IOE – ACT/EMP TOOLKIT FOR EMPLOYERS ON INTERNATIONAL LABOUR STANDARDS

FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANIZE CONVENTION, 1948 (NO. 87)

November 2013
1. Summary of the contents

Convention No. 87 deals with various aspects of freedom of association and protection of the right to organize, in particular:

- the freedom of employers and workers to establish and join organizations (Art. 2)
- the right of employers’ and workers’ organizations to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes (Art. 3)
- the protection of employers’ and workers’ organizations against dissolution and suspension by administrative authority (Art. 4)
- the right of employers’ and workers’ organizations to establish federations and confederations and the right of these organizations to affiliate with international organizations of workers and employers (Art. 5)
- the rights and protection of federations and confederations (Art. 6)
- the acquisition of legal personality by workers’ and employers’ organizations, federations or confederations (Art. 7)
- respect of the law of the land by employers, workers and their respective organizations (Art. 8)
- application of the Convention to the armed forces and the police (Art. 9)
- definition of the term "organization" (Art. 10)

For further detail, see the text of Convention No. 87.
2. Assessment from an Employers’ perspective

Convention No. 87 is one of the eight fundamental International Labour Conventions (“the Fundamental Conventions”). It sets out the general freedom of association and right to organize in the specific context of the world of work. In doing so, the Convention gives equal rights and protection to employers, workers and their respective organizations.

Convention No. 87 is of utmost importance to employers as an institutional guarantee for the autonomy and independence of employers’ organizations, and thus for the promotion and defence of employers’ needs and interests.

Nevertheless, concerns have been expressed by the employers in the ILO over certain extensive interpretations of the Convention made by the Committee of Experts on the Application of Conventions and Recommendations (CEACR), in particular regarding a right to strike. Although not regulated or even mentioned in the Convention, the CEACR has deduced from the Convention detailed rules providing for a very extensive right to strike. The Employers have consistently opposed these interpretations as having no textual basis in the Convention and as interfering unduly with national industrial relations systems.

While these interpretations by the CEACR are not legally authoritative, they still may have significant influence on law and practice in member States. It is for this reason that the Employers consider Convention No. 87 with reservations.

**Overall Employer Assessment:**

Convention No. 87 provides an institutional guarantee for the freedom of association, including the employers’ freedom of association. It is therefore of utmost importance for the setting up and operation of free and independent employers’ organizations.

Nevertheless, employers have expressed important concerns regarding certain interpretations of the Convention made by the CEACR, in particular as regards a right to strike.
3. Legal Analysis of the Provisions

Article 1

Each Member of the International Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions.

COMMENTS

Art. 1 makes clear that ratifying countries have an obligation to implement all the subsequent provisions.

While the Convention provides flexibility as regards the methods of implementation and discretion as to the necessity and appropriateness of measures taken\(^1\), there is no flexibility for “picking and choosing” provisions for implementation.

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\(^1\) See below, Art. 11
Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

COMMENTS

Art. 2 is the central provision of Convention No. 87 in that it guarantees the right to organize for workers and employers. The CEACR has rightly pointed out the interdependence and links between the freedom of association on the one hand and democracy and the respect of civil liberties on the other.

“Workers and employers, without distinction whatsoever”

The rights provided by Art. 2 are equally guaranteed for all employers and workers. The terms “without distinction whatsoever”, emphasizes that the right to organize should be guaranteed without discrimination of any kind as to occupation, sex, colour, race, creed, nationality or political opinion.

The CEACR has clarified that the Convention applies, for instance, to the following categories of workers: seafarers, agricultural workers, migrant workers, domestic workers, apprentices, subcontracted workers, dependent workers, workers employed in export processing zones and in the informal economy, and self-employed workers. It is also important to note that the Convention applies both to public and private employers (and workers).

The only possible exceptions are detailed in Art. 9 of the Convention (armed forces and police).

“the right to establish and, subject only to the rules of the organisation concerned, to join organizations of their own choosing”

The right to organize consists of two distinct rights: the right of employers and workers to establish and the right to join organizations of their own choosing.

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5 ILC; Record of Proceedings, 1947, para. 570.
8 General Survey, 1994, para. 45.
1) Regarding the right to establish employers’ or workers’ organizations, the CEACR has observed that the following restrictions may not compatible with the Convention:

- Legal rules which require an inappropriate minimum number of founding members; for instance
- Legal rules which limit the number of organizations in a region or sector
- Legal rules which limit membership to individuals within the same or similar field of activity
- Legal rules which limit the number of organizations that an individual may join
- Restrictive registration rules which require an administrative decision for the establishment of an employers’ organization.
- Inappropriate administrative discretion concerning registration of organizations and the process to obtain legal personality
- The exclusion of legal recourse against a negative administrative decision
- Trade union monopolies, imposed directly by legislation or indirectly by regulations which make it impossible to establish or register multiple organizations.
- Legal rules which unduly restrict the designation of “representativity” or which give the most representative organizations undue privileges.

With regard to the requirement of a minimum number of members to establish an employers’ or workers’ organization, the CEACR has considered that while this requirement is not in itself incompatible with the Convention, „the number should be fixed in a reasonable manner so that the establishment of organizations is not hindered.“ In the view of the CEACR, a minimum number of ten members for establishing an employers’ organizations would be too high.

2) As is stated in Art. 2, the right to join organizations is “subject only to the rules of the organisation concerned”. This right is of significant importance for the free determination of the structure and membership of organizations.

A contentious issue in connection with the right to join organizations has been the question of the compatibility of “union security clauses” with the Convention. These clauses make trade union membership or payment of union dues compulsory, or require employers to give preference in recruitment or other matters to unionized workers. The CEACR considers these clauses to be in compliance with Convention No. 87 if they are the result of free negotiations. However, if the same clauses are imposed directly by legislation, the CEACR considers the government to be in violation of their obligations under the Convention. The Employers have always considered “union security clauses” to be an infringement of the Convention, whether they have been imposed by legislation or by collective agreement as a result of free negotiations. In the Employers’ view, the existence of union security clauses creates undue pressure on individual workers to join trade unions and thus denies the individual freedom not to associate. However, without the acknowledgement of a freedom not to associate, the freedom to associate protected by the Convention loses its voluntary character and becomes an obligatory duty. The Employers therefore believe that no ratifying State should require or allow, in law or in

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11 General Survey, 2012, para. 89 and footnote 159 (CEACR, observation, 2011 regarding Panama)

12 General Survey, 1994, para. 89.

practice, that workers or employers have to establish or to join any organization, which is incompatible with the rights and freedoms guaranteed by the Convention.\textsuperscript{14}

**“without previous authorization”**

Art. 2 guarantees the right of workers and employers to establish organizations “without previous authorization” from the public authorities. The CEACR has stated that, in their view, national regulations governing the formal functioning and registration of organizations are compatible with the Convention, provided that they are not, in practice, so onerous as to

- constitute “previous authorization,”
- give the authorities discretionary power to refuse the establishment of an organization, or
- constitute such an obstacle to registration or establishment as to amount to a “pure and simple” prohibition.\textsuperscript{15}

The CEACR has also noted that, although the official recognition of a workers’ organization through its registration is a relevant aspect of the right to organize, the freedom to exercise of legitimate trade union activities should not be dependent upon registration.\textsuperscript{16} Given that the Convention is meant to apply equally to employers and workers, it can be deduced that the enjoyment of the Convention's provisions by employers' organizations must also not be dependent upon official registration.


\textsuperscript{15} General Survey, 2012, para. 82.

**Article 3**

1. Workers’ and employers’ organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

**COMMENTS**

Art. 3 guarantees the free functioning of workers’ and employers’ organizations by recognizing four basic rights:

- to draw up their constitutions and rules;
- to elect their representatives in full freedom;
- to organize their administration and activities; and
- to formulate their programmes without interference by the public authorities.

According to the CEACR, any legislative provisions concerning the preparation, content, amendment, acceptance or approval of constitutions and rules of occupational organizations which go beyond formal requirements may hinder the establishment and development of organizations and constitute interference contrary to Art. 3 of the Convention.  

