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CHAPTER V

The right to strike

Introduction

136. Strike action, which is the most visible form of collective action in the event of a labour dispute, is often seen as the last resort of workers' organizations in the pursuit of their demands. It is also the means of action which gives rise to the most controversy, which is reflected in the discussions within the supervisory bodies and in particular in the large number of complaints presented to the Committee on Freedom of Association on this subject. The right to strike also raises special difficulties in the public and semi-public sectors, where the concept of employer is not without ambiguities and where the problem of essential services arises more frequently than in other sectors, since the exercise of this right inevitably affects third parties who sometimes feel that they are the victims in disputes in which they have no part. The Committee believes that it would be useful to explain in some detail its views on this essential feature of industrial relations, with reference to the existing substantive provisions and the process which has led it to establish certain principles on this subject. However, before proceeding, it would like to make some general observations.

137. First, strike action cannot be seen in isolation from industrial relations as a whole. It is true that it is a basic right, but it is not an end in itself. Strikes are expensive and disruptive for workers, employers and society and when they occur they are due to a failure in the process of fixing working conditions through collective bargaining which should remain the final objective.

138. Furthermore, more than any other aspect of industrial relations, strike action is often the symptom of broader and more diffuse issues, so that the fact that a strike is prohibited by a country's legislation or by a judicial order will not prevent it from occurring if economic and social pressures are sufficiently strong. In addition, while the judicial authorities generally have to confine themselves to applying existing legal rules to strikes, it is not unusual for workers and their unions to launch strikes precisely with the aim of having these rules changed, which inevitably leads to differences of opinion and even further disputes.

139. The Committee also emphasizes that the maintaining of the employment relationship is a normal legal consequence of recognition of the right to strike. However, in some countries with the common-law system strikes are regarded as having the effect of terminating the employment contract,

leaving employers free to replace strikers with new recruits.[1] In other countries, when a strike takes place, employers may dismiss strikers or replace them temporarily, or for an indeterminate period. Furthermore, sanctions or redress measures are frequently inadequate when strikers are singled out through some measures taken by the employer (disciplinary action, transfer, demotion, dismissal); this raises a particularly serious issue in the case of dismissal, if workers may only obtain damages and not their reinstatement. In the Committee's view, legislation should provide for genuine protection in this respect, otherwise the right to strike may be devoid of content.

140. Lastly, one should not overlook the sociological dimension of strike action, which, like any other social phenomenon, is affected by economic, social, technological and other changes to which it has to adapt. To name only a few examples, technological advances, increasing globalization and the development of multinational enterprises — all factors profoundly affecting the conditions in which goods and services are produced and their relationship with work — cannot but influence the issue of strike action. Change can also be seen in the motives underlying strikes: while most strikes used to support demands for improved pay or other working conditions, strikes have recently been held in some countries "for the protection of employment" or "against delocalization", sometimes with backing from employers.

141. The ILO instruments are the primary source of law in this context, but the right to strike is also recognized in several other international or regional instruments, and in national legislation and practice.

ILO instruments

142. Although the right to strike is not explicitly stated in the ILO Constitution or in the Declaration of Philadelphia, nor specifically recognized in Conventions Nos. 87 and 98, it seemed to have been taken for granted in the report prepared for the first discussion of Convention No. 87.[2] The right to strike was mentioned several times in that part of the report describing the history of the problem of freedom of association and outlining the survey of legislation and practice.[3] In the conclusions and observations of the same report, it was also mentioned in connection with the special case of public servants and voluntary conciliation.[4] However, during discussions at the

[1] Although this is rare in practice, workers are vulnerable to this type of measure. See, for example, CFA, 277th Report, Case No. 1540 (*United Kingdom*), paras. 47-98.

[2] ILC, 30th Session, 1947, Report VII, *Freedom of Association and Industrial Relations*.

[3] ibid., pp. 30, 31, 34, 46, 52, 73-74.

[4] "... the recognition of the right of association of public servants in no way prejudges the question of the right of such officials to strike, which is something quite apart from the question under consideration", ibid., p. 109; "... if the parties have recourse by mutual agreement to an agency for conciliation, they should be obliged to refrain from strikes or lockouts during the procedure of conciliation." ibid., p. 121.

Conference in 1947 and 1948, no amendment expressly *establishing* or *denying* the right to strike was adopted or even submitted. At present, only Article 1 of the Abolition of Forced Labour Convention, 1957 (No. 105),[5] and Paragraphs 4, 6 and 7 of the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92),[6] mention strike action, albeit indirectly. However, several resolutions of the International Labour Conference, regional conferences and industrial committees[7] refer to the right to strike or to measures to guarantee its exercise.

