

ILO Law and the Right to Strike

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The author, former Director of the International Labour Organization, provides a succinct overview of the principles developed by the ILO's supervisory bodies (especially the Committee on Freedom of Association) in relation to the right to strike. The topics discussed include general recognition of the right to strike, as well as the types of conditions and restrictions on collective action that may be permitted, e.g. in the area of essential services. The paper also examines the extent to which public authorities may interfere in strikes, and whether sanctions and anti-strike measures imposed by employers are allowed. In the second part of the paper, the author turns to a consideration of the ILO standards that apply to alternative means of dispute resolution, with particular emphasis on the use of conciliation, mediation and arbitration. The paper concludes with some general observations based on the ILO's accumulated experience.

1. INTRODUCTION

Strikes are certainly one of the most complex phenomena regulated by labour law, and one of the most difficult to grasp in all their dimensions. Not infrequently, rational arguments about strikes are mixed with arguments of an ideological or emotive nature. Strikes can sometimes even have a revolutionary flavour, working against the established order of social and economic relations. This is often anathema to the authorities, even when they are by no means totalitarian.

Trade union leaders have sought (with uneven success) to incorporate strikes into their strategies, and democratic lawmakers have sought (again, with uneven results) to incorporate them into laws and public policies. Historically strikes have expressed an irritation, a refusal to work, a spontaneous revolt against what are deemed to be unacceptable employment conditions. The laws governing

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industrial disputes depend on the political system, and vary considerably throughout the world.¹ Quite often, collective conflict between employers and wage-earners is severely restricted and even made completely unlawful.

Legal regulation of strikes comes in many forms, depending on the country and the times. Sometimes there is only a *freedom* to strike, in that no criminal sanctions in the form of fines or imprisonment are imposed, though the possibility of contractual liability remains. Today, however, there is more often than not a *right* to strike, with the result that except in certain circumstances, the employer cannot invoke a strike as a legal basis for breaking off an employment contract or for taking other reprisals. Strikes may be a means of action open only to trade unions (as in Sweden), or they may be recognized as a right of individual workers (as in France). Sometimes they are treated as an exceptional measure that workers can invoke when the employer does not fulfil its obligations. Sometimes strikes are allowed only in their classic form, and at other times the right to strike may extend to slow-downs, rotating stop-pages, work-to-rule, boycotts and other kinds of direct action.

Contrary to other universal or regional instruments, International Labour Organization (ILO) Convention 87 (on Freedom of Association and Protection of the Right to Organise, 1948) and Convention 98 (on the Right to Organise and Collective Bargaining, 1949) say nothing about strikes.² Fear of restricting the freedom of relations between employers' and workers' organizations, and fear of restricting the possibility of direct action, would seem to be one of the main reasons why so few ILO standards have been

1 O. Kahn-Freund & B. Hepple, *Laws Against Strikes* (London: Fabian Society, Fabian Research Series 305, 1972); R. Blanpain & R. Ben-Israel, eds., "Strikes and Lock-outs in Industrialized Market Economies" (1994), 29 *Bulletin of Comparative Labour Relations*.

2 Canada has ratified Convention 87 but not Convention 98. It has not ratified the Labour Relations (Public Service) Convention, 1978 (No. 151) or the Collective Bargaining Convention, 1981 (No. 154). Other ILO instruments do refer to labour conflicts. See, for example, the Unemployment Provision Convention, 1934 (No. 44), Article 10; the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), at paras. 4, 6 and 7; the Social Security (Minimum Standards) Convention, 1952 (No. 102), Article 69; and the Abolition of Forced Labour Convention, 1957 (No. 105), Article 1.

adopted on the settlement of industrial disputes.³ Moreover, it has proven difficult to reconcile the Anglo-American legal vision of work stoppages with the continental European vision, let alone with the Communist total prohibition of such stoppages, and to work out the consequences of those different approaches in terms of the legitimate objectives of industrial action and the appropriate degree of protection for strikers.

