

ITUC Guide to international trade union rights

This guide is intended to be an introduction to the international protection of trade union rights, and is also aimed at increasing the understanding of the ITUC Annual Survey of Violations of Trade Union Rights. It is mainly based on the 2006 Digest of decisions and principles as well as on individual decisions of the International Labour Organization (ILO) Committee on Freedom of Association¹ (CFA) and on the 1994 General Survey on Freedom of association and collective bargaining, the Individual Observations and the Direct Requests of the ILO Committee of Experts on the Application of Conventions and Recommendations² (CEACR). The reader is invited to consult the Guide to the ITUC international trade union rights framework for more detailed information, but should note that the only valid legal sources in this regard are the decisions of the CFA and the said proceedings of the CEACR.³

I Introduction

What are international labour standards?

The basics

International labour standards are norms and principles relating to work and social policy that are codified in international instruments. The ILO is the main international body responsible for developing and overseeing international labour standards⁴, and adopts conventions and recommendations to this end⁵. Conventions have binding effect on the member states that ratify them, while recommendations supplement or clarify the conventions and serve more as guidelines for national policy making.

Core labour standards

In 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work which identified a set of universal core labour standards. The core labour standards cover four areas, namely freedom of association and the right to organise, elimination of all forms of forced or compulsory labour, abolition of child labour, and elimination of discrimination in respect of employment and occupation, all of which are expressed in eight ILO conventions collectively referred to as the core conventions⁶. According to the Declaration, all ILO member states shall respect, promote and realise the core labour standards whether or not they have ratified the relevant conventions. Freedom of association and the right to organise, as codified in Convention 87 on Freedom of Association and Protection of the Right to Organise and Convention 98 on the Right to Organise and Collective Bargaining, constitute the gist of international trade union rights.

How are international labour standards protected?

Periodic reviews

International labour standards are supervised in the ILO through two different mechanisms.⁷ Each member state that has ratified a convention must submit a periodic report to the ILO on the measures it has taken to implement the provisions of the convention.⁸ The CEACR comments on these reports through individual observations or issues direct requests, which concern more technical issues or are appeals for additional information. The observations are published in the CEACR's annual report, which is subsequently considered at the annual International Labour Conference by the tripartite Conference Committee on the Application of Standards, which may also recommend actions to selected member states to rectify certain issues. Workers' and employers' organisations are given the opportunity to comment on the governments' reports. Workers' and employers' organisations may also submit comments on the application of conventions directly to the ILO at any time.

Special procedures

The ILO also provides for a special procedure outside the regular reporting system for complaints against the member states. Workers' and employers' organisations may submit a representation to the ILO Governing Body against a member state that has failed to fulfil its conventional obligations.⁹ A member state which is party to the same convention, a delegate to the International Labour Conference and the Governing Body acting on its own initiative may also file a complaint against a member state for failure to implement a convention.¹⁰ In this case, the Governing Body may decide to form a Commission of Inquiry to investigate the case. Complaints about violations of freedom of association are handled in a separate manner by the CFA. These complaints can be filed by a workers' or employers' organisation against a member state whether or not the member state has ratified conventions 87 and 98. The CFA then issues recommendations to the member state, which shall subsequently report on the implementation of those recommendations.

II Freedom of association and the right to organise

Freedom of association and the right to organise entail the right to form and join the trade union of one's choosing, as well as the right of unions to operate freely and carry out their activities without undue interference by employers or the authorities.

Establishment of a union

Procedures

Since the establishment of a union constitutes the very foundation for the exercise of trade union rights, it is important that the laws lay down clear procedures so that the establishment of a union is not substantially delayed or impaired, and so that union recognition can not be refused on arbitrary, unjustified or ambiguous grounds. The minimum number of workers

needed to set up a union should also be fixed in a reasonable manner and not hinder union formation. Where workers need previous authorisation from the authorities in order to form a union, or where the authorities must approve the constitution and rules of the union before it can be legally recognised, this is a serious infringement of freedom of association. Workers should always have the right to appeal a refusal to recognise a union to the courts.

Pluralism

Being able to form the union of one's choosing implies that workers should not be prevented from creating a union where another union already exists. They shall also not be required to obtain permission from an existing union or a central trade union organisation. Trade union monopoly, i.e. a situation where only one official trade union organisation is permitted by law and to which all unions must affiliate or pay contributions, is generally contrary to the principles of freedom of association.

