International Labour Office

Challenges, Prospects and Opportunities of Ratifying ILO Conventions Nos. 87 and 98 in India

ILO Decent Work Team for South Asia
New Delhi

Bureau for Workers' Activities
Geneva

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Foreword

The Decent Work Agenda is based on the principles of freedom, equity, human dignity and security and it presupposes that there should be inter alia, respect, recognition and promotion of the fundamental rights at work on Freedom of Association and Collective Bargaining, Freedom from Discrimination, Freedom from Forced Labour and Freedom from Child Labour.

Of the 183 member States of the International Labour Organization (ILO), 150 have ratified Convention 87 (Freedom of Association and Collective Bargaining) and 140 ILO member states, Convention 98 (Collective Bargaining). India, as the biggest democracy in the world, could soon join this growing list by ratifying these two core Conventions which are fundamental to the achievement of basic human rights and decent work.

At the recent National Trade Union conference convened by the INTUC together with BMS, HMS, CITU and AITUC, with the support of ILO - ACTRAV in New Delhi last August 2010, a very elaborate almost exhaustive and enlightening paper was presented dealing with challenges prospects and opportunities of ratification of the ILO Core Conventions in India.

I take this opportunity to express my appreciation to Ms. Ramapriya Gopalakrishanan for the excellent analysis. I also thank ILO Senior Specialist on Workers Activities for South Asia, Ariel Castro, for his efforts in coordinating the preparation of this study.

I hope this publication would serve to kindle the aspirations of all concerned to consider the early ratification of C. 87 & C. 98.

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for South Asia and
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Preface

India, a founder member of the ILO is among a small minority of 19 ILO member states that have not ratified either of the two fundamental Conventions on freedom of association, namely, the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98).

Regardless of the fact of its non-ratification of the Conventions, India is expected to give effect to the principles contained in the Conventions by reason of its very membership of the ILO and its consequently being bound by the principles contained in the Constitution of the ILO and the Declaration of Philadelphia. This obligation is reinforced by the ILO Declaration of Fundamental Principles and Rights at Work, 1998. At the same time, ratification by India of these Conventions is important for the reason that it is only upon ratification that India will be legally bound to ensure that the principles contained in the Conventions are observed in law as well as in practice, in the country. However, over the last six decades since the Conventions came into force, notwithstanding the various efforts made by the ILO to achieve the universal ratification of these Conventions, the Government of India has consistently indicated its inability to ratify the Conventions.

The non-ratification by India of these two Conventions has been a matter of concern to the world community at large considering the huge size of India's workforce and the fact that these Conventions contain basic human rights principles that need to be universally observed in order to ensure decent work for workers, the world over. In the last two decades, this concern has been heightened on account of the changed economic context of India.

This paper examines the challenges, prospects and opportunities for the ratification of ILO Conventions Nos. 87 and 98 by India. It begins with a brief discussion of the international labour standards contained in Conventions Nos. 87 and 98. This paper examines the extent to which the central laws in India concerning the right to organize and collective bargaining rights of workers in India are in conformity with standards spelt out in these Conventions. A discussion regarding the stand of the Government of India on the issue of ratification of the Conventions and the prospect of ratification of these Conventions in India is also presented. In conclusion, this paper takes the view that India needs to re-examine its stance of the issue of ratification of the Conventions and accord high priority for the early ratification of the Conventions.

On behalf of ILO Bureau for Workers' Activities (ACTRAV), I thank and commend Ms. Ramapriya Gopalakrishnan for her efforts in putting this research together. The analysis and findings of the research proved helpful in shaping the common trade union policy on ratification of the core labour standards in India adopted last August 2010. I also acknowledge, with great thanks, the guidance and assistance provided by Ariel Castro, ILO Sr. Specialist on Workers' Activities based at the ILO Decent Work Technical Support Team for South Asia, New Delhi.

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Chapter Introduction

This document is divided in to fifteen chapters the brief details of which are as follows.

Chapter - 1 introduces the conventions on freedom of association and collective bargaining (Convention 87 and Convention 98).

Chapter - 2 gives a glimpse of the two ILO Declarations adopted by the Governing body of the ILO.

Chapter- 3 briefly defines the role of the ILO supervisory mechanisms concerned with freedom of association and collective bargaining.

Chapter- 4 reviews the Indian laws relating to freedom of association and collective bargaining in the back drop of the constitution vis a vis international standards.

Chapter -5 examines the various aspects and relevance of anti union discrimination in Indian labour laws and analyses the status of protection against the acts of interference as envisaged in C 98.

Chapter- 6 discusses the extent to which right to strike has been given to workers and trade unions.

Chapter -7 studies the collective bargaining rights available in India and the suggestions given by the supervisory bodies in this regard.

Chapter 8 points out the classes of workers covered by laws.

Chapter -9 lists out the excluded categories of workers from the coverage of laws.

Chapter -10 makes an in-depth examination of the status of government employees vis a vis labour standards.

Chapter -11 portrays the freedom of association and collective bargaining rights in practice i n India.

Chapter -12 discusses the stand of government of India on ratification of C 87 andC98.

Chapter -13 analyses the concerns from an economic perspective.

Chapter -14 highlights the benefits of ratification and the consequences of India's failure to ratify the conventions.

Chapter -15 summarises the conclusion and expectations.

1. CONVENTIONS ON FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

Introduction

Freedom of association including the right to form and join unions for the protection of one's rights and interests has been recognized as one of the fundamental human rights. It is derived from the inherent dignity of the human person. The Preamble to the Constitution of the ILO indicates that recognition of the principles of freedom of association is vital for the improvement of the conditions of labour and the achievement of universal and lasting peace. The Declaration concerning the aims and principles of the ILO called the 'Declaration of Philadelphia' that is appended to the Constitution of the ILO reaffirms that freedom of association is essential to sustained progress.

The two main instruments of the ILO that protect the freedom of association of workers are the Freedom of Association and Protection of the Right to Organize Convention, 1948 (Convention No. 87) and the Right to Organize and Collective Bargaining Convention, 1949. (Convention No. 98). On account of the importance of the principles contained in the two Conventions, they have been categorised as 'fundamental conventions' requiring universal observance.

A. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)

The Convention applies to all workers-with the exception of the armed forces and the police- and all employers.

The Convention guarantees to all workers, without any distinction, the right to establish and join organizations of their own choosing, without prior authorization. It makes an exception in the case of the armed forces and the police by providing that the extent to which the Convention shall apply to the armed forces and the police shall be determined by national laws or regulations. It further provides that workers' and employers' organizations shall have the right to establish and join federations and confederations and also to affiliate with respective international organizations.

The Convention also guarantees to workers' and employers' organizations the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes. It calls upon public authorities to refrain from any interference that would restrict this right or impede its lawful exercise.

The right to strike has not been explicitly guaranteed under the Convention. However, the right to strike is considered to be an intrinsic corollary of the right to organize guaranteed under the Convention. Articles 3, 8 and 10 of the Convention that guarantee to trade unions the right to organize their administration and activities and to formulate their programmes and further the interests of workers have been interpreted as being inclusive of the right to strike.

150 member states of the ILO have ratified Convention No. 87.

B. Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

The Convention guarantees to all workers adequate protection against acts of anti-union discrimination in respect of their employment. It provides that such protection shall apply more particularly in respect of acts calculated to: (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership or (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or with the consent of the employer, within working hours. It also protects workers' organizations from acts of interference by employers or their organizations.

In addition, the Convention requires member states to take appropriate measures to encourage and promote collective bargaining between workers' organizations and employers or employers' organizations and workers' organizations in order to regulate the terms and conditions of employment by means of collective agreements.

160 member states of the ILO have ratified Convention No. 98.

2. ILO DECLARATIONS

A. ILO Declaration of Fundamental Principles and Rights at Work and its Follow-up

Declarations adopted by the Governing Body of the ILO have been described as 'informal normative instruments' and are considered as 'informal labour standards'.

Some member States of the ILO have not ratified either or both Convention Nos. 87 or 98. However, even such member States that have not ratified either or both of the Conventions are expected to give effect to the principles contained in the Conventions, by virtue of the abovementioned Declaration adopted in 1998.

The Declaration requires all member states to respect, promote and realize the principles contained in the eight fundamental Conventions relating to the freedom of association and the effective recognition of the right of collective bargaining, the elimination of forced or compulsory labour, the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation, even when they have not ratified the Conventions in question. It proclaims that all member States have an obligation to do so, arising from the very fact of their membership of the organization.

Under the Follow-up to the Declaration, member States that have not ratified all or any of the eight Conventions in the aforesaid four categories are required to submit annual reports to the ILO in respect of the Conventions they have not ratified. Member States that have not ratified the core conventions on freedom of association and collective bargaining are required to submit annual reports indicating the status of law and practice regarding these principles in their countries, the measures taken to realize the rights, the difficulties encountered in the realization of the rights and the kind of technical assistance needed from the ILO to realize these rights. Copies of these reports are required to be furnished to the most representative employers' and workers' organizations in the respective member States for their observations.

The International Labour Office compiles information on the basis of the annual reports submitted by the concerned member States and the observations made thereon by employers' and workers' organizations. This information is examined by a group of seven experts called the ILO Declaration Expert-Advisers. The Expert-Advisers present an introduction to the compilation bringing to the attention of the Governing Body aspects of these reports that in its view need to be discussed in-depth by the Governing Body.

B. ILO Declaration on Social Justice for a Fair Globalization, 2006

Recognizing that decent work is an effective response to the challenges of globalization, the Declaration seeks to promote a fair globalization based on decent work.

It declares that decent work should be placed at the centre of economic and social policies of member states.

It sets out the four objectives of the Decent Work Agenda:

(a) promoting employment by a creating a sustainable institutional and economic environment;

(b) developing and enhancing measures of social protection;

(c) promoting social dialogue and tripartism as the most appropriate methods;

(d) respecting, promoting and realizing the fundamental principles and rights at work.

3. ILO SUPERVISORY MECHANISMS

The two main supervisory mechanisms of the ILO concerned with the freedom of association and collective bargaining rights of workers are the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association.

A. 1. Committee of Experts on the Application of Conventions and Recommendations

The Committee of Experts on the Application of Conventions and Recommendations (CEACR) is a twenty member body consisting of eminent jurists drawn from member States who are appointed by the Governing Body of the ILO. The Committee monitors compliance with international labour standards on the basis of reports submitted by member States regarding the application of the Conventions ratified by them and also on the basis of observations by employers' and workers' organizations.

Article 22 of the ILO Constitution requires each member State to submit an annual report in respect of the Conventions it has ratified. This requirement has been modified and since 1994, member states are required to submit reports once every two years in respect of each of the fundamental conventions they have ratified including Convention Nos. 87 and 98 and the priority conventions. In respect of other conventions, reports are required to be submitted every five years.

The reports contain details of the measures taken in law and in practice to apply the provisions of the Conventions ratified. Copies of the reports are required to be sent by the Government to representative employers' and workers' organizations for their observations. Employers' and workers' organizations may also send their observations on the application of the Conventions directly to the ILO.

The CEACR examines the reports submitted by member states and the observations of workers' and employers' organizations and makes country-wise individual comments. Such comments may either be observations on the application of the Convention or direct requests seeking further information. The observations of the Committee are published in an annual report.