ILO supervisory bodies have had numerous occasions to take a position on the right to strike. They have built up a body of principles⁴ which recognize that the right to strike is an intrinsic corollary to the right to organize, and a fundamental right of workers and of their organizations. They have allowed some restrictions that figure in a variety of ways in many national laws and regulations. Employers have contested the extent of the right to strike,⁵ but not its very existence.

This paper focuses on the interpretation and development by the ILO supervisory bodies, for particular countries and in particular cases, of the right to collectively stop work. The first part of the paper reviews principles drawn from the decisions of those bodies on the right to strike, especially the principles adopted by the ILO Governing Body's Committee on Freedom of Association (CFA).⁶ The second part examines the few ILO standards dealing with alternative ways of settling collective labour disputes.

3 See also R. Ben-Israel, *International Labour Standards: The Case of Strikes* (Deventer: Kluwer, 1988), at p. 46.

4 The conclusions of the Committee of Experts on the Application of Conventions and Recommendations and of the Committee on Freedom of Association have been approved by both the ILO Governing Body and the yearly International Labour Conference, and have been accepted worldwide. Any question or dispute relating to the interpretation of a convention may be referred to the International Court of Justice under Article 27 of the ILO Constitution, but there have been no decisions of the Court in this regard.

5 A. Wisskirchen & C. Hess, *Employers' Handbook on ILO Standards-Related Activities* (Geneva: ILO, 2001), at pp. 35-36. See also J.-M. Verdier, "Débat sur le droit de grève à la Conférence internationale du Travail," *Droit social*, No. 12 (December 1994), at pp. 968-971.

6 Unless indicated otherwise, the principles mentioned below arise from CFA decisions. They are set out in the *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th (revised) ed. (Geneva: ILO, 2006) [*Digest of Decisions*], §§520 *et seq.*

2. ILO PRINCIPLES ON DIRECT ACTION, INCLUDING STRIKES

(a) General Recognition of the Right to Strike

The CFA has pointed out that Convention 87 recognizes the right of trade unions, as organizations of workers set up to further and defend their occupational interests, to formulate their programs and organize their activities.⁷ These rights imply that unions may negotiate with employers *and* express their views on economic and social issues affecting the occupational interests of their members. They constitute the basis for the Committee's position that the right to strike is one of the essential means available to workers to further and defend their occupational interests.⁸ This right arises directly from the freedom of association — i.e., it is a qualified species of that freedom — rather than from the right to bargain collectively. Nevertheless, the strike is regarded as legitimate only insofar as it is used to defend and promote occupational interests. Purely political strike action decided upon long before negotiations take place does not fall within the scope of the protection.

ILO supervisory bodies have recognized, however, that trade unions should be able to have recourse to protest strikes, in particular where such strikes are aimed at criticizing government economic and social policy. The objectives of a strike may go beyond a concern for better working conditions or other collective claims of an occupational nature; they may include the resolution of problems posed by major social and economic policy trends which have a direct impact on union members and on workers in general, and in particular on employment, social protection and standards of living. In other words, the right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement. Workers and their organizations should be authorized to express in a broader context their dissatisfaction on economic and social matters that affect their members' interests, even if it is often

7 Convention 87, Articles 10 and 3.

8 Compare T. Novitz, *International and European Protection of the Right to Strike* (Oxford: Oxford University Press, 2003), at p. 198.

difficult to distinguish between the political and occupational aspects of a strike. Strikes at the national level, even general strikes, are within the normal field of activity of trade unions.

Making the right to call a stoppage of work the sole preserve of trade union organizations is compatible with Convention 87. A demand for recognition of a union is nevertheless a legitimate interest, in support of which collective action may be used. The same is true of collective action in support of multi-employer contracts.

