

A stylized world map composed of a grid of dots. Most dots are light gray, but several are highlighted in red, including the United Kingdom, France, Germany, and parts of Africa and South America.

# The Right to Strike Struck Down?

## An Analysis of Recent Trends

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October 2016

- The right to strike is under attack at the national and international levels. This attack has intensified in a situation in which economic and security arguments are increasingly being used as a pretext for the violation of fundamental human and democratic rights.
- At the national level, almost all (117) countries covered by the report have implemented legal measures and practices which violate the right to strike. Of the violations that have been committed over a long stretch of time, the most common ones involve barring groups of workers from the right to strike. While such practices are still prevalent, in the last 5 years 89 countries have been responsible for new violations, mainly in the guise of heavy-handed action against legitimate strikes and interference in the midst of strikes. There continues to be significant restrictions on public sector workers' right to strike.
- At the international level as well, at the 2012 International Labour Conference the Employers' Group challenged the right to strike protected by the ILO Convention No. 87 and questioned the role of most authoritative international mechanism to bring violations of the right to strike to a global audience.
- The strengthening of alliances between workers, communities, academia and other democratic forces is critical in exposing this attack as an assault on the democratic space needed to build a more just society and in building power to ensure that all workers in all countries can exercise their fundamental right to strike.



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## 1. Introduction

The right to strike is under attack. Workers and their unions are fighting on various fronts to obtain, exercise and defend their right to strike. Suspension and prohibition of strikes, acts of interference and sanctions related to strikes are being reported in a growing number of countries. At the international level as well, the right to strike has been coming under increasing pressure. This reached a new peak at the 2012 International Labour Conference (ILC), at which the Employers' Group challenged the existence of an internationally recognised right to strike protected by ILO Convention No. 87 and questioned the most authoritative international mechanism for bringing violations of the right to strike to the attention of a global audience. These developments prompted the Friedrich-Ebert-Stiftung (FES) to conduct a global survey on trends and patterns of violations of the right to strike, with a particular focus on the last 5 years (2012–2016). The survey reveals the extent of violations, i.e. restrictions violating obligations established by ILO supervisory bodies both in terms of the legal framework as well as in actual practice. In this report, the key findings of the survey are complemented with insight obtained in a review of recent reports of the International Labour Organisation (ILO) and the International Trade Union Confederation (ITUC).

## 2. Main Findings – Widespread Violations

The survey findings and the reviewed reports were analysed in terms of 12 areas of violations of the right to strike<sup>1</sup>. Of 70 countries<sup>2</sup> covered by the survey, almost

all (68) countries have made use of legal provisions (law and/or case law) and have adopted practices which violate one or more areas of the right to strike. The review of the ILO and ITUC reports of the last 5 years shows that such violations are being committed in another 49 countries<sup>3</sup>, bringing the number of countries where violations in one or more areas of the right to strike are observed either in the legal framework/case-law rulings and/or the practice of the right to strike to 117. This list, however, is not exhaustive: countries covered by this report may have enacted statutes in violation of the right to strike in more areas than indicated here and there may also be violations of the right to strike in other countries.

### Areas of Violation of the Right to Strike

**(1)** General prohibition of the right to strike; **(2)** Exclusion of workers in EPZs from the right to strike; **(3)** Exclusion of other workers from the right to strike; **(4)** Exclusion/restriction based on the objective and/or type of the strike; **(5)** Provisions in law allowing for the suspension and/or declaration of illegality of strikes by administrative authority; **(6)** Removal/restriction of compensatory guarantees accorded to lawful restrictions on the right to strike; **(7)** Infringements relating to minimum services; **(8)** Compulsory arbitration for strikes; **(9)** Excessive prerequisites in order to exercise the right to strike; **(10)** Acts of interference during the strike action; **(11)** Imposing excessive sanctions in the case of legitimate strikes; and **(12)** Abrogation of/restrictions on the guarantee of due process and/or justice regarding violations.