A.2. Conference Committee on the Application of Standards

The Conference Committee on the Application of Standards is a tripartite body appointed by the Governing Body of the ILO and consists of representatives of the governments of member states, employers and workers. The Committee examines the annual report of the CEACR that is submitted to the International Labour Conference (ILC) through the Governing Body and chooses from it issues of concern for discussion. It invites representatives of the concerned governments to appear before it to respond to such issues. On the basis of such discussion, the Committee draws its conclusions. In its conclusions, the Committee may recommend that the Government take certain measures to ensure conformity with the requirements of a Convention. The discussions and conclusions of the Committee are published in its report.

B. Committee on Freedom of Association

The Committee on Freedom of Association (CFA) is a tripartite body consisting of nine members with three members each drawn from representatives of governments, workers and employers in the Governing Body. It is assisted by an independent Chairperson. The CFA meets thrice a year and examines complaints concerning the violation of freedom of association. Ratification by the concerned country of the relevant Conventions on the protection of freedom of association is not necessary for the examination of complaints made by or on behalf of employers' or workers' organizations in that country. Thus, workers' organizations from ILO member States that have not ratified either Convention Nos. 87 or 98 can also prefer complaints to the CFA. ILO procedures stipulate that the complaint must be made either by a national organization directly interested in the matter or an international organization with ILO consultative status, or an international organization whose affiliates are directly affected by the matters raised in the complaint.

The CFA generally does not have any procedure of holding hearings to take evidence from the concerned parties. The CFA relies on the complaint, the observations made in reply by the concerned government and the documents submitted by the parties to arrive at its conclusions. In respect of countries that have ratified the core conventions on the freedom of association, the legislative aspects of the case are often referred to the CEACR for examination. The CFA arrives at decisions unanimously. It may make such recommendations as it deems fit to the Governing Body. On approval by the Governing Body, the recommendations are transmitted to the concerned member State. The recommendations may require the concerned government to report on the action taken pursuant to the recommendations. The principles enunciated by the Committee are compiled in the Digests of Principles and Decisions of the Freedom of Association Committee published by the ILO and afford guidance for the decision of future cases of a similar nature.

68 complaints concerning the freedom of association and collective bargaining rights of workers in India have so far been examined by the CFA.

4. REVIEW OF INDIAN LABOUR LAWS

This section of the paper examines the extent to which whether the central laws concerning the freedom of association and collective bargaining rights of workers in India are in conformity with the standards contained in Conventions Nos. 87 and 98 and the principles developed by the ILO supervisory bodies on the basis of these standards.

The section begins with an overview of the constitutional protection afforded to the freedom of association and other related rights.

Rights guaranteed by the Constitution of India

The right of citizens of the country to form and join associations and unions is a fundamental right guaranteed under Article 19 (1)(c) of the Constitution of India. In the All India Bank Employees' Association case, the Supreme Court of India considered the issue whether the right guaranteed by Article 19(1)(c) would be inclusive of the right to collective bargaining and the right to strike. The Court was of the view that the fundamental rights could not be interpreted as including concomitant rights necessary to achieve the object which might be supposed to underlie the grant of each of these rights as such an interpretation would be contrary to the scheme of Part III of the Constitution and particularly, Articles 19(1)(a) to (g). On that basis, the Court held that even a very liberal interpretation of Article 19(1)(c) cannot lead to the conclusion that trade unions have a guaranteed right to effective collective bargaining or to strike.

Article 19(1)(a) guarantees to all citizens of the country the freedom of speech and expression. The right to information has been held to be a facet of the freedom of speech and expression protected by Article 19(1)(a). Article 19(1)(b) protects the right of citizens to assemble peacefully without arms. In Kameshwar Prasad and others v. State of Bihar and another, the Supreme Court held that the right of workers to participate in peaceful and orderly demonstrations flows from Articles 19(1)(a) and (b). In that case, the Court ruled that Rule 4-A of the Bihar Government Servants' Conduct Rules was in violation of Articles 19(1)(a) and (b) as it imposed a blanket ban on the participation of government employees in demonstrations of all kinds including peaceful and orderly demonstrations.

Article 19(1)(d) guarantees the freedom of movement throughout the territory of India. The Supreme Court has held that the right of citizens to take out public processions and hold public meetings flows from Article 19(1)(b) guaranteeing the freedom of assembly read together with Article 19(1)(d).

The fundamental rights guaranteed under the aforesaid Articles are subject to the reasonable restrictions specified respectively in clauses (2) to (5) of Article 19. Reasonable restrictions on the rights may be placed by law on grounds such as interest of the security of the state and public order.

Article 14 guarantees to all citizens equality before the law and the equal protection of the laws. Article 21 provides that 'no person shall be deprived of his life or personal liberty except according to the procedure established by law.' Article 21 and Articles 21(1) and (2) guarantee protection against arbitrary arrest and detention.

A. Relevant central laws:

Under the Constitution of India, subjects such as labour welfare, trade unions, labour disputes and social security are enumerated in the concurrent list in the seventh schedule thus empowering the central government as well as the governments of the 28 states or provinces in the country to legislate on labour related issues. As a result, India has a number of central as well as state laws on labour related issues. While central laws generally have application all over India, the application of state laws is confined to the territories of the respective states.

The Trade Unions Act, 1926 and the Industrial Disputes Act, 1947 are the two principal pieces of central legislation concerning the freedom of association and collective bargaining rights of workers in India.

B.1. The Trade Unions Act, 1926

The Trade Unions Act enables workers as well as employers to register trade unions. The Act prescribes the requirements to be fulfilled for the registration of trade unions. It prescribes the particulars that should be covered by the rules of trade unions. It also sets out the objects on which the general funds of trade unions may be spent.
It affords protection to the office bearers and members of trade unions against prosecution for the offence of criminal conspiracy, in respect of any act done for the furtherance of the objects of the trade union. Furthermore, it affords immunity to office bearers and members of trade unions from civil proceedings in respect of acts done either in contemplation of or in furtherance of trade disputes.

The amendments to the Act effected in 2001 imposing a minimum membership requirement on unions for the purpose of registration and placing restrictions on outsiders holding office in the union may be viewed as falling short of international labour standards.

Minimum membership requirement

The proviso to section 4 of the Act imposes a minimum membership requirement of ten per cent or seven up to a maximum of hundred workers, engaged or employed in the establishment or industry with which the union is connected, for the purpose of registration of a trade union. As per section 9A, for the purpose of maintaining its status as a registered trade union, a union shall continue to meet the said minimum membership requirement. Section 10(c) empowers the Registrar to withdraw or cancel the certificate of registration if he is satisfied that a registered trade union ceases to have the requisite minimum number of members.

Restriction on outsiders holding office in the trade union

Section 22 of the Act places restrictions on outsiders holding office in the trade union. Sub-section (2) of section 22 stipulates that all office bearers of a registered trade union except not more than one-third of the total number of office bearers or five, whichever is less shall be persons actually engaged or employed in the establishment or industry with which the trade union is connected. In the case of trade unions representing workers in the unorganised sector, sub-section (1) of section 22 prescribes that at least half of the office bearers of every registered trade union in an unorganised sector shall be persons actually engaged or employed in an industry with which the trade union is connected.

The supervisory bodies have considered such restrictions as being contrary to the principle of free election of representatives. The CFA has observed: "For the purpose of bringing legislation which restricts union office to persons actually employed in the occupation concerned into conformity with the principle of free election of representatives, it is necessary at least to make these provisions more flexible by admitting as candidates persons who have previously been employed in the occupation concerned and by exempting from the occupational requirement a reasonable proportion of the officers of an organization."

The Industrial Disputes Act, 1947

The Industrial Disputes Act affords protection to office bearers and members of trade unions from acts of anti-union discrimination. It also protects workers and their trade unions from acts of interference by employers and their organizations.

The Act recognizes the collective bargaining rights of workers. It recognizes the right to strike of workers and the corresponding right of employers to resort to lock outs.

It provides for the resolution of disputes between workers and employers by the processes of conciliation, adjudication and arbitration. During the pendency of such proceedings, the Act requires the concerned employer to refrain from altering the conditions of service of the concerned workers in respect of any matter concerned with the dispute, in a manner prejudicial to them or from punishing them for any misconduct connected with the dispute, without the express permission in writing of the authority before whom the proceedings are pending. In the case of misconducts not connected with the pending dispute, the employer is required to make an application for approval of the action taken, to the authority before whom the proceedings are pending.

In the event of a proposed change in the conditions of service of the workers, the Act requires the employer to give prior notice of a minimum of 21 days of the proposed change, to the concerned workers.

The Act also stipulates the conditions to be followed in the event of lay off or retrenchment of workers and the closure of establishments covered by the Act. In the case of establishments where more than 100 workers are employed, the Act requires the employer to obtain the permission of the government prior to effecting the lay off or retrenchment of workers or closure of the concerned establishment.

5. ANTI-UNION DISCRIMINATION AND PROTECTION AGAINST ACTS OF INTERFERENCE

Convention No. 98 guarantees to all workers adequate protection against acts of anti-union discrimination in respect of their employment.

A. Protection against anti-union discrimination

Section 25-T of the Act prohibits the commission of unfair labour practices. Part I of the fifth schedule to the Act enumerates various unfair labour practices on the part of the employer. It includes the discharge or dismissal of workmen, the change of their seniority rating and the denial of promotion to workmen on account of their trade union activities. Section 25-U penalizes the commission of such practices with imprisonment for a term which may extend to 6 months or with fine that may extend to Rs. 1000/- or with both. Section 34 provides for the prosecution of those who commit unfair labour practices on the basis of a complaint made by or under the authority of the Government. Sections 2(k) and 2-A enable workmen to raise collective and individual industrial disputes respectively. However, under section 2-A, an individual dispute may be raised only in respect of unjust discharge or dismissal from service. Section 11-A empowers the Labour Court or Industrial Tribunal as the case may be, to grant the relief of reinstatement to workers unjustly dismissed for their union activities.

Apart from such protection against the commission of unfair labour practices, the Act also generally affords protection to workmen during the pendency of conciliation or adjudicatory or arbitration proceedings under the Act in respect of any industrial dispute concerning them, as indicated above. In the case of trade union officials recognized by the employer as 'protected workmen,' during the pendency of such proceedings relating to any industrial dispute concerning them, as per section 33(3), the employer is required to obtain the permission of the concerned authority both for altering to the prejudice of the protected workman, the applicable conditions of service or for discharging or punishing him or her.

A.1. Examination of the adequacy and effectiveness of the framework for protection against acts of anti-union discrimination

The principles laid down by the ILO supervisory bodies in respect of the protection of workers against acts of anti-union discrimination indicate that an adequate and effective system of protection against anti-union discrimination would mean: ***(a) statutory prohibition of all acts of anti-union discrimination, (b) appropriate protection for trade union officials, (c) sufficiently dissuasive sanctions against the commission of acts of anti-union discrimination, (d) access for workers who consider that they have been prejudiced because of their trade union activities to means of redress that are expeditious, inexpensive and impartial, (e)***

reinstatement of dismissed trade unionists in their jobs, if they so wish and (f) a system of inspection to ensure that the legal provisions relating to anti-union discrimination are strictly observed.