Employees should be able to launch a sympathy strike if it is in support of a strike that is itself lawful. The ILO Committee of Experts on the Application of Conventions and Recommendations (the Committee of Experts) has noted that such strikes are becoming increasingly frequent because of the move toward the concentration of enterprises, the globalization of the economy and the delocalization of work centres. The Committee of Experts has pointed out that a number of lines need to be drawn here (for example, to delineate the concept of a sympathy strike and the types of relationship that will justify recourse to a sympathy strike). However, the Committee of Experts considers that a general prohibition on this kind of collective action could lead to abuse.⁹

The CFA considers that denying legal protection to certain forms of collective action, such as demonstrations, wildcat strikes, downing tools, slow-downs, working to rule and sit-down strikes, may be justified only if the action ceases to be peaceful. Taking part in picketing and firmly inciting other workers to stay away from work cannot be considered unlawful, except when it disturbs public order or is accompanied by violence or coercion of non-strikers, whose freedom to work should be respected. In the same manner, management should be able to enter the premises, with the help of the police if necessary.¹⁰ The requirement that picket lines only be set up near the struck enterprise has been accepted. The Committee of Experts has stated that the occupation of the workplace or its immediate surroundings by workers should not be subject to penalties as

9 B. Gernigon, A. Odero & H. Guido, *ILO Principles Concerning the Right to Strike* (Geneva: ILO, 1998), at p. 16.

10 *Ibid.*, at p. 49.

long as it is peaceful.¹¹ That decision may, in my view, imply that employers or public authorities should only take sanctions against the occupation of a workplace in the event that the strike is no longer peaceful.

(b) Conditions and Restrictions

A general prohibition of collective action can be justified only in the event of an acute national emergency, and then only for a limited time. That is true whether the emergency is of an economic nature or one which relates to national security or public health. Responsibility for suspending a strike on the grounds of national security or public health should, in the view of the CFA, not lie with the government but with an independent body which has the confidence of all parties concerned.

A number of recent cases before the ILO supervisory bodies relating to Canadian provinces concern the denial or restriction of collective bargaining and the right to strike in the public sector and in other related services.¹² While a detailed analysis of each of those

11 International Labour Conference (ILC), 98th session (Geneva, 2009), *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A) (Geneva: ILO, 2009), at p. 162. See also ILO, *Digest of Decisions*, *supra*, note 6, §545; compare, however, *ibid.*, §546.

12 Case No. 2467 (Canada/Quebec), Report No. 344, ILO Official Bulletin, Vol. XC, 2007, Series B, No. 1, §§461-587; Case Nos. 2314 and 2333 (Canada/Quebec), Report No. 340, *ibid.*, Vol. LXXXIX, 2006, Series B, No. 1, §§373-432; Case No. 2405 (Canada/British Columbia), Report No. 340, *ibid.*, §§318-338 and Report No. 343, *ibid.*, No. 3, §§433-457; Case No. 2430 (Canada/Ontario), Report No. 343, *ibid.*, §§339-363; Case No. 2324 (Canada/British Columbia), Report No. 336, Vol. LXXXVIII, 2005, Series B, No. 1, §§233-284; Case No. 2277 (Canada/Alberta), Report No. 333, Vol. LXXXVII, 2004, Series B, No. 1, §§240-277; Report No. 337, No. 2, Vol. LXXXVIII, 2005, Series B, No. 2, §§343-360; Case No. 2349 (Canada/Newfoundland and Labrador), Report No. 337, *ibid.*, §§361-407; Case Nos. 2343, 2401 and 2403 (Canada/Quebec), Report No. 338, *ibid.*, No. 3, §§536-603; Case No. 2257, Report No. 335, Vol. LXXXVII, 2004, Series B, No. 3, §§412-470; Case No. 2305 (Canada/Ontario), Report No. 335, *ibid.*, §§471-512. See B.A. Langille, "Can We Rely on the ILO?" (2007), 13 C.L.E.L.J. 273; B. Etherington, "The *B.C. Health Services and Support Decision* – The Constitutionalization of a Right to Bargain Collectively in Canada: Where Did It Come From and Where Will It Lead?" (2009), 30 Comp. Lab. L. & Pol'y J. 715, at pp. 740-741.

cases is beyond the scope of this paper, the general principles they enunciate are discussed below.