The CEACR has also considered that national legislation which regulates in detail the internal functioning of workers’ and employers’ organizations pose a serious risk of interference by the public authorities. Where such provisions are deemed necessary by the public authorities, they should simply establish an overall framework, leaving the greatest possible autonomy to the organizations to determine their functioning and administration. Restrictions on this principle should have the sole objective of protecting the interests of members and guaranteeing the democratic functioning of organizations. Furthermore, there should be a procedure for appeal to an impartial and independent judicial body so as to avoid any risk of excessive or arbitrary interference on the free functioning of organizations.

The “right to strike”

(a) Procedural Issues regarding the Right to Strike

The CEACR has over time developed detailed rules on the right to strike. In the absence of any explicit provision in the Convention on a right to strike, the CEACR has based its respective interpretations on Art. 3 ("workers’ and employers’ organizations shall have the right … to organize their … activities …"), taken with Art. 10 ("… the term “organization” means any organization of workers … for furthering and defending the interests of workers …").

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However, as the Employers have pointed out on several occasions, the views of the CEACR regarding a right to strike do not constitute a valid interpretation of Art. 3:

- Nowhere does the wording of the Convention refer to the right to strike as a component of freedom of association.

- When Convention No. 87 was negotiated and adopted in 1948, there was consensus in the committee which drafted the text of the Convention not to take up the issue of the right to strike, but rather to leave this to another discussion regarding conciliation and arbitration to be held at a later date.\(^{19}\)

- The contents of Art 3 clearly shows that the term “activities”, like the other items mentioned in this provision (the drawing up of the organizations` constitutions and rules; the election of the organizations` representatives, the organization of the organizations` administration; the formulation of the organizations programs) only refers to internal matters and in any case interventions that (different from strikes !) are not meant to interfere with the rights and freedoms of third parties.

- If the right to strike was a necessary part of the freedom of association and derived from Convention No. 87, as affirmed by the CEACR, it would have to apply in line with Art. 1 and 9 to all workers, except to the armed forces and the police. However, even the CEACR considered that this outcome was not satisfactory and felt the necessity to develop further restrictions of the scope of application as regards the right to strike (e. g. workers in “essential services”).

While most parties would agree that the right to strike was not included as part of the Convention when it was adopted in 1948, the CEACR has repeatedly insisted that their opinions on the right to strike have, over time, become a valid interpretation of Art. 3. For instance, the CEACR has relied upon the Vienna Convention on the Law of Treaties to state that while the preparatory work of a Convention is an important supplementary source for use in its interpretation, it may yield to the other interpretative factors, such as subsequent practice.\(^{20}\) However, the relevant provision of the Vienna Convention on the Law of Treaties does not just refer to subsequent practice as such, but to “any subsequent practice which establishes the agreement of the parties in its interpretation.”\(^{21}\)

Given the significant variations in the law and practice of ILO member States in the area of the right to strike, as reflected in the numerous observations of the CEACR on this issue in its annual reports, it is hardly possible to speak of an “agreement of the parties” on the interpretations by the CEACR regarding the right to strike. It should be also noted in this context that the Employers in the ILO have expressed, over the last 52 years, consistent objections to the opinions of the CEACR regarding the right to strike.

Moreover, at several points, governments have also taken issue with particular aspects of the CEACR’s views on strike-related matters.\(^{22}\) In 2002, the European Court of Human Rights (ECHR)  

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19 ILC, Record of Proceedings, 1948, Report VII, page 87; it should be noted that the issue of a “right to strike”, different from what was proposed, was not taken up in the latter discussion on “conciliation and arbitration”.


22 These Governments include Japan, Cyprus and Switzerland in 1973, Tunisia in 1983, and Belarus and Portugal in 1994. Their objections were raised in the discussion of the respective year’s General Survey regarding the freedom of association Conventions.
deemed inadmissible a court case launched by the (Norwegian) Federation of Offshore Workers’ Trade Unions against the government of Norway. In doing so, the ECHR made reference to the 1997 judgment of the Norwegian Supreme Court on the same matter. The Norwegian Supreme Court had emphasized that “under the 1919 ILO Statute, the Governing Body, the Committee of Experts and the Freedom of Association Committee had no competence to determine with binding effect disputes on the interpretation of the ILO Conventions, for which competence was vested in the International Court of Justice. … In its view, the opinions held by the institutions of the ILO on the limits to State intervention in labour disputes did not have a basis in the Convention texts as negotiated and adopted.” The Norwegian Supreme Court determined that, because neither Convention No. 87 nor the International Covenant on Civil and Political Rights contained detailed standards limiting State restrictions on the right to strike, there was no conflict between Norway’s domestic law and its international obligations.

Given that the right to strike is not contained in Convention No. 87, the expansion and promotion of the CEACR’s views on the matter constitutes an attempt to set standards and to define policies on industrial relations, which falls outside the mandate of the CEACR:

- The mandate of the CEACR is derived from the resolution of the International Labour Conference in 1926, establishing a technical committee tasked with carrying out the preparatory work of the Conference in examining the application of ratified Conventions.

- It was agreed at that time that “the functions of the Committee would be entirely technical and in no sense judicial” and that the body “would have no judicial capacity, nor would it be competent to give interpretations of the provisions of the Conventions nor decide in favour of one interpretation rather than of another.”

- When the mandate of the CEACR was revisited in 1947, it was emphasized that the mandate of the CEACR was to undertake a “technical examination of the annual reports … [as a] preliminary to the over-all survey of application conducted by the Conference through its Committee on the Application of Conventions.”

As a result, it must be stated that the interpretations by the CEACR have been creating significant legal uncertainty regarding the scope of the obligations under Convention No. 87. This may also be one of the reasons for the relatively low ratification rate of Convention No. 87 amongst the eight fundamental ILO Convention and the hesitation of quite a number of (in particular, bigger) ILO member States to ratify the Convention.

(b) Content-related Issues regarding the Right to Strike

Because the CEACR has “by-passed” the regular standard-setting procedures within the ILO, their views on the right to strike cannot be said to capture the views or needs of the tripartite constituents, particularly the Employers. The CEACR’s views also clearly contradict the structure and purpose of the Convention which according to its authors was “not intended to be a ‘code of regulations’ for the right to organize, but rather a concise statement of certain fundamental principles.” Despite all of this, the CEACR has taken it upon itself to set out a very detailed regulation of the right to strike, without the input of any of the ILO’s constituents.

24 ILC, Record of Proceedings, 1926, Annex V, pages 400 and 405.
The CEACR has taken, as a starting point, an almost unlimited right to strike. In applying Art. 3 of the Convention, the CEACR has adopted the position that any limitation on the right to strike constitutes a *prima facie* violation of the Convention. While the CEACR has set out particular regulations “justifying” the limitation of strike action, these exceptions are very narrow and, in practice, often meaningless.

Some of the more problematic “regulations” for employers, as well as examples of their application by the CEACR, are described below:

- **Essential services:**

  o The CEACR states that restrictions on the right to strike are acceptable in relation to “essential services.” However, they have defined “essential services” narrowly as those “the interruption of which would endanger the life, personal safety or health of the whole or of part of the population.”

  o Example: In its 2012 observations on the application of international labour standards, the CEACR notes that strikes cannot be prohibited even in the face of serious economic crisis; that injunctions on strikes may be unacceptable even when the national interest is threatened or affected; and that “while the economic impact of industrial action and its effect on trade and commerce may be regrettable, such consequence in and of themselves do not render a service ‘essential’ and thus do not justify restrictions on the right to strike.”

  o The CEACR’s definition of essential services severely limits the ability of Governments to protect the overall public interest and provide for their citizens with respect to other consequences of strikes, including severe economic damage. The adoption of such a position by the CEACR also stands in contradiction to the ILO’s 2008 Declaration, which highlights sustainable enterprise as a key component in the achievement of social justice.

  o The European Court of Justice (ECJ), in the *Laval* case, determined that “since the freedom to provide services is one of the fundamental principles of the Community … a restriction on that freedom is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest.” Furthermore, they determined that Art. 49 EC precludes unions “from attempting, by means of collective action in the form of a blockade of sites such as that at issue in the main proceedings, to force a provider of services …to enter into negotiations with it … and to sign a collective agreement.” This judgment recognizes that a right to strike, even when recognized at the national level, is not necessarily the paramount consideration in determining whether a form of collective action is legitimate.