This paper now proceeds to examine the adequacy and effectiveness of the framework for protection against anti-union discrimination afforded under the Act on the basis of the aforesaid criteria.

A.2. Prohibition of acts of anti-union discrimination

While section 25-T of the Act prohibits the commission of the acts of anti-union discrimination categorized as unfair labour practices under Part I of the fifth schedule to the Act, a perusal of Part I would indicate that the list is not exhaustive. For instance, measures such as the suspension of workers by reason of their trade union membership or activities and the issue of warning letters to workmen ostensibly on the ground of poor performance but in fact on the basis of their trade union membership or activities, have not been included in the list. ***This indicates that not all acts of anti-union discrimination are prohibited under the Act.***

The supervisory bodies have emphasized that it is important to forbid and penalize all acts of anti-union discrimination both at the time of taking up employment and in the course of employment.

Therefore, a review of Part I of the fifth schedule is necessary so as to ensure that all measures of anti-union discrimination both at the time of taking up employment and in the course of employment are prohibited under the Act.

A.3. Appropriate protection for trade union officials

Under the Act, the only protective measure specific to trade union officials is that under section 33(3) of the Act which is applicable during the pendency of conciliation or adjudicatory or arbitration proceedings under the Act. However, ***even this provision is not generally applicable to all trade union officials as its application is restricted to those recognized by the employer as 'protected workmen'. The protection specifically afforded under the Act to trade union officials is thus limited.***

The supervisory bodies have pointed out that adequate protection against anti-union discrimination is particularly desirable in the case of trade union officials in order to ensure that they would be able to perform their trade union duties in full independence. It has considered that such protection for trade union officials is also necessary in order to ensure that effect is given to the fundamental principle that workers' organizations should have the right to elect their representatives in full freedom. The measures identified by the supervisory bodies in order to ensure appropriate levels of protection for trade union officials include:

(i) providing that trade union officials may not be dismissed, either during their period of office or for a certain time thereafter;

(ii) requiring that the employer obtain prior authorization from the labour inspectorate before effecting a dismissal;

(iii) making it compulsory for the employer to prove that the motive for the dismissal had no connection with the worker's trade union activities

At the same time, the supervisory bodies have pointed out that the principle that a trade union official should not suffer prejudice by reason of his or her trade union activities does not necessarily imply that the holding of such office confers immunity against dismissal irrespective of the circumstances.

It is therefore necessary to review the protection afforded to trade union officials under the Act so as to ensure that adequate protection for all trade union officials against anti-union discrimination during their period of office.

A.4. Sanctions

Section 25-U of the Act penalizes the commission of acts of anti-union discrimination categorized as unfair labour practices with imprisonment for a term which may extend to 6 months or with fine that may extend to Rs. 1000/- or with both. As per section 34, prosecution for the commission of unfair labour practices can only be initiated on the basis of a complaint made by or under the authority of the Government.

While the imposition of penal sanctions on employers found guilty of anti-union discrimination is thus provided for, in practice employers are seldom prosecuted on account of the reluctance of the Government to either initiate or authorize such prosecution.

The supervisory bodies have explained that the imposition of penal sanctions against acts of anti-union discrimination has the dual purpose of punishing those responsible for violating a fundamental right and acting as a deterrent.

Considering the importance of the imposition of penal sanctions in cases of anti-union discrimination, appropriate measures need to be taken both under the law and in practice to ensure that the sanctions provided for in the Act are indeed effective.

In this context, it would also be relevant to refer to the recommendation made in the report of the second national labour commission that sanction for prosecution of offences should be given within one month failing which sanction will be deemed to be given and that offences under the Industrial Disputes Act, 1947 should be triable by the Labour Court.

A.5. Means of redress

(1) Access

The supervisory bodies have pointed out that the existence of general legal provisions prohibiting acts of anti-union discrimination is not enough if they are not accompanied by effective and rapid procedures to ensure their application in practice. The supervisory bodies have also emphasized the need for expeditious means of redress in cases of anti-union discrimination so as to ensure that the remedies afforded can be really effective. It follows as a corollary that workers who consider that they have been prejudiced in employment of account of their trade union membership or activities should have free and timely access to the means of redress afforded under the law.

Sections 2(k) and 2-A of the Act are the provisions that afford access to justice for workers who consider that they have been prejudiced in their employment on account of their trade union membership or activities. An individual worker can access the machinery under section 2-A of the Act only in the event of severence of his or her service. All other disputes have to be raised collectively under section 2(k). In the case of both collective industrial disputes raised under sections 2(k) and individual industrial disputes raised under section 2-A of the Act, a reference from the Government is needed under section 10(1) of the Act for adjudication of the dispute following the failure of conciliation proceedings to bring about a settlement between the parties to the dispute. In the state of Tamil Nadu and some other states however, there is no reference requirement in respect of industrial disputes raised under section 2-A of the Act in relation to which the appropriate government is the state government.

In practice, the reference requirement under section 10(1) that makes access to adjudicatory mechanisms under the Act contingent upon the manner of exercise of discretion by the Government is a serious stumbling block for workers seeking justice both on account of the time involved in the making of decisions in respect of reference and as the Government many a time exercises its reference power unfairly and in a manner contrary to well-established norms on the subject.

Noting that under the Act, the initiation of conciliation proceedings and the reference of cases for adjudication are left to the discretion of the competent authorities, the CFA while examining a complaint from the Calcutta Port Commissioners Workers' Union in 1964 recommended that the Government consider amending the Act with a view to affording to

workers and their organizations, a fuller right to have access to statutory procedures for the settlement of disputes by conciliation, and if conciliation fails by adjudication.

The CFA recommended that the Government take all necessary measures including the amendment of the Industrial Disputes Act so as to ensure that suspended workers and trade unions can also approach the courts directly.

More recently, in Case No. 2512 concerning a complaint regarding acts of anti-union discrimination, made by the MRF United Workers Union, an enterprise union in 2006, the CFA has reiterated its recommendation that the Government take the necessary measures to amend the Industrial Disputes Act so as to ensure that suspended workers and trade unions can approach the courts directly without the requirement of a reference from the Government.

There is a need to appropriately amend the Act in accordance with the above-mentioned recommendations of the CFA. This would ensure that all workers who consider that they have been prejudiced in employment because of their union membership or activities have free and timely access to the dispute resolution mechanisms under the Act.

The Supreme Court and the second national labour commission had also recommended that the scope of Section 2-A of the Industrial Disputes Act, 1947 be widened so that all matters pertaining to individual workers can be taken up for adjudication.

(2) The need for expeditious relief

The need for expeditious relief in cases of anti-union discrimination cannot be overemphasized. Only when the means of redress afforded to victims of anti-union discrimination are expeditious, the freedom of association of workers can be effectively protected. The CFA has repeatedly stressed the need for means of redress that are 'expeditious, inexpensive and fully impartial'

While so, both the conciliation and adjudication processes under the Act, in particular, the latter are long drawn out processes. The fact that the Act does not allow for immediate and appropriate interim relief to be granted in such cases compounds the problem. The conciliation process which under the Act is normally expected to be completed within 14 days often takes months. Moreover, Conciliation Officers sometimes take months to even issue the failure report. Adjudication of industrial disputes before the Labour Courts and Industrial Tribunals routinely goes on for years. Following this lengthy process, the High Court may be moved as against the award of the Labour Court or Industrial Tribunal as the case may be and the Supreme Court may in turn be moved as against the order of the High Court. The entire process may go on for a decade or more. Thus, in practice, workmen who are victims of anti-union discrimination do not have any means of expeditious relief.

The CFA has in several cases concerning allegations of anti-union discrimination against workers in India expressed concern at the slowness of the proceedings under the Act. It has pointed out that such cases need to be examined rapidly so that remedies can be really effective. On this basis, it has called upon the Government to improve labour court procedures together with grievance mechanisms so that parties can obtain speedy relief.

There is therefore a need to ensure means of speedy redress for workmen who consider that they have been prejudiced on account of their trade union membership or activities.

(3) Reinstatement of dismissed trade unionists

As indicated earlier, section 11-A empowers the Labour Court or Industrial Tribunal as the case may be, to grant the relief of reinstatement to workers unjustly dismissed for their union activities.

(4) Inspection

The Act however does not contain any provisions relating to inspection. Appropriate measures therefore need to be taken in order to ensure that there is in place an effective system for such inspection. An effective system of inspection would help prevent and check the commission of acts of anti-union discrimination. The CFA has pointed out that governments should take the necessary measures to enable labour inspectors to enter freely and without previous notice any workplace liable to inspection in order to satisfy themselves that legal provisions including those relating to anti-union discrimination are strictly observed.

B. Protection Against Acts of Interference

Article 2 of Convention No. 98 provides that workers' and employers' organizations shall enjoy adequate protection against acts of interference by each other or each other's agents in their establishment, functioning or administration. Clause 2 of Article 2 states that acts which are designed to promote the establishment of workers' organizations under the domination of 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 shall be deemed to constitute acts of interference within the meaning of the Article.

Part I of the fifth schedule to the Act which lists out unfair labour practices on the part of employers and their organizations includes acts of interference such as the establishment of employer sponsored trade unions and partiality on the part of the employer towards non-recognized trade unions. However, the list of such acts is again not exhaustive.

Therefore, appropriate measures would need to be taken to ensure that trade unions enjoy adequate protection against all acts of interference by employers and their organizations.

6. RIGHT TO STRIKE

A combined reading of sections 22 to 24 and items 4 (b), 8 and 12 of Part I of the Fifth Schedule to the Industrial Disputes Act, 1947 indicate that the Act recognizes the right to strike of workers covered by the Act.

However, the Act places certain restrictions on this right. Section 22 of the Act places restrictions on the right to strike, of workers in establishments defined as 'public utility services' under the Act. It requires workers in public utility services to give a minimum of 14 days prior notice to the employer in the prescribed manner before resorting to strike. In addition, sub-clause (d) of sub-section (1) of section 22 prohibits workers in public utility services from resorting to strikes during the pendency of any conciliation proceedings before a Conciliation Officer and 7 days after the conclusion of such proceedings.

Section 23 of the Act prohibits workers in any industrial establishment from going on strike during the pendency of conciliation proceedings before a Board and 7 days after the conclusion of such proceedings. It also prohibits workers from going on strike during the pendency of adjudicatory proceedings before a Labour Court, Tribunal or National Tribunal and arbitration proceedings and 2 months after the conclusion of such proceedings. However, as per sub-section (2) of section 24, a strike or lock out commenced prior to or in existence at the time of reference of an industrial dispute for conciliation, adjudication or arbitration proceedings shall not be deemed to be illegal.

Section 23 also prohibits workers from going on strike during any period in which a settlement or award is in operation, in respect of any of the matters covered by the settlement or award.

In addition to the aforesaid restrictions, the Act empowers the Government to issue orders prohibiting the continuance of any strike following the reference of any industrial dispute connected with the strike for conciliation, adjudication or arbitration. Sub-section (3) of section 10 provides that when an industrial dispute has been referred either to the Board of Conciliation or to a Labour Court, Industrial Tribunal or National Tribunal for adjudication, the Government may by order prohibit the continuance of any strike in connection with such dispute, which may be in existence on the date of the reference. Similarly, sub-section (4A) of section 10A provides that when an industrial dispute has been referred to arbitration, the Government may by order prohibit the continuance of any strike or lockout in connection with the dispute, which may be in existence on the date of the reference.

