

## The Right to Strike, the ILO-dispute

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by

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## 1. The ILO, how it works?

### ILO SUPERVISORY SYSTEM

- **Commission of experts** comments every year the application of standards in every country;
- Every year the Tripartite **Committee of Application of Standards (CAS)** of the International Labour Conference discusses 25 difficult cases;
- 3 times a year the **Commission of Freedom of Association (CFA)** discusses cases;
- The Governing Body discusses the most difficult situations and complaints (art 24, 26).

## 2. C 87 Freedom of Association and the Right to Strike

“Right to strike” not literally mentioned in C87:

- Art. 3: ...the right *“to organize their administration and activities and to formulate their programmes”*;
- Art. 10: ...such organizations are *“furthering and defending the interest of workers or of employers”*;

But longstanding jurisprudence:

- Recognition Right to Strike deferring from C87;
- From 1952 to 1992 without remarks;
- Recognised by 3 constituents in Resolutions of the International Labour Conference and other Conventions.

## 3. C 87 Freedom of Association and the Right to Strike

- Cold war:
  - Symbol, recognized by employers and governments of the Western Bloc...;
  - To prove to the Eastern Bloc the freedom and the workers’ rights in the social corrected free market system;
  - In 40 years (from 1952 to 1992) no challenge made by employers;
- Recognition by national and regional tribunals and courts of interpretation by ILO-experts: fundamental nature of Right to Strike, citing C87. 30 January Canadian Supreme Court: “Right to strike is essential to meaningful collective bargaining.”

## 3. C 87 Freedom of Association and the Right to Strike

- After Cold War:
  - Employers begun criticizing *“not so much 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”* (1994);
  - In 1997 the Employers’ Group *“acknowledged that the principle of industrial action, including the right to strike and lockouts, formed part of the principles of freedom of association as set out in C87”*;

## 3. C 87 Freedom of Association and the Right to Strike (R2S)

- But from 1992-2012: IOE (International Organisation of Employers) and Employers-chair
  - Conclusions about C87 in general, OK. No conclusions anymore about the R2S in CAS;
  - No problem with R2S conclusions in CFA;
  - CFA: constitutional principles about FA;
  - CFA: more specific case by case situations;
  - CFA members represent themselves;
  - Conclusions CFA, J. Ronnest (ILC ‘14): *“The decisions taken in relation to specific cases may not be elevated as general principles or general rulings with reference to C87 or 98”*

#### 4. C 87 Freedom of Association and the Right to Strike (R2S)

- 2012: the change, the crisis in the CAS
  - Position and attitude of Employers' Chair not sufficient anymore for IOE;
  - Elimination of Employers' Representative as too consensus minded and too pragmatic;
  - Appointment British lawyer (lawyer law firm working for British Employers);
  - Domination Employers Group by British and American lawyers (US-law firm bashing unions) and IOE secretariat.

#### 4. C 87 Freedom of Association and the Right to Strike (R2S)

- The objectives of the employers
  - IOE made the choice not to appoint responsible E-representatives, but lawyers who defend a position and do not want to seek a solution;
  - R2S not part of C87. Consequence: legitimacy of ILO to comment R2S in a particular country is undermined (cfr. Cambodia). E' G: R2S is national matter, not international.

#### 5. What now?

##### Employers:

- Employers: interpretation of conventions, not by experts but by tripartite consensus;
- But in CAS employers want non-consensual conclusions ("workers positioned like this, employers think that.."). Reaching consensus on interpretation of serious matters becomes impossible. They want to use a factual veto-right;
- This is not only about 25 cases/year, but we risk to lose the interpretations made by the experts over +60 years;

#### 4. C 87 Freedom of Association and the Right to Strike (R2S)

- 2012: the change, the crisis in the CAS
  - IOE asked for a disclaimer "*The experts advise the CAS. Only the tripartite formulated conclusions are valuable as interpretation*". To be printed on the cover of report. Refused by Workers' Group;
  - Employers' Group didn't want to discuss C87 at all;
  - E' G wanted to put their opinion in the conclusions (no more consensual), as respect for their "freedom of speech";
  - E' G announced also problems with interpretation of other conventions.

#### 4. C 87 Freedom of Association and the Right to Strike (R2S)

- The objectives of the employers
  - Different layers in E' G:
    - How to avoid/bashing unions;
    - European E: R2S national matter, avoiding ILO-interference, limit right to strike, limit solidarity/sympathy strikes, limit political strikes.
  - Employers have more problems with real workers' rights conventions (labour relations), less with more general HR conventions, recommendations (Domestic Work, Social Protection Floors, Protocol C29 are new conventions).

#### 5. What now?

- 3 initiatives to find a way out (2012-2015)
  - Informal tripartite meetings (2012);
  - Initiative Swiss Government (2013);
  - Initiative Director General (2014).
- Workers:
  - We have/had confidence in interpretation Experts, they are objective and impartial, not for the employers;
  - Workers' proposal to use art. 37 of ILO-constitution, made to resolve disputes is refused by employers:
    - art 37.1 Referral to the International Court of Justice;
    - art 37.2 Establishment of an Internal ILO Tribunal.

## 5. What now?

- Employers:
  - want to use CAS to come to non-consensual conclusions, to veto the right to strike and other conventions they don't like;
  - ... want to find the solution about R2S in a discussion in a future conference to make a recommendation. They know very well that a majority about the same interpretation of the R2S will be difficult with the governments;
  - ... want to *"retake their part of the tripartite house"*. They *"want to change the ILO from the 'workers and governments house' now to a house that takes much more into account employers' interests."* IOE secretary-general.