Limitations on collective action, and on the right to strike in particular, are accepted in three types of situation. Firstly, recognition of public servants' trade union freedom does not necessarily imply the right to take any form of collective action. Such action may be restricted or prohibited for public servants who exercise authority in the name of the state — for example, customs officers or those employed in the administration of justice and the judiciary. In contrast, public servants in state-owned commercial or industrial enterprises should enjoy the right to strike, unless (as discussed immediately below) they provide essential services.

Second, limitations may apply to employees working in public or private services that are considered essential. What is an essential service has been interpreted strictly by the ILO supervisory bodies, to cover only services the absence of which will bring a clear and imminent threat to the life, personal safety or health of all or part of the population. The highly controversial issue of the extent of the concept of essential services has been vigorously debated at meetings of ILO representative bodies, including the Conference Committee on the Application of Standards. Employer and worker representatives usually come to these meetings with totally different views, and solutions have been found on a case-by-case basis. This means in practice that the ILO definition of essential services depends largely on the circumstances prevailing in the country in question. Moreover, the concept is not absolute, in that a non-essential service may become essential if the freezing of operations lasts beyond a certain time or extends beyond a certain scope. In the event that a total and prolonged strike in a vital sector of the economy might endanger the life, health or personal safety of the population, and only in that event, a back-to-work order will be acceptable if it applies to the specific categories of staff whose refusal to work could cause such a danger.¹³

The ILO supervisory bodies have deemed the following to be essential services: police and armed forces; hospital and health sectors; firefighting services; public or private prison services; water and electricity services; the telephone service; the provision of food

13 Case No. 2467, *supra*, note 12.

to pupils of school age; the cleaning of schools; and air traffic control services. Even within essential services, certain classes of personnel, such as labourers and gardeners, should not be deprived of the right to strike, because the interruption of their functions does not in practice affect life, personal safety or health.¹⁴

The following have been considered not to constitute essential services: radio and television broadcasting; the education sector (except for functions carried out by principals and vice-principals); the petroleum sector; airlines; ports, railways, metropolitan transport, and transport generally; garbage collection, unless the stoppage exceeds a certain duration or scope; fuel production and distribution; postal services; computer services for collecting excise duties and taxes; banking; refrigeration enterprises; department stores; hotel services; agriculture; food and alcohol supply; and pleasure parks and casinos. The possible long-term consequences of a strike in the teaching sector have been considered not to justify a prohibition on essential services grounds.¹⁵

Employees deprived of the right to strike because they perform essential services must have appropriate guarantees to safeguard their interests. These guarantees should include a corresponding denial of the right to lock out. They should also include the provision of joint conciliation or mediation proceedings, and only where those proceedings fail, joint arbitration machinery. Such proceedings should meet certain requirements, which will be examined below.

Third, in public utilities, the authorities may establish minimum service requirements in order to avoid damage that is irreversible or out of all proportion to the occupational interests of the parties to the dispute, as well as to avoid damage to third parties.¹⁶ Such requirements may be put into place in essential services and fundamental public services. They may also be used in the event of an acute national crisis endangering the normal living conditions of the population, but they must be confined to operations that are strictly necessary to avoid the danger.