Part I of the Fifth Schedule to the Act enumerates acts on the part of employers and their organizations that are considered as unfair labour practices under the Act. These include:

(i) discharging or dismissing a workman for taking part in any strike which is not deemed to be illegal under the Act (item 4 (b));

(ii) to insist upon individual workmen, who are on a legal strike to sign a good conduct bond, as a pre-condition to allowing them to resume work (item 8);

(iii) to recruit workmen during a strike which is not an illegal strike (item 12).

As stated hereinbefore, section 25-T of the Act prohibits the commission of unfair labour practices and section 25-U renders the commission of such practices punishable with imprisonment for a term that may extend to six months or with a fine which may extend to one thousand rupees or with both.

Part II of the Fifth Schedule to the Act which enumerates acts on the part of workers and their trade unions considered as unfair labour practices under the Act categorises advising a strike deemed to be illegal under the Act as or supporting or instigating an illegal strike as an unfair labour practice (item 1).

Section 26 makes participation in illegal strikes punishable with imprisonment for a term which may extend to one month, or with fine which may extend to one thousand rupees or with both. As per section 27, instigating or inciting other workers to take part in or act in furtherance of an illegal strike is punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both. Under section 28, financially supporting an illegal strike is punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both.

6.1. Examination of the aforesaid provisions in the light of international labour standards

The restrictions placed on the right to strike on workers in public utility services may be viewed as falling short of international labour standards for the following reasons:

The term 'public utility service' has been defined in a very broad manner under the Act to include a wide range of industries. Section 2(n) of the Act has defined the term to include railway services, port and dock services, postal services, industries supplying power, light and water to the public, public conservancy and sanitation services. Apart from this, the Government is empowered to notify any industry specified in the first schedule to the Act as a public utility service if it is considers it necessary in the public interest. The first schedule to the Act includes a wide range of industries including banking, cotton textiles and mining. State Governments have further expanded the list of establishments in the first schedule. For instance, the Government of Tamil Nadu has included leather, synthetic fibre, electric goods manufacturing industries and newsprint manufacturing among other industries as public utility services. Industrial units whose entire production is exported and industries in the special economic zones have been included in the list. Information technology and software establishments have also been included in the list. Thus, 'public utility services' encompass both industries in the public sector such as railway services and defence establishments and also industries in the private sector such as leather manufacturing industries and industrial units in special economic zones.

A combined reading of sub-section (1) of section 22, sub-section (1) of section 12 and the second proviso to sub-section (1) of section 10 of the Act would indicate that it is virtually impossible to carry out a legal strike in establishments notified as public utility services. This is because on the workers of a public utility service giving notice of the proposed strike as required under section 22 of the Act to the employer as well as the concerned labour authorities, it is mandatory for conciliation proceedings to be commenced by the Conciliation Officer. It is also open to the Government to refer the dispute for adjudication, under the second proviso to the sub-section (1) of section 10. As pointed out earlier, during the pendency of either conciliation or adjudication proceedings, any strike by workers in public utility services will be considered illegal. In other words, there is virtually a prohibition on strikes in public utility services.
This is contrary to the principles developed by the supervisory bodies concerning the right to strike. The supervisory bodies have held that the right to strike may be restricted or prohibited only: ***(1) in the case of public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term, that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population.***

In Case No. 1890 concerning allegations of anti-union discrimination against the members of a trade union of workers in a beach resort in Goa, wherein there was a reference to a strike by the union members, the Government indicated that the hotel industry had been declared a public utility service and as the workers had gone on strike even while adjudication proceedings were pending, the strike was not legal. The CFA in its conclusions in the case pointed out that the hotel industry is not an essential service in the strict sense of the term, where strikes can be prohibited and therefore requested the Government to repeal the decision declaring the hotel industry a public utility service. It also drew the Government's attention to the principle that arbitration implying a binding decision to end a collective labour dispute and a strike is only acceptable if it is at the request of both parties involved in a dispute. Otherwise, recourse to compulsory arbitration at the request of one party to the dispute should be limited to disputes in the public service involving public servants exercising authority in the name of the State or in essential services in the strict sense of the term.

The provisions in the Industrial Disputes Act providing for penal sanctions against workers participating in illegal strikes are also likely to be viewed as being contrary to international standards. The supervisory bodies have held that no one should be penalized for carrying out or attempting to carry out a legitimate strike.

In Case No. 1479, concerning a complaint made by the CITU of interference by the management in the internal affairs of a union representing workers in the Heavy Water Project, Talcher, Orissa and harassment of union activists, the Government had indicated that disciplinary action had been taken against the President and the General Secretary of the union on account of their instigation and participation in a stoppage of work. In its conclusions in the case, noting that it had not been presented with any evidence to suggest that the "strikes" in question were other than peaceful, or that they were unlawful, the CFA recalled that the imposition of penal or other sanctions upon workers who organise or participate in peaceful industrial action is not in conformity with the principles of freedom of association. It therefore called upon the Government to ensure that the said trade union officials and other workers who organised or participated in apparently lawful industrial action were not subject to penal or other sanctions by virtue of that fact.

7. COLLECTIVE BARGAINING RIGHTS

A.1. Legal Position

The Industrial Disputes Act recognises the right of workers and their unions to collectively bargain with employers and enter into collective agreements with them. This right is evident from sections 2(p), 18 and 19 of the Act and also the fifth schedule to the Industrial Disputes Act which sets out the acts described as 'unfair labour practices' on the part of employers and their organizations and also on the part of workers and their trade unions.

As per item 15 in Part I of the fifth schedule, any refusal on the part of the employer to bargain collectively in good faith with the recognised trade union is an unfair labour practice. Likewise, under item 3 of Part II of fifth schedule which lists out unfair labour practices on the part of trade unions, any refusal on the part of a recognised trade union to bargain collectively in good faith with the employer is an unfair labour practice.

Sections 2(p), 18(1), 19, 23(c) and 29 of the Act recognise the sanctity of collective agreements or settlements, arrived at voluntary negotiations between workers and their organizations and employers and their organizations. As per section 18(1) of the Industrial Disputes Act, a settlement arrived at by bilateral negotiations between the employer and workman shall be binding on the parties to the agreement.

Section 23(c) requires workers and employers to refrain from resorting to strikes and lock outs respectively during any period in which a settlement is in operation, in respect of any of the matters covered by the settlement. As per item 13 of Part I of the fifth schedule to the Act, the failure of an employer or organization of employers to implement any settlement or agreement amounts to an unfair labour practice. Under section 29 of the Act, a breach of any term of any settlement is punishable with imprisonment for a term which may extend to six months or with fine or with both.

Under the scheme of the Act, in the event of either a refusal on the part of the employer to bargain collectively with the trade union or the failure of bilateral negotiations between the employer and trade union in bringing about any agreement between the parties, an industrial dispute may be raised by the aggrieved party. Such a dispute is usually taken up for conciliation initially. In the event of the parties arriving at a settlement in the course of conciliation proceedings, it would be binding on all parties to the dispute as per section 18(3) of the Act. In the event of failure of the conciliation proceedings to bring about any agreement between the parties, the matter may be referred for adjudication by the Government to the Industrial Tribunal under section 10(1) of the Act.

A.2. Legislative vacuum in respect of the issue of recognition by employers, of representative trade unions.

While item 15 in Part I and item 3 in Part II of the fifth schedule to the Industrial Disputes Act, 1947 speak of "recognised unions" and while item 4 in Part II of the fifth schedule makes a reference to the 'certification of a bargaining representative,' the Act does not prescribe any procedure for the recognition of trade unions or certification of a bargaining representative by the employer. The Trade Unions Act, 1926 also does not address this issue.

There is no central statutory enactment in India regarding the recognition of trade unions. In most Indian states, there are also no state enactments regarding the recognition of trade unions. Only a few states in India, namely, Andhra Pradesh, Gujarat, Madhya Pradesh, Maharashtra, Rajasthan and West Bengal have statutory provisions relating to the recognition of trade unions. Apart from this, there are non-statutory rules relating to the recognition of trade unions in the states of Bihar and Orissa.

There is thus a legislative vacuum in India on the crucial subject of recognition of trade unions. As a result, employers in most states in India are not statutorily bound to grant recognition to trade unions representing the majority of the workers. In practice, this has resulted in employers often ignoring or by-passing representative unions and choosing to enter into "agreements/settlements" with employer established trade unions or individual workers. Such practices seriously undermine the collective bargaining rights of workers and trade unions. Such practices also threaten industrial peace.

The aforesaid legislative vacuum thus seriously hinders the collective bargaining process in India. There is an urgent need for the central Government to adopt appropriate legislative provisions regarding the recognition of representative trade unions by the employer. Such a measure would help ensure that the principle enshrined in Article 4 of Convention No. 98 that collective bargaining between employers and workers' organizations should be encouraged and promoted, is respected in the country.

A.3. Code of Discipline

While there is no central statute in India on the subject, a non-statutory Code of Discipline that was evolved in 1961 by certain federations of employers and workers however prescribes procedures for the recognition of trade unions. Under paragraph 10 of the Code of Discipline, a union that satisfies the conditions for recognition prescribed in paragraph 8, may seek the assistance of the concerned implementation machinery, that is, the central or state labour machinery when its request for recognition is not accepted by the management of the concerned establishment. Appendix III of the Code prescribes the procedure for the verification of membership of a union. As per the Code, the verification of membership is to be done principally on the basis of records. Moreover, the Code is of a voluntary and recommendatory nature and does not prescribe any legal sanctions for failure to observe a recommendation made under the Code.

B. Recommendations of the CFA on the issue

The CFA has called for the adoption of appropriate legislative provisions for the designation of the most representative union for collective bargaining purposes. In its conclusions in Case No. 1517 and in Case No. 2512, the CFA pointed out that employers should recognize for collective bargaining purposes the organizations representative of the workers employed by them. It emphasized that in order to encourage the harmonious development of collective bargaining and to avoid disputes, it should always be the practice to follow, where they exist, the procedures laid down for the designation of the most representative unions for collective bargaining purposes when it is not clear by which unions the workers wish to be represented. In the absence of such procedures, the authorities, where appropriate, should examine the possibility of laying down objective rules in this respect. It therefore recommended that the Government consider laying down objective rules for the designation of the most representative union for collective bargaining purposes, when it is not clear by which union the workers wish to be represented.

The CFA further pointed out that in order to determine whether an organization has the capacity to be the sole signatory to collective agreements, two criteria should be applied: representativeness and independence. The determination of which organizations meet these criteria should be carried out by a body offering every guarantee of independence and objectivity.

In the light of the factual backdrop of Case No. 2512, the CFA observed that ***the determination of the most representative trade union by secret ballot is not only an acceptable but a desirable way to ensure that workers exercise their right to choose the organization which shall represent them in collective bargaining***.

Recommendations of the Second National Commission on Labour

The report of the Second National Commission on Labour had also recommended that criteria for recognition of unions should be spelt out. The report however recommended that recognition be granted on the basis of the check off system and that the process of secret ballot be adopted for the purpose of recognition only in establishment where less than 300 workers are employed. It recommended that for securing recognition as the negotiating agent, a union would have to secure 66% of the vote. In the event of no one union, securing 66% of the vote, every union that has secured more than 25% of the vote will have negotiating status while unions which have not even secured even 10% of the vote, will have no standing in the establishment.