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29 *Report III (Part 1A), 2012, Antigua and Barbuda.*

30 *Report III (Part 1A), 2012, Australia, page 60.*

31 See: *ILO Declaration on Social Justice for a Fair Globalization, 2008.*

32 *Laval un Partneri Ltd. v. Svenska Bygnardsarbetareförbundet and Others, Case No. C-341/05.*
• **Replacement of striking workers:**

  o The CEACR has determined that, during the course of a strike, the dismissal or replacement of strikers, temporarily or for an indeterminate period, constitutes an impediment to the exercise of the right to strike and that legislation should provide protection against this type of employer action. The replacement of striking workers, the CEACR has noted, should be limited to the narrow instances in which they have determined that the prohibition or limitation of strikes is “justified.”

  o **Example:** In 2011, the CEACR commented that Peruvian legislation providing for the replacement of teachers on strike should be overturned, “taking account of the fact that strikers should only be replaced in the event of a strike in an essential service in the strict sense ... and if the strike results in an acute national crisis.” Such high thresholds place undue limitations on the sovereignty of Governments and expose the general public, including non-striking workers, to negative consequences of strikes which are beyond their control. This type of strike regulation also places employers at an extreme disadvantage. It is also likely to produce economic damage, threaten sustainable enterprise and disregard the public interest.

• **Political strikes:**

  o The CEACR has stated that strikes related to a Government’s economic and social policies are legitimate because they may affect the socio-economic and occupational interests of workers and their organizations. The only restriction the CEACR recognizes is that “purely political” strikes may be prohibited because the right to strike is a “corollary” of the freedom of association. Further, if workers believe that they do not enjoy the fundamental civil liberties necessary to exercising the rights guaranteed by the Convention, according to the CEACR the workers are justified in having recourse to strikes to draw attention to those issues. Finally, the CEACR has determined that, even when a collective agreement stipulates that strikes are not permitted for the duration of the agreement, workers must not be prevented from striking against the social and economic policy of the Government.

  o **Examples:** In its 2012 observations, the CEACR noted that workers’ organizations “should be able to use strike action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and standard of living.”

  o The CEACR’s virtually unlimited recognition of “political strikes” is not compatible with democratic principles, as such strikes affect and entirely dismiss the rights of uninvolved employers and other third parties. The CEACR’s reservation regarding “purely political strikes” has no relevance in practice as the CEACR has never

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34 Report III (Part 1A), 2011, Peru, page 139.
considered a strike to be purely political. It is important to recognize that strikes aimed at protesting State policy, whether “purely political” or not, are aimed at the Government. Consequently, this form of industrial action is more accurately characterized as a protest, rather than a strike directed at the employer, taking the action out of the realm of industrial relations and outside the scope of Convention No. 87. It is particularly worrisome that the CEACR has effectively interfered in collective agreements by inserting an automatic “right to (not purely) political strike” clause, even where none exists.

- **Sympathy strikes:**
  - “Sympathy strikes” in which workers’ organizations engage in strike action in order to show solidarity with other workers, have been deemed acceptable by the CEACR, as long as the supported strike itself is lawful. The CEACR considers that a general prohibition of sympathy strikes “could lead to abuse, particularly in the context of globalization characterized by increasing interdependence and the internationalization of production.”

  - **Example:** The CEACR has emphasized the right of workers to take industrial action in relation to matters which affect them, even though, in certain cases, the direct employer may not be party to the dispute, including participation in sympathy strikes, provided that the strike they are supporting is lawful. They have also made repeated requests for the amendment of legislation which restricts the ability of workers to engage in sympathy strikes, expressing their belief that such legislation is not in conformity with the Convention.

  - Allowing workers to engage in strike action against an employer for reasons unrelated to the employer and regarding matters on the resolution of which he has no influence, cannot be seen as falling within the ambit of Convention No. 87.

- **Sanctions:**
  - According to the CEACR, sanctions must not be leveled against workers who participate in lawful and peaceful strikes. As such, determining whether or not a strike is lawful is an important question, which should lie with a body which is independent of the government authorities. Penal sanctions must only be taken in cases where violence against persons or property or other “serious” infringements of penal law have taken place during the course of a strike. Other types of sanctions, such as fines or removal of trade union officers, should only be possible where the prohibition of strike action is justified – as set out by the CEACR itself – and the sanctions are proportionate to the seriousness of the fault committed. Under no circumstances should workers who participate in lawful strikes be dismissed or discriminated against by their employers.

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39 Report III (Part 1A), 2011, United Kingdom.
Example: The CEACR has noted that legislation which provides a right of appeal for workers if the Government declares their strike unlawful is not a sufficient guarantee against violations of the freedom of association. They have also noted that penal sanctions should not be taken against workers engaged in a peaceful strike, even if the strike is unlawful.42

The CEACR believes that sanctions on the basis of more general penal legislation, such as trespassing or “obstruction of business” are incompatible with the Convention. Given that strikes are a matter which should be regulated at the national level, it is the Employers’ view that the definition of a “lawful” strike and the sanctions which are imposed against striking workers for violations of laws and regulations should also be determined by individual States. Furthermore, the employers freedom to enterprise should not be unduly restricted when it comes to making decisions regarding the dismissal or suspension of workers, whether or not they have participated in strikes. It is objectionable that the CEACR has declared that the “consent of the employer” should not be a factor in determining whether a worker may not return to work.43

- **Strike pickets and workplace occupation:**

  Example: The CEACR has determined that picketing and workplace occupation are acceptable forms of strike action for as long as the strike remains peaceful. At the same time, non-striking workers and managerial officers must be allowed to enter the premises. To that end, the CEACR has noted that any legislation requiring the closing of an enterprise, establishment or business during the course of a strike may infringe the rights of non-striking workers and management, and raises problems of compatibility with the convention.44

  Example: The CEACR has noted “with satisfaction” the situation in Panama, in which owners, managerial staff and “workers in positions of trust” are allowed to enter the premises of an enterprise but only if they do not intend to recommend productive activities.45

  In the view of the Employers, non-striking workers and managerial staff must always be allowed onto the premises of an enterprise throughout the course of a strike, regardless of their purpose for entering. In addition, workplace occupation, which is intended to disrupt or prevent the industrial activities of managers and non-striking workers, constitutes trespassing and an unacceptable disregard of private property. It can under no circumstances be seen as a possible means of engaging in strike action.

- **Compulsory arbitration:**

  In the opinion of the CEACR, compulsory arbitration to end a strike is only acceptable when both parties to a dispute agree to participate, or when the strike may be justifiably restricted or prohibited, including where work stoppages constitute a threat

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44 General Survey, 2012, paras. 149-150.
45 Report III (Part 1A), 2011, Panama.
to essential services. Compulsory arbitration may, however, not be initiated by the government authorities for reasons such as economic considerations. The CEACR also notes that if conciliation attempts between an employer and workers’ organizations are unsuccessful, it may be compatible with the Convention to allow an independent body to draw up recommendations which take effect and become enforceable after a sufficient period of time has elapsed.

Example: In its 2012 observations, the CEACR reiterated that arbitration imposed by the State at the request of one party to a dispute is generally contrary to the voluntary negotiation of collective agreements and the autonomy of the bargaining partners. Therefore, any arbitration, imposed at the unilateral request of a bargaining party, which leads to a binding award or agreement is in contravention of the Convention.