Other international and regional instruments

143. Article 8(1)(d) of the International Covenant on Economic, Social and Cultural Rights provides that the States parties to the Covenant undertake to ensure, inter alia, "... the right to strike, provided that it is exercised in conformity with the laws of the particular country".[8] At the regional level, article 6(4) of the European Social Charter of 1961 expressly recognizes the right to strike in the event of a conflict of interests, subject to the obligations resulting from collective agreements in force.[9] Article 27 of the Inter-American Charter of Social Guarantees of 1948 stipulates that: "Workers have the right to strike. The law shall regulate the conditions and exercise of that right."[10] The

[5] Forced or compulsory labour is prohibited ... "(d) as a punishment for having participated in strikes;".

[6] "4. If a dispute has been submitted to conciliation procedure with the consent of all the parties concerned, the latter should be encouraged to abstain from strikes and lockouts while conciliation is in progress ...

6. If a dispute has been submitted to arbitration for final settlement with the consent of all parties concerned, the latter should be encouraged to abstain from strikes and lockouts while the arbitration is in progress and to accept the arbitration award.

7. No provision of this Recommendation may be interpreted as limiting, in any way whatsoever, the right to strike."

[7] For example: para. 15 of the resolution concerning trade union rights and their relation to civil liberties, 1970; para. 1(3) of the resolution concerning protection of the right to organize and to bargain collectively, Third Labour Conference of the American States which are Members of the International Labour Organization, Mexico, 1946; paras. 13(2) and 17 of the Resolution concerning industrial relations in inland transport, 1947.

[8] Of the 83 member States of the ILO which have ratified *both* Convention No. 87 and the Covenant, four (*Japan, Netherlands, Norway, Trinidad and Tobago*) registered a reservation specifically concerning Article 8(1)(d). Four others (*Algeria, India, Mexico, New Zealand*) accompanied their ratification with a declaration or general reservation concerning Article 8. Japan made a declaration of interpretation concerning fire-fighting personnel. France stated that it would apply the provisions of the Covenant concerning the right to strike in accordance with article 6(4) of the European Social Charter.

[9] Concerning the genesis of the European Social Charter and the influence which ILO standards have had on it, see *International Labour Review*, Vol. LXXXIV, No. 5, Nov. 1961, pp. 364-365; No. 6, Dec. 1961, pp. 475-476.

[10] Inter-American Charter of Social Guarantees adopted by the Ninth International Conference of American States, Bogota, 1948. The sixth paragraph of the Preamble — a text

right to strike is also recognized in article 8(1)(b) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. [11]

National legislation and practice

144. An examination of national legislation and practice shows that the manner and extent to which the right to strike is recognized varies from country to country. Although it is enshrined in the Constitution of some countries, [12] it is most often recognized in general legislation on trade unions or collective bargaining and accompanied by a number of more or less significant restrictions, depending on the country, which may sometimes amount in practice to an actual ban. In other countries the right to strike is not expressly recognized in legislation, although immunities are provided for as regards civil liability, under certain conditions. [13]

ILO supervisory bodies

145. In the absence of an express provision on the right to strike in the basic texts, the ILO supervisory bodies have had to determine the exact scope and meaning of the Conventions on this subject. These bodies are mainly the Committee on Freedom of Association within the framework of the special procedure set up to examine complaints of violations of freedom of association and the present Committee under the terms of articles 19 and 22 of the Constitution.

Committee on Freedom of Association

146. As early as its second meeting in 1952, the Committee on Freedom of Association affirmed the principle of the right to strike, stating that it is an "essential [element] of trade union rights" [14] and stressing shortly afterwards that "in most countries strikes are recognized as a legitimate weapon of trade

which dates from the same period as the international labour Conventions on freedom of association — states that it is "to the public interest, from the international point of view, to enact the most comprehensive social legislation possible, to give workers guarantees and rights on a scale not lower than that fixed in the Conventions and Recommendations of the International Labour Organization".

[11] Additional protocol of 1988, known as the "Protocol of San Salvador".

[12] For example: *Argentina, Burkina Faso, France, Portugal, Romania, Rwanda.*

[13] For example: *Ireland, United Kingdom.*

[14] Second Report, 1952, Case No. 28 (*Jamaica*), para. 68.

unions in furtherance of their members' interests".[15] Although the Committee subsequently specified the content of this right in a large number of cases, taking account of the particular circumstances brought to its attention, it has never departed from this position of principle.[16] In dealing with complaints, the Committee has considered that "... it should be guided in its task, among other things, by the provisions that have been approved by the Conference and embodied in the Conventions on freedom of association, which afford a basis for comparison when particular allegations are examined".[17] As regards more specifically the right to strike, the Committee based itself, inter alia, on the provisions of the Conventions on freedom of association.[18]