8. COVERAGE OF THE LAWS

Having examined the broad features of the two main central laws in India concerning the freedom and collective bargaining rights of workers in India and the gaps between the law and international labour standards on the subject, it is necessary to now point out that both the laws do not apply to all categories of workers in India.

The Industrial Disputes Act, 1947

The Industrial Disputes Act, 1947 applies to workers in both industries in the private sector and also industries in the public sector or Government owned undertakings. The application of the Act is however restricted to workers defined as 'workmen' under section 2(s) of the Act. The term 'workman' has been defined to mean a person employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work. Employees in the armed forces, police service and prisons are expressly excluded from the coverage of the Act. The Act also expressly excludes managerial employees and supervisory employees discharging functions mainly of a managerial nature, from its scope.

Section 2 (j) of the Act defines the term 'industry' as any business, trade, undertaking, manufacture or calling of employers. The definition of the term also includes any calling, service, employment, handicraft or industrial occupation or avocation of workmen. In the landmark judgment in Bangalore Water Supply and Sewerage Board v. Rajappa, the Supreme Court interpreted the term 'industry' to mean any systematic activity organized by co-operation between the employer and employee for the production and/or distribution of goods and services calculated to satisfy human wants and wishes(not being wants or wishes which are merely spiritual or religious in nature). Thus, all organized activity possessing these three elements would be industry.

Pursuant to the aforesaid judgment, in 1982, the Industrial Disputes (Amendment) Act (Act No.46 of 1982) was passed. The Act amended the definition of the term 'industry' under section 2 (j). The amendment has not been brought into force. It is however relevant to refer to the amended definition for the reason that it indicates the kinds of activities excluded from the scope of the definition of the term 'industry' under the Act as a result of which workers engaged in such activities would not be treated as 'workmen' for the purpose of the Act. These activities include agricultural operations and domestic services. Thus, most categories of agricultural workers stand excluded from the scope of the Act. Domestic workers are also excluded from the scope of the Act. Other categories of informal workers may also stand excluded from the scope of the Act. Teachers in educational institutions have also been held to be excluded from the scope of the Act.

The Trade Unions Act, 1926

The definition of the term 'trade dispute' under section 2(g) of the Act which makes a reference to 'workmen' defined as 'all persons employed in trade or industry' indicates that the Act applies to workers engaged in activities considered as 'trade' or 'industry.' Judgments of the courts indicate that the term 'industry' has to be interpreted in the same manner as under the Industrial Disputes Act, 1947.

Section 6(ee)(iii) and 22 of the Act make a reference to workers in the unorganized sector indicating that the Act would also be applicable to workers in the unorganized sector. In practice, trade unions of agricultural workers and self employed workers have been registered under the Act.

However, considering that the Act applies to workers engaged in activities considered as 'trade' or 'industry,' Government employees would stand excluded from the scope of the Act.

Implications of the restricted coverage of the laws

The restricted application of these laws would mean that a large segment of workers in India are not entitled to the rights granted by the laws, in particular, the important rights granted by the Industrial Disputes Act, 1947. For instance, supervisory and managerial employees may have the right to register trade unions under the Trade Unions Act, 1926 but would not be entitled to the protection against anti-union discrimination and acts of interference afforded by the Act or the right to strike and the collective bargaining rights provided for under the Act.

9. EXCLUDED CATEGORIES OF WORKERS

The paper now goes on to examine whether the exclusion of the following categories of workers from the scope of the laws is in accordance with freedom of association principles.

A. Employees in the armed forces, police service and prisons

Both Conventions Nos. 87 and 98 provide that the extent to which the guarantees provided for in the Conventions shall apply to the armed forces and the police shall be determined by national laws or regulations. ***The supervisory bodies have however pointed out that the members of the armed forces who can be excluded from the scope of the Conventions should be defined in a restrictive manner.***

With respect to prison staff, the supervisory bodies have held that the functions exercised by them would not justify their exclusion from the right to organize on the basis of Article 9 of Convention No. 87. However, restrictions may be imposed on their right to resort to strike.

B. Managerial and supervisory employees

The supervisory bodies have pointed out that it is not necessarily incompatible with the requirements of Article 2 of Convention No. 87 to deny managerial or supervisory employees the right to belong to the same trade unions as other workers, on condition that two requirements are met: first, that such workers have the right to form their own associations to defend their interests and second, that the categories of such staff are not defined so broadly as to weaken the organizations of other workers in the enterprise or branch of activity by depriving them of a substantial portion of their present or potential membership. Thus, they may only be restricted from joining the same trade unions as other workers.

However, in India, supervisory and managerial employees are denied the protection against acts of anti-union discrimination and acts of interference and the collective bargaining rights granted under the Industrial Disputes Act, 1947. This does not appear to be in accordance with freedom of association principles.

The National Confederation of Officers' Associations of Central Public Sector Undertakings (NCOA) had made a complaint to the CFA in June 1991 pointing out that officers employed in public sector undertakings do not effectively enjoy the freedom of association because such employees are excluded from the coverage of the Industrial Disputes Act, 1947. The complainant also alleged that when the office bearers of Executive Staff Association are victimized through action such as denial of promotion or transfer etc., there is no effective grievance redressal machinery for them.

In its conclusions in the case, the CFA pointed out that while supervisory and managerial staff cannot be denied the right to associate or bargain collectively altogether, they may be restricted from joining trade unions representing other workers subject to the following two conditions: namely, that they have the right to form their own organization to defend their interests and secondly, the categories of managerial staff and employees in positions of confidence are not so broadly defined that the organization of other workers in the enterprise or branch of activity are weakened by depriving them of substantial portion of their present or potential membership.

In the case of high level managerial employees in the public service, Article 1 of Convention No. 151 allows national law to determine the extent to which the Convention shall apply to them.

C. Agricultural workers

As indicated earlier, agricultural workers are entitled to register trade unions under the Trade Unions Act, 1926. As per the definition of the term 'industry' in the Bangalore Water Supply and Sewerage Board case, organized agricultural activity would be covered by the Industrial Disputes Act, 1947. This would however mean that seasonal and temporary agricultural workers and small farmers would stand excluded from the scope of the Act. Agricultural operations (except where they are carried on in an integrated manner with any other predominant activity considered as 'industry') have also been excluded from the amended definition of 'industry' as per Act 46 of 1982.

The excluded categories of agricultural workers have no protection against acts of anti-union discrimination and acts of interference. They also do not have access to machinery to facilitate collective bargaining between themselves and their employers.

The supervisory bodies have emphasized that all categories of agricultural workers, whether they are wage earners or self employed workers should enjoy the guarantees of Convention No.87 and Convention No. 98. The Government of India is also obliged to statutorily guarantee these rights to agricultural workers considering that it has ratified the Rural Workers' Organizations Convention, 1975 (No. 141).

D. Domestic workers

The work done by domestic workers may not be construed as 'trade' or 'industry' for the purposes of the Trade Unions Act, 1926. However, it needs to be pointed out that in some states in India, trade unions of domestic workers have been registered under the Trade Unions Act, 1926.

Furthermore, domestic workers are not considered as "workmen" for the purposes of the Industrial Disputes Act, 1947 and are thus do not have the protection against anti-union discrimination and acts of interference under the Act. Their exclusion from the coverage of the Industrial Disputes Act, 1947 also means that their right to collectively bargain and right to strike is not recognized under the law.

Efforts are on to statutorily protect the rights of domestic workers and two bills have been framed for the purpose. A bill framed by Nirmala Niketan and the National Campaign Committee for Unorganized Sector Workers to protect the rights of domestic workers, called the Domestic

Workers (Regulation of Employment, Conditions of Work, Social Security and Welfare) Bill, 2008 calls for the recognition of the right of domestic workers to form trade unions and to collectively bargain, among other rights.

The supervisory bodies have emphasized that domestic workers should be entitled to the guarantees of Conventions Nos. 87 and 98 both under the law and in practice.

E. Other unorganized sector workers/Workers in the informal sector

Workers in the informal sector who constitute the majority of India's workforce would need also need to be extended the rights granted under the Industrial Disputes Act, 1947. As of now, several categories of workers in the informal sector may stand excluded from the coverage of the Act by reason of the definition of the term 'industry' and by reason of the fact that it may be difficult to establish a clear employer-employee relationship in their case.

F. Teachers

In its conclusions in Case No. 1514 concerning a complaint preferred by a trade union of teachers in a private engineering college, taking note of the Government's indication that the coverage of the Industrial Disputes Act, 1947 did not extend to teachers, the CFA recommended that the Government take appropriate legislative measures to guarantee teachers adequate protection against acts of anti-union discrimination.

In its conclusions in Case No. 2364 regarding the right to strike of government servants and teachers in the State of Tamil Nadu, the CFA had emphasized that teachers should have the right to strike.

The Government would therefore need to take measures to ensure that the freedom of association and collective bargaining rights of supervisory and managerial employees, agricultural workers, domestic workers and teachers are protected under the law.

Section 36-B

Section 36-B of the Industrial Disputes Act empowers the Government to exempt Government run industrial establishments from the application of the Act, if it is satisfied that adequate provisions exist for the investigation and settlement of industrial disputes in respect of workers employed in the establishment.

The CFA considers that the application of Section 36-B of the Industrial Disputes Act to railway employees would place them in a more unfavourable position than they enjoy at present. It would also expose them to dispute settlement procedures which do not have their confidence. The CFA therefore expressed the hope that the provisions would not be used at all.

Special Economic Zones Act, 2005

Section 49 of the Act empowers the central government to exempt any SEZ from any of the provisions of the Act or any other central Act or rules made thereunder. The government may also issue directions to modify the application of the law in relation to any SEZ. The proviso to the section provides that the powers of modification are not applicable to laws relating to trade unions, industrial and labour disputes, welfare of labour including conditions of work, PF, employer liability, workman's compensation, invalidity and old age pension and maternity benefits applicable in SEZs.

Some states in the country have SEZ related laws which provide that Development Commissioner of SEZs shall exercise the powers exercised by the Labour Commissioner and the Chief Inspector of Factories in respect of labour laws. Punjab and Haryana are examples of states that have such laws. The Development Commissioner of the SEZ is tasked with ensuring the speedy development of the zone.

In Case No. 2228 concerning workers in a manufacturing unit in the Visakhapatnam Export Processing Zone, noting that the Development Commissioner of the zone had been designated as the Grievance Redressal Officer who would look into the grievances of workers in the zone, the CFA considered that there could be incompatibility between the functions of Deputy Development Commissioner and Grievance Redressal Officer when performed by the same person. The CFA also noted that this mechanism may not always have the confidence of all parties concerned especially when allegations of anti-union discrimination are directed against the zone administration itself. It therefore requested the Government to take necessary steps so as to ensure that the functions of Grievance Redressal Officer are not performed by the Deputy Development Commissioner in the VEPZ but by an independent person or body, having the confidence of all parties concerned.

