



Governing Body

319th Session, Geneva, 16–31 October 2013

GB.319/INS/15/1

Institutional Section

INS

Date: 22 October 2013

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FIFTEENTH ITEM ON THE AGENDA

Reports of the Officers of the Governing Body

First report: Complaint concerning non-observance by Fiji of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), made by delegates to the 102nd Session (2013) of the International Labour Conference under article 26 of the ILO Constitution

1. In a letter dated 20 June 2013, addressed to the Director-General of the International Labour Office, a number of Workers' delegates at the 102nd Session (2013) of the International Labour Conference presented a complaint under article 26 of the ILO Constitution against the Government of Fiji for persistent and grave violations of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). The letter was signed by nine titular delegates: Ms Ged Kearney (Australia), Ms Helen Kelly (New Zealand), Mr Takaaki Sakurada (Japan), Mr Mudhofir Mudhofir (Indonesia), Mr Dong-Man Kim (Republic of Korea), Ms Catherine Schlachter (France), Mr Sam Gurney (United Kingdom), Mr Miguel Morantes (Colombia), and Mr Francis Atwoli (Kenya); and one adviser and substitute delegate, Mr Luc Cortebееck (Belgium). The text of the complaint is attached (see appendix).
2. Furthermore, at the 18th plenary sitting of the Conference, held on 20 June 2013,¹ Ms Kearney made a statement briefly introducing the complaint for the purpose of serving notice to the Government of Fiji and to all the members of the Conference.
3. At the 318th Session (June 2013) of the Governing Body, Mr Luc Cortebееck, the Worker Vice-Chairperson of the Governing Body, informed the Governing Body of the complaint

¹ *Provisional Record* No. 19(Rev.), International Labour Conference, 102nd Session, Geneva, 2013, p. 12.

presented during the Conference and requested that the matter be prepared for discussion at the 319th Session of the Governing Body in October 2013.

4. Article 26 of the ILO Constitution provides as follows:

1. Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles.

2. The Governing Body may, if it thinks fit, before referring such a complaint to a Commission of Inquiry, as hereinafter provided for, communicate with the government in question in the manner described in article 24.

3. If the Governing Body does not think it necessary to communicate the complaint to the government in question, or if, when it has made such communication, no statement in reply has been received within a reasonable time which the Governing Body considers to be satisfactory, the Governing Body may appoint a Commission of Inquiry to consider the complaint and to report thereon.

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

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

5. The Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), was ratified by Fiji on 17 April 2002 and has been in force in that country since 17 April 2003. The ten authors of the complaint were Workers' delegates of their respective countries to the 102nd Session of the Conference on the date of filing the complaint. Accordingly, they were entitled to file a complaint under article 26, paragraph 4, of the Constitution if they were not satisfied that Fiji was securing the effective observance of this Convention. This means that the conditions set forth in article 26, paragraph 1, of the Constitution for the receivability of the complaint are satisfied. The authors of the complaint have requested that it be referred to a Commission of Inquiry, as provided for in article 26, paragraph 3, of the Constitution. It is for the Governing Body to decide on this request.

6. No discussion on the merits of the complaint is admissible at this stage. Indeed, it would be inconsistent with the judicial nature of the procedure provided for in article 26 and the following articles of the ILO Constitution that there should be any discussion in the Governing Body on the merits of the complaint until the Governing Body has before it the contentions of the Government against which the complaint is filed, together with an objective evaluation of these contentions by an impartial body.

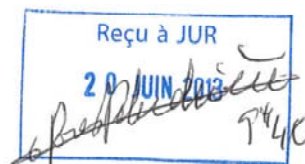
7. It will be recalled that the Committee on Freedom of Association has been examining a number of complaints submitted by workers' organizations alleging violations of trade union rights in Fiji of a similar nature (this case is expected to be examined by the Committee at its upcoming meeting in October 2013 and would thereafter figure in document GB.319/INS/10). It will also be recalled that the Committee of Experts on the Application of Conventions and Recommendations made observations to the Government of Fiji regarding the observance of the Convention referred to in the complaint submitted under article 26 of the ILO Constitution and that the Conference Committee on the Application of Standards discussed some matters relating to the observance, in practice and under law, of Convention No. 87 at its meeting in June 2013 and included its conclusions on this case in a special paragraph.