Committee of Experts

147. As early as 1959, the Committee expressed in its General Survey the view that the prohibition of strikes by workers other than public officials acting in the name of the public powers "... may sometimes constitute a considerable restriction of the potential activities of trade unions ... There is a possibility that this prohibition may run counter to Article 8, paragraph 2, of the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)".[19] This position was subsequently reiterated and reinforced: "a general prohibition of strikes constitutes a considerable restriction of the opportunities opened to trade unions for furthering and defending the interests of their members (Article 10 of Convention No. 87) and of the right of trade unions to organize their activities";[20] "the right to strike is one of the essential means available to workers and their organizations for the promotion and protection of their economic and social interests. These interests not only have to do with better working conditions and pursuing collective demands of an occupational nature, but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to the workers".[21] The Committee's reasoning is therefore based on the recognized right of workers' and employers' organizations to organize their activities and to formulate their programmes for the purposes of furthering and defending the interests of their members (Articles 3, 8 and 10 of Convention No. 87).[22]

[15] Fourth Report, 1953, Case No. 5 (*India*), para. 27.

[16] *Digest*, paras. 362-363.

[17] *Digest*, p. 2.

[18] *Digest*, paras. 366, 379, 416, 438, 443.

[19] *General Survey*, 1959, para. 68.

[20] *General Survey*, 1973, para. 107.

[21] *General Survey*, 1983, paras. 200, 205.

[22] Article 3(1): "Workers' and employers' organizations shall have the right ... to organize their ... activities and to formulate their programmes";
Article 3(2): "The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof";

148. The words "activities and ... programmes" in this context acquire their full meaning only when read together with Article 10, which states that in this Convention the term "organization" means any organization "for furthering and defending the interests of workers or of employers". The promotion and defence of workers' interests presupposes means of action by which the latter can bring pressure to bear in order to have their demands met. In a traditional economic relationship, one of the means of pressure available to workers is to suspend their services by temporarily withholding their labour, according to various methods, thus inflicting a cost on the employer in order to gain concessions. This economic logic cannot be applied as such to the public sector, although here again the suspension of labour services is the last resort available to workers. The Committee therefore considers that the ordinary meaning of the word "programmes" includes strike action, which led it very early on to the view that the right to strike is one of the essential means available to workers and their organizations to promote their economic and social interests.

149. Under Article 3(1) of Convention No. 87, the right to organize activities and to formulate programmes is recognized for workers' and employers' *organizations*. In the view of the Committee, strike action is part of these activities under the provisions of Article 3; it is a collective right exercised, in the case of workers, by a group of persons who decide not to work in order to have their demands met. The right to strike is therefore considered as an activity of workers' organizations within the meaning of Article 3. [23]

150. As regards the practice followed in the various member States, an examination of the national legislation currently in force shows that although the conditions and restrictions of the right to strike vary enormously, the *principle* of the strike as a means of action of organizations is now widely recognized. The Committee points out in this connection that while 102 countries had ratified the Convention as of 31 December 1992, in its reports of 1992 and 1993 it made observations only on about 40 countries, and some of these referred merely to the conditions in which the right to strike is exercised: this shows that the legislation of more than 60 per cent of the countries was considered satisfactory with regard to Convention No. 87.

151. In the light of the above, the Committee confirms its basic position that the right to strike is an intrinsic corollary of the right to organize protected by Convention No. 87. That being said, the Committee emphasizes that the right to strike cannot be considered as an absolute right: not only may it be subject to a general prohibition in exceptional circumstances, but it may be governed by

Article 8(2): The law of the land, which organizations and their members must respect, must not "be such as to impair, nor shall it be applied as to impair, the guarantees provided for in this Convention".

[23] It should be noted, however, that the protection provided for in Article 1(d) of the Abolition of Forced Labour Convention, 1957 (No. 105) extends to individuals, and that the right to strike recognized by the international instruments referred to in paragraph 143 of this survey also applies to workers as individuals.

provisions laying down conditions for, or restrictions on, the exercise of this fundamental right.

General prohibition of strikes

152. A general prohibition of strikes, such as occurs in certain countries, may arise from specific provisions in the law.[24] It may also result from provisions adopted under emergency or exceptional powers, the government invoking a crisis situation to justify its intervention. Inasmuch as general prohibitions of this kind are a major restriction of one of the essential means available to workers and to their organizations for furthering and defending their interests, such measures cannot be justified except in a situation of acute national crisis and then, only for a limited period and to the extent necessary to meet the requirements of the situation. This means genuine crisis situations, such as those arising as a result of a serious conflict, insurrection or natural disaster in which the normal conditions for the functioning of society are absent.