Figure 1 shows that the most common areas of violation by *law and/or case-law* among the 117 countries are:

- 1) exclusion of workers from the right to strike;
- 2) excessive prerequisites for the right to strike; and
- 3) excessive sanctions on legitimate strikes.

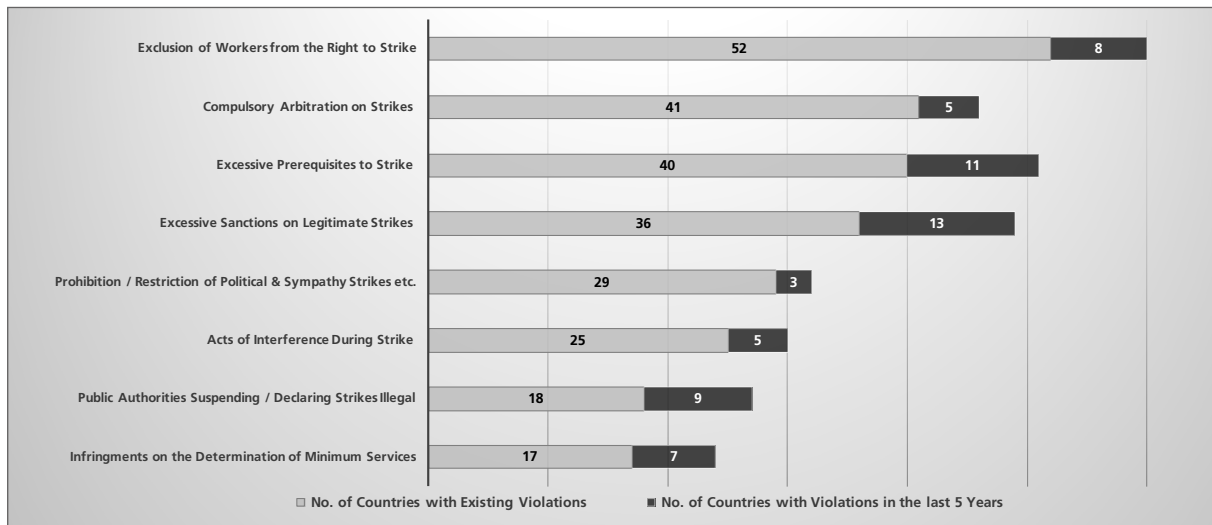
1. The 12 areas of violations of the right to strike were constructed by David Kucera and Dora Sari as applied in the Labour Rights Indicator Project of the Global Labour University and the Center for Global Workers' Rights at Penn State University (<http://labour-rights-indicators.la.psu.edu/>). The global survey adopted this list. The analysis of the survey results and the reviewed reports is based on the 1998 Gernigon et al.'s paper *ILO principles concerning the right to strike*.

2. The survey questionnaire, which was fielded between 1 March and 21 April 2016 in four languages (Arabic, French, English and Spanish) was completed by 87 national respondents in 60 countries, namely Argentina, Australia, Bangladesh, Barbados, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Burundi, Cambodia, Cameroun, Canada, China, Colombia, DR Congo, Cote d'Ivoire, Denmark, Ecuador, Egypt, Estonia, Ethiopia, Fiji, Germany, Ghana, Greece, Guatemala, India, Indonesia, Ireland, Italy, Japan, Kenya, Madagascar, Malaysia, Mauritania, Mexico, Nepal, Niger, Nigeria, Norway, Palestine, Philippines, Poland, Portugal, Romania, Senegal, Slovakia, South Africa, Spain, Sudan, Swaziland, Tanzania, Trinidad and Tobago, Turkey, Uganda, United Kingdom, USA, Vietnam, Zambia and Zimbabwe. One regional respondent covered another 10 Latin American countries, namely Plurinational State of Bolivia, Chile, Costa Rica, Dominican Republic, El Salvador, Haiti, Honduras, Nicaragua, Panama and Paraguay.

