent of the limitation;
the relation between the limitation and its purpose; and
less restrictive means to achieve the purpose."

[42] D M Davis, The South African Position on Strikes: Viewed from the Perspective of Health Services BC, (2009); available online at: http://www.law.utoronto.ca/documents/conferences2/StrikeSymposium09_Davis.pdf (Last visited on March 12, 2010).

[43]Supra note 17.

[44]Ibid. at ¶ 13, per Judge O'REGAN:
"This case concerns the right to strike. That right is both of historical and contemporaneous significance. In the first place, it is of importance for the dignity of workers who in our constitutional order may not be treated as coerced employees. Secondly, it is through industrial action that workers are able to assert bargaining power in industrial relations. The right to strike is an important component of a successful collective bargaining system. In interpreting the rights in section 23, therefore, the importance of those rights in promoting a fair working environment must be understood".

[45]In Re: Certification of the Constitution of the Republic of South Africa, [1996] 10 B.C.L.R. 1253.

that "the right to strike for workers has led to it being far more frequently entrenched in constitutions as a fundamental right than is the right to lock out.[46] While also rejecting the indispensability towards the entrenchment of right to lock in domestic laws once right to strike has been included, it added further, that "right to strike and right to lock out are not always and necessarily equivalent".[47]

B. *U.S.A.*

Although the U.S. Constitution did not originally provide for the right to freedom of association, the constitutional courts have constantly read this right in the speech and assembly clauses of the First Amendment,[48] the slavery and involuntary servitude clause of the Thirteenth Amendment,[49] and the due process and equal protection clause of the Fourteenth Constitutional Amendment.[50] These clauses are understood to recognize a constitutional right to freedom of association.[51] The right to strike necessarily follows from freedom of

[46]Id. at ¶ 66.

[47]Id. See also, Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd (1999) 20 I.L.J. 321 at ¶¶ 27-28 quoted in Eskom Holdings (Pty) Ltd v National Union of Mineworkers and Others [2009] 1 B.L.L.R. 65 at ¶ 28

[48]U.S. CONSTITUTION FIRST AMENDMENT – Religion and Expression – "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

[49] U.S. CONSTITUTION THIRTEENTH AMENDMENT – Slavery and Involuntary Servitude – "Section 1 – Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the U.S, or any place subject to their jurisdiction".

[50]U.S. CONSTITUTION FOURTEENTH AMENDMENT – Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection – "Section 1 – All persons born or naturalized in the US and subject to the jurisdiction thereof, are citizens of the US and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the U.S.; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

[51] See generally, James Pope, The Right to Strike under the United States Constitution: Theory, Practice, and Possible Implications for Canada, (2009);

association, individual autonomy and human dignity and equality rights introduced to the U.S. Constitution by these amendments.[52]
In the landmark 1923 case of *Charles Wolf Packing Company*,[53] while addressing the constitutionality of a Kansas State law, the U.S. Supreme Court declared unconstitutional a 'wage-fixing' law as being ultra vires to the due process clause of the Constitution Fourteenth Amendment in that it infringed upon the right to contract of workmen. The court used equality as a tool to overturn key provisions of anti-strike law and stated that "although the worker is not required to work, at the wages fixed, he is forbidden, on penalty of fine or imprisonment, to strike against them, and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him."[54] This case, therefore, established a constitutional right to strike in U.S.A.[55]

In *Lyng v. Auto Workers*,[56] the SC of U.S.A while considering the constitutionality of a federal statutory provision that denied food stamps to the families of workers out on strike,[57] held that denial of food stamps did not "directly and substantially interfere"[58] with the