153. A less general but still very serious prohibition may also result in practice from the cumulative effect of the provisions relating to collective labour disputes under which, at the request of one of the parties or at the discretion of the public authorities,[25] disputes must be referred to a compulsory arbitration procedure leading to a final award which is binding on the parties concerned.[26] These systems make it possible to prohibit virtually all strikes or to end them quickly: such a prohibition seriously limits the means available to trade unions to further and defend the interests of their members, as well as their right to organize their activities and to formulate their programmes, and is not compatible with Article 3 of Convention No. 87.

[24] For example: The Committee requested the Government of *Chad* to repeal *specifically* Ordinance No. 30 of 26 Nov. 1975, which had "suspended all strike action on the national territory" (RCE 1993, p. 181).

[25] For example: *Antigua and Barbuda*: ss. 19, 20 and 21 of the Labour Court Act of 1976. *Honduras*: s. 555(2) of the Labour Code. *Kuwait*: s. 88 of the Labour Code. *Malta*: ss. 27 and 34 of the Industrial Relations Act of 1976. *Trinidad and Tobago*: s. 65 of the Industrial Relations Act, as amended in 1978.

[26] For example: *Bolivia*: s. 113(c) of the General Labour Act of 1939. *Colombia*: ss. 448(3) and (4) and 450(1)(g) of the Labour Code. *Côte d'Ivoire*: s. 183 of the Labour Code. *Dominica*: s. 59(1) of Industrial Relations Act No. 18 of 1986, as amended. *Guyana*: s. 3 of the Law on arbitration in public utilities and the public health services. *Nigeria*: Industrial Disputes Decree No. 7 of 1976. *Philippines*: s. 263(g) and (i) of the Labour Code. *Senegal*: ss. 238-245 of the Labour Code. *Swaziland*: s. 63(1) of the Industrial Relations Act of 1980.

Specific restrictions

154. In some countries legislation, while admitting the principle of the right to strike, imposes a number of restrictions on the exercise of this right; such restrictions vary in extent, and most often concern certain categories of workers because of their status (public service), the functions they perform (essential services, role in the industrial relations system), their hierarchical rank (managerial staff) or any combination of these. [27] Other restrictions also relate to strike objectives or methods, or the obligation to give advance notice (clauses imposing a waiting period).

155. The legislative restrictions imposed on the public service and essential services are often very similar or even identical, since work in essential services is often carried out by public officials or employees with a related status. The Committee considers that the essential criterion is not so much the public or private nature of the functions concerned as the nature of the tasks carried out. However, the distinction may be useful here since, while it is easy to imagine situations in which workers in the private or semi-private sectors perform duties which undeniably come under the heading of essential services (for security reasons, for example), there are very broad categories of other workers who, despite the fact that they belong to the public service, cannot be assimilated to groups for which the prohibition or restriction of the right to strike would be justified.

Restrictions relating to the public service

156. Convention No. 87 guarantees the right to organize to workers in the public service. However, their corollary right to strike may be either limited or prohibited if they are governed by restrictive provisions, such as those referred to in paragraph 151 above. National legislation varies widely in this respect: at one end, there are systems which specifically recognize it [28] and at the other end, there are those that specifically prohibit it. [29] In some countries there are no laws or regulations on the subject, which can give rise to radically different interpretations by the public authorities: tacit prohibition or recognition. Furthermore, public servants are sometimes governed by entirely separate legislation which defines, in particular, the conditions for their right to strike, [30] whereas other countries make no distinction between the private and public

[27] In its General Survey of 1959, the Committee had already commented on this point, in particular as regards the restrictions applicable to the public service and essential services (para. 68).

[28] For example: *Côte d'Ivoire, Fiji, France, Gabon, Poland, Spain.*

[29] For example: *Bolivia, Republic of Korea.*

[30] For example: *Central African Republic, Guatemala, Italy, Lesotho, Luxembourg, Portugal.*

sectors, so that workers in the latter must observe the procedures laid down in the general legislation in order to strike. [31]

157. Even when the right to strike is recognized in the public service, this does not mean that all public servants enjoy unlimited freedom in this respect. In most countries law and practice establish various restrictions and conditions, which are generally based on such criteria as the hierarchical rank or level of responsibility of the employees concerned, the nature of the services they perform, the conditions to be observed where a strike is called and held, and even the parties' choice of the machinery for settling disputes. [32]