3. The review included reports of the Committee on Application of Standards (CAS), the Committee of Experts on Application of Conventions and Recommendations (CEACR) and International Trade Union Confederation (ITUC) of the last 5 years (see the bibliography for more details). The reviewed reports were used to complement the country information retrieved through the survey and to provide insights on another 49 countries, namely: Algeria, Bahamas, Belarus, Belize, Benin, Burkina Faso, Chad, Croatia, Djibouti, Equatorial Guinea, France, Georgia, Guyana, Hungary, Iran, Iraq, Jamaica, Jordan, Kazakhstan, Kiribati, Kuwait, Lebanon, Lesotho, Liberia, Mali, Mauritius, Montenegro, Morocco, Mozambique, Oman, Pakistan, Peru, Russian Federation, Sao Tome and Principe, Seychelles, Singapore, South Korea, Sri Lanka, Sweden, Switzerland, Qatar, Tunisia, Thailand, Ukraine, United Arab Emirates, Venezuela, Yemen and Zanzibar, bringing the total number of countries covered by this survey to 119.



Figure 1: Number of Countries per Types of Violations of the Right to Strike in Law and/or Case-law



In the last 5 years, new violations in one or more areas of the right to strike have been introduced by law and/or through case-law rulings in 27 countries (24 countries<sup>4</sup> identified by the survey and 3 countries<sup>5</sup> by the reviewed reports). Many of these countries have already had in place restrictive legal measures either in the same area or in other areas of the right to strike. Figure 1 shows that most areas of violations which have recently been introduced are:

- 1) excessive sanctions in the case of legitimate strikes;
- 2) excessive prerequisites for strikes; and
- 3) public authorities suspending or declaring strikes illegal.

The fact that the most common violation introduced through law and/or case-law rulings is related to excessive sanctions in the case of legitimate strikes is very revealing of the repressive nature of measures introduced in the last 5 years. This is further reinforced by findings relating to violations in the practice of the right to strike.

Practices which violate different areas of the right to strike are even more pervasive (Figure 2). During the last

4. Violations were reported in 24 countries of the 70 countries covered by the survey: Argentina, Australia, Bangladesh, Belgium, Brazil, Canada, DR Congo, Ecuador, Egypt, El Salvador, Fiji, Greece, Guatemala, India, Indonesia, Honduras, Italy, Mauritania, Romania, South Africa, Spain, Turkey, Viet Nam and Zimbabwe.

5. Violations were reported in 3 of the 49 countries covered by the reviewed reports: Hungary, Norway and Peru.

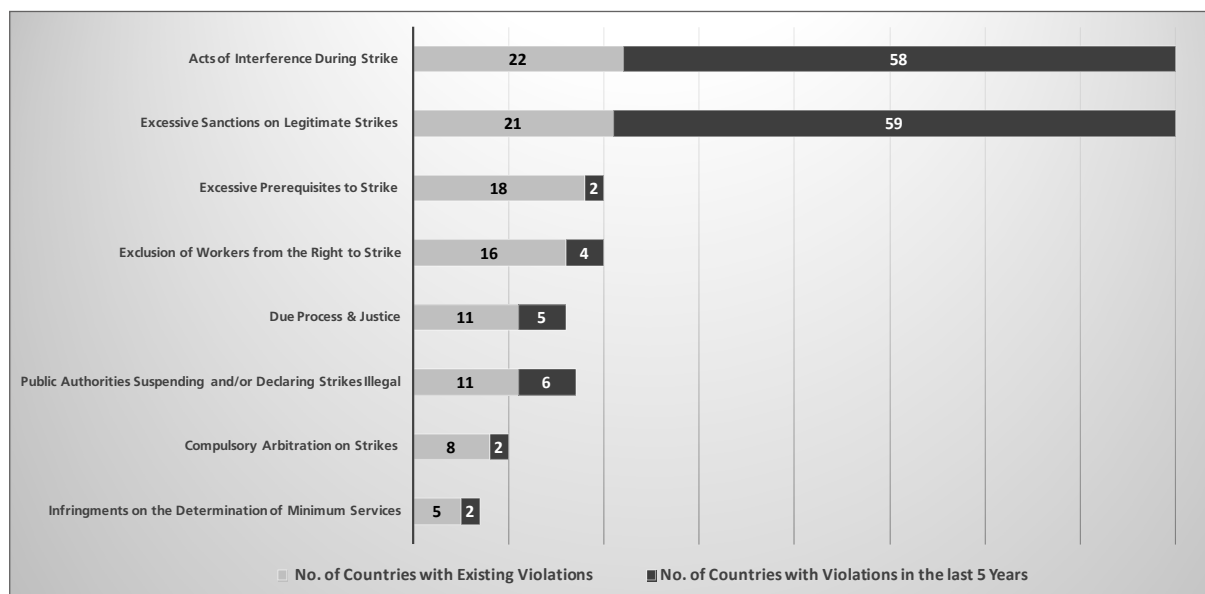
5 years, the vast majority (84) of countries covered by the survey<sup>6</sup> and the reviewed reports<sup>7</sup> are reported to have adopted restrictive practices in one or more areas of the right to strike. Here as well, many of the countries introducing practices which violate various areas of the right to strike in the last 5 years had already adopted such practices in the past.