8. The Governing Body has also been considering the trade union situation in Fiji in a separate item of its agenda since March 2012 in follow-up to the 15th Asia and the Pacific Regional Meeting resolution on the trade union situation in Fiji of December 2011. This item is on the agenda of the 319th Session² and the decision following its discussion will take into account the recommendation of the Officers in relation to this article 26 complaint.
9. In accordance with established practice, when a commission of inquiry is appointed, the relevant matters before the various ILO supervisory bodies are referred to this Commission.
10. The Officers, considering the complaint as receivable in accordance with article 26 of the ILO Constitution and without entering into the substance of the complaint, have agreed to refer the matter to the Governing Body.
11. ***The Officers of the Governing Body recommend that the Governing Body:***
 - (a) ***request the Director-General to transmit the complaint to the Government and invite it to provide its observations on the complaint by 20 January 2014;***
 - (b) ***defer the decision to establish a commission of inquiry to its 320th Session (March 2014).***

² GB.319/INS/8.

Appendix

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Director-General
International Labour Office
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CH-1211 Genève 22
Switzerland



20 June 2013

Complaint under Article 26 of the ILO Constitution against the Government of Fiji for non-observance of Convention No. 87 on Freedom of Association and Protection of the Right to Organise

We, the undersigned delegates to the 102nd Session of the International Labour Conference (Geneva, 2013) request the establishment, without delay, of a Commission of Inquiry under Article 26 of the ILO Constitution against the Government of Fiji for its egregious non-observance of Convention No. 87, which it ratified in 2002.

In the last two years alone, there have been repeated condemnations of the serious and worsening situation in Fiji from the ILO regular and special supervisory system, the ILO Governing Body and from the ILO Director General. The consistent message from the ILO and its constituents could not be any clearer – Fiji is on the wrong path and must change course immediately. Yet, each time, the government has responded by issuing more repressive executive decrees that are unreviewable by any court, harassing and arresting trade unionists for legitimate union activity, and even resorting to physical assault.

In November 2012, the ILO Governing Body issued a tripartite resolution that set forth specific action items that the Government of Fiji must undertake, including to: 1) accept a direct contacts mission under the previously agreed terms of reference, based on the conclusions and recommendations of the ILO Committee on Freedom of Association on Case No. 2723; and 2) to find appropriate solutions in law and in practice that are in conformity with freedom of association principles together with the social partners.

In March 2013, the ILO Governing Body noted the absence of cooperation by the government, expressed its strong disappointment at the failure of the government to bring the law and practice into conformity with freedom of association principles and again urged the government to accept the direct contacts mission. As of the June 2013 Conference Committee on the Application of Standards (CAS), the Government of Fiji had still failed to do either.

There is still no agreement on the timing and terms of the contact mission, despite clear direction from the Governing Body and the CAS. Similarly, there has been no progress on ensuring that laws and practices are brought into conformity with Convention 87. Indeed, the government has taken major steps backward in law and in

practice even since November, including constitutional amendments that threaten to undermine fundamental labor rights, including freedom of association. Last minute efforts prior to arriving for the ILC to convene a subcommittee to discuss the laws and decrees are wholly unconvincing.

The Current Situation in Fiji

This year, the Committee of Experts (CEACR) again expressed its serious concern and urged the government to make progress on the several issues raised in the report.

1. Trade Union Rights and Civil Liberties

The CEACR has expressed its deep concern regarding the numerous acts of assault, harassment, intimidation and the arrest of trade union leaders and members for their exercise of the right to freedom of association.

On the acts of assault and physical attacks on trade unionists, the CEACR recalled that amongst the liberties essential for the normal exercise of trade union rights the right “to freedom and security of person” was fundamental. It also urged the government to conduct ex officio an independent investigation without delay into the well-known alleged acts of assault, harassment and intimidation against Mr Felix Anthony, Mr Mohammed Khalil, Mr Attar Singh, Mr Taniela Tabu and Mr Anand Singh and to transmit detailed information regarding the outcome of such inquiry and the action taken. *No measures have been taken by the Government in this regard.* It is also incorrect that no complaint has been filed with regard to these beatings, as the government stated to the CEACR. A complaint was filed with the police in July 2012 regarding the beating. The government has failed to act in any way on this complaint.