158. In the view of the Committee, a too broad definition of the concept of public servant is likely to result in a very wide restriction or even a prohibition of the right to strike for these workers. One of the main difficulties is due to the fact that the concept itself varies considerably from one legal system to another. For example, the terms "civil servant", "fonctionnaire" and "funcionario" are far from having the same coverage; furthermore, an identical term used in the same language does not always mean the same thing in different countries; lastly, some systems classify public servants in different categories, with different status, obligations and rights, [33] while such distinctions do not exist in other systems or do not have the same consequences. Although the Committee cannot overlook the special characteristics and legal and social traditions of each country, it must, however, endeavour to establish fairly uniform criteria in order to examine the compatibility of legislation with the provisions of Convention No. 87. It would be futile to try to draw up an exhaustive and universally applicable list of categories of public servants who should enjoy the right to strike or be denied such a right. As it has already noted, [34] the Committee considers that the prohibition of the right to strike in the public service should be limited to public servants exercising authority in the name of the State. The Committee is aware of the fact that except for the groups falling clearly into one category or another, the matter will frequently be one of degree. In borderline cases, one solution might be not to impose a total prohibition of strikes, but rather to provide for the maintaining by a defined and limited category of staff of a negotiated minimum service when a *total and prolonged* stoppage might result in *serious* consequences for the public.

Restrictions relating to essential services

159. Numerous countries have provisions prohibiting or limiting strikes in essential services, a concept which varies from one national legislation to

[31] For example: *Algeria, Australia, Egypt, Hungary, Iceland, India, Mauritania, Sweden.*

[32] For example: *Canada*: Public Service Staff Relations Act: the choice, which can be reviewed periodically by workers, between two procedures, one of which excludes strike action.

[33] For example: *Germany*: Beamte, Arbeitnehmer (Angestellte, Arbeiter). *Turkey*: manual workers, office employees.

[34] *General Surveys*: 1959, para. 68; 1973, para. 109; 1983, para. 214.

another. They may range from merely a relatively short limitative enumeration [35] to a long list which is included in the law itself. [36] Sometimes the law includes definitions, from the most restrictive to the most general kind, covering all activities which the government may consider appropriate to include or all strikes which it deems detrimental to public order, the general interest or economic development. [37] In extreme cases, the legislation provides that a mere statement to this effect by the authorities suffices to justify the essential nature of the service. [38] The principle whereby the right to strike may be limited or even prohibited in essential services would lose all meaning if national legislation defined these services in too broad a manner. As an exception to the general principle of the right to strike, the essential services in which this principle may be entirely or partly waived should be defined restrictively: the Committee therefore considers that essential services are only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population. [39] Furthermore, it is of the opinion that it would not be desirable — or even possible — to attempt to draw up a complete and fixed list of services which can be considered as essential.

160. While recalling the paramount importance which it attaches to the universal nature of standards, the Committee considers that account must be taken of the special circumstances existing in the various member States, since the interruption of certain services which in some countries might at worst cause economic hardship could prove disastrous in other countries and rapidly lead to conditions which might endanger the life, personal safety or health of the population. A strike in the port or maritime transport services, for example, might more rapidly cause serious disruptions for an island which is heavily dependent on such services to provide basic supplies to its population than it would for a country on a continent. Furthermore, a non-essential service in the

[35] For example: *Algeria, Dominican Republic, Haiti, Hungary, Lesotho.*

[36] For example: *Bolivia*: Supreme Decree No. 1598 of 1950. *Colombia*: ss. 430 and 450(1)(a) of the Labour Code and Decrees Nos. 414 and 437 of 1952; 1543 of 1955; 1593 of 1959; 1167 of 1963; 57 and 534 of 1967. *Ecuador*: s. 503 of Act No. 133 to reform the Labour Code. *Ethiopia*: s. 136(2) of Proclamation No. 42/1993 respecting labour. *Greece*: s. 4 of Act No. 1915 of 1990. *Mali*: Decree No. 90-562/P-RM of 22 Dec. 1990. *Swaziland*: s. 65(6) of the Industrial Relations Act of 1980.

[37] For example: *Côte d'Ivoire*: s. 183 of the Labour Code. *Dominica*: s. 59(1)(b) of Industrial Relations Act No. 18 of 1986, as amended. *Trinidad and Tobago*: s. 65 of the Industrial Relations Act. *Tunisia*: s. 384 of the Labour Code.

[38] For example: *Guatemala*: s. 243 of the Labour Code. *Pakistan*: s. 33(1) of the Industrial Relations Ordinance of 1969. *Philippines*: s. 263(g) and (i) of the Labour Code. *Romania*: ss. 38-43 of Act No. 15 of 1991 respecting the settlement of industrial disputes.

[39] *General Survey*, 1983, paras. 213-214. See also the observation of the Committee on this point concerning *Ecuador* (RCE 1993, p. 193). As regards *Lesotho*, the Committee has noted with satisfaction that s. 232(1) of the 1992 Labour Code defines essential services as indicated above (RCE 1993, p. 206).

strict sense of the term may become essential if the strike affecting it exceeds a certain duration or extent so that the life, personal safety or health of the population are endangered (for example, in household refuse collection services). In order to avoid damages which are irreversible or out of all proportion to the occupational interests of the parties to the dispute, as well as damages to third parties, namely the users or consumers who suffer the economic effects of collective disputes, the authorities could establish a system of minimum service in other services which are of public utility ("services d'utilité publique") rather than impose an outright ban on strikes, which should be limited to essential services in the strict sense of the term.