Two areas of violations most commonly observed among countries are: (1) acts of interference during strikes; and (2) excessive sanctions in the case of legitimate strikes. Figure 2 also shows that the number of countries which have adopted these restrictive practices has tripled in the last 5 years. This may reflect to some extent the fact that the focus of the survey and of the reviewed reports was on recent years. However, the comparison with violations in law and/or case law (Figure 1), which covers findings from the same sources, suggests that countries have preferred to adopt more restrictive practices than to introduce legal changes. This trend needs to be un-

6. Violations were observed in 47 of 70 countries covered by the survey, namely: Argentina, Bangladesh, Belgium, Bolivia, Brazil, Bulgaria, Burundi, Cambodia, Cameroun, Canada, Chile, China, Colombia, Costa Rica, Cote d'Ivoire, DR Congo, Egypt, Fiji, Germany, Greece, Haiti, Honduras, India, Indonesia, Kenya, Madagascar, Malaysia, Mauritania, Mexico, Nepal, Nigeria, Palestine, Panama, Paraguay, Philippines, Portugal, Romania, Swaziland, South Africa, Spain, Tanzania, Trinidad and Tobago, Turkey, Uganda, Viet Nam, Zambia and Zimbabwe.

7. Violations were observed in 37 of 49 countries covered by the reviewed reports, namely: Algeria, Bahrain, Belarus, Benin, Chad, Croatia, Djibouti, France, Georgia, Guinea, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Lebanon, Lesotho, Mali, Montenegro, Morocco, Mozambique, Oman, Pakistan, Peru, Qatar, Republic of Congo, Serbia, Singapore, Sri Lanka, South Korea, Switzerland, Syria, Tunisia, Ukraine, United Arab Emirates and Venezuela.

Figure 2: Number of Countries per Types of Violations of the Right to Strike in Practice



derstood in light of a repressive environment, increasingly precarious work and job insecurity, and an obvious bias of public authorities towards employers, including labour and civil courts.

### Two-thirds of OECD Countries Violate the Right to Strike

The survey findings and the review of the ILO and ITUC reports show that most (23 countries<sup>8</sup>) of the 35 countries which are OECD members have enacted legal provisions and/or case-law rulings and/or have adopted practices which restrict the right to strike above and beyond established international standards. Whereas these violations took place in these countries prior to the 2012 debates at the ILO, in the last 5 years 9 countries – Australia, Belgium, Canada, Greece, Hungary, Italy, Norway, Spain and Turkey – have introduced legal measures which violate the right to strike. Plans to introduce a more restrictive legal framework are also in the pipeline in the United Kingdom. In addition to violations in the legal framework, 8 OECD countries – Belgium, Canada, Germany, Greece, Mexico, Portugal, Spain and Turkey – have recently adopted practices restricting the

8. The 35 OECD countries are: Australia, Belgium, Canada, Chile, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Korea, Mexico, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States.

right to strike. Figure 3 shows that the areas violated by several countries are:

- 1) exclusion of groups of workers from the right to strike;
- 2) prohibition of / restrictions on political and sympathy strikes; and
- 3) excessive sanctions on legitimate strikes.