Affiliation

Trade unions should be allowed to freely establish and join higher-level trade union organisations such as federations and confederations, which on their part should be free to group together unions from different sectors. The higher-level unions should enjoy the same rights as the first-level unions with the appropriate adjustments. Unions should also have the right to affiliate internationally, as well as to accept assistance and support from an international organisation.

Categories of workers

While each state can decide on the extent to which it grants members of the armed forces and the police the right to form and join trade unions, it may not deny these rights to migrant workers, workers in export processing zones, managerial and supervisory staff, agricultural workers, domestic workers, temporary workers, minors, or public servants who do not exercise authority in the name of the state,.

Union administration and organisation

Instruments

Freedom of association implies that unions shall be free to draw up their own constitutions and rules. Although national laws may regulate the preparation, content or amendment of these instruments, it is important that the legal provisions have the objective of protecting the interests of the union members, and that they do not go beyond formal requirements. It is also contrary to the principles of freedom of association where the constitution and rules of a union must be approved by the authorities or a higher-level trade union, where they must conform to those of a trade union centre, or where they can be elaborated upon by the union centre.

Integrity

Unions should be free to receive funding and to administer and utilise their funds for normal

and lawful purposes. As with any other organisation, they may be required by law to provide periodic financial statements to the authorities. However, the authorities shall not have a discretionary right to carry out inspections or request information at any time they see fit, and should not be allowed to audit the union funds themselves. To avoid any risk of excessive or arbitrary interference by the authorities there should always be a procedure for appeal to the courts.

Union activities

It is of fundamental importance that unions are free to pursue lawful activities for the defence of workers' interests. They shall thus be free to e.g. hold union meetings, demonstrate, petition, access workplaces and communicate and negotiate with management without undue interference by the public authorities or by the employers.

Union elections and freedom to exist

Free elections

Union members shall be able to elect their representatives in full freedom and to determine the rules and conditions for the election. While the law may require that a direct, secret and universal vote be held in order to promote democratic principles, it should not in detail regulate the procedures. The public authorities should not be allowed to nominate candidates, supervise the elections, express their opinions or in any other way unduly interfere with the election process. The election results should also not be subject to approval by the authorities, without which they would be invalid.

Free candidacy

The law should not disqualify a candidate because of some activity or characteristic that is not prejudicial to the aptitude and integrity of the candidate, nor should it require a candidate to be a longstanding union member or employee at a particular workplace. Also, any removal or suspension of a union official that is not the result of an internal decision of the union or ordered by a judicial body is a serious infringement of the principles of freedom of association.

Dissolution

The dissolution or cancellation of registration of a union are extreme measures that should only be taken as a last resort. This implies that any possibility of discretionary suspension or dissolution by the public authorities should be eliminated from the law. It is important to note that illegal activity on the part of a union member or official should in no case lead to the dissolution of the entire union. However, dissolution can be justified if the union's membership level drops below a reasonable and fixed minimum threshold, provided that the drop is not a result of anti-union activities.

Anti-union discrimination

Characteristics

Anti-union discrimination denotes any employer practice that disadvantages a worker or a group of workers on grounds of their past, current or prospective trade union membership, their legitimate trade union activities, or their use of trade union services. It is one of the most common and serious violations of freedom of association, and may jeopardise the very existence of a trade union. While taking many forms, anti-union discrimination usually involves dismissal, transfer, demotion, harassment or the like.

Protection

The authorities must not only forbid and penalise all acts of anti-union discrimination, they should also take all necessary steps to eliminate it. Access to means of redress which are prompt, inexpensive and fully impartial should be provided for in the law, as well as explicit remedies - including reinstatement - and penalties that are sufficiently dissuasive. Special protection is desirable for certain persons such as union officials and members of a union which has applied for recognition. Finally, the authorities should take stringent measures to combat blacklisting of union members and officials.

III Right to collective bargaining

The right to collective bargaining refers to the right of unions to freely bargain with employers on terms of employment and conditions of work without undue interference by the authorities, which shall take measures to encourage and promote voluntary negotiations between the social partners.