available online at: http://www.law.utoronto.ca/documents/conferences2/StrikeSymposium09_Pope.pdf (Last visited on February 17, 2010).
[52]Id.
[53]Supra note 18.
[54]Ibid. at 540.
[55]Philip Kurland Ed., FELIX FRANKFURTER ON THE SUPREME COURT, 141 (1970) (reprinting Frankfurter's unsigned editorial from the New Republic, June 27, 1923) as cited in James Gray Pope, The Right to Strike under the United States Constitution: Theory, Practice, and Possible Implications for Canada (2009); available online at: http://www.law.utoronto.ca/documents/conferences2/StrikeSymposium09_Pope.pdf (Last visited on February 17, 2010).
[56]Supra note 18.
[57]James Gray Pope, The Right to Strike under the United States Constitution: Theory, Practice, and Possible Implications for Canada (2009) available online at: http://www.law.utoronto.ca/documents/conferences2/StrikeSymposium09_Pope.pdf (Last visited on February 17, 2010).
[58]Ibid.

constitutionally recognized right to freedom of association. The Court also held that the statute did not "prevent" future associations but at the same time acknowledged that such a denial "made it harder for strikers to maintain themselves and their families during the strike and exerted pressure on them to abandon their union".[59] This judgment is important in that it was a reiteration of the constitutional guarantee given to the right to strike under the U.S. Constitution

C. *Canada*

The Canadian Charter of Rights, in section 2(d), categorically declares that "everyone has a number of fundamental freedoms, including freedom of association". Section 2(d) makes formation of association a positive right by stating that "everybody has the freedom of association". This right includes the freedom to "establish", "maintain" and "belong" to an association.[60] Although right to strike has not been given a special mention by the constitutional courts, the right to and freedom of "collective bargaining" is now a well settled principle after the Court's unprecedented judgment in *Health Services and Support – Facilities Sub-sector Bargaining Association v British Columbia.* [61] This case did not concern right to strike but the argumentation favoring 'collective bargaining' is indeed helpful in building a strong case towards a right to strike in the Indian context.
While answering whether the guarantee of freedom of association in section 2(d) of the Canadian Charter of Rights protects 'collective bargaining', the Court ruled:[62]

> "*We conclude that section 2(d) of the Charter protects the capacity of members of labour unions to engage, in*

[59]Ibid. See, also supra note 18 at 368.
"Exercising the right to strike inevitably risks economic hardship, but we are not inclined to hold that the right of association requires the Government to minimize that result by qualifying the striker for food stamps".
[60]Canadian Egg Marketing Agency v Richardson, [1998] 3 S.C.R. 157.
[61]Supra note 19.
[62]Ibid. at ¶ 19.

> *association, in collective bargaining on fundamental workplace issues. This protection does not cover all aspects of 'collective bargaining' as that term is understood in the statutory labour relations regimes that are in place across the country. Nor does it ensure a particular outcome in a labour dispute, or guarantee access to any particular statutory regime. What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates section 2(d) of the Charter*".

The Court articulated four propositions upon which the ration was based.[63] The propositions laid down in Para 20 of the judgment are as follows;

> "*Our conclusion that section 2(d) of the Charter protects a process of collective bargaining rests on four propositions. First, a review of the section 2(d) jurisprudence of this Court reveals that's the reasons evoked in the past for holding that the guarantee of freedom of association does not extend to collective bargaining can no longer stand. Second, an interpretation of section 2(d) that precludes collective bargaining from its ambit is inconsistent with Canada's historic recognition of the importance of collective bargaining to freedom of association. Third, collective bargaining is an integral component of freedom of association in international law, which may inform the interpretation of Charter guarantees. Finally, interpreting section 2(d) as including a right*

[63]Brian Langille, The Freedom of Association Mess: How We Got into It and How We Can Get out of It, 54 MCGILL LAW JOURNAL 177 (2009).

> *to collective bargaining is consistent with, and indeed, promotes, other Charter rights, freedoms and values*".

Therefore, it is well settled in Canada that collective bargaining of which strike forms an inseparable part is employed to overcome the "inherent inequalities of bargaining power in the employment relationship and to protect themselves from unfair, unsafe, or exploiting work conditions"[64] and acts as a tool to "influence the establishment of rules that control a major aspect of their lives".[65] However, right to collective bargaining flowing from the freedom to form association must always be exercised with proper care and caution in a lawful and justified manner. In other words, the people engaging in expressive or associational activities that constitute violence cannot later seek the protection under section 2(d).