## 5. What now?

- Governments:
  - Just no 50% in favour of the referral to the ICJ. (Workers 14 +, Employers 14 -, Governments 13 + of 28)
    - Because of credibility ILO;
    - Because they want negotiated internal solution;
    - Because the ICJ is too close to the International Criminal Court;
    - Because they have the same fear as the employers about a clear conclusion of ICJ.

## 5. What now?

- February, GB March 2015.
  - In case of solution, Workers want to open the assessment of the Supervisory Mechanism;
  - We need to re-establish the Committee of Application of Standards;
  - We are negotiating with the Employers. It will be very difficult to find a solution with them. C 87 will be not possible, maybe recognition only in extremely tough and exceptional situations;
  - If no solution: the governments have to take up their responsibility.

## 5. What now?

- Governments:
  - No common attitude. Some want to keep and protect the supervisory system. But in general not much helpful during meetings. Exception: support from Europe and Latin America to go to the ICJ;
  - Some are pleased with the conflict, so they have less risk to be called before the CAS;
  - Most of Governments are not in favour of art. 37.2 (internal tribunal) because too complicated and too costly;

## 5. What now?

- February, GB March 2015.
  - 18 February: Action Day;
  - Or there is a recognition of the International Right to Strike deriving from C87 or we have to go to the ICJ. Modalities have to be decided on national level but ILO experts and CAS and CFA must have the possibility to follow up the application of C87 and the Right to Strike;
  - In case of a solution, Workers will not block any longer the Standards' Mechanism Review to actualise conventions; Therefore we need trust, confidence;

## Joint Statement -The new norm !

- **A possible way forward**  
The right to take industrial action by workers and employers in support of their legitimate industrial interests is recognised by the constituents of the International Labour Organisation.
- This international recognition by the International Labour Organisation requires the workers and employers groups to address:
  - The mandate of the CEACR as defined in their 2015 report;
  - An approach to the way in which the CAS list is elaborated and the role for the workers and the employers representatives of the Committee in drafting of conclusions is to be respected;
  - Improvement in the way the supervisory procedures operate (CFA, Art 24, Art 26); and
  - Agreement on the principles to guide the regular Standards Review Mechanism (SRM) and its subsequent establishment.

## Joint Statement -The new norm !

- ITUC: A breakthrough at the ILO - Following two years during which employers at the ILO brought the UN body's global supervisory system to a standstill, in an attempt to eliminate decades of ILO jurisprudence supporting the right to strike.
- Union and employer representatives have now reached an understanding, based on recognition of the right to take industrial action, backed by explicit recognition from governments of the right to strike, linked to ILO Convention 87 on Freedom of Association.
- The agreement comes on the back of a hugely successful international union mobilisation on 18 February, which involved more than 100 actions in over 60 countries in support of the right to strike.
- Sharan Burrow, ITUC General Secretary, said, "Having created the crisis, employer groups and some governments were refusing to allow the issue to be taken to the International Court of Justice even though the ILO Constitution says it should be. We've now managed to negotiate a solution which protects the fundamental right of workers to take strike action, and allows the ILO to resume fully its work to supervise how governments respect their international labour standards obligations."

## Joint Statement -The new norm

- Does it work?  
CFA – GB – Nomination of Experts – Article 26:  
Fiji, Guatemala & Qatar
- Was it a win-win? Employers – Governments
- Challenges:  
CFA - CAS (Disitions in R2S cases)  
Are we back to 2012?
- Peace agreement – The issue still not solved

## Joint Statement -The new norm !

- GB March decisions on the follow-up on the standard issues were further:
  - (a) decided to take the necessary steps to ensure the effective functioning of the Committee on the Application of Standards at the 104th Session of the International Labour Conference (June 2015), taking into account any recommendations made by the Working Group on the Working Methods of the Conference Committee on the Application of Standards, in particular with regard to the establishment of the list of cases and the adoption of conclusions;
  - (b) called on all parties concerned, in light of the commitments made at the Tripartite Meeting and at the 323rd Session of the Governing Body (March 2015), to contribute to the successful conclusion of the work of the Conference Committee on the Application of Standards at the 104th Session of the International Labour Conference (June 2015);
  - (c) decided to establish under the Standards Review Mechanism (SRM) a tripartite working group composed of 32 members: 16 representing Governments, eight representing Employers and eight representing Workers to meet once per year for one week;
  - (d) requested the Director-General to prepare draft terms of reference for the tripartite SRM working group for its consideration and submission to the 325th Session of the Governing Body (November 2015) for decision;
  - (e) decided that this tripartite SRM working group would report to the Governing Body at its 325th Session in November 2015 on progress made in the implementation of the SRM;
  - (f) requested the Chairperson of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), Judge Abdul Koroma (Sierra Leone), and the Chairperson of the Committee on Freedom of Association (CFA), Professor Paul van der Heijden (Netherlands), to jointly prepare a report, to be presented to the 326th Session of the Governing Body (March 2016), on the interrelationship, functioning and possible improvement of the various supervisory procedures related to articles 22, 23, 24 and 26 of the ILO Constitution and the complaints mechanism on freedom of association;
  - (g) decided to place on the agenda of its 328th Session (November 2016) an overall review of this decision, without prejudice to any other issue arising out of the standards initiative requiring prior consideration.