Representativity

Minimum requirements

For the right to collective bargaining to be adequately secured, the law must not lay down excessive requirements regarding a union's representativity. Thus, if a union needs the support of the majority of the workers in a bargaining unit to be recognised as a bargaining agent, and if no union meets this requirement, then the minority unions should at least be able to bargain collectively on behalf of their own members. While systems where the most representative union is awarded exclusive bargaining rights are not contrary to the right to collective bargaining, they should be accompanied by adequate safeguards.

Guarantees

The determination of the unions that are allowed to bargain collectively should always be based on objective, pre-established and precise criteria to avoid any opportunity for partiality or abuse. It is also important that the employers recognise the unions that are permitted to bargain, and that they are not able to by-pass the representative unions. Furthermore, affiliation to a trade union centre should not be a prerequisite for a union to engage in collective bargaining.

Free and voluntary bargaining

Negative obligations

The social partners shall be free to determine the terms of employment and conditions of work. The state has an obligation to refrain from interfering with the bargaining process, and shall not require that collective agreements conform to a unilaterally set state policy, require the renegotiation of an agreement or alter its contents, or suspend or derogate from a concluded collective agreement. The authorities can, however, encourage the social partners to take voluntary account of government social and economic policy considerations. In no case shall the validity of a collective agreement be subject to the discretionary approval by the public authorities, as collective agreements should only be refused on ground of procedural flaws or non-conformity with minimum standards laid down in the law.

Scope

Free collective bargaining also entails that the parties are able to bargain on matters that primarily or essentially relate to conditions of employment. Such matters shall not be excluded from the scope of collective bargaining by law or unilaterally by the authorities, and any limitation should be preceded by consultations with the social partners. However, certain matters that exclusively pertain to the management of an establishment, such as staffing levels, are not proper subjects for bargaining, although a union should be allowed to bargain on the consequences of such matters. Collective agreements should have binding force, and their duration should primarily be a matter for the negotiating parties. The parties shall also be able to decide on the level of bargaining.

Public sector

All persons employed by the government, by public undertakings or by public institutions should have the right to bargain collectively,¹¹ with the possible exception of public servants exercising authority in the name of the state.¹² Whether members of the armed forces and the police are allowed to bargain is a matter that each state is free to determine. While the state may determine upper and lower wage limits for future negotiations, significant room should be left for real bargaining, and unions must be able to participate in the designing of the overall bargaining framework. Only in cases of serious economic budgetary difficulties, for very compelling reasons and for a limited period of time can the authorities unilaterally fix the wage rate in the public sector.

Dispute resolution

Positive obligations

The state also has an obligation to promote collective bargaining. It should thus establish a sound legal framework as well as machinery such as conciliation and mediation to facilitate the conclusion of a collective agreement. It is important that recourse to such machinery is on a voluntary basis and by mutual agreement. The negotiating parties should also be given

ample opportunity to reach an agreement, and the laws should neither establish too short nor excessively long time limits for collective bargaining. Furthermore, promoting collective bargaining also implies that the laws should not accord equal or enhanced status to individual contracts over collective agreements.

Compulsory arbitration

Since compulsory arbitration generally encroaches upon the principle of free collective bargaining, it can only be justified under certain conditions. Compulsory arbitration is thus only permissible if both parties so request, if the collective dispute concerns public servants exercising authority in the name of the state, in essential services, or in the event of an acute national crisis. Compulsory arbitration at the request of the union for the conclusion of a first collective agreement may also be justified. On the other hand, where compulsory arbitration is imposed either unilaterally by the authorities or at the request of the employer only, this is a serious infringement of the right to collective bargaining. While there may come a time in bargaining where a serious deadlock cannot be broken without some initiative by the authorities, any such intervention must be consistent with the principle of free and voluntary bargaining.

IV Right to strike

The right to strike is one of the most important means for workers and their organisations to defend their occupational and economic interests, and may only be prohibited for public servants exercising authority in the name of the state and in essential services.

Prerequisites

Procedures

While the law may stipulate that certain procedures need to be followed before taking strike action, such procedures should be reasonable and must not substantially limit, delay or render ineffective a strike. An obligation to observe a certain quorum and take strike decisions by secret ballots is permissible, and it is appropriate for the decision to be taken by a simple majority of the workers who vote. When more than half of the workers or union members, including those absent and those present but not voting, must approve of a strike, this is an excessive requirement. Likewise, while the obligation to give prior notice of a strike is acceptable, the cooling-off period should be fixed at a reasonable length. A union shall also not be obliged to specify the duration of a strike in advance.