IV. CONSTITUTIONALIZING RIGHT TO STRIKE IN INDIA

T.K.Rangarajan is the latest division bench judgment delivered by the SC on the constitutionality of a legislation restricting right to strike by government employees in India. In that case, the Tamil Nadu Government in accordance with Rule 22 of the Tamil Nadu Government Servants Conduct Rules, 1973 terminated services of all employees who have resorted to strike. On a writ petition filed by the aggrieved persons, the Court held that there is no statutory provision empowering the government employees to go on strike and any kind of economic misconduct is "required to be dealt with in accordance

[64]Supra note 19 at ¶ 84.
[65]Supra note 19 at ¶ 85. See also, 1968 Woods Report at p. 96 quoted in BC Health Services:
"One of the most cherished hopes of those who originally championed the concept of collective bargaining was that it would introduce into the workplace some of the basic features of the political democracy that was becoming the hallmark of most of the western world. Traditionally referred to as industrial democracy, it can be described as the substitution of the rule of law for the rule of men in the workplace".

with law".[66]

This judgment evoked "passionate reactions"[67] because it suffers from the vices of judicial reasoning and indiscipline and is also not final because of the following reasons. *First*, and the most obvious, *T. K. Rangarajan* restricts itself to the determination of constitutionality of strike from the perspective of government services and holds no authority so far as non-government employees are concerned. *Secondly*, it is not only a radical restatement and affirmation of the earlier SC jurisprudence on right to strike, but also lacks "judicial creativity" as it conveniently disregards some of the core principles of Indian industrial jurisprudence. For instance, T.K.Rangarajan blatantly disregards the statutory right to strike under the I.D. Act for government employees and also concludes, with sheer non-observance to international human rights standards to which India is a party, that there cannot be a fundamental or moral right to strike.

T.K.Rangarajan, unlike *Enerji Yapi-Yol Sen,*[68] was partially right in its ruling since although it correctly acknowledged that the right to strike was not an absolute right and could be subject to certain conditions and restrictions (by highlighting the exceptions of "public utility services"), it completely failed to identify that only certain categories of civil servants could be prohibited from taking strike action. The prohibition on strikes cannot under any circumstances extend to all government employees who are otherwise entitled to a legal and justified strike action under the I.D. Act, 1947. On the facts in *Enerji Yapi-Yol Sen,*[69] a union of civil servants founded in 1992 that were active in the fields of land registration, energy, infrastructure services and motorway construction and are a member of the Federation of Public – Sector Trade Unions challenged the validity of Circular No. 1996/21 issued by the Prime Minister's

[66]Supra note 9 at ¶ 24.
[67]Supra note 8.
[68]Enerji Yapi-Yol Sen v. Turkey, Application No. 68959/01, available online at: http://www.echr.coe.int.
[69]Id.

Public Service Staff Directorate. The Circular prohibited public-sector employees from taking part in a national one- day strike organized in connection with events planned to secure the right to a collective bargaining agreement. The ECHR allowed the application on grounds (a) adoption and application of the circular did not answer a "pressing social need"; (b) there has been a disproportionate interference with the applicant union's rights and; (c) the prohibition on the right to strike does not extend to all kinds of public servants employed in State-run commercial or industrial concerns.

Back to the Indian position, in *All India Bank Employees Association* (1962), decided forty one years before *T. K. Rangarajan*, the point for discussion before the Court was whether Article 19(1)(c) which guarantees right to form association, also implicitly protects the long term fulfillment of collateral objectives of an association so formed, from constitutional or legal interference save on recognized grounds set out in Article 19(4). This question, unfortunately, was answered in the negative. The Court as a justification for its conclusion laid down a distinction between "formation" and "objective" of an association, and ruled that article 19(1)(c) not being an absolute right will only include those actions which partake the character of an association and not the objectives of it. Simply put, although article 19(1)(c) is a protection against the formation or set up of an association or trade union, it cannot be liberally construed so as to include consequential "aims" and "objectives" that the association or trade union so formed seeks to accomplish. The Court, unmindful of the "purposive approach" to fundamental rights, erred in its reasoning by giving "objectives" a go by and failing to understand that if "aims" and "objectives" of an association were not conceded, rights protected under article 19(a) and (b) would lack any substance and become at best, illusory.