The OECD countries have followed the same trends revealed by general findings with regard to the practice of the right to strike (Figure 3): more countries have adopted restrictive practices in the areas of (1) acts of interference during strikes; and (2) excessive sanctions on legitimate strikes.

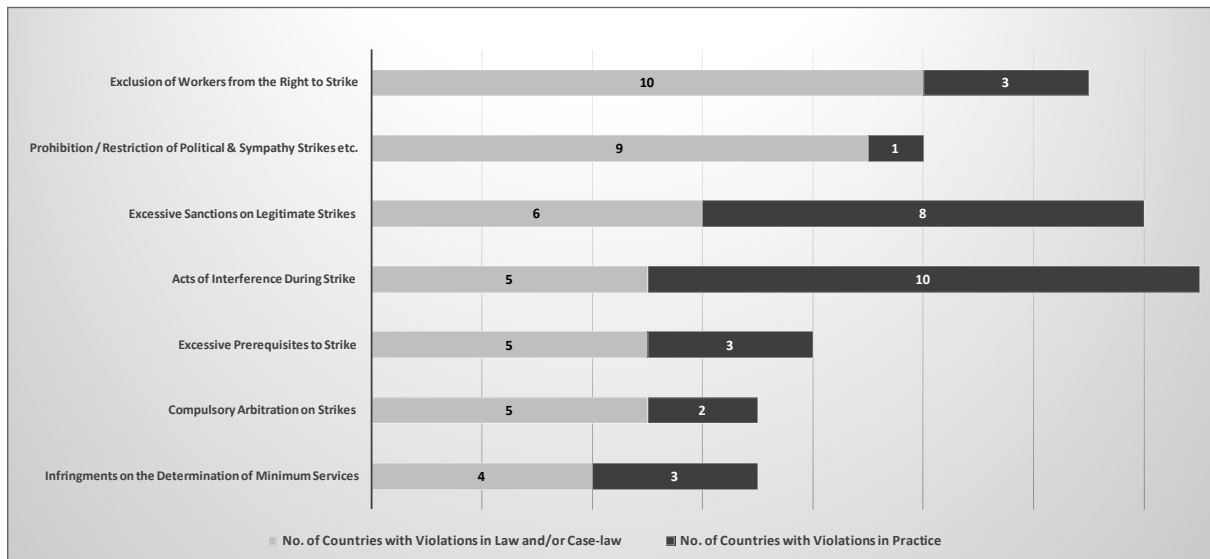
All emerging countries and economies<sup>9</sup> are also reported to have enacted legal provisions and/or have had case-law rulings which violate the right to strike. In the last 5 years, restrictive legal measures have been introduced in Brazil and India, while practices which violate the right to strike have been adopted in all the countries.

In summary, the violations of the last 5 years can be better understood as a continuation of the attack on the right to strike. Indeed, the survey and the reviewed

9. Per OECD definition, emerging countries and economies are: Brazil, Chile, the People's Republic of China, India and Mexico, and Turkey.



Figure 3: Number of OECD Countries per Types of Violations of the Right to Strike in Law/Case-law and Practice



reports indicate that a restrictive regulatory framework existed in almost all the countries covered by the survey as well as in many other countries prior to the 2012 controversy at the ILC. At the same time, however, there is noticeable trend towards further restrictions on the right to strike in countries across regions and regardless of their stage of economic development. Under the guise of ›public order‹, ›public security‹, ›threat of terrorism‹, ›national interest‹ and ›economic crisis‹, countries have continued to introduce restrictive regulations which violate internationally recognized principles regulating the right to strike. The exercise of right to strike is further undermined by threats of dislocation, increasingly precarious work, arbitrary dismissals and extensive use of non-standard workers to replace striking workers.