Dispute resolution

It is also not contrary to the right to strike where the law provides for voluntary conciliation and arbitration in industrial disputes before a strike, or for the possibility to suspend a strike for a reasonable time to allow the parties to seek a negotiated solution. However, such

procedures should be adequate and impartial, and should not delay the negotiation procedure nor prevent the calling of the strike. Compulsory arbitration is only allowed in situations where a strike can be restricted or even prohibited, i.e. in essential services or for public servants exercising authority in the name of the state, or when requested by both parties.

Limitations and bans

Format

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. While purely political strikes are not protected, unions should be able to call protest strikes, in particular against a government's economic and social policies. Also, since there are many different types of strike action, restrictions on the form of a strike may only be justified if the strike ceases to be peaceful. Workers should thus be free to resort to sympathy strikes (provided that the initial strike is lawful), picketing, and general strikes (in so far as they have economic and social objectives). Federations and confederations shall also be allowed to call a strike.

Public servants

All public sector employees should enjoy the right to strike, with the possible exception of public servants exercising authority in the name of the state and workers in essential services.¹³ The categories of workers whose right to strike may be limited should be restrictively defined, and appropriate compensatory guarantees should always be available. The right to declare a strike illegal shall not lie with the government, but with an independent body that has the confidence of the parties involved. This especially concerns cases in which the government is a party to the dispute.

Essential services

The right to strike may be restricted and even prohibited in essential services in the strict sense of the term, i.e. services the interruption of which would endanger the life, personal safety or health of the whole or part of the population.^{14 15} It is important that the definition and list of essential services are narrowly construed so as to avoid ambiguity or abuse. However, a non-essential service may become essential if a strike affecting it exceeds a certain duration or extent.¹⁶ Workers whose right to strike may be restricted or prohibited should always be afforded compensatory guarantees such as conciliation and mediation procedures, and it is essential that workers are able to participate in determining and implementing these procedures.

Minimum service

A minimum service can be set up in the event of a strike where a substantial restriction or total prohibition would not appear to be justified, if it is necessary to avoid compromising the life or basic needs of the population or causing irreversible or disproportionate damages.¹⁷ It is important that the minimum service is genuinely and exclusively confined to operations that are necessary in this regards, and it should neither result in the strike becoming

ineffective in practice, nor call into question the right to strike of the large majority of workers. The provisions regarding the minimum service should thus be established clearly, applied strictly and made known to those concerned in due time. Unions should be able to participate in defining the minimum service, and any disagreement as to the number and duties of workers concerned shall be settled by an independent body and not by the public authorities.

Undermining

Intervention

A general prohibition on strikes can only be foreseen in situations of acute national crises, such as genuine natural disasters, and then only for a limited period and to the extent necessary to tackle the situation. As regards intervention by the authorities in a strike, this is only acceptable where there is a genuine threat to public order, in said acute national crises, or where the right to strike can be restricted or even prohibited. However, a strike must not be suspended merely because it is deemed detrimental to the public or national interest, and the responsibility for suspending a strike shall not lie with the public authorities but with an independent body. Any intervention by the police or the army should be both proportionate and strictly limited to the maintenance of public order.

Replacement and requisitioning

The use of requisitioning orders constitutes a serious violation of the right to strike unless the order concerns a specific category of workers in essential services or public servants exercising authority in the name of the state, or if the strike in question may give rise to an acute national crisis. The hiring of workers to replace strikers in a sector which cannot be regarded as essential is also a severe violation of the right to strike.

Sanctions

No one should be penalised for carrying out or attempting to carry out a legitimate strike. Dismissals before, during or after a strike, or a refusal to re-employ workers having participated in a strike are very serious measures. While criminal offences carried out during a strike are not protected, in general sanctions for striking workers should only be possible where a strike is prohibited, and then only if the national laws are in conformity with international labour standards. Any sanction must be proportionate to the offence or fault and be accompanied by all the necessary judicial safeguards. No one should be imprisoned for participating in a peaceful strike, and if imprisonment is to be imposed at all, it should only be for serious penal violations committed during the strike. Unions shall also not be sanctioned for leading a legitimate strike, and cancellation of union registration is always a disproportionate measure. Finally, a withdrawal of all legal protection against civil liability for strikes can in practice entail a serious restriction on the right to strike.