While the Employers have agreed that compulsory arbitration is rarely an acceptable procedure, the reasons for which they believe so differ from the reasons of the CEACR. The CEACR believes that recourse to compulsory arbitration is “tantamount to a general prohibition of strikes, which is incompatible with the Convention.” The Employers, on the other hand, contest any inclusion of the right to strike within the Convention. Instead, the Employers’ position is that negotiations on collective agreements and industrial relations should be entered into voluntarily, and they have criticized any instance of compulsory arbitration at the unilateral request of one of the parties.

Governments and regional bodies have also been critical of the CEACR’s interpretations on compulsory arbitration. In its 1997 judgment, the Supreme Court of Norway “observed that Norway had never accepted that the use of compulsory arbitration required by a substantial societal interest was contrary to the ILO Convention nos. 87 and 98.” The Supreme Court noted that Norway’s imposition of compulsory arbitration in situations involving a “substantial state interest,” which could arguably include severe economic damage or other matters of public interest, does not present a conflict with its international obligations, as the provisions of Convention No. 87 do not contain detailed regulations on the matter.

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50 The Employers therefore find it very concerning when the CEACR, as an exception, considers compulsory arbitration compatible with Convention No. 98 when legal provisions allow trade unions (only !) to initiate compulsory arbitration in order to pave the way towards conclusion of a first collective agreement. This can hardly be seen compatible with the principle of voluntary negotiation in Art. 4 of the Convention (no matter if it comes to the first or a latter collective agreement), see General Survey 2012, para. 250.
51 See: Supreme Court judgment quoted by the European Court of Human Rights in Federation of Offshore Workers’ Trade Unions v. Norway, Case No. 38190/97.
**Article 4**

Workers and employers’ organisations shall not be liable to be dissolved or suspended by administrative authority.

**COMMENTS**

The dissolution and suspension of trade unions and employers’ organizations constitute extreme forms of interference by the authorities in the activities of organizations. Such actions are likely to impair the exercise of the freedoms guaranteed by Arts. 2 and 3 of the Convention.

Art. 4 therefore prohibits the dissolution or suspension of employers' and workers' organizations by administrative authority. The provision covers every employers’ and workers’ organization and, in combination with Art. 6, their federations and confederations.

Unlike the freedoms provided for in Arts. 2 and 3, Art. 4, however, does not provide an absolute guarantee. While dissolution and suspension may not take place “by administrative authority”, it is still possible for an organization to be dissolved or suspended

- by regular judicial procedures,
- through administrative processes which allow for recourse to judicial appeal, or
- during emergency situations if a right of appeal to the courts is provided.\(^{52}\)

Even in these cases, however, the CEACR has noted that it is important to determine whether dissolution or suspension by legislative or judicial authority prevents workers and employers from pursuing activities in organizations of their choosing. If so, the legislation may not be in conformity with the Convention.\(^{53}\)

In any case, dissolution and suspension should be accompanied by all the necessary guarantees.\(^{54}\)

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\(^{52}\) General Survey, 1994, paras. 182 and 185.


HIGHLIGHTS

- Workers and employers’ organizations have the right to join federations and confederations.
- Federations and confederations have the right to affiliate with international organizations.
- Federations and confederations have the same rights as first-level organizations.

Article 5

Workers’ and employers’ organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

Article 6

The provisions of Articles 2, 3 and 4 hereof apply to federations and confederations of workers’ and employers’ organisations.

COMMENTS

In order to defend the interests of their members effectively, Art. 5 provides for the right of workers’ and employers’ organizations to form and join federations and confederations of their own choosing. Further, the need to represent employers’ and workers’ interests at the international level also requires that national federations and confederations be able to group together and act globally.

According to Art. 6, these higher-level organizations enjoy the various rights accorded to the first-level organizations, in particular as regards their freedom of internal governance, activities and programmes.

The guarantees contained within Arts. 5 and 6 allow, for instance, for first-level organizations to receive financial aid or subsidies from foreign organizations and for national employers’ federations to join bodies such as the International Organisation of Employers (IOE).
Article 7

The acquisition of legal personality by workers’ and employers’ organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 2, 3 and 4 hereof.

COMMENTS

Art. 7 provides that national legislation related to freedom of association and the right to organize must not create obstacles for workers’ and employers’ organizations attempting to acquire legal personality. Legal personality should not be refused to organizations when they fulfill the requirements envisaged by law and its acquisition should not be subject to conditions of such a character as to restrict the application of Arts. 2, 3 and 4 of the Convention.56

When legislation makes the acquisition of legal personality a prerequisite for the existence and functioning of organizations, the conditions for acquiring legal personality must not boil down to a de facto requirement for previous authorization to establish an organization.56 The CEACR has observed that the exercise of legitimate activities related to freedom of association and the right to organize should not depend on the ability of an organization to acquire legal personality.57

In addition, workers’ and employers’ organizations must have the right to appeal to impartial and independent courts against any administrative decision regarding their registration.58

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56 General Survey, 1994, para. 76. See also: commentary on Art. 2, above.


58 General Survey, 2012, para. 88
Article 8

1. In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.

2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

COMMENTS

It is important to note that the guarantee against arbitrary dissolution and suspension of workers’ and employers’ organizations does not grant immunity with regard to the ordinary law; organizations and their members, under Art. 8(1) are still bound to “respect the law of the land”.

Art. 8(2), however, provides that the corollary of this obligation is that the “law of the land” in ratifying States should not be used to impair, directly or in practice, the guarantees of the Convention.59

The CEACR’s application of this provision has been problematic, particularly with regard to contentious issues, such as the right to strike. Where “the law of the land” – that is, national law – creates limitations on the right to strike, the CEACR has determined that such limitations constitute an impairment of the Convention. As noted above, it is the Employers’ position that such issues fall outside the ambit of Convention No. 87 and should not be read into any of its provisions.60

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60 See: commentary on Art. 3, above.
Article 9

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

2. In accordance with the principle set forth in paragraph 8 of article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

COMMENTS

Art. 9(1) contains the only authorized exception within the Convention, concerning the armed forces and the police. Due to their importance in ensuring the internal and external security of the State, ratifying States are free to determine if or to what extent the Convention will apply to these two groups within their national context.

Issues have arisen with regard to the CEACR’s view that these two exceptions have to be construed in a restrictive manner. In this regard, the CEACR has determined for instance that civilian personnel in the armed forces; civilian employees in the industrial establishments of the armed forces, or civilian employees in the intelligence services, do not fall within the ambit of Art. 9(1). The Employers do not accept this view for which the Convention does not provide any justification and which unduly limits the flexibility of application for ratifying countries. Hence, member States are free to determine the meaning of the terms “armed forces” and “police” in line with their national context and applicable methods of interpretation.

The following categories of workers cannot be considered to be members of the armed forces or the police unless the employing institutions form an organisational part of the armed forces or the police: fire service personnel, prison staff, custom and excise officials, employees of the legislative authority, workers in private security firms, members of the security services of civil aviation companies, workers engaged in security printing services or member of the security or fire services of oil refineries, airports and seaports.\(^\text{62}\)

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\(^{61}\) General Survey, 1994, para. 67

Article 10

In this Convention the term ‘organisation’ means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.

COMMENTS

Art. 10 provides a definition of the term “organisation.” The broad terminology utilized within this provision ensures that employers and workers have ample freedom in defining themselves as organizations falling under and enjoying the protection of this Convention.

This provision, in combination with Art. 3 (“activity” aimed at “furthering and defending the interests of workers”), has been used by the CEACR to justify the right to strike as part of the guarantees under the Convention. The Employers have shown on various occasions that these provisions, in isolation or in combination with one another, do not provide a basis for the regulation of a right to strike within Convention No. 87.63

63 See commentary on Art. 3 above;
Article 11

Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

COMMENTS

Art. 11 requires States to “take all necessary and appropriate measures”, which gives government flexibility in deciding what, according to national circumstances and needs, would be “necessary” and “appropriate”.