Again, lack of consensus within ILO representative bodies on a precise definition of essential services and special circumstances has

14 Case Nos. 2343, 2401, 2403 and 2277, *supra*, note 12.

15 Case No. 2305, *supra*, note 12.

16 See ILC, 98th session, *supra*, note 11, at p. 53.

led to conclusions being reached on a case-by-case basis. Minimum operational service requirements have been accepted in the following areas: ferry services (in view of the impact on people living on coastal islands);¹⁷ ports; underground transport; railways services; other forms of transportation of passengers and commercial goods; postal services; garbage collection; mint services; the education sector (for regular basic education,¹⁸ and in the case of strikes of long duration);¹⁹ and an animal health service, in the face of an outbreak of a highly contagious disease.²⁰

In such cases, trade unions should be in a position to participate, along with employers and public authorities, in defining minimum service requirements. Measures for the provision of those services should be established clearly, applied strictly, and made known in a timely way to those concerned. Any disagreement on the number and duties of the workers involved should be settled by an independent body and not by the government. To the extent that deciding what is an indispensable minimum level of service depends on a full knowledge of the facts and a thorough understanding of the functioning of the establishments concerned and the real impact of the strike action, a definitive ruling should be pronounced only by judicial authorities. In the view of the ILO, judicial institutions alone offer sufficient guarantees of independence from the government. Fully autonomous administrative bodies of the type that exist in common law countries would most probably be equally acceptable.

The ILO's supervisory bodies have also allowed restrictions on collective work stoppages for reasons of safety and security within particular enterprises. The staff needed to ensure the safety of machinery and other equipment, and to prevent accidents, may be obliged to work.

Collective action may also be suspended for a reasonable "cooling off" period, to allow the parties to seek a negotiated solution through mediation and conciliation. The exhaustion of that process may be required before a strike is called, unless the process is so

17 Case No. 2324, *supra*, note 12.

18 See ILC, 98th session, *supra*, note 11, at p. 149.

19 Case No. 2305, *supra*, note 12.

20 ILO, *Digest of Decisions*, *supra*, note 6, §626.

complex or slow that a lawful strike becomes impossible or ineffective.²¹ Strikes may also be prohibited while a collective agreement is in force.²²

Rather than directly restricting or prohibiting strikes, national law sometimes imposes conditions that must be met in order to render a strike lawful. Such conditions should be reasonable, and in any event not so complicated as to make a legal strike practically impossible.

The obligation to give notice to the employer before calling a strike does not undermine the principles of freedom of association. However, national law should not require such notice to include the duration of the strike, as workers and their organizations should be able, if they wish, to call an indefinite stoppage.²³

Requiring that a majority of all workers involved must vote for a strike (rather than just a majority of those who actually vote) has been considered to be excessive, in that it could greatly limit the possibility of carrying out a strike, particularly in large enterprises. Nevertheless, a requirement of a certain quorum, and a requirement that a decision to strike be made by secret ballot, may be acceptable. The same can be said of the requirement to hold a second vote if a strike has not begun within a specified time. Legislation may make the exercise of the right to strike subject to the consent of a certain percentage of the workers, regardless of their union membership.²⁴ In one case where the government had consulted workers in order to determine whether they wished the strike to continue, and the organization of the (secret) ballot had been entrusted to a permanent, independent body, the CFA nevertheless emphasized the desirability of consulting the representative organizations, with a view to ensuring freedom from pressure by the authorities.²⁵

(c) Interference by Public Authorities

Responsibility for declaring a strike illegal should lie not with the government, but with an independent body.

21 ILC, 98th session, *supra*, note 11, at p. 119.

22 See discussion below.

23 ILC, 98th session, *supra*, note 11, at p. 125.

24 Gernigon, Otero & Guido, *supra*, note 9, at p. 11.

25 ILO, *Digest of Decisions*, *supra*, note 6, §640.

The use of military and requisitioning orders to break a strike over occupational claims is acceptable only when it is aimed at maintaining essential services in circumstances of the utmost gravity. Where an essential public service, such as the telephone service, is interrupted by a strike, and where this action is unlawful under national law, the government may take responsibility for ensuring the functioning of the service in the interest of the general public. For this purpose, the government may consider it expedient to call in the armed forces or other persons to perform the suspended duties, and to take the necessary steps to give such persons access to the premises where those duties are performed.