### 3. Main Types of Violations of the Right to Strike

This part of the report provides an overview of some of the areas of the right to strike violated by several countries in the past 5 years. Each section starts with a short summary of internationally recognised principles developed by the ILO supervisory bodies regulating the particular area of the right to strike. This is followed by information on the countries adopting restrictive legal measures and practices (whenever significant) as well as an analysis of the nature of violations.

#### 3.1 General Prohibitions of Strikes are Atypical

The ILO supervisory bodies consider »the right to strike as a fundamental right to be enjoyed by workers and their organizations (trade unions, federations and confederations), which is protected at international level, provided that the right is exercised in a peaceful manner« (Gernigon et al. 1998: 55).

The survey shows that the right to strike is upheld as a recognised right enshrined either in the constitution or in labour law. Indeed, only a few countries have had legal provisions and/or case-law rulings which prohibit the right to strike or suspend this right during a certain period (Belarus, Benin, Burundi and Cambodia).

A general prohibition of the right to strike, however, is more likely to be observed when it comes to actual practice of the right to strike (Cameroun, China, Congo, Ethiopia, Madagascar, Mexico and Viet Nam). For example, the prohibition takes the form of ›No strikes policy of the Mexican government or the categorisation of strikes as a threat to national security. Many of the violations of the right to strike which will be analysed in this report have in some countries had the effect of suppressing strike action and denying workers the right to strike in practice. In the case of Romania, for instance, the National Institute of Statistics reported zero strikes for the period 2010–2014 (the most recent figures available).

### 3.2 Political and Sympathy Strikes as Well as Different Forms of Strike Continue to Be Prohibited or Restricted in Several Countries

The ILO supervisory bodies have stated that »the occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also seeking of solutions to economic and social policy questions« (Gernigon et al. 1998: 14). With regard to sympathy strikes – defined by the supervisory bodies as workers coming out in support of another strike – it has been stated that: »a general prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action provided the initial strike they are supporting is itself lawful« (ibid: 16). Finally, ILO supervisory bodies have accepted other types of strikes such as occupation of the workplace, go-slow or work-to-rule strikes (ibid: 12).

#### Violations in Law and/or Case law

A restrictive environment for political and sympathy strikes as well as other forms of strike have existed in several (29) countries (Figure 1). Said violations take the form of prohibiting or restricting:

- 1) political and/or general strikes by limiting the strike action only to industrial disputes related to signing of a collective agreement, only to one employer/enterprise, and/or only to strictly professional and economic claims;
- 2) strikes initiated by federations and confederations;
- 3) solidarity strikes by placing limitations on its duration and on the relation to the workers who the solidarity strike is supporting;
- 4) strikes which demand the improvement of employment conditions of posted workers beyond the minimum conditions set out in agreements at central level or the undertaking applying such;
- 5) other forms of strikes such as: occupation of workplaces and go-slow.

Finally, the vague and unclear language used in connection with terms, such as »collective interest«, may lead to restrictions on certain strikes in the public sector.

In the last 5 years, new laws and/or case-law rulings which prohibit/restrict strikes if such are motivated by factors other than occupational ones have been enacted in 3 countries, namely: Brazil, Mauritania, and Viet Nam.

### 3.3 The Majority of Countries Surveyed Continue to Exclude Groups of Workers from the Right to Strike

The ILO supervisory bodies have recognized a general right to strike with the sole possible exception of (1) armed forces and police; (2) public servants exercising authority in the name of the state; and (3) workers in essential services in the strict sense of the term, i. e. »services the interruption of which would endanger the life, personal safety or health of the whole or part of the population« (Gernigon et al. 1998: 55). Essential services where the right to strike may be restricted or even prohibited are: the hospital sector; electricity services; water supply services; telephone services; air traffic control. The right to strike may also be prohibited in cases of acute national emergency.