Negotiated minimum service

161. In the view of the Committee, such a service should meet at least two requirements. Firstly, and this aspect is paramount, it must genuinely and exclusively be a *minimum* service, that is one which is limited to the operations which are strictly necessary to meet the basic needs of the population or the minimum requirements of the service, while maintaining the effectiveness of the pressure brought to bear. Secondly, since this system restricts one of the essential means of pressure available to workers to defend their economic and social interests, their organizations should be able, if they so wish, to participate in defining such a service, along with employers and the public authorities. It would be highly desirable for negotiations on the definition and organization of the minimum service not to be held during a labour dispute, so that all parties can examine the matter with the necessary objectivity and detachment. The parties might also envisage the establishment of a joint or independent body responsible for examining rapidly and without formalities the difficulties raised by the definition and application of such a minimum service and empowered to issue enforceable decisions.

Essential services and minimum service

162. Because of the diversity of terms used in national legislation and texts on the subject, some confusion has sometimes arisen between the concepts of minimum service and essential services: they must therefore be defined very clearly. When the Committee uses the expression "essential services" in this survey or in its reports, it refers only to essential services in the strict sense of the term, i.e. those mentioned above in paragraph 159, in which restrictions or even a prohibition may be justified, accompanied however by compensatory guarantees. The minimum service suggested in paragraph 161 above as a possible alternative to a total prohibition would be appropriate in situations in which a substantial restriction or total prohibition of strike action would not appear to be justified and where, without calling into question the right to strike of the large majority of workers, one might consider ensuring that users' basic

needs are met or that facilities operate safely or without interruption. [40] Indeed, nothing prevents authorities, if they consider that such a solution is more appropriate to national conditions, from establishing only a minimum service in sectors considered as "essential" by the supervisory bodies according to the criteria set forth above, which would justify wider restrictions to, or even a prohibition of strikes.

Requisitioning

163. Under the legislation of some countries, workers on strike can be requisitioned. Since the requisitioning of workers could be abused as a means of settling labour disputes, such action is to be avoided except where, in particularly serious circumstances, essential services have to be maintained. Requisitioning may be justified by the need to ensure the operation of essential services in the strict sense of the term.

Compensatory guarantees

164. If the right to strike is subject to restrictions or a prohibition, workers who are thus deprived of an essential means of defending their socio-economic and occupational interests should be afforded compensatory guarantees, for example conciliation and mediation procedures leading, in the event of deadlock, to arbitration machinery seen to be reliable by the parties concerned. It is essential that the latter be able to participate in determining and implementing the procedure, which should furthermore provide sufficient guarantees of impartiality and rapidity; arbitration awards should be binding on both parties and once issued should be implemented rapidly and completely.

Restrictions relating to the objectives of a strike

Political strikes/protest strikes

165. The Committee has always considered that strikes that are purely political in character do not fall within the scope of freedom of association. [41] However, the difficulty arises from the fact that it is often impossible to distinguish in practice between the political and occupational aspects of a strike, since a policy adopted by a government frequently has immediate repercussions for workers or employers; this is the case, for example, of a general price and

[40] For example, in the iron and steel industry, the continuous operation of blast furnaces. See also CFA, 273rd Report, Case No. 1521, para. 39 (*Turkey*); 268th Report, Case No. 1486, para. 187 (*Portugal*).

[41] *General Surveys*, 1959, para. 69; 1973, para. 113; 1983, para. 216.

wage freeze. In the legislation of many countries political strikes are explicitly or tacitly deemed unlawful. Elsewhere, restrictions on the right to strike may be interpreted so widely that any strike might be considered as political. In the view of the Committee, organizations responsible for defending workers' socio-economic and occupational interests should, in principle, be able to use strike action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and the standard of living. [42]

Strikes, collective bargaining and "social peace"

166. The legislation in many countries does not establish any restrictions on the time when a strike may be initiated, stipulating only that the advance notice established by the law must be observed. Other industrial relations systems are based on a radically different philosophy in which collective agreements are seen as a social peace treaty of fixed duration during which strikes and lockouts are prohibited under the law itself, with workers and employers being afforded arbitration machinery in exchange. Recourse to strike action is generally possible under these systems only as a means of pressure for the adoption of an initial agreement or its renewal. The Committee considers that both these options are compatible with the Convention and that the choice should be left to the law and practice of each State. In both types of systems, however, workers' organizations should not be prevented from striking against the social and economic policy of the Government, in particular where the protest is not only against that policy but also against its effects on some provisions of collective agreements (for instance the impact of a wage control policy imposed by the Government on monetary clauses in the agreement).