In this context, it should also be pointed out that the Convention does not specify particular means of application and thus provides flexibility to governments in choosing the preferred means of implementation. Hence, States are not necessarily required to adopt legislation for the implementation of the Convention, although legislation usually is a central means of application. Alternative or supplementary means of implementation can be: collective agreements, case law, arbitration awards, declarations, public policies/programmes, codes of conduct and other forms of self-regulation, or yet other methods which take into account national conditions.64

When the Convention was originally being discussed in committee, the Chairman of the committee, “stated that the Convention was not intended to be a ‘code of regulations’ for the right to organize, but rather a concise statement of certain fundamental principles. The States would remain free to provide such formalities in their legislation as appeared appropriate to ensure the normal functioning of industrial relations.”65

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The Working Party on Policy regarding the Revision of Standards ("Cartier Working Party") (1994-2002) was a Working Party of the ILO Governing Body Committee of Legal Issues and International Labour Standards. It was chaired by a Government representative. Its meetings were private. It was comprised of 16 Government members (four from each region), eight Employer members and eight Worker members, and had the following mandate: to assess actual revision needs; to examine the criteria that could be applied to the revision of standards; to reflect on the possibility of extending and supplementing the evaluation of standards; to make the standard-setting system more coherent by narrowing the differences between the social policy objectives it establishes; to analyze the difficulties and obstacles involved in the ratification of ILO Conventions; to envisage the measures which might be proposed to improve the ratification of Conventions that have been revised.

A broad consensus emerged in the Cartier Working Party that the six basic human rights Conventions (Nos. 87 and 98, 100 and 111, 29 and 105) and the four other priority Conventions (Nos. 81, 129, 122 and 144) would be excluded from revision.

**Employers’ Position on the Conclusions of the Cartier Working Party**

“The Employer members were very pleased with the results of the meeting of the Working Party. It was clear that the members of the Working Party were aware of the need to reach a consensus. They drew the attention of the Committee to paragraph 3 of the report. They were pleased that ten basic human rights and other priority Conventions had been set aside as instruments that should be excluded from the current exercise, but noticed that such a decision was not irreversible in the long term. Issues concerning the appropriate use of terminology such as “basic” or “fundamental” when referring to human rights Conventions should be decided at a later stage. Although the discussions during the Working Party were hesitant on some occasions, the Employer members were confident that progress had been made and there would be more progress at future sessions. They hoped that the papers to be prepared by the Office, mentioned in paragraph 50, would be available to the Government representatives early enough so that they would have time to consult with their governments prior to the next meeting of the Working Party.”

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68 Conventions No. 87, 98, 29, 105, 100 and 111; Conventions No. 138 and 182 were added later on to this group;

69 Conventions No. 81, 129, 122, and 144;
EMPLOYERS’ ATTITUDES AT THE TIME OF ADOPTION

FIRST DISCUSSION

1947, Report of the Committee on Freedom of Association, 30th session ILC.

Regarding a proposed provision guaranteeing a freedom to establish organisations. “The Employers’ members proposed a sub-amendment by which the words "or not to join" were to be added… After a short discussion the Employers’ sub-amendment was rejected by 41 votes to 50.”

1947, Report of the Committee on Freedom of Association: Submission, Discussion and Adoption in Plenary, 30th session ILC

Mr. CORNIL – Employers’ delegate, Belgium, Deputy Reporter of the Committee on freedom of association. “The problem of freedom of association is absolutely fundamental for this Organisation. If there were not freedom of association, it could not survive…the best definition of democracy would be to say that it is the form of government which establishes the best balance between individual and collective freedoms…so that next year we may proceed to adopt a Convention which will contain the essential principles.”

Mr. Taylor – Employers’ delegate, Canada. “The employers take the position…that the acceptance of the principle of freedom of association should surely not be at the price of individual freedom. Individual freedom and freedom of association as such are equally important…The principle of the ‘closed shop’ and compulsory unionism as such cannot be accepted by the employers…I am urging the Employers’ group to accept the Resolution and the report…”

SECOND DISCUSSION

1948, Report of the Committee on Freedom of Association: Submission, Discussion and Adoption in Plenary, 31st session ILC

Mr. CORNIL – Employers’ delegate, Belgium, Deputy Reporter of the Committee on freedom of association. “Although we realise the necessity of organisation among the employers, we have too much respect for individual freedom to demand that we all conform to one average opinion which, through its very neutrality, would lose all point and all human value. … Employers and workers have discussed this proposed Convention with a common desire to achieve something. The extent of the concessions made by all parties reveals a mutual trust which I do not think has ever before been so clearly shown. … [This document] is a faithful embodiment of the common will of workers’ and employers’ organisations to give each other recognition, to respect each other, and to help each other in promoting genuine social progress.”
FIRST DISCUSSION

- 1947, Report of the Committee on Freedom of Association: Submission, Discussion and Adoption in Plenary, 30th session ILC

Mr. ALTMAN – Government delegate, Poland. “We attach very particular importance to a guarantee, on the international level, of respect of freedom of association, which we consider a basic element of peace and collaboration among the nations of the world.”

Mr. V. CYRIL PHELAN – Government adviser, Canada. “Therefore the ILO should and does, I am sure, welcome the opportunity it has had this year to accomplish something substantial in opening the way to those nations which do not yet give full and practical recognition to the freedom of association, in the hope that its precept may result in benefit for all citizens.”

SECOND DISCUSSION

- 1948, Third Report of the Committee on Freedom of Association and Industrial Relations, 31st session ILC, Appendix XI

“There was wide support for the view that nothing in the Convention already adopted or in the discussions then under discussion could deprive a worker or employer of his inherent freedom not to exercise his right of association if he so desired.”

- 1948, Report of the Committee on Freedom of Association: Submission, Discussion and Adoption in Plenary, 31st session ILC

Mr. VEIGA – Government delegate, Portugal. “In their replies to the questionnaire on freedom of association, several Governments made significant reservations on the matter. Austria, Chile, China, Ecuador, Hungary, Pakistan, Switzerland and the Union of South Africa stressed the necessity of taking account of the requirements of public order in each country, and of respecting national regulations concerning the establishment of occupational associations. Bolivia, Ecuador and the Union of South Africa were definitely in favour of excluding public servants from occupational associations. Austria, Belgium, Canada, Ecuador, Egypt, the Netherlands, Sweden, Switzerland, the Union of South Africa, the United Kingdom and the United States also stated more or less explicitly that we should avoid any drafting which might imply the idea that we were granting public servants the right to strike.”

“Secondly, the Portuguese system embodies the principle of freedom of association, that is to say, it recognises the right of all employers and all workers to join or not to join the organisations established. Our law is opposed absolutely to any clause or action limiting this liberty or impeding its exercise.”
The right of every person to establish and join organizations was the very foundation of freedom of association. The comments and recommendations of the Committee of Experts on this subject concerned the fundamental rights and liberties which every citizen should be able to invoke, worker or employer, who wishes to join an organization and participate in its activities. For the Employers’ members, respect for these principles was the indispensable prerequisite for the existence of a state of law respectful of democratic rules. For a number of years, this Committee had recalled that the violation of civil liberties had negative repercussions on freedom of association. The Committee had the duty to draw attention to the regrettable situations of this type when they occurred and to request the necessary changes. … The real and recognizable difficulties, obstructions and shortcomings concerning freedom of association in its practical application formed an important field of action for the supervisory bodies of the ILO. There was considerable agreement on this subject, constituting a base for effective action in this field and this opportunity should not be lost. The differences of opinion about the limits of strikes should not be allowed to imperil the general measure of agreement. However, controversial matters needed to be discussed at somewhat greater length than questions on which there was agreement.”

“The Employers’ members nevertheless expressed serious reservations with respect to the differentiation made by the Experts between trade union security clauses freely negotiated and clauses imposed by legislation. This differentiation, which was perhaps no longer a true differentiation, was far too complex. If this reasoning were accepted, pressures through collective bargaining would be acceptable but not by state regulation. Reservations were necessary in this regard because there were countries where collective bargaining produced the same effects as legislation. The Employers’ members thus did not see any real difference between the factual pressures and those exercised by legislation: for the individual the result was the same whether the pressure came from workers’ organizations, employers’ organizations or the State. In the opinion of the Employer’s members, there was a logically obvious link between the freedom to join an organization and the freedom not to join. Freedom required the possibility to choose among several options and the freedom not to join was an inalienable part of the guarantee for freedom. The Employers’ members considered that on this point, the Committee of Experts did not follow the principle retained in paragraph 55 of the survey wherein it applied the principle that exceptions to a basic rule should be interpreted in a very narrow sense.”