In the second major case on right to strike, *Kameshwar Prasad*, a constitutional bench of SC was confronted with a writ petition challenging the constitutional validity of Rule 4-A introduced into the

Bihar Government Servants' Conduct Rules, 1956 [70] on various grounds including inter alia that it interfered with the rights guaranteed to the petitioners by sub-clauses (a), (b) and (c) of clause (1) of article 19 of the Constitutional of India. Judge Ayyangar, speaking for the majority, ruled that particular forms of demonstrations fall within the purview of article 19(1)(a) and 19(1)(b) and cannot be restricted unreasonably save permissible restrictions enshrined in the article itself. The Court could have inferred right to strike into right to demonstration since the definition that it gives for "demonstration" technically possess all the essentials of a strike.[71] This did not presumably happen because the SC decision of an equal bench strength in *All India Bank Employees' Association* negated right to strike as a constitutional guarantee and thus, the validity of Rule 4-A so far as it prohibits strikes, was no longer under challenge thereby confining the arguments to the sole question of the legality of the provision as regards the right to hold demonstrations. Nonetheless, the SC could have constitutionally justified its intervention in the issue, under the wide residual powers endowed upon it for doing "complete justice" between parties principled in article 141(1)[72] read with article 32 [73] of the Indian Constitution. This power to do "complete justice" includes inter alia the authority to allow a fresh point of law to be taken up *suo moto* in any constitutional litigation.[74]

[70]"4-A. – Demonstrations and Strikes – No Government servant shall participate in any demonstration or resort to any form of strike in connection with any matter pertaining to his conditions of service."

[71]¶ 15 of the judgment, "Without going very much into the niceties of language it might be broadly stated that a demonstration is a visible manifestation of the feelings or sentiments of an individual or a group….."(emphasis in the original).

[72]"142(1)- The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India…"

[73]Under this article the SC has unfettered powers to enforce Part III rights and guarantees standing by "appropriate proceedings" as also through the issuance of directions or orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto, and certiorari.

[74]Prem Chand v Excise Commissioner A.I.R. 1963 SC 996.

By failing to exhaust constitutional provisions, the SC demonstrated a rarest disposition of "judicial convenience" which was neither expected nor desired by a constitutional bench given the nature of significant issues of constitutional importance involved in the facts of the case.

To bridge the gap between *All India Bank Employees' Association* and *Kameshwar Prasad*, in *B R Singh* (1990) a division bench of Apex Court went a step further to examine the constitutional validity of "objectives" of an association. However, *B R Singh* does not give right to strike a fundamental character, worse, reiterated the restrictions on this right under the Indian industrial jurisprudence and echoed its non-absoluteness.[75]

What *B R Singh* gives is a sound justification for future benches to read right to strike in "right to demonstrate" which is implicit, both on principles and precedents, in right to speech and expression and peaceful assembly guaranteed under article 19(1)(a) and (b) of the Constitution. Another important aspect of B R Singh is the emphasis upon "purposive approach" to fundamental rights i.e. the acknowledgement of the fact that article 19 (freedom of association) like other fundamental rights in Part III has no exclusive purpose of formation of a union, but also has in its purview other foundational rights (for instance, right to strike) which cannot be accomplished without due recognition of their implicit existence.

In fact, a combined reading of *B R Singh* and *Kameshwar Prasad*, makes it amply clear that since there is a fundamental right to "peaceful demonstration" flowing from the right to speech and expression and peaceful assembly explicit in article 19, and strike in a given situation being one such mode of "peaceful demonstration" by workers for their rights should also be understood to be implicitly guaranteed and protected under art 19.