167. If legislation prohibits strikes during the term of collective agreements, this major restriction on a basic right of workers' organizations must be compensated by the right to have recourse to impartial and rapid arbitration machinery for individual or collective grievances concerning the interpretation or application of collective agreements. Such a procedure not only allows the inevitable difficulties of application and interpretation to be settled during the term of an agreement, but has the advantage of clearing the ground for subsequent bargaining rounds by identifying the problems which have arisen during the term of the agreement.

[42] See also Ch. IV, paras. 130-133.

Sympathy strikes

168. Sympathy strikes, which are recognized as lawful in some countries, are becoming increasingly frequent because of the move towards the concentration of enterprises, the globalization of the economy and the delocalization of work centres. While pointing out that a number of distinctions need to be drawn here (such as an exact definition of the concept of a sympathy strike; a relationship justifying recourse to this type of strike, etc.), the Committee considers that a *general* prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is itself lawful.

Export processing zones

169. In an increasing number of countries, legislation establishes a special system of industrial relations in free zones, which are sometimes called export processing zones or industrial zones.[43] In its General Report of 1993[44] the Committee referred to this problem, which is not unrelated to the growing phenomenon of the delocalization of enterprises. Amongst other provisions establishing exceptions from the general system of industrial relations, some of this legislation specifically or indirectly prohibits strikes: such a prohibition is incompatible with the provisions of the Convention, which provide that all workers, *without distinction whatsoever*, shall have the right to establish organizations of their own choosing and that such organizations shall have the right to organize their activities and to formulate their programmes.[45]

Other prerequisites

Requirement of a strike ballot

170. In many countries legislation subordinates the exercise of the right to strike to prior approval by a certain percentage of workers. Although this requirement does not, in principle, raise problems of compatibility with the Convention, the ballot method, the quorum and the majority required should not be such that the exercise of the right to strike becomes very difficult, or even impossible in practice. The conditions established in the legislation of different

[43] For example: *Bangladesh*, Export Processing Zones Authority Act of 1980. *Pakistan*: Export Processing Zone Authority Ordinance of 1980 and Export Processing Zone (Control of Employment) Rules of 1982. *Togo*: no provisions regulating industrial relations in export processing zones.

[44] RCE 1993, paras. 58-61. See also Ch. III, para. 60.

[45] See also CFA, 241st Report, Case No. 1323 (*Philippines*), para. 371; 253rd Report, Case No. 1383 (*Pakistan*), para. 98.

countries vary considerably and their compatibility with the Convention may also depend on factual elements such as the scattering or geographical isolation of work centres or the structure of collective bargaining (by enterprise or industry), all of which require an examination on a case by case basis. If a member State deems it appropriate to establish in its legislation provisions which require a vote by workers before a strike can be held, it should ensure that account is taken only of the votes cast, and that the required quorum and majority are fixed at a reasonable level.

Exhaustion of conciliation/mediation procedures

171. In a large number of countries legislation stipulates that the conciliation and mediation procedures must be exhausted before a strike may be called.[46] The spirit of these provisions is compatible with Article 4 of Convention No. 98, which encourages the full development and utilization of machinery for the voluntary negotiation of collective agreements.[47] Such machinery must, however, have the sole purpose of facilitating bargaining: it should not be so complex or slow that a lawful strike becomes impossible in practice or loses its effectiveness.[48]

Waiting period, advance notice

172. In a large number of countries the law requires workers and their organizations to give notice of their intention to strike[49] or gives the authorities the power to impose an additional cooling-off period.[50] In so far as they are conceived as an additional stage in the bargaining process and designed to encourage the parties to engage in final negotiations before resorting to strike action — preferably with the assistance of a conciliator or a special mediator — such provisions may be seen as measures taken to encourage and promote the development of voluntary collective bargaining as provided for in Article 4 of Convention No. 98. Again, however, the period of advance notice should not be an additional obstacle to bargaining, with workers in practice simply waiting for its expiry in order to be able to exercise their right to strike. The period of advance notice should be shorter if the mediation or conciliation procedure itself

[46] For example: *Bahamas, Bulgaria, Cameroon, Madagascar, Morocco, Poland, Thailand, Venezuela, Zambia.*

[47] When conciliation and arbitration are voluntary, account should be taken of Para. 7 of the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92): "No provision of this Recommendation may be interpreted as limiting, in any way whatsoever, the right to strike."

[48] See, for example, as regards administrative obstacles and practical difficulties for the lawful initiation of a strike, CFA, 279th Report, Case No. 1566 (*Peru*), para. 89.