In relation to arrest and detention of trade unionists – namely Mr Felix Anthony, Mr Daniel Urai, and Mr Nitendra Goundar - the Committee noted that the ITUC has indicated that Mr Daniel Urai, the FTUC President, has two cases pending in court which have still not been heard: one for preparing union members for collective and the other one for having allegedly incited political violence by urging to overthrow the Government; and that, in the first case which is pending for almost a year, the prosecution has not been able to produce all of the required disclosures including the identification of the complainant. The Committee has considered that the authorities should not use legitimate trade union activities as a pretext for arbitrary arrest or detention or criminal charges. With respect to the abovementioned trade unionists, the Committee has urged the Government to take the necessary measures to ensure that all charges against them are immediately dropped. *These cases remain pending against these trade unionists.*

2. Continuing Restrictions to Freedom of Assembly and Expression

Many of the powers found in the repealed Public Emergency Regulations (PER) of 2009 are included and expanded in the 2012 Public Order (Amendment) Decree (POAD). Indeed, the Committee noted with *concern* provisions of the POAD, in particular Section 8(5), under which gives the authorities broad powers to refuse to grant persons or organizations, including trade unions, a permit to meet. The Committee stated that this provision “could be used in such a way as to make it

difficult for trade unions to hold public meetings, especially given the previous allegations of the use of the PER to restrict their rights in this regard.” The Committee requested that the Government “consider abrogation or amendment of the POAD so as to ensure that the right to assembly may be freely exercised. *The Government has failed to abrogate or amend the law.* We note that the provision of the law requiring police permission for meetings has been suspended during the constitutional revision process; we also note that that process has been substantially completed and are concerned that Section 8 of the POAD will imminently enter into force. Under the previous law, the PER, permits for trade union meetings were rarely granted. We are also deeply concerned about several other repressive provisions of the POAD that have and continue to remain in force.

3. Legislative Issues

Below are just some of the issues previously raised by the Committee of Experts.

Essential National Industries Decree: The Committee again took note of the devastating impact of the Essential National Industries Decree issued in 2011. The Committee had previously urged the Government to take the necessary measures to amend the Essential National Industries Decree *without delay*, in full consultation with the social partners, so as to bring it into conformity with the Convention. *Not only has the government not done repealed or amended the ENID, it appears the government is even considering expanding its reach to councils and firefighters. There remains a pending threat to extend the ENID to the sugar sector, if the workers make demands.* Of particular concern are section 6 (cancellation of all existing trade union registrations in essential national industries); sections 10–12 (unions to apply to the Prime Minister to be elected as bargaining unit representative; determination by the Prime Minister of composition and scope of a bargaining unit for election purposes; conduct and supervision of elections by the Registrar); section 14 (50 per cent plus one necessary for a union to be registered as representative of the bargaining unit); section 7 (union officials to be employees of the relevant company); section 27 (providing for serious restrictions of the right to strike); section 26 (lack of judicial recourse for rights disputes; compulsory arbitration by the Government of disputes beyond a certain financial threshold); section 24(4) (prohibition of automatic dues deduction for workers in essential national industries).

Public Sector: The public sector remains seriously impacted by a series of executive decrees that have limited or eliminated many of the fundamental rights of workers. Information provided to the Committee of Experts by the Government of Fiji to the contrary is incorrect. Public service unions are unable to exercise fully their fundamental rights, including the right to freedom of association.

Employment Relations Promulgation of 2007 (ERP): The Committee has for years commented on the necessity to amend the following provisions of the ERP in order to bring them into conformity with the Convention. *The government has failed to do so.*

The ERAB subcommittee met on 13 August 2012 to discuss revision of the labour law in line with international conventions, but nothing resulted from that meeting. There was no further meeting until immediately prior to this Conference, a transparent attempt by the government to be able to claim that it is engaged in social dialogue.

4. New Concerns:

Fiji Political Parties Decree: In 2013, the government sought to exclude trade unions from the political process by decree. In January, the government promulgated the Fiji Political Parties Decree. The decree excludes public officers from applying for, being a member of, or holding office in a political party. Article 14.2(d) defines as “public officer” any elected or appointed trade union officer, or of any federation, congress, council or affiliation of trade unions. A subsequent amendment to that decree broadened the scope of unionists barred from the political process. Under Art 14.1(c), a trade union official cannot even express support for a political party. If a trade unionist does become an applicant, member or officer, they will be deemed as having resigned from their trade union office under Art 14.5. Anyone defying this decree faces a \$50,000 fine, 5 years imprisonment or both. The decree also provides that existing political parties that fail to successfully reregister under the decree’s cumbersome new requirements will have their assets confiscated by the government.