“On the principle of the right to strike, a broad consensus was expressed in the Standards Committee. The Employers’ members specified that, according to them, the text of Conventions Nos. 87 and 98 did not include the right to strike and expressed their disagreement with the scope given to this right by the Committee of Experts. The Employers’ members made detailed comments on this question, clearly stressing on a number of occasions that they did not challenge the principle of the freedom to strike and lock-out, but they...
absolutely could not accept that the Committee of Experts deduced from the text of the Convention a right so universal, explicit and detailed, as it had done in this part of the survey. … There were no concrete provisions and it was not helpful to quote the standards contained in the instruments of other organizations where strikes and collective action were sometimes mentioned in another context and in a very general or only indirect manner.”

“Under these circumstances, it was incomprehensible to the Employers that the supervisory bodies could take a stand on the exact scope and content of the right to strike in the absence of explicit and concrete provisions on the subject, and that this absence seemed precisely to be the justification for their position, as is suggested in paragraph 145. … Article 3 of Convention No. 87 which confers to organizations the right to “organize their administration and activities and to formulate their activities” did not mean, according to the Employers’ members, the right to intervene in the rights of others. … In any event, strikes were clearly not an internal and autonomous matter of a trade union; they were above all directed against employers and, in today’s world with its division of labour, the effects of a strike which were regularly and deliberately calculated increasingly touched third parties and the general public who had nothing to do with this conflict. … [The interpretation of the Committee] did not allow for the conclusion that the right to strike was an intrinsic corollary of the right to organize, as asserted in paragraph 151 of the survey.

The Employers’ members also felt it important to note that they were not so much criticizing the fact that the Committee of Experts wanted to recognize the right to strike in principle, but rather that it took as a point of departure a comprehensive and unlimited right to strike. The views of the Committee of Experts on the various forms of strikes and their scope were obviously based on erroneous premises. The Committee did not generally examine whether strikes were permissible, nor the question of how far a strike can go. Beginning with the erroneous premise of an unlimited right to strike, the Committee considered rather whether limitations on the right to strike required a specific justification, which could be seen in the treatment of all the important cases. Two examples could be given in this respect: the public service and political strikes.”

“According to the Employers’ members, the Committee of Experts considered that restrictions on strikes in the public service were only allowable if the strike affected the essential services, an expression which the Experts later defined in the strict sense of the term. Consequently, the Committee came to accept restrictions on the right to strike only in cases where the strike might endanger the life, personal safety or health of whole or part of the population. The Employers’ members had already responded a State could not accept that its duty to protect the welfare of its citizens be restricted to the values of life and health.”

2012 General Survey. Article 19 of the ILO Constitution72

“The Employer members, with reference to the comments by the Chairperson of the Committee of Experts concerning the discussion of the right to strike in relation to the 1994 General Survey, emphasized that, as indicated in the present General Survey, they had clearly articulated their objections during the 1994 discussion to the interpretations of the Committee of Experts on the right to strike. While the Employer members acknowledged that a right to strike existed, as it was recognized at the national level in many jurisdictions, they did not at all accept that the comments on the right to strike contained in the General Survey were the politically

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accepted views of the ILO’s tripartite constituents. … There was no mention of the right to strike in the text of Convention No. 87, and the determinative body to decide such rules recognized by the ILO was the Conference, not the Committee of Experts. … The Employer members therefore objected in the strongest terms to the interpretation by the Committee of Experts of Convention No. 87 and the right to strike, to the use of the General Survey with regard to the right to strike and to being placed in such a position by the General Survey. …

In more general terms, the Employer members agreed with the comments of the Committee of Experts that, in the absence of a democratic system in which fundamental rights and principles were respected, freedom of association could not be fully developed. There were situations of the failure to apply Convention No. 87 outlined in the General Survey, such as the denial of the right to organize to certain categories of persons, restrictions on the holding of free elections in representative organizations, restrictions on the categories of persons who could hold office in organizations, restrictions on the independence and functioning of organizations, the requirement of excessive numbers of members to establish organizations, which went to the heart of the Convention and were also experienced by some employers. Moreover, the Committee of Experts had rightly emphasized that employers were also protected by the freedom of association instruments. …

The Committee of Experts had created arbitrary distinctions in interpreting the right to strike, which forced it to make special rules for the public sector. Public employers [in Denmark] would not follow the creative inventions of the Committee of Experts, as the right to strike depended on national legislation, not international ILO Conventions."

Discussion of Individual cases

Freedom of Association for Employers and Tripartism

2007 – Venezuela

“The case involved government interference in the affairs of employer’s organizations, in particular FEDECAMARAS, as well as interference in the work of the Conference Committee by restricting the travel of Ms Albis Muñoz outside the country. Since 1995, the Employer members had been complaining of interference in the affairs of employers’ organizations, as well as in the composition of the Venezuelan Employer’s delegation to the Conference. Since 2004, the ILO Credentials Committee had explicitly recognized FEDECAMARAS as the most representative employers' organization. However, the Government had created parallel employers’ associations to replace and undermine FEDECAMARAS. That was contrary to tripartism and freedom of association and it undermined social dialogue.”

“The principle of non-interference enshrined in Article 3 was clear and unambiguous. The Employer members considered that some tangible and specific progress had to be made. The Government should be prompted to take immediate steps to comply with Article 3 in all its aspects and should ensure that the conditions for freedom of association were met - protection of civil liberties, freedom of expression and compliance with genuine, free and independent tripartite consultation and social dialogue.”

“The Employer member of the Bolivarian Republic of Venezuela regretted that an international forum again had to consider the way in which freedom of association was hindered in his country. All Venezuelans identified with tripartite social dialogue and the values of freedom of expression, association and initiative. The social market economy that facilitated the generation of formal employment in private enterprises made a fundamental contribution to economic development and social progress. Without a constructive attitude, it would be impossible to resolve the problems affecting the 1.2 million unemployed Venezuelans. For the 400,000 new jobseekers who entered the labour market every year there was no prospect of finding formal employment and five million workers were not covered by the social security system. The ILO should continue supplying assistance for the effective observance of freedom of association by sending a new high-level mission.”

“The Employer members said that the Government representative had not touched upon two main concerns that they had raised, namely the need to ensure respect for civil liberties, freedom of speech and freedom of movement as a prerequisite for freedom of association, and non-interference in the internal affairs of employers' and workers' organizations. The systematic destruction of the most representative employers' organization in the country, FEDECAMARAS, was a matter of grave concern. The rights enshrined in the Convention applied to democratic and authoritarian societies alike. The case of Albis Muñoz, which had been discussed in the Committee in 2004, 2005 and 2006, was significant given the systematic violations of the Convention and was a serious breach of the principle of freedom of association. The Committee's conclusions should emphasize that civil liberties, freedom of speech and freedom of movement were prerequisites for freedom of association, recognize that those conditions did not exist in the country and also address the interference by the Government in the internal affairs of FEDECAMARAS. Furthermore, it should be emphasized that Article 3 of the Convention protected both workers' and employers' organizations, meaning that the Committee of Experts should be requested to address all issues relating to Article 3 in relation to both workers' and employers' organizations. The Conference Committee should also recognize that scant progress had been made in terms of freedom of association, particularly concerning the employer aspects of the case. They indicated that a high-level tripartite mission should therefore be sent to the country to examine the situation.”