[49] For example: *Algeria, Central African Republic, Djibouti, Guinea, Poland.* In some countries, for example *France*, legislation makes advance notice obligatory only in the public sector, while parties in the private sector are allowed to negotiate this point.

[50] An identical period of advance notice is generally required for lockouts.

is already lengthy and has enabled the remaining matters in dispute to be clearly identified.

Forms of strike action

173. When the right to strike is guaranteed by national legislation, a question that frequently arises is whether the action undertaken by workers constitutes a strike under the law. Any work stoppage, however brief and limited, may generally be considered as a strike. This is more difficult to determine when there is no work stoppage as such but a slowdown in work (go-slow strike) or when work rules are applied to the letter (work-to-rule); these forms of strike action are often just as paralyzing as a total stoppage. Noting that national law and practice vary widely in this respect, the Committee is of the opinion that restrictions as to the forms of strike action can only be justified if the action ceases to be peaceful.

The course of the strike

Picketing/occupation of the workplace

174. Strike picketing aims at ensuring the success of the strike by persuading as many persons as possible to stay away from work. The ordinary or specialized courts are generally responsible for resolving problems which may arise in this respect. National practice is perhaps more important here than on any other subject: while in some countries strike pickets are merely a means of information, ruling out any possibility of preventing non-strikers from entering the workplace, in other countries they may be regarded as a form of the right to strike, and the occupation of the workplace as its natural extension, aspects which are rarely questioned in practice, except in extreme cases of violence against persons or damage to property. The Committee considers in this respect that restrictions on strike pickets and workplace occupations should be limited to cases where the action ceases to be peaceful.

Replacement of strikers

175. A special problem arises when legislation or practice allows enterprises to recruit workers to replace their own employees on *legal* strike. The difficulty is even more serious if, under legislative provisions or case-law, strikers do not, as of right, find their job waiting for them at the end of the dispute.[51] The Committee considers that this type of provision or practice

[51] CFA, 278th Report, Case No. 1543 (*United States*), para. 93; the case-law makes a distinction between "unfair labour practice" strikes and "economic" strikes. See also para. 139 as regards the maintaining of the employment relationship.

seriously impairs the right to strike and affects the free exercise of trade union rights. [52]

Sanctions against strikes

176. Most legislation restricting or prohibiting the right to strike also contains clauses providing for sanctions against workers and trade unions that infringe these provisions. In some countries, striking illegally is a penal offence punishable by a fine or term of imprisonment. [53] Elsewhere, engaging in an unlawful strike may be considered as an unfair labour practice and entail civil liability and disciplinary sanctions.

177. The Committee considers that sanctions for strike action should be possible *only* where the prohibitions in question are in conformity with the principles of freedom of association. Even in such cases, both excessive recourse to the courts in labour relations and the existence of heavy sanctions for strike action may well create more problems than they resolve. Since the application of disproportionate penal sanctions does not favour the development of harmonious and stable industrial relations, if measures of imprisonment are to be imposed at all they should be justified by the seriousness of the offences committed. In any case, a right of appeal should exist in this respect.

178. In addition, certain prohibitions of, or restrictions to, the right to strike which are in conformity with the principles of freedom of association sometimes provide for civil or penal sanctions against strikers and trade unions which violate these provisions. In the view of the Committee, such sanctions should not be disproportionate to the seriousness of the violations.

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179. *In the view of the Committee, the right to strike is an intrinsic corollary of the right of association protected by Convention No. 87. This right is not, however, absolute and may be restricted in exceptional circumstances or even prohibited for certain categories of workers, in particular certain public servants or for essential services in the strict sense of the term, on condition that compensatory guarantees are provided for. A negotiated minimum service might be established in other services which are of public utility ("services d'utilité publique") where a total prohibition of strike action cannot be justified. Provisions which, for instance, require the parties to exhaust mediation or*

[52] Some countries have adopted legislation which prohibits employers from hiring outside workers to ensure continuation of production or services, for example: *Bulgaria*; *Canada* (*Quebec, Ontario, British Columbia*) with some exceptions made for managerial staff; *Greece*; *Turkey*.

[53] For example: *Ecuador* (RCE 1992, p. 330); *Philippines* (RCE 1993, p. 302); *Sudan* (RCE 1993, p. 304); *Syrian Arab Republic* (RCE 1993, p. 305); *Thailand* (RCE 1992, p. 356). By contrast, the Committee recently noted with satisfaction the repeal of such provisions in *Costa Rica* (RCE, 1994 observation on C.87).

conciliation procedures or workers' organizations to observe certain procedural rules before launching a strike are admissible, provided that they do not make the exercise of the right to strike impossible or very difficult in practice, which would result in a very wide restriction of this right in fact. Since the maintaining of the employment relationship is a normal consequence of recognition of the right to strike, its exercise should not result in workers being dismissed or discriminated against.