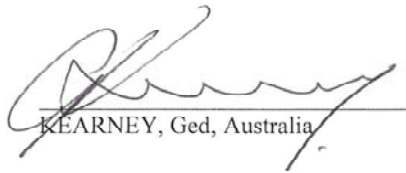
Proposed New Constitution: After having received a draft constitution from an independent Constitution Commission, which was informed by a highly-participatory process – with over 7,000 public submissions, including from Fijian trade unions – the government in December 2012 confiscated copies of the Commission’s draft and announced that it would instead write its own. On March 20, the Prime Minister unilaterally issued a new draft constitution, which is substantially inferior to the draft presented by the Commission, in particular its fidelity to principles of international law. The government also decided to do away entirely with the Constituent Assembly, which was charged with reviewing, amending and adopting the constitution. This left only a brief period, from March 20 to April 30 for the public to submit comments on the government’s lengthy and complex new draft.

There is much to be concerned about with the new constitution. For example, Articles 19 and 20, while first providing that all persons have the right to associate, to join a union, to bargain collectively and to strike, they include exceptions so broad that they could be invoked to limit severely those fundamental labour rights and indeed to justify the existing harmful decrees already criticized by the ILO. For example, the right to join a union and bargain collectively can be limited for the following reasons: (a) in the interests of national security, public safety, public order, public morality, public health or the orderly conduct of elections; (b) for the purposes of protecting the rights and freedoms of others; (c) for the purposes of imposing reasonable restrictions on the holders of public offices and members of a disciplined force in order to secure their impartial service; (d) for the purposes of regulating the registration of trade unions, or of any federation, congress, council or affiliation of trade unions, or of any federation, congress, council or affiliation of employers; (e) for the purposes of regulating collective bargaining processes, providing mechanisms for the resolution of employment disputes and grievances, and regulating strikes and lockouts; or (f) for the purposes of regulating essential services and industries, in the overall interests of the Fijian economy and the citizens of Fiji. The broadly stated principles can and no doubt will be undermined through the invocation of these exceptions. Of note, the Commission’s draft constitution contained none of these sweeping exceptions.

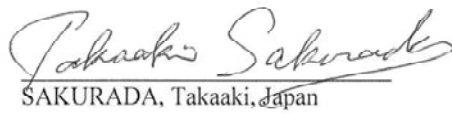
The contents of the political party decree have also been incorporated into the constitution.

We note that the CEACR had welcomed the news of an inclusive process to develop a new constitution for Fiji and hoped that the new Constitution would reflect the eight fundamental ILO Conventions. We believe that the government has failed to meet these expectations and urge the members of the Commission of Inquiry to review the constitution, which we believe fail to comply with the principles of the fundamental conventions, and specifically Convention 87.

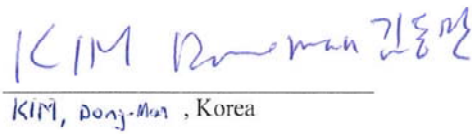
Taking into account *inter alia* the issues raised above, we hereby lodge a Complaint under Article 26 of the ILO Constitution and call upon the Governing Body to establish thereafter a Commission of Inquiry for the non-observance of Convention 87 in law and in practice. The complainants reserve the right to submit additional information at the appropriate time.

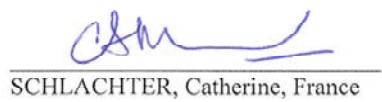

KEARNEY, Ged, Australia

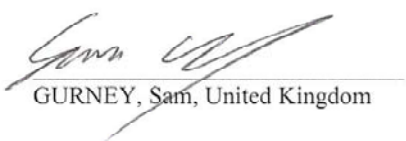

KELLY, Helen, New Zealand

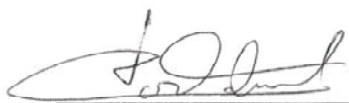

SAKURADA, Takaaki, Japan

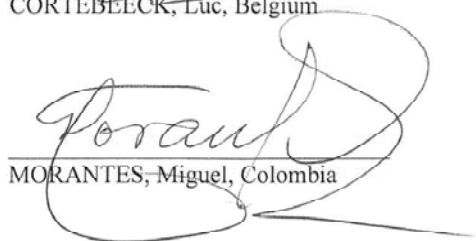

MUDHOFIR, Indonesia

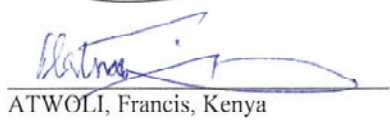

KIM, Dong-Man, Korea


SCHLACHTER, Catherine, France


GURNEY, Sam, United Kingdom


CORTEBEECK, Luc, Belgium


MORANTES, Miguel, Colombia


ATWOLI, Francis, Kenya