10. GOVERNMENT EMPLOYEES

Employees directly employed by the central and state governments in India cannot register trade unions under the Trade Unions Act, 1926. They however have the right to form associations to represent them. This right is implied in the Central Civil Services (CCS) (Conduct) Rules, 1964 applicable to central government employees and also the Central Civil Services (Recognition of Association) Rules.

Taking note of such legal restrictions on the free choice of public servants that are intended to prevent any form of political involvement by trade union members in the public sector or to deter them from taking strike action, the CEACR has considered that it is admissible for first level organizations of public servants to be limited to that category of workers, subject to two conditions **– firstly, that their organizations are not restricted to employees of any particular ministry, department or service and secondly, that they may join freely federations and confederations of their own choosing, like organizations of workers in the private sector. However, provisions stipulating that different organizations must be established for each category of public servant are incompatible with the right of workers to establish and join organizations of their own choosing (para 86, General survey)**

In Case No. 2680, a recent case concerning members of the All India Audit and Accounts Association, Kerala (AIAAK) representing the majority of the employees in the Audit and Accounts department of the Office of the Accountant General, Kerala wherein the complainant had alleged that following a peaceful demonstration, disciplinary measures were taken against officials and members of the AIAAK and false criminal cases were also foisted against them, the CFA examined the Central Civil Service (Recognition of Service Association) Rules that are applicable to the members of the AIAAK.

Taking note of the fact that government employees were entitled to form associations but not unions, the CFA recalled that the denial of the right of workers in the public sector to set up trade unions where this right is enjoyed by workers in the private sector, with the result that their associations do not enjoy the same advantages and privileges as trade unions involves discrimination as regards employed workers and their organizations as compared with private sector workers and their organizations. Such a situation gives rise to the question of compatibility of these distinctions with Art. 2 of Convention No. 87 according to which workers without distinction whatsoever shall have the right to establish and join organizations of their own choosing without previous authorization as well as Articles 3 and 8, paragraph 2 of the Convention.

The CFA was of the view that Rule 5 (c) that restricts membership in a service association to a distinct category of civil servants having common interest is not in conformity with freedom of association principles.

The CFA was of the view that Rule 6 (b) which provides that service associations shall not espouse or support the cause of individual government servants related to service matters restricts the freedom of association rights of service associations.

The CFA also considered that Rule 8 which empowers the government to withdraw the recognition accorded to a service association under the Rules for failure to comply with any of the conditions set out in Rules 5, 6 and 7, as being in violation of freedom of association principles.

The CFA therefore requested the government to take the necessary measures to amend rules 5, 6 and 8 of the Rules in order to ensure the freedom of association rights of civil servants.

Earlier, in its conclusions in Case No.1817 also, the CFA had examined the Central Civil Service (Recognition of Service Association) Rules. On that occasion also, the CFA had while examining Rule 5(c) which stipulates that membership is restricted to a distinct category of government servants having common interest, pointed out that it is admissible for membership of first-level organizations of public servants to be limited to that category of workers on condition that their organizations are not also restricted to employees of any particular ministry, department or service, and that the first-level organizations may freely join the federations and confederations of their own choosing Thus, the restriction on first-level organizations to limit their membership to government servants having common interest may be admissible, provided no such restriction is placed on the membership of higher-level organizations.

The CFA was of the view that Rule 5(e) and (g) that prohibits retired and former employees from becoming members or office bearers of an association is not in conformity with freedom of association principles. The CFA emphasized that retired and former employees should have the right to join organizations of their own choosing and it should be left to the organizations themselves to make provisions in their constitution or rules as to what right retired and former employees are entitled to. The CFA also drew the government attention to the principle that the rights of workers' organizations to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and effectively promote the interest of their members. For this right to be fully acknowledged, it is essential that the public authorities refrain from any intervention which might impair the exercise of this right whether it be in determining conditions of eligibility of their leaders or in the conduct of the election themselves. More specifically, for the purpose of bringing legislation which restricts union office to persons actually employed in the occupation concerned into conformity with the principles of free election of representatives, it is necessary at least to make these provisions more flexible by admitting as candidates persons who have been previously employed in the occupation concerned and by exempting from the occupational requirement a reasonable proposition of the officers of an organization. The CFA therefore requested the government to take steps to amend Rules 5 (e) and (g) accordingly.

In respect of Rule 6(g) which stipulates that any amendment to the constitution or by-laws of an association shall be made only with the prior approval of the Government, the CFA pointed out that amendments to the constitution of a trade union should be debated and adopted by the union members themselves. It emphasized that to guarantee the right of workers' organizations to draw up their constitutions and rules in full freedom, national legislation should only lay down formal requirements as regards trade union constitutions, and the constitutions and rules should not be subject to prior approval by the public authorities. The CFA therefore requested the Government to take steps to amend Rule 6(g) so that amendments to the constitution or by-laws of an association are not subject to prior government approval.

In respect of Rule 6(h) which provides that an association shall not start or publish any periodical, magazine or bulletin without the previous approval of the Government; Rule 6(i) which provides that an association shall cease to publish any periodical, magazine or bulletin, if directed by the Government to do so, on the ground that the publication thereof is prejudicial to the interests of the central government, the government of any state or any government authority or to good relations between government servants and the Government or any government authority, or to good relations between the Government of India and the Government of a foreign State; and Rule 6(j) which provides that the association shall not address any communication to, or enter into correspondence with, a foreign authority except through the Government which shall have the right to withhold it, the CFA recalled that it had emphasised on previous occasions that the right to express opinions on all issues of general or special interest to trade unions and their members, without previous authorization through the press or otherwise, is one of the essential elements of the rights of occupational organizations. Moreover, the fear of the authorities of seeing a trade union newspaper serve political ends unrelated to trade union activities or which, at least, lie far outside their normal scope, is not a legitimate reason to refuse to allow such a newspaper to appear. Finally, the principle that national organizations of workers should have the right to affiliate with international organizations carries with it the right, for these organizations, to make contact with one another and, in particular, to exchange their trade union publications The CFA therefore called upon the Government to take steps to amend clauses (h), (i) and (j) of Rule 6 in line with the above-mentioned principles.

Noting that Rule 7 stipulates that the verification by the Government of membership for the purpose of recognition of a service association shall be done by the check-off system in payrolls at such intervals and in such manner as the Government may by order prescribe, the CFA recalled that pre-established, precise and objective criteria for the determination of the representativity of workers' and employers' organizations should exist in the legislation and such a determination should not be left to the discretion of governments. It pointed out that such a determination of ascertaining or verifying the representative character of trade unions can best be made when strong guarantees of secrecy and impartiality are offered. Thus, verification of the representative character of a union should a priori be carried out by an independent and impartial body. The CFA therefore requested the Government to take steps to amend Rule 7 accordingly.

The CFA observes that generally, the Recognition Rules regulate issues pertaining to service associations in too much detail. It therefore drew the Government's attention to the principle that

legislation concerning workers' organizations should not undermine the rights of workers as defined by the principles of freedom of association. Overly detailed or restrictive legal provisions in this area may in practice hinder the creation and development of trade union organizations.

In a communication dated 30 September 1996, the Government indicated that civil servants in the country are differentiated from other workers and are accorded a special status. The Government stated that civil servants enjoy a high degree of job security and that their legitimate concerns such as wages, health and other areas of welfare are adequately taken care of by their terms of appointment and the Rules. Therefore, they do not need the protection granted by general labour legislation to other workers. It added that they civil servants need to remain totally impartial in the execution of their work. It therefore stated that it is not in a position to take any step which would tend to dilute the existing distinction between civil servants and industrial workers and is not able to therefore give effect to the CFA's recommendations.

Right to strike

Rule 7 (ii) of the Central Civil Services (Conduct) Rules provides that no government servant shall resort to or in any way abet any form of strike or coercion or physical duress in connection with any matter pertaining to his service or the service of any other government servant.

The Supervisory bodies have however held that recognition of the principles of freedom of association in the case of public servants does not necessarily imply the right to strike. They have held that their right to strike may be restricted or even banned in the case of public servants exercising authority in the name of the State or in essential services in the strict sense of the term, namely, those services whose interruption would endanger the life, personal safety or health of the whole or the part of the population.

In its conclusions in Case No. 2364 concerning government servants in Tamil Nadu which is discussed in greater detail subsequently in this paper, the CFA had emphasized that public servants other than those exercising authority in the name of the State or in essential services in the strict sense of the term, namely, those services whose interruption would endanger the life, personal safety or health of the whole or the part of the population, should have the right to strike.

Collective bargaining rights

Article 6 of Convention No. 98 reads as follows: "This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way." Thus, public servants engaged in the administration of the State stand excluded from the right to collectively bargain, under Convention No. 98.

The CEACR has stated that it has adopted a restrictive approach concerning this exception and that a distinction must be drawn between, on the one hand, public servants who by their functions are directly employed in the administration of the state (for example, civil servants employed in government ministries and other comparable bodies as well as ancillary staff) and all other persons employed by the government, by public enterprises or by autonomous public institutions. Only the former category of employees may be excluded from the scope of Convention No. 98.

The supervisory bodies have held that all public service workers other than those engaged in the administration of the State should enjoy collective bargaining rights and priority should be given to collective bargaining as the means to settle disputes arising in connection with the determination of the terms and conditions of employment in the public service.

In 1978, the ILO adopted the Labour Relations (Public Service) Convention (No.151) which requires ratifying States to promote machinery for negotiation or such other methods as will allow representatives of public employees to participate in the determination of the terms and conditions of employment in the public service. Only high-level employees whose functions are normally considered as policy making or managerial and employees whose duties are of a highly confidential nature and armed forces and the police may stand excluded from the scope of the Convention. Article 8 of the Convention provides that the settlement of disputes arising in connection with the determination of the terms and conditions of employment

This was followed by the adoption in 1981 of the Collective Bargaining Convention, 1981 (No. 154) which is applicable to all branches of economic activity. As regards the public service, it is provided that special modalities of application of the Convention may be fixed by national laws or regulations or national practice.

In its conclusions in Case No. 2364 concerning government employees in the state of Tamil Nadu, wherein the complainants had alleged that the collective bargaining rights of government employees had been violated by the State, the CFA recalled that public servants other than those engaged in the administration of the state, should enjoy collective bargaining rights and priority should be given to collective bargaining as the means of settling disputes arising in connection with the determination of the terms and conditions of employment of public servants.

The Government thereafter in a communication dated 21 September 2006 indicated that the government servants are treated as a separate category of workers and that they do not have the right to collective bargaining. However, they are provided with alternative negotiation machinery in the form of Joint Consultative Machinery. They can also approach the administrative tribunals and seek redress of their specific service-related grievances.

It would now be relevant to take a brief look at the Joint Consultative Machinery (JCM) and Compulsory Arbitration Scheme for central government employees started in 1966. The JCM is a bipartite body consisting of representatives of the government and recognized employees organizations. The scheme provides for the establishment of Joint Councils at the national, departmental, regional and office levels. It covers class III and class IV employees of the central government. The Joint Councils deal with matters concerning the conditions of work, standards of work, efficiency and staff welfare. The National Council deals with matters such as pay and dearness allowance. Disputes may be referred to a three member Board of Arbitration which has jurisdiction in respect of matters concerning pay and allowances, weekly hours of work and leave.