2008 – Egypt 74

“The Employer members thanked the Minister for her comprehensive reply. They emphasized that the Convention was a fundamental one and a cornerstone of the ILO. Compliance with this Convention was therefore not an evolutionary process; there could be no concessions or “middle ground” in securing respect for its provisions. Social dialogue and tripartism was a second cornerstone of the ILO. The existence of dialogue and consensus, however, could not veto the requirements of the Convention. They recalled that the present case concerned two fundamental aspects of the Convention. The first, which concerned the situation of trade union monopoly, was inconsistent with the requirement that a multiplicity of trade unions be allowed to exist and flourish. The second aspect touched upon the right of trade unions to set their own rules and govern themselves without government interference.

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2008 – Japan

“The Employer members recalled that there were special exceptions in the Convention for some public employees, as provided in Article 9 of the Convention. Further, the Convention included special clauses for the armed services and the police. There were good reasons for their exclusion. The Committee of Experts had a much narrower interpretation of these provisions than the Japanese Government. The Government might have good reasons for its position, taking into consideration the historical circumstances of the Japanese ratification and the traditional view of firefighters in Japan. However, the Employer members did not agree with the Government's reasoning. …

In 2001, the Employer members noted that full freedom of association had not been achieved. They recognized, however, that the Government had taken steps to remedy the situation. … The fundamental right to organize without interference from the Government could not be compromised in Japan. The Employer members therefore welcomed that the Japanese Government had informed the Committee of new and positive initiatives in the law-making process.”

2009 - Panama

“The Employer members believed that the fact that the Government had organized consultations did not excuse it from fully complying with Convention No. 87. Consultations with the social partners should not be used as a pretext to neglect responsibilities, using consensus as an excuse. They said that the Government had referred to bills that had nothing to do with the cause for concern and they were not certain that the employers had been consulted. They emphasized that they hoped for rapid progress and would not give up on the progressive use of the mechanisms available in the ILO supervisory system.”

2009 – Venezuela

“[The Employer members stated that] the basic issue in the present case was that if there was no private sector, there was no tripartism. The case involved the most fundamental and sacred values of the ILO, namely freedom of association, social dialogue and tripartism. For the attainment of those values, it was crucial to protect civil liberties, freedom of speech and freedom of movement. Yet those conditions were not being met, with particular reference to freedom of speech, which was jeopardized, among other reasons, by Government control over the media. With regard to the vandalism and occupation of the premises of FEDECAMARAS, the perpetrators were well known, but there was no evidence of any investigation or prosecution.”

“The Employer member of Brazil said that, when discussing freedom of association, it was necessary to realize that it could not exist in the absence of the other fundamental human rights


from which it was inseparable. For employers, the right to economic initiative, a corollary of which was the right to property and freedom of expression and communication, was essential for the existence of freedom of association. Dictators always targeted communications as a key factor in social organization and use the media to intoxicate public opinion and thus impose regimes opposed to democracy. He expressed his strongest protest against the recent government acts against the media, including the closure of a television channel and a threat to close another one."

“[The Employer member of the Bolivarian Republic of Venezuela] said that the Venezuelan employers were under constant harassment through the violation of their fundamental civil freedoms and rights, principally as a result of the lack of social dialogue. There as a legal net around the national productive sector which limited investment in the country and condemned current society and future generations to dependence on a rentier economy that was subject to the fluctuations of raw material prices. In conclusion, she said that FEDECAMARAS had the obligation to ensure that this did not continue to happen. She called on the Government to bring an end to this harassment and to stop excluding the independent productive force in the country, so that everyone could work for the Venezuela that they all deserved."

“The Employer member of Ecuador emphasized that workers’ and employers’ rights could only be effective when their other individual rights were respected, including freedom of expression and opinion. When these rights were not respected, there was no freedom of association. Moreover, for social dialogue to be genuine, it had to include the most representative workers’ and employers’ organizations. When the representativeness of the organizations was not taken into account, it was a false dialogue."

“The Employer member of Argentina … emphasized that this was the most important case in the history of the ILO for the Employer members. Freedom of association, which was of benefit to both workers and employers, was based on the right to life, respect for other human rights and the existence of the rule of law. In this context, when private property was confiscated and private initiative was not respected, there was a violation of the right to freedom of association of employers."

“The Employer members stressed that the discussion was not about the merits of different economic systems but rather about the existence of free, open and democratic societies. The Government had given no evidence that it intended or was willing to apply and implement the Convention. Many Government members had raised the issue of the criteria according to which the case had been selected for discussion. The Employer members highlighted that, while some cases selected met only one of the eight criteria set out in the Committee’s methods of work, six of the criteria applied to the case of application of the Convention in the Bolivarian Republic of Venezuela. They further drew attention to the fact that the Government representative had not addressed the two main fundamental issues relating to the case: the need to ensure respect for civil liberties, freedom of speech and freedom of movement as a prerequisite for freedom of association; and the non-interference in the internal affairs of employers’ and workers’ organizations. These were not issues of a political nature, given that the sine qua non of a free, open and democratic society was freedom of association without interference. The systematic destruction of the most representative employers’ organization in the country, FEDECAMARAS, was a matter of grave concern. The rights enshrined in Convention No. 87 applied to democratic and authoritarian societies alike.”
2010 – Canada

“Moreover, [the Employer member of Canada] noted that, contrary to the findings of the Committee of Experts regarding the freedom of association of agricultural workers in certain provinces, these workers in Ontario were granted the statutory right under the Agricultural Employees Protection Act (AEPA) to form and join employees' associations and the right to protection against interference, coercion and discrimination in the exercise of freedom of association, that this issue was being examined by the Supreme Court of Canada, and that meaningful statutory protections concerning freedom of association could be contained in legislation other than the Labour Relations Act.”

2011 - Nigeria

“The Employer members noted this was not a case of restricting the right to strike – a right not enshrined in the Convention – but rather that it violated Article 3 in terms of the right of workers’ organizations to organize activities and formulate their programmes. While arbitration could be helpful in resolving workplace disputes and hence avoiding recourse to industrial action, it should be entered voluntarily by the parties that would be bound by the outcome.”

2011 – Serbia

“The Employer members urged the Government to change the provisions of the Labour Law concerning the establishment of employer organizations as had repeatedly been requested by the Committee of Experts. Under the current laws, social dialogue was an empty shell. The practice that the Chamber of Commerce had effectively taken over the role of authoritative employer organizations had to be ended as soon as possible. Law and practice had to be brought into compliance with Conventions Nos. 87 and 98. Employer organizations had to be formed and established free from State intervention. Considering the repeated empty promises by the Government, the Employer members had almost lost their patience. The Government had therefore to act quickly, otherwise the Employers’ group would file a complaint of violation of freedom of association with the ILO.”

Union Security Clauses

2011 - Panama

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“[The Employer members] hoped that those changes would not be long in coming. Finally, they drew attention to the point raised by the Committee of Experts regarding the deduction of union dues while a collective agreement or accord was in force. It was strange that, on the one hand, the Committee of Experts considered that deducting contributions from non-unionized public servants was contrary to Convention No. 87, while on the other it deemed that applying the same requirement to workers who were not public servants was valid only if the amount of the contribution was not so great as to limit their right to join the union of their own choosing. They were not aware of the real reasons for such a double standard, and they emphasized that as employers they were somewhat reticent about the practice of imposing union contributions on all the workers, especially where collective agreements covered the entire workforce. Freedom of association and the right to organize did not require the payment of a contribution to a specific trade union or employers’ organization. With regard to the Committee of Experts’ comments concerning the right to strike, they reiterated their view that an interpretation could not be inferred of its scope and limits.”

Right to Strike

2008 – Egypt

“With respect to the right to strike, the Employer members recognized a generalized right to strike but the State had the discretion to regulate it in accordance to its needs and conditions. However, during a strike, the human rights and civil liberties of the individuals in the action must be respected. In conclusion, the Government was requested to provide a comprehensive report on the issues raised. There was also a need for ILO technical assistance.”