This section discusses exclusions from the right to strike of workers in Export Processing Zones (EPZs) and other groups of workers.

#### Violations in Law and/or Case Law

As Figure 1 shows, exclusion of groups of workers from the right to strike beyond what has been established in international principles have been prevalent in a great number (52) of countries. Said violations in law provisions and/or case-law rulings range from complete exclusion of all civil servants to exclusion of workers in specific sectors or industries, such as in:

- 1) *Export Processing Zones (EPZs)*, where workers are not able to form a union or are considered outside the jurisdiction of labour authorities;
- 2) *education sector*: all employees in educational institutions; education inspectors and their assistants;
- 3) *transportation and communication services*: civil aviation, ports, railways, ferry and bus services, goods transportation; workers engaged in loading and unloading on docks and quays; postal and telephone services; public radio and television; telecommunication technicians, drivers and mechanics;

- 4) *municipal services*: city cleaning and sanitation; fire protection; funeral and mortuary; and forests;
- 5) *other several services and sectors such as*: veterinary care; pharmacies and health-related laboratory services; social care and social protection; domestic workers; market places; milk production; slaughterhouses and their distribution services; mining; textile sector; salt extraction and distribution; petroleum refining and distribution; bakeries; oil and gas exploration and extraction, and petroleum production; banking services; government liquor and gaming monopolies; meteorological services; the print industry; hotels and restaurants.

Most of the exclusions listed above stem from the application of a broad and ambiguous definition of 'essential services' or 'sectors of vital importance', thus excluding groups of workers from the right to strike. In some other cases, exclusions are based on workers' migrant status (Malaysia), employment status (home-based workers and independent professionals), size of workplace, their trade union affiliation and type of company or activity. For example, workers in establishments with less than 21 employees are excluded from the right to strike in Romania. In other cases, law and/or case-law rulings grant the right to form a union and hence to strike only to those workers who are recognised as employees, thereby excluding a wide category of self-employed (Argentina) or autonomous professionals (Spain). In addition, the law excludes from the right to strike trade union organisations which do not possess a trade union status or which are in the process of being established (Argentina). In Indonesia, the law prohibits the right to strike at vital national sites, encompassing 49 factories and 14 industrial estates.

In **Ecuador**, a 2015 constitutional amendment excludes all new entrants in the public sector from the right to strike by making them subject to another law which does not include the right to strike.

In the last 5 years, new exclusions have been introduced in 8 countries, namely Argentina, Bangladesh, Canada Ecuador, Egypt, Fiji, Turkey and Viet Nam. Here, too, most exclusions are mainly due to the application of broad and vague categories of 'essential services', 'civil servants' or 'strategic or vital establishments' in law and/or case law. They include: domestic workers, informal

workers, workers in mobile phone companies; pilots and technical, maintenance and operational support employees at airports, cabin groomers, aircraft cleaners, baggage and cargo handlers, baggage and cargo agents, weight and balance agents, instructors and planners; all workers performing a public service work; civil servants; pine and mahogany industries; domestic workers, home-based workers, and agriculture workers employed in establishments and enterprises employing a minimum of 50 employees (50 included), property saving, funeral and mortuary, fire fighting, production of which starts from naphtha or natural gas; oil and gas exploration and extraction, production and provision of gas.

### Violations in Practice

Practices of excluding groups of workers from the right to strike – often due to arbitrary application of 'essential services' – is common in several (20) countries (Figure 2). They include: shopkeepers; workers in small or medium enterprises (SMEs); media; all public sector workers; teachers; forestry workers. In EPZs, the restriction of the right to organise and continuous repression of trade unionists also have the effect of denying these workers the right to strike. In one particular case, workers who are members of the party in power are required to report to work during striking days and thus denied the right to strike. In recent years, practices which improperly exclude workers from the right to strike have been adopted in DR Congo, Nepal, Sri Lanka, and Turkey.