Thus, the JCM facilitates voluntary negotiations or collective bargaining between government employees and the government. Higher level public servants stand excluded from the JCM and Compulsory Arbitration scheme but such exclusion seems to be permissible under the provisions of Convention No. 151.

The aforesaid discussion would indicate that while some of the rights guaranteed under Conventions 87 and 98 have been extended to some categories of employees in the public service, the rules applicable to government employees will need to be reviewed to bring them into conformity with freedom of association principles, on the lines indicated by the CFA in the aforesaid cases.

Essential Services Maintenance Act (ESMA)

As indicated earlier, the Industrial Disputes Act, 1947 places restrictions on the right to strike. In addition, the Essential Service Maintenance Acts of different states place severe limitations on the right to strike. Between 1957 and 1981, various central Essential Service Maintenance Ordinances and enactments were in place. The central ESMA of 1981, the last such central law is no longer in force. However, some states in India have similar laws that are in force. The Haryana ESMA, 1974 is an example of one such law.

Broadly speaking, such Essential Services Maintenance laws empower the government to prohibit strikes in any essential service if it is satisfied that it is necessary in the public interest to do so. Any strike declared after the issue of such an order shall be illegal.

Other general features of such enactments are as follows: The term ‘essential service’ is defined in a wide manner to include postal, telegraph, telephone and related services, any railway service or any transport service, any service in or in connection with the working of any major port, any service in any establishment connected with the armed forces of the union, any service connected with any undertaking engaged in the purchase, procurement, storage, supply or distribution of food grains, any service in any establishment or undertaking dealing with the production, supply or distribution of coal, power, steel or fertilizers etc. In addition, the government is empowered to declare any other service as an ‘essential service’ if it is of the opinion that strikes in the service would prejudicially affect the maintenance of any public utility service or the maintenance of supplies and services necessary for the community or would result in infliction of grave hardship on the community.

The laws prescribe penalties for participation in or instigation of an illegal strike. Participation in illegal strikes is punishable with imprisonment or fine or both.

The Essential Services Maintenance Act has often been invoked by the government to prohibit strikes in the public sector and to take action against employees participating in a strike.

CFA cases relating to the Essential Services Maintenance laws

The ILO's Committee on Freedom of Association (CFA) has had occasion to examine such Essential Services Maintenance laws in the following cases:

Case Nos. 589 and 594:

In its conclusions in the aforesaid cases, **the CFA observed that the definition of the term "essential services" under the Essential Service Maintenance Ordinance, 1968 was very wide. Noting that the law establishes a list of government services including activities which do not appear to be essential such as general dock work, aircraft repairs, all transport services and the fact that the government can extend this list, it recommended that the government consider reforming the law to bring it into conformity with the principle that essential services should be defined as strictly as possible.**

Case No. 1091:

In a complaint dated 10 November 1981, the Trade Unions International of Public and Allied Employees (TUIPAE) had alleged that the Essential Services Maintenance Ordinance of 27 July 1981 violates international standards concerning trade union rights because, under its terms, strikes can be prohibited in postal and telecommunication services, railways, aviation, defence, production, transport, ports and docks, banks, petroleum industries, municipal and health services and in all industries and services connected to matters "with respect to which Parliament has the power to make laws".

Upon an examination of the list of services classified as 'essential' under the Ordinance, the CFA expressed the opinion that the range of services described as essential is an extensive one, going well beyond the concept of essential services defined as those whose interruption would endanger the existence or well-being of the whole or part of the population. **The CFA therefore recommended that the Government consider the possibility of reviewing the legislation by narrowing down the list of services in which strikes may be prohibited to essential services in the strict sense of the term.**

Taking note of the penalties prescribed under the law for participating in illegal strikes, the CFA observed that the penalties are severe and that the legislation can therefore hinder the development of harmonious industrial relations.

Case No. 1100

Various federations of trade unions in India including the All India Trade Union Congress, the Centre of Indian Trade Unions, the Indian National Trade Union Congress, Hind Mazdoor Sabha, Bhartiya Mazdoor Sangh, the United Trade Union Congress, the United Trade Union Congress (Lenin Sarani) and the Trade Union Coordination Centre preferred a complaint to the CFA in December 1981 alleging that the Essential Services Maintenance Act violates trade union rights.

The complainants pointed out that the Act gives the Government wide powers to ban strikes in almost every industry in India. It also imposes heavy penalties for participation in strikes prohibited under the Act

While examining the case, the CFA reaffirmed its conclusions in Case No. 1091. The CFA also drew the Government's attention to the fact that the development of harmonious industrial relations could be impaired by an inflexible attitude being adopted in the application of severe sanctions to workers who participate in strikes, and in particular that massive dismissals following strikes involve a serious threat to freedom of association.

Case No. 2364:

In 2002, the Government of Tamil Nadu enacted the Tamil Nadu Essential Services Maintenance Act (TESMA). The provisions of TESMA were on the lines on similar enactments as discussed above.

The Act allowed the government to issue orders prohibiting strikes in essential services in the public interest or in the interest of the public order. The term 'essential services' was defined in a wide manner so as to include a range of services including services provided by the secretariat staff of the state assembly and any public services and posts in connection with the affairs of the state. The term 'strike' was defined widely to include not only a refusal to work but also refusal to work overtime or any other conduct likely to result in substantial retardation of work in any essential sector.

The Act prescribed a punishment of up to three years' imprisonment and a fine of Rs. 5000/- against those who participate in or call for a strike or anyone who provides financial assistance for the conduct of a strike. Apart from these penalties, the Act allowed for disciplinary action against any employee participating in or instigating an illegal strike.

On 2 July 2003, following the unilateral decision of the government of Tamil Nadu to withdraw pension benefits, a coalition of organisations of government employees and teachers employed by the state went on a strike demanding restoration of the benefits. Even prior to the strike, on 30 June 2003, 2400 government employees were arrested.

On 4 July 2003, two days after the strike commenced, the Tamil Nadu Essential Services Maintenance (Amendment) Ordinance, 2003 (Tamil Nadu Ordinance 3 of 2003) was passed. The Ordinance was made operational with retrospective effect from 23 April, 2003. The Ordinance provided for the summary dismissal of employees who absent themselves during a strike and thus are deemed to be participants in the strike and also deemed to have admitted their misconduct. It further allowed for such an order of dismissal to be merely displayed on the notice board of the office where the employee was working or published in a newspaper thereby dispensing with the need for the order to be individually served on the concerned employee.

The very next day after the aforementioned Ordinance was passed, that is, on 5 July 2003, over 1,70,000 government employees and teachers were dismissed summarily. through announcements made on notice boards. Thereafter, on 07 July 2003, the strike was called off but the employees were not allowed to resume duty.

In the course of proceedings concerning the en masse dismissal before the Supreme Court of India, the majority of the employees were reinstated in service upon their giving an unconditional apology as well as an undertaking to abide by Rule 22 of the Tamil Nadu Government Servants Conduct Rules, 1973 in the future, as demanded. Rule 22 prohibits government employees from engaging in strikes and similar activities. On 6 August 2003, the Supreme Court pronounced its judgment in the said cases. The court held that government employees have no fundamental, statutory, equitable or moral right to go on strike.

In May 2004, a complaint was made to the CFA regarding the violation of trade union rights by TESMA and Rule 22 of the Government Servants Conduct Rules. In its conclusions, the CFA pointed out that public servants should also enjoy the right to strike, provided that the interruption of services does not endanger the life, personal safety or health of the whole or part of the population. The right to strike could however be restricted or prohibited for public servants exercising authority in the name of the State. In public services of fundamental importance and services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population, a certain minimum service may be requested, but in this case, the trade union organizations should be able to participate, along with employers and the public authorities, in defining the minimum service.

Noting that by virtue of Rule 22 of the Tamil Nadu Government Servants Conduct Rules and the TESMA, the right to strike is prohibited for government employees, including teachers, the CFA recommended that the Government take the necessary measures to amend the Tamil Nadu Government Servants Conduct Rules and the TESMA so as bring them in line with the aforesaid principles.

Recalling that arrests and dismissals of strikers on a large scale involves a serious risk of abuse and place freedom of association in grave jeopardy and that the competent authorities should be given appropriate instructions so as to obviate the dangers to freedom of association that such arrests and dismissals involve, the CFA recommended that the Government issue appropriate instructions to the police and the other competent authorities in this respect.

The Government thereafter indicated that in India, government servants are treated as a separate category of workers who cannot be given the right to strike.

In June 2006, the Government of Tamil Nadu passed the Tamil Nadu Essential Services Maintenance (Repeal) Act, 2006 (Act No.11 of 2006) repealing the Tamil Nadu Essential Services Maintenance Act, 2002. The repealing Act also provided that all actions taken under the TESMA and all proceedings pending thereunder before any court or authority shall abate. The Government however indicated its disinclination to the CFA to repeal Rule 22 of the Tamil Nadu Government Servants Rules

While the TESMA has been repealed, the Essential Service Maintenance laws that are in force in some states in India need to be amended in conformity with the freedom of association principles indicated above.

11. FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING RIGHTS IN PRACTICE

Having examined the national laws concerning the freedom of association and collective bargaining rights of workers in India, this paper now proceeds to take a brief look at the extent to which workers in India actually enjoy these rights in practice.

The rate of unionization of workers in the country is as such low and is particularly low for workers in the unorganized sector or informal sector workers. The changed economic context of India since 1991 and the consequent change in employment patterns in industrial establishments in the country has affected the unionization of workers. The decrease in the permanent workforce and increased informalisation of the workforce coupled with increased contracting and sub-contracting of core production work and the consequent insecurity of employment has placed such workers in a position where they are unable to form and join unions of their choice and exercise their collective bargaining rights.

Even permanent workers in industrial establishments are often unable to form and join trade unions of their choice and exercise their collective rights on account of widespread anti-union acts by employers.

Employers often refuse to recognize representative unions. They often by-pass representative unions and enter into settlements with management supported minority unions or even with individual workers.

The system of law enforcement is ineffective. Employers are seldom prosecuted or penalized for the commission of unfair labour practices under the Industrial Disputes Act, 1947.

Both conciliation proceedings and adjudicatory proceedings in industrial disputes are usually long drawn out. The requirement of a reference from the Government for adjudication of industrial disputes compounds the delay as despite the Supreme Court laying down clear guidelines for the exercise of the power of reference, the guidelines are often overlooked.

In short, there is a rampant violation of the freedom of association and collective bargaining rights of workers, by employers in the country.

12. INDIA'S STAND ON RATIFICATION OF CONVENTIONS NOS. 87 AND 98

The analysis in the previous section would indicate the urgent need for India to ratify Conventions Nos. 87 and 98. Ratification would ensure that that the national legislation relating to the freedom of association and collective bargaining rights of workers is upgraded in conformity with the principles contained in Conventions Nos. 87 and 98. Ratification would also help ensure that all categories of workers in India are entitled to these rights. In addition, ratification would help ensure compliance with freedom of association and collective bargaining principles in practice.

The Government of India has however over the last 60 years consistently been reluctant to ratify the Conventions. It has cited various reasons in support of its decision of not ratifying the Conventions. This paper now proceeds to examine the reasons given by the Government for not ratifying the Conventions.

The Government of India has indicated that it is not interested in formal ratification and that it can ratify the Conventions only when implementation of their provisions is fully achieved in Indian law and in practice.