Although workers and their trade unions have an obligation to respect the law of the land, police intervention in the course of strikes should be limited to the maintenance of law and order, and should be in proportion to the extent of any threat to public order. Governments should give adequate instructions to law enforcement personnel, to avoid the danger of excessive force in efforts to control demonstrations that might undermine public order. Measures taken to enforce court decisions affecting strikers should observe the elementary guarantees applicable in any system that respects fundamental liberties.

ILO supervisory bodies have held that mandating by law the closure of an establishment in the event of a strike infringes the freedom to work of non-strikers and members of management. Moreover, it may disregard the establishment's basic need to maintain equipment and prevent accidents.

(d) Sanctions

The principles of freedom of association do not shelter criminal acts committed during strikes. However, penal sanctions should be imposed only for the violation of strike prohibitions which are themselves in conformity with the requirements of freedom of association. All penalties in respect of illegal actions linked to strikes should be proportionate to the offence.

Salary deductions for time not worked because of strikes have given rise to no objection, as long as they correspond to the length of the stoppage. Such deductions should be neither required nor prohibited by statute, but left to the parties concerned. A government-

imposed obligation to work overtime to make up for time lost may unduly influence the course of the strike.

In the same vein, it is a serious violation of the principles of freedom of association to impose sanctions on a union in response to legitimate strike action (sanctions such as closing down the union's premises, making it liable in damages for losses incurred by the firm, withdrawing the union's dues check-off, exposing it to class actions,²⁶ or arresting or deporting strikers). Non-compliance with minimum service requirements should not lead to suspension or revocation of a union's legal status, even where the finding of non-compliance is made by an independent judicial body.

(e) Anti-Strike Measures

The CFA has concluded that the hiring of workers for the purpose of neutralizing a strike in a sector which cannot be regarded as essential in the sense explained above constitutes a serious violation of trade union rights.²⁷ In my view, Convention 87 may be interpreted as requiring states to prevent the hiring of strikebreakers, whether in the public or the private sector, for either temporary or indefinite replacement of strikers. The CFA has condemned the use of threats to dismiss strikers, recruitment of underpaid workers, and bans on joining a trade union in order to break up lawful and peaceful strikes. These practices may be considered unacceptable pressures hindering the right to strike under Convention 87, as well as a form of anti-union discrimination in violation of Article 1 of Convention 98. The same may be said of paying bonuses to non-strikers.

In some common law countries, strikes are regarded as having the effect of terminating the employment contract, leaving employers free to replace strikers with new recruits. In other countries, when a strike takes place, employers may dismiss strikers or replace them temporarily or for an indeterminate period. Furthermore, in some countries there is inadequate redress against employer actions that single out strikers for disciplinary action, transfer, demotion or dismissal. In the Committee of Experts' view, such reprisals are not

²⁶ Case No. 2467, *supra*, note 12.

²⁷ ILO, *Digest of Decisions*, *supra*, note 6, §632.

acceptable, and legislation should provide genuine protection against them. The matter is particularly serious if dismissed workers may only obtain a remedy of damages rather than reinstatement.²⁸

3. ILO STANDARDS ON ALTERNATIVE MEANS OF DISPUTE RESOLUTION

(a) Conciliation, Mediation and Arbitration

Convention 151 (Labour Relations in the Public Service, 1978) covers not only the right to organize in the public service but also procedures for determining terms and conditions of employment. It aims to adapt the general principles of freedom of association to conditions inherent to the public service. States are invited to establish institutions for protection of employee rights and negotiation of terms and conditions in accordance with a relatively detailed scheme, which allows exceptions for high-level employees or those with duties of a highly confidential nature.

Article 7 of Convention 151 deals with the full development and use of machinery for negotiating terms and conditions of employment between public authorities and public employee organizations. It nevertheless allows for the possibility of using other methods to enable public employee representatives to participate in determining those conditions. Article 8 indicates that disputes should be settled through negotiation, or through independent and impartial machinery such as mediation, conciliation or arbitration, established in a manner that ensures the confidence of the parties involved.