Notes

¹ A special committee of the Governing Body of the ILO made up of three titular representatives each of workers, employers and governments and of an equal number of deputies.

² A supervisory body composed of 20 eminent legal experts from around the world, appointed for three-year terms.

³ The decisions of the CFA and the General Survey, the Individual Observations and the Direct Requests of the CEACR can be found through ILOLEX at www.ilo.org/ilolex/english/.

⁴ At the international level, trade union rights are also protected under the United Nations (UN) International Covenant on Civil and Political Rights (ICCPR), article 22 of which provides for freedom of association; the UN International Covenant on Economic, Social and Cultural Rights (ICESCR), which in its article 8 provides for the right to form and join trade unions, the right of unions to affiliate and function freely, as well as the right to strike; and in article 20 of the UN Universal Declaration of Human Rights (UDHR) which guarantees freedom of association. While the covenants are binding on the ratifying parties, the Universal Declaration is not an instrument open for ratification.

⁵ By May 2010 188 conventions and 199 recommendations had been adopted by the ILO, however a number of those have become obsolete.

⁶ Convention 29 - Forced Labour (1930); Convention 87 - Freedom of Association and Protection of the Right to Organise (1948); Convention 98 - Right to Organise and Collective Bargaining (1949); Convention 100 - Equal Remuneration for Work of Equal Value (1951); Convention 105 - Abolition of Forced Labour (1957); Convention 111 - Discrimination in Employment and Occupation (1958); Convention 138 - Minimum Age for Employment (1973); and Convention 182 - Worst Forms of Child Labour Convention (1999).

⁷ At the UN level, the ICCPR and the ICESCR are monitored by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, respectively. The state parties to the covenants are required to submit regular reports on how the rights are implemented. Countries that have ratified the First Optional Protocol to the International Covenant on Civil and Political Rights have also opened up the possibility for individual complaints against the governments for violations of the covenant. No such mechanism accompanies the ICESCR, and the UDHR, not being an international instrument open for ratification, lacks any supervisory mechanism.

⁸ All member states must also report on any progress they have made concerning conventions that they have not ratified, including annual reports on unratified core labour conventions. These reports are then drawn upon by the CEACR when it compiles the General Surveys.

⁹ This procedure is governed by articles 24 and 25 of the ILO Constitution.

¹⁰ The complaint procedure is governed by articles 26 to 34 of the ILO Constitution.

¹¹ Categories of workers that should enjoy collective bargaining rights include workers of state-owned commercial or industrial enterprises; employees of the postal and communications services; bank employees; staff of the national radio and television institute; teachers; staff of the water administration; air flight control personnel; persons employed in

public hospitals; fire-fighting and lifesaving employees; workers of the prison services; civil aviation technicians working under the jurisdiction of the armed forces; seafarers not resident in the country; and locally recruited personnel in embassies.

¹² For example officials working in the administration of justice and the judiciary, and customs officers.

¹³ Employees in state-owned commercial enterprises and public institutions, e.g. teaching staff, postal workers and railway employees, shall not be denied the right to strike.

¹⁴ The following may be considered to be essential services: the hospital sector; electricity services; water supply services; the telephone service; the police and the armed forces; the fire-fighting services; public or private prison services; the provision of food to pupils of school age and the cleaning of schools; and air traffic control.

¹⁵ The following do not constitute essential services in the strict sense of the term: radio and television; the petroleum sector; ports; banking; computer services for the collection of excise duties and taxes; department stores and pleasure parks; the metal and mining sectors; transport generally; airline pilots; production, transport and distribution of fuel; railway services; metropolitan transport; postal services; refuse collection services; refrigeration enterprises; hotel services; construction; automobile manufacturing; agricultural activities, the supply and distribution of foodstuffs; the Mint; the government printing service and the state alcohol, salt and tobacco monopolies; the education sector; and mineral water bottling companies.

¹⁶ This could be the case for example in household refuse collection services.

¹⁷ A minimum service can be established in essential services, in non-essential services where the extent and duration of a strike might result in an acute national crisis, and in public utility or public services of fundamental importance. A minimum service could be foreseen in the following services of public utility: the ferry service - regarding the population living on islands along the coast -, transportation of passengers and commercial goods, rail transport, underground railway, ports, postal services, refuse collection, the Mint, banking services, and the petroleum and educational sector.