[75]Although B R Singh stated that right to association would be a mere lip-service right to workers if the fulfillment of "objectives" are not taken into consideration.

V. SOCIALISM AS A "VALUE"

The Indian Constitution is not a Constitution without Fundamental Rights and Directive Principles of State Policy.[76] Socialism, which although was not mentioned in the drafting of Preamble to the Constitution of India, was affirmed in 1976 by the Forty-second Amendment.[77] As it presently stands, the Preamble proclaims India to be a Sovereign, Socialist, Secular, Democratic, Republic union of States. The aims and objectives specified in the Preamble constitute the basic structure of the Constitution and cannot be amended through an Act of Parliament[78]. Socialism, being included in the Preamble, also, is a basic feature of the Indian Constitution.[79] Also incorporated in the D.P.S.P. (Part IV, Art.37-51), the essence of socialism requires equality at workplace and quality in work standards.

However, the constitutional courts in India had never sought for a liberal, coherent and harmonious interrelation of the range of rights enshrined in Part III and IV to create a linkage between D.P.S.P. and Fundamental Rights that in turn leads to a linkage between right to strike and fundamental rights. Article 21, the god father of several concomitant rights, is constantly held to be of paramount importance in the Indian constitutional set up. It confers on every person, the right to life and personal liberty. Although, personal liberty explicit in the article itself can be a sufficient ground to confirm the *vires* of right to

[76]Per JAGANMOHAN REDDY J., Keshavananda Bharati v State of Kerela (1973) 4 S.C.C. 225 at 637.

[77]THE CONSTITUTION (FORTY-SECOND AMENDMENT) ACT, 1976
"2. Amendment of the Preamble.- In the Preamble to the Constitution,-
(a) for the words "SOVEREIGN DEMOCRATIC REPUBLIC" the words "SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC" shall be substituted; and….."

[78]Keshavananda Bharti v State of Kerela A.I.R. 1973 SC 1461; Indira Gandhi v Raj Narain A.I.R. 1975 SC 2299; Minerva Mills v Union of India A.I.R. 1980 SC 1789

[79]Sanjeev Coke Manufacturing v Bharat Coking Coal Ltd. A.I.R. 1983 SC 239.

strike,[80] the right to life also explicit in the article read with other directives laid down in Part IV of the Constitution, includes right to live with human dignity.[81] For instance, article 21 is meaningless if the objectives in article 39, 41 and 42 of the D.P.S.P. are not fulfilled by the government to preserve human dignity of bonded labourers.[82]

In the context of a legal and justified strike, the workers shall have the constitutional protection of legitimate demands which protects their human dignity by ensuring reasonable amenities and work-satisfaction. In order to guarantee basic amenities and overall work satisfaction, and as a consequence, their right to dignity, the working people must have a pro-active tool in the nature of strike or threat to strike as a reasonable means of protest. This right to strike implicit in right to human dignity can best be appreciated through a careful reading of the range of directives stipulated in Part IV.

Despite there being a specific reference to the non-enforceability of these principles, the importance of D.P.S.P. is evident from the use of word 'directive' in Part IV as also from the phrase alive in article 37 "principles laid down therein are fundamental in the governance of the country..." The rights and directives enshrined in Part III and IV form the essence of the Constitution and the creation of a harmony and balance between these two supplementary constitutional frameworks is a basic feature of the Constitution.[83] The "promotion of economic welfare" in article 38, "right to adequate means of livelihood", "operation of economic system for the common good" in article 39, making of "effective provisions for right to work" in article 41, and most importantly, the spirit of article 43 which provides that

[80]The author posits that the right to go on a strike for the achievement of legitimate demands of working people in effect bolsters the non-derogable right to "personal liberty" insofar as it strengthens the participation of the working people in the decision making of the management.

[81]Bandhua Mukti Morcha v Union of India, A.I.R. 1984 SC 802.

[82]Id.