The CFA has accepted that financial considerations may be taken into account to a certain extent in determining public service pay, and recognizes that the special characteristics of the public service justify some flexibility in applying the principle of the autonomy of the parties to collective bargaining.²⁹ That said, the reservation of budgetary powers to the legislative authority should not lead to non-compliance with awards handed down by compulsory arbitration tribunals.

28 Gernigon, Otero & Guido, *supra*, note 9, at p. 38.

29 Case No. 2305, *supra*, note 12.

Aside from the standards just mentioned, the ILO has issued only one Recommendation on voluntary conciliation and arbitration (Recommendation 92, 1951). It is limited to general principles and leaves the matter largely to the discretion of the parties. Nonetheless, the final paragraph of Recommendation 92 underlines that none of its provisions may be interpreted as “limiting, in any way whatsoever, the right to strike.” In the view of the Committee of Experts, compulsory arbitration to end a collective dispute is acceptable only if it is requested by both parties,³⁰ or if the potential strike is one that may be restricted or banned on the grounds set out above. Provisions which allowed one party to refer a dispute to compulsory arbitration when a work stoppage exceeded 60 days were held to seriously limit the exercise of trade union rights.³¹

Recommendation 92 provides for the establishment of voluntary conciliation machinery to help prevent and settle industrial disputes. It proposes that such procedures be set in motion at the request of either party or by the relevant voluntary conciliation authority. If a dispute has been submitted to conciliation with the consent of all parties concerned, the parties should be encouraged to abstain from strikes and lockouts while the process is under way. The same holds true if they have agreed to final settlement by arbitration; in such a case, they should be encouraged to accept the arbitration award. The proceedings should be expeditious and free of charge. However, where the procedure compensates for legitimate restrictions on the right to strike, the CFA has accepted charges that are reasonable and that do not inhibit the ability of the parties, particularly those with inadequate resources, from making use of the services in question.³²

In order to gain and retain the parties’ confidence, any arbitration system should be truly independent, and the outcomes should not be predetermined by legislated criteria. Especially when the right to strike is restricted or prohibited, adequate protection should be given to workers to compensate for the limitations on their freedom of action. Such protection should take the form of impartial, rapid

30 ILC, 98th session, *supra*, note 11, at p. 77.

31 ILC, 97th session (Geneva, 2008), *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A) (Geneva: ILO, 2008), at p. 88 (Convention 87/Canada).

32 ILO, *Digest of Decisions*, *supra*, note 6, §602.

and effective conciliation, mediation and arbitration proceedings in which the parties concerned can take part at every stage, and in which an award (once made) is fully and promptly implemented.³³

Even in the case of compulsory arbitration, successful outcomes really depend on gaining and maintaining the confidence of both sides. To this end, all members of conciliation, mediation and arbitration institutions must not only be impartial, but must also appear to be impartial in the eyes of both the employers and the workers concerned. Thus, for example, the appointment by a minister of five members of an arbitration tribunal was found to call into question the tribunal's independence and impartiality, as well as the confidence of the parties to the process.³⁴ Employer and worker organizations should be able to select the members of the tribunal who will represent them in the proceedings.

Both conciliation and mediation are seen as ways to help the parties reach agreement voluntarily. Therefore, when the ILO supervisory bodies have accepted restrictions or prohibitions on the right to strike, they have taken no position on the relative desirability of conciliation as opposed to mediation, or on whether a system which separates conciliation and arbitration is preferable to a system which combines the two.