This stand of the Government is impractical for the reason that achieving and sustaining compliance with the provisions of the Conventions under the law and in practice is a continuing process. If this were to be the criterion for ratification, barely any convention can be ratified by any country. India had also not adopted this yardstick when it came to the ratification of two other freedom of association related Conventions, namely, the Right of Association (Agriculture) Convention, 1921, (No.11) and the Rural Workers' Organizations Convention (No. 141).

Ratification ought to be the first step and not the other way around. Following ratification, the Government can work towards bringing its national laws and practice in conformity with the principles contained in the Conventions. In the process, it could be guided by the comments of the supervisory bodies, particularly, the CEACR and the CFA. If necessary, it could also seek the ILO's technical assistance for the purpose.
Therefore, the Government should not insist on its first achieving compliance with the provisions of the Conventions in law as well as in practice.

Ratification would involve the granting of union rights to government employees. This will affect their impartiality and political neutrality.

The main reservation of the Government of India to the ratification of Conventions Nos. 87 and 98 seems to stem from the fears it has concerning the extension of the guarantees contained in the Conventions to government employees in India. The Government has expressed its inability to ratify the Conventions on the ground that the trade union system of the country is highly politicized and that therefore permitting the unionization of government employees and the exercise of collective bargaining rights by them would impair their impartial functioning.

This position of the Government is firstly not in conformity with freedom of association principles and cannot justify the denial of the rights set out in the Conventions to all government employees in the country, as a class. The ILO supervisory bodies have held that government employees should have the right to form and join trade unions of their own choosing without previous authorization. However, it may be admissible for first level organizations of public servants to be limited to that category of workers, subject to two conditions-firstly, that their organizations are not restricted to employees of any particular ministry, department or service and secondly, that they may join freely federations or confederations of their own choosing.

The supervisory bodies have also held that government employees should enjoy collective bargaining rights. They have held that an exception may be made only in the case of public servants directly involved in the administration of the state such as civil servants employed in government ministries. Moreover, the Labour Relations (Public Service) Convention (No. 151) permits the exclusion only of high level employees whose functions are normally considered as policy making or managerial and employees whose duties are of a highly confidential nature.

Therefore, any restriction on the freedom of association and collective bargaining rights of government employees ought to be only in accordance with the aforesaid principles.
Secondly, the fear of the Government that permitting unionization of government employees could prevent them from discharging their duties impartially and fairly is only a presumption.

Thirdly, in practice, associations of central and state government employees in the country are already closely associated with central trade union federations in the country even though they may not be formally affiliated to them and this has not resulted in preventing them from discharging their functions in a fair and neutral manner.

Government employees in the country are allowed to form associations. They have fair working conditions and fair wages. They have alternative dispute redressal mechanisms such as the JCM and CAT. They do not therefore need additional rights.

The Government has sought to justify the denial of trade union rights to government employees on the ground that they are allowed to form associations. It has claimed that they have fair working conditons and fair wages. They also have alternative dispute redressal mechanisms such as the Joint Consultative Machinery, the Central Administrative Tribunal etc.

This position of the Government is again not in conformity with freedom of association principles. While government employees may be entitled to form associations, the fact remains that such associations do not have the same rights and protection under the law as trade unions in the country do. Furthermore, government employees in the country do not have any protection against acts of anti-union discrimination and acts of interference in the functioning of their organizations. They also do not enjoy collective bargaining rights, like other workers in the country. The Joint

Consultative Machinery does not cover all government employees.

Moreover, even assuming that government employees have good working conditions and fair wages, that cannot be a legitimate ground for denuing them the rights guaranteed by Conventions Nos. 87 and 98.

The guarantees of the two Conventions are by and large available to workers in India. National laws and constitutional provisions would suffice.

This again would not be a valid ground for refusal to ratify the two Conventions. On the other hand, if indeed the guarantees provided under the Conventions are by and large available to workers in India, the Government of India should indicate its willingness to ratify the Conventions and subject itself to the supervisory mechanisms of the ILO, particularly the CEACR, which can then make necessary recommendations for legislative reforms in India.

Supervisory and managerial employees should not have trade union rights.

The former Chief Labour Commissioner of the Government of India, Mr. S. Nath had indicated that Conventions Nos. 87 and 98 had not been ratified by India as it has been the policy of the Government to exclude supervisory and managerial employees from the exercise of freedom of association and collective bargaining rights.

This stand of the government is again not in consonance with freedom of association principles. The supervisory bodies have pointed out that Article 2 of Convention No.87 make no distinction based on the nature of the function or hierarchical level of workers, who should all enjoy their right to organize including managerial and executive staff. The supervisory bodies have considered that provisions which prevent workers in this category from joining trade unions in which other workers are represented is not necessarily incompatible with the requirements of Article 2 of Convention No.87 on condition that two requirements are met. First, that such workers have the right to form their own associations to defend their interest and second, that the categories of such staff are not defined so broadly as to weaken the organization of other workers in the enterprise or branch of activity by depriving them of a substantial proportion of their present or potential membership. The CFA has also taken the view that the expression 'supervisors' should be limited to cover only those persons who genuinely represents the interests of employers.

In the light of these principles, supervisory and managerial employees in the country should be extended protection against anti-union discrimination and they should enjoy collective bargaining rights on par with other workers in the country.

Technical reasons: Ratification implies initiating cumbersome, complex and relatively slow

procedures.

The Government's stand that ratification of the Conventions would entail the initiation of cumbersome, complex and relatively slow procedures is not correct. Under Article 73 of the Constitution of India, the executive power of the Union Government is co-extensive with the legislative power of the Parliament. As per sub-clause (b) of clause (1) of Article 73, the executive power of the Union extends to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement. Article 253 of the Constitution vests the Parliament with the power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. Thus, the Parliament of India has the power to make legislation for giving effect to any international Convention. It therefore follows that the Union Government has the power to enter into any treaty or Convention without prior Parliamentary approval. Thus, there are no valid technical reasons that would prevent the Government from ratifying the Conventions if it wishes to.

13. CONCERNS FROM AN ECONOMIC PERSPECTIVE

The stand of the Government of India in respect of social clauses or any other attempt to link trade and labour standards suggests the Government may also have concerns about ratifying the Conventions, from an economic perspective. It is likely that its concerns are: (a) that ratification could lead to the comparative advantage of the country being eroded and (b) that it could also result in trade and investment shifting to countries with lower labour standards. At this point, the paper therefore very briefly re-visits the arguments for and against the linkage of trade and labour standards.

Those advocating for such a linkage, the USA and the EU, in particular, argue that core labour standards provide a universal social floor and that observance of these standards will help avoid a race to the bottom. On the other hand, those against such a linkage argue such linkages are nothing but disguised protectionist measures designed to deny market access for goods manufactured in developing countries. They also argue that linking trade and labour would result in the erosion of the comparative advantage of developing countries.

Even while the debate between the Governments of States for and against such a linkage goes on, other private initiatives such as the Social Accountability 8000 standards (SA 8000) and Worldwide Responsible Apparel Protection (WRAP) certification mandating adherence by industrial establishments to the core labour standards, have made inroads into the country.

While the issue of whether or not there should be such a linkage is debatable, it is clear that the economic growth of any country ought not to take place at the cost of the basic human rights of its workers.

Moreover, the notion that a country's comparative advantage could be eroded by adherence to core labour standards is nothing but a misconception. Economic studies indicate that the implementation of the core labour standards will not result in the implementation of significantly higher labour costs or any additional economic burden and will not harm the economic performance of developing countries.

Research has shown that observance of core labour standards could improve labor market efficiency and worker productivity. Studies indicate that free, strong and representative workers' organizations have a major role to play in building workplace relations conducive to improvements in working conditions and increases in productivity and competitiveness. Studies also indicate that the observance of core labour standards can improve efficiency by raising the skill levels of the workforce and creating an environment that encourages productivity, growth and innovation.

Adherence to freedom of association and collective bargaining standards would also help counter balance the market power of employers and reduce income inequality which in turn would help accelerate economic development.The observance of core labour standards, particularly freedom of association and collective bargaining rights also helps ensure that the benefits of growth are shared and this has a positive effect on the economic development of a country.

On the other hand, there is no credible evidence that suggests that countries which do not respect core labour standards are more competitive in the global economy.

In respect of the issue of Foreign Direct Investment (FDI), studies indicate that respect for national and international labour standards is a major factor for attracting investment that promotes long term, high quality growth. Studies on the effect of freedom of association and collective bargaining rights on FDI also indicate that stronger rights are associated with greater FDI.

Thus, India's ratification of the Conventions would help enhance and not undermine India's economic performance.

14. ADVANTAGES OF RATIFICATION AND DISADVANTAGES OF NON-RATIFICATION

Benefits of Ratification

India's ratification of the Conventions would indicate its commitment to the observance of internationally recognized core labour standards and increase its influence and enhance its standing in the international arena.

In addition, as the discussion in the previous section would indicate, ratification of the Conventions would also result in economic benefits for the country.

Ratification of the Conventions would obviously be beneficial to workers in the country and their organizations as it would lead to an improvement in the national labour standards concerning the freedom of association and collective bargaining rights and also help ensure better implementation of these standards in practice.

Respect for freedom of association and collective bargaining rights can lead to better labour-management relations and co-operation between them thereby reducing costly labour-management conflicts and promote industrial harmony and social stability.

Studies on the relationship between trade unions and productivity have indicated that trade unions can enhance productivity and efficiency and that unionized workers are more likely to adopt productivity raising innovations relating to technological change, changing product mix and reorganization of work. It is also obvious that adherence to core labour standards and the promotion of decent work would facilitate human capital development which is necessary to achieve long term growth.

Thus, ratification of the Conventions would be beneficial to the country as such and also the workers and the employers in the country.

Consequences of India's Failure to Ratify the Conventions

The aforesaid discussion would establish that there are no sound reasons for India's failure to ratify Conventions Nos. 87 and 98 and that ratification of the Conventions really depends only on the political will of the Government to implement the core labour standards in the country.

India's failure to ratify the Conventions undermines its credibility in the international arena. It conveys the impression that India is a country that wishes to achieve rapid economic growth at the expense of basic human rights. Giving such an impression at a time when there is a clear international consensus on the need to adhere to core labour standards and promote the goal of decent work for all, certainly hurts its reputation.

Apart from this, India's failure to ratify the Conventions also leaves its workers more vulnerable to exploitation and unfair labour practices which in turn adversely affects the country's economic development as well as human capital development.

15. CONCLUSIONS

Considering the many advantages of ratification of Conventions Nos. 87 and 98, the Government of India would need to change its mindset and reconsider its stand on the issue of ratification of the Conventions. It would need to view the issue afresh from a long term perspective recognizing that ratification of the Conventions would be in the interest of the Government and workers and employers in the country.

It would also need to view the issue of ratification of the Conventions from a human rights perspective keeping in mind that "The failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve conditions in their own countries." In other words, it would need to recognize that all workers in all countries would benefit from the worldwide ratification and implementation of the ILO Core Conventions.

As a founder member of the ILO, India should take the lead and ratify all the eight fundamental conventions of the ILO. This would also be in consonance with India's constitutional and democratic values.

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