[83]Kerela Education Bill, Re, 1957 A.I.R. 1958 SC 956; Minerva Mills Ltd. v Union of India A.I.R. 1980 SC 1789.

the "state shall endeavour to secure, by suitable legislation…….to all workers, agricultural, industrial or otherwise, work, a living wage, *conditions of work ensuring a decent standard of life and full enjoyment of leisure*…"(emphasis on the original) are the clearest enunciation of the founding fathers of the Constitution to protect the human dignity of the working people as implicitly secured in article 21 though judicial activism. Any contrary view shall result human dignity in article 21 to be an ineffective fundamental right, worse a mere lip-service propounded by the SC supposedly guaranteed to persons without any consequential relief.

Unfortunately, not on a single occasion, had the constitutional courts in India approached right to strike from the underlying jurisprudence of right to life and liberty in article 21 and the implied right to human dignity read in harmony with the D.P.S.P. which, although unenforceable in courts of law, pave a long way in the melodious construction of constitutional rights in order to attenuate the legitimate expectations of working people.

It is, therefore, seen that even assuming the constitutional incompetence of article 19 to stand as a guarantee for striking employees, the constitutionalization of right to strike is clearly justified through the establishment of a link between "human dignity" principled in article 21 and the combined spirit behind the D.P.S.P.

VI. CONCLUDING REMARKS

Precedents established by the constitutional courts in common law jurisdictions "…have become the primary catalyst behind the growing importance of comparative constitutional law".[84] In the areas of

[84]K. G. Balakrishnan, The Role of Foreign Precedents in a Country's Legal System, Lecture at Northwestern University, Illinois (October 28, 2008); available online at: http://www.supremecourtofindia.nic.in/speeches/speeches_2008/28%5B1%5D.10.08_Northwestern_University_lecture.pdf (Last visited on March 19, 2010).

"public interest litigation" and "conflict of laws", the "persuasiveness" of comparative constitutional laws has become a daily affair.[85] In India, too, foreign precedents can be incorporated into the line of judicial thinking through three different ways viz. vertical means,[86] horizontal means [87] and mixed vertical horizontal means. [88] Comparative constitutional analysis, a "useful strategy" to deliberate upon constitutional adjudication may "insert a fresh line of thinking".[89] Moreover, as is argued by Balakrishnan, "one of the functions of judges in a constitutional court is to protect the counter-majoritarian safeguards enumerated in the Constitution… [which] can benefit from an evaluation of how similar provisions have been interpreted and applied in other jurisdictions". [90] Reliance on comparative constitutionalism must be seen as a "vital instrumentality" for the Indian constitutional courts in extending "constitutional protection to several socio-economic entitlements and advanced causes such as environmental protection, gender justice and good governance among others".[91]

Right to strike is essentially meant to bring employees, if not higher, than on an equal pedestal, with the employers. The putting of employees at par with the employers if the latter is granted a fundamental right to lock out on the granting of a fundamental right to strike to the employees would prima facie be a dangerous example of equal treatment of unequals. *All India Bank Employee Association*,

[85]Mark Tushnet, The Possibilities of Comparative Constitutional Law, 108 YALE LAW JOURNAL 1225 (1999).
[86]When a reference is made to international instruments to which it is not a party, for example the decisions of the E.C.H.R. Id. at p.4.
[87]When a reference is made to precedents from other national jurisdictions for domestic interpretation; Id.
[88]When a reference is made both to foreign judicial precedents and international instruments. Refer: Anne- Slaughter, Marie, The typology of transjudicial communication, 29 UNIVERSITY OF RICHMOND LAW REVIEW 99-137 (1994) as cited in Balakrishnan, supra note 84.
[89]Id.
[90]Supra note 84 at p.9.
[91]Id.

Kameshwar Prasad and *T.K.Rangarajan* are glaring examples of the lack of commitment in the India judiciary towards the replication of and compliance to international laws and spells sheer disregard to the idea of "persuasiveness" of comparative constitutionalism" in their approach to proper adjudication of constitutional dilemmas.