(b) Grievances

ILO Recommendation 130, adopted in 1967, deals specifically with the consideration of grievances within the undertaking with a view to settling them. It provides that any worker, whether acting individually or jointly with others, should have the right to submit grievances without suffering any prejudice whatsoever as a result, and the right to have such grievances examined through an appropriate procedure. Recommendation 130 specifies that it does not apply

33 Case No. 2277, *supra*, note 12; ILC, 81st session (Geneva, 1994), *Freedom of Association and Collective Bargaining*, Report III (Part 4B) (Geneva: ILO, 1994), §§136-176; ILO, *Digest of Decisions*, *supra*, note 6, §§569 and 595 *et seq.*; see also A.M. Trebilcock, ed., *Remedies and Sanctions in Industrial Action: Preliminary Relief* (Geneva: ILO, 1995).

34 ILO, *Digest of Decisions*, *supra*, note 6, §599.

to collective claims aimed at modifying terms and conditions of employment.

The Recommendation goes on to state that as far as possible, grievances should be settled within the undertaking itself, in accordance with procedures which are effective and are adapted to the conditions of the particular country, branch of economic activity and undertaking concerned, and which give every assurance of objectivity. Where efforts to settle a grievance within the undertaking have failed, there should be provision for final settlement through one of the following: (1) procedures set out in a collective agreement, such as joint examination of the case by the employers' and workers' organizations, or voluntary arbitration by someone to whom they have agreed; (2) conciliation or arbitration by the competent public authorities; (3) recourse to a labour court or other judicial authority; or (4) any other procedure that may be appropriate under national conditions.

Recommendation 130 takes the precaution of adding that when procedures for the examination of grievances are established through a collective agreement, the parties should be encouraged to include a provision renouncing direct action: they should undertake, during the lifetime of the agreement, to promote settlement of grievances through the specified procedures and to abstain "from any action which might impede the effective functioning of these procedures." This reflects the obligation of social peace provided for by statute or case law in many countries — an obligation which may be relative (in that it only prohibits industrial action on the matters dealt with in the collective agreement) or absolute (in that it prohibits any industrial action whatsoever as long as the agreement is in force).

As already mentioned, the CFA has accepted that strikes may be prohibited while a collective agreement is in force. It has asked that any such restriction be compensated for by recourse to impartial and rapid mechanisms through which individual or collective complaints about the interpretation or application of collective agreements can be examined. This type of mechanism not only allows the resolution of the differences which inevitably occur while an agreement is in force, but also helps to prepare the ground for future rounds of negotiation, by bringing to light problems that arise during the lifetime of the agreement.³⁵

35 *Ibid.*, §533.

Nothing in Recommendation 130 restricts a worker's right to apply directly to the competent labour authority, to a labour court, or to another judicial authority. The Recommendation states that the resolution of conflicts over the interpretation of legal texts should be left to the competent courts. The CFA considers that prohibiting strikes in such a situation is not a breach of freedom of association.³⁶

4. CONCLUSION

A few concluding observations can be made on the basis of the ILO's accumulated experience.³⁷ First is the importance of the interplay between freedom of association, free collective bargaining and the proper functioning of a dispute resolution system. In particular, this implies a real involvement of the social partners in preventing and resolving labour conflicts. A second and related observation is that any democratic government, acting alone, has only a limited capacity to prevent and resolve collective labour conflicts. Lastly, given the deep differences between countries in their socioeconomic, political and cultural environments, it would be presumptuous to promote any particular system of dispute resolution as being the best. However, it can be underlined that a sophisticated process for preventing conflict by securing and preserving peace and cooperation between the social actors — a process which guarantees easy access, transparency and fair outcomes — matters as much as or more than the machinery for resolving conflicts once they have arisen.

³⁶ *Ibid.*, §532.

³⁷ See ILO, *Collective Dispute Resolution through Conciliation, Mediation and Arbitration: European and ILO Perspectives*, High-Level Tripartite Meeting on the Settlement of Labour Disputes through Mediation, Conciliation, Arbitration and Labour Courts (Nicosia, Cyprus, October 18-19, 2007), http://www.ilo.org/public/english/region/eurpro/geneva/download/events/cyprus_2007/cyprus_dialogue.pdf.