“The Employer member of Egypt stated that as a resident of El Mahallah City, he had witnessed the recent strikes and could report that the security forces intervened only after being attacked with stones and Molotov canisters by the demonstrators who had burnt schools and other public buildings, causing considerable damage. The Egyptian employers believed in human rights, democracy and freedom of expression but these rights should be exercised in a framework of respect for national legislation and public order. Laws and regulations could not be the same everywhere and should reflect cultural specificities. … He also noted that the number of strikes had recently increased and this was something that the Egyptian society was not used to. As a result of the strikes, a number of companies had reached agreements with the trade unions and had paid workers’ salaries agreed upon in negotiations. The right to strike was guaranteed to all workers, but strikes were not supposed to be used as a means to intimidate, pillage and burn. He concluded by emphasizing that employers’ organizations in Egypt strongly believed in social dialogue and were continually involved in consultations with the Government and the workers, attaching great importance to their counterparts who had a specific role to play in this process.”


“Furthermore, the Employer members emphasized that during the discussion, before the adoption of the Convention, the question of whether there should be a paragraph on the right to strike was thoroughly discussed. It was decided that the Convention would not include such a provision, and it was adopted and ratified without it. The Employer members were well aware that the Committee of Experts had tried for many years to reverse the original decision in such a way that they read into the Convention a right to strike. The Employer members did not acknowledge this right.”

“Furthermore, the Employer members emphasized that during the discussion, before the adoption of the Convention, the question of whether there should be a paragraph on the right to strike was thoroughly discussed. It was decided that the Convention would not include such a provision, and it was adopted and ratified without it. The Employer members were well aware that the Committee of Experts had tried for many years to reverse the original decision in such a way that they read into the Convention a right to strike. The Employer members did not acknowledge this right.”

“The Committee of Experts also set out a series of considerations relating to the right to strike. The Employer members reiterated their view that an interpretation could not be derived from the Convention concerning the limits and scope of the right to strike, and they maintained this position. The Employer members considered that the fundamental pillar upholding freedom of association was the freedom of the enterprise to organize its resources. The absence of direct or indirect coercion was based on this freedom.

Section 493 of the Labour Code, which had been amended in 1972, required the immediate closure of all the enterprises, establishments or businesses affected by a strike. This was a unique provision without parallel anywhere else in the world. This meant closure by the police or by order of the public authorities. ... In other words, according to Panamanian law, their action prevented employers from entering their own businesses. The Committee of Experts, the Conference Committee and the Committee on Freedom of Association had reiterated that this regulation constituted a serious and inadmissible infringement, which violated the provisions of Convention No. 87. A regulation that forced enterprises to close in the event of a dispute: (1) completely undermined its ability to organize its resources; (2) violated the right of property and the right of free access to property; (3) restricted the freedom of movement of the employer; (4) interfered with the proper management of the employers' business, which also prejudiced the interests of the workers; (5) interfered in an admissible and excessive manner with the capacity to bargain freely, thereby obstructing or distorting any negotiation, particularly if the enterprise was also required to pay wages during this period; (6) could irreversibly threaten the sustainability of the enterprise itself, and (7) infringed the freedom of workers to support this type of action. The essence of the right to organize and freedom of association lay in their voluntary nature.

“Among the issues referred to by the Committee of Experts, [the Employer member of Panama] considered that the most serious was the closure of an enterprise in the event of a strike and he emphasized that there was no recourse available against closure in such a case. He explained that in practice the police would close the enterprise, seal its entrance and prohibit both workers and employers from entering. This had extremely serious consequences for the enterprise, and also for the workers, particularly those non-striking workers who were thus obliged to participate in the strike

against their will. Moreover, it allowed for the closure in the event of a dispute based on a mere allegation by workers that the law had been violated and in the absence of proof of the allegation. Allegations were not even verified during conciliation. This was a breach of due process and constituted a serious case of irresponsibility.

He also addressed the issue of the obligation to pay wages lost during the closure of the enterprise. The Committee of Experts had already indicated that the payment of lost wages for strikes should be negotiated between employers and workers.”

2010 – Canada

“In addition, the Employer members reaffirmed that Convention No. 87 guaranteed neither the right to strike nor certain strike action. Recalling the firm view expressed on this question in this year’s general discussion, they requested that the following observations be clearly set out in the conclusions in this case: Article 11 of the Convention required members to undertake “all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise”; the Conference decided in 1948 that the right to strike was not included in the Convention; the Committee of Experts could not regulate in detail a general right to strike as it was seeking to do in this case; and a “one-size-fits-all” approach to Canada failed to recognize the difference in economic and industrial development throughout its provinces. They made reference to the 1953 General Survey on Conventions Nos. 87 and 98, which stated that the object of Convention No. 87 was to define as concisely as possible the principles governing freedom of association, whilst refraining from prescribing any code or model regulations. They further stated that members had the right to define “essential services” and concluded that the Conference Committee was tasked with considering Canada’s application of the Convention and not more.”

“The Employer member of Canada thanked the Government for the measures it had taken and processes put in place, like the Advisory Committee on International Labour Affairs, to engage in social dialogue with the social partners regarding labour law, policies, and implementation of international labour objectives. She stated that the Canadian Employers Council did not believe that cases arising under the Committee on Freedom of Association were directly relevant to the consideration of the application of Convention No. 87. She also reminded the Committee that it was only examining Canada’s application of Convention No. 87, and not Convention No. 98, which Canada had not ratified. … Finally, she stressed that the Canadian Employers Council shared the view of the Employer spokesperson in this year’s general discussion that the Convention did not contain the right to strike. Thus, a government could regulate strikes and lockouts in accordance with its national requirements and remain in compliance with the Convention. It appeared inappropriate that the Committee of Experts made efforts to regulate in detail the ability to strike under this Convention.”

2010 - Swaziland


“With reference to their earlier intervention during the general discussion, the Employer members wished to emphasize that, in their view, Convention No. 87 neither provided for the right to strike nor guarantee certain forms of strike action. They could not therefore agree with the comments of the Committee of Experts in respect of recognizing the right to strike in sanitary services, ensuring that penalties imposed on strikers did not impair the right to strike and guaranteeing that workers might engage in sympathy strikes without incurring sanctions.”

**2011 - Nigeria**

“As regards the remaining issues raised by the Committee of Experts, they wished to make two comments. First, noting that the Committee of Experts construed the compulsory arbitration prior to strike action currently in place as a restriction on the “right to strike” in violation of Article 3 of the Convention, the Employer members wished to express caution and pointed out that they had consistently asserted in this Committee that there was no right to strike under Article 3. In this regard, they referred to comments made at the 31st Session of the International Labour Conference (ILC) in 1948, according to which the Convention was not intended to be a “code of regulations” for the right to organize, but rather a concise statement of certain fundamental principles. … Second, the Committee of Experts further suggested that, pursuant to Article 3, legislation concerning the strike vote should require the majority of the votes cast, not the majority of the workers. **The Employer members were concerned that the Committee of Experts was going beyond what the Convention stipulated and felt that observations on compliance with Article 3 should not extend beyond the four basic rights guaranteed in this provision.**”

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- See in particular: page 477, para. 2.


- See in particular: page 87, para. 2.

Minutes of the 121st session of the ILO Governing Body (5 March 1953), pages 35 et seq.

- English: http://www.ilo.org/public/libdoc/ilo/P/09601/09601%281953-121%29.pdf
- French: http://www.ilo.org/public/libdoc/ilo/P/09626/09626%281953-121%29.pdf
- Spanish: http://www.ilo.org/public/libdoc/ilo/P/09650/09650%281953-121%29.pdf

- See in particular: The statement of the employer spokesperson, Mr Waline, on the competence of the Committee on Freedom of Association to deal with the “right to strike” – page 38, para. 3.


- Spanish: http://www.ilo.org/public/libdoc/ilo/P/09656/09656%281994-81%29.pdf
• See in particular:
  o Discussion on the “right to strike”: paras. 115 – 148
  o Employers’ position: paras. 115 – 135
  o Workers’ position: paras. 136 – 143
  o Government positions: paras. 144 – 148


• English:
  French:
  Spanish:

• See in particular, on the “right to strike”: pages 283 et seq.