### 3.4 Many Countries Impose Excessive Prerequisites for the Strike to be Considered Legal

ILO supervisory bodies have specified that such conditions »should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organizations«. They accept the prerequisites of:

- 1) prior notice;
- 2) recourse to conciliation, mediation and (voluntary) arbitration procedures in industrial disputes as a condition prior to declaring a strike, provided that the proceedings are adequate, impartial and speedy and that the parties concerned can take part at every stage;



- 3) observation of a certain quorum and the agreement of a specified majority;
- 4) strike decision by secret ballot;
- 5) measures to ensure compliance with safety requirements and to prevent accidents;
- 6) establishment of minimum service in particular cases;
- 7) guarantee of freedom to work for non-strikers (Gernigon et al. 1998: 25).

#### Violations in Law and/or Case law

Excessive prerequisites for exercising the right to strike were enacted in a significant number (40) of countries prior to the 2012 ILC controversy (Figure 1). Findings from the survey respondents and reviewed reports show that excessive requirements take the form of:

- 1) long notice of strike (ranging up to 6 months in public services) and cooling-off periods;
- 2) high number of votes required for taking strike action;
- 3) excessive requirements in terms of procedures such as:
  - a. proving in front of labour authorities that the reason for striking is a general and systematic violation of rights;
  - b. obligation to state how long the strike will last;
  - c. formal secret ballot or protected action ballot, employer empowered to submit a ballot directly to employees or invited to meetings where strike decisions are taken;
  - d. obligation to obtain the written approval of workers, which has been interpreted by jurisprudence as an obligation of the trade union to get a registration number from the employer for the document submitted containing a table with names and signatures of the members;
  - e. obligation to obtain the approval of a general union or of an organization with trade union status;
  - f. informing/getting the approval of the administrative authorities or obtaining a certification of no settlement;

In **Mexico**, to exercise the right to strike the union must petition the labour authority, which means that there is a procedure before a tripartite tribunal where the state acts both as judge and jury. The unions must prove that that the reason for strike is a systematic violation of rights under the Constitution, which is practically impossible.

- g. pursuing strike action within a given time of certification issued by the minister;
- h. supervision of a strike ballot by an official of the ministry;
- 4) obligation to stay in the enterprise during office hours even if there is a strike;
- 5) the strike should be related to bargaining for a new enterprise agreement and the union should not be seeking the same outcome when bargaining with a different employer; and
- 6) performance requirements or satisfactory services during strikes.

Recently, however, new requirements which violate international standards have been introduced in 11 countries, namely Australia, Brazil, Canada (Saskatchewan), DR Congo, El Salvador, Fiji, Hungary, Indonesia, Mauritania, Turkey and Viet Nam. Said violations include:

- 1) multiple procedural requirements and cooling-off periods before a strike prolonging the period between a bargaining impasse and a strike up to 90 days (Canada/Saskatchewan) or up to 120 days for strikes in public services (Mauritania);
- 2) obligation on unions to identify and schedule 'qualified' workers to provide essential services in a very short time frame which unduly burdens unions because the employee information is more often with the employer (Canada/Saskatchewan);
- 3) agreement of employer and labour inspectorate (DR Congo); notification of employer about the time and method of collecting opinions on going on strike (Viet Nam);
- 4) court rulings to include company directors and subcontracted workers outside the bargaining unit in the count (El Salvador);
- 5) the requirement that over half of the workers support the decision to go on strike (Guatemala);
- 6) excessive requirements in terms of strike logistics, such as:
  - a. requiring trade unions to minimize the volume of loudspeakers, not to create congestion or cause traffic jams and stage the strikes only in (three) designated locations (Indonesia);
  - b. not to display posters that are likely to affect the reputation or cause offence to an employer by declaring these strikes 'unprotected' (Australia); and
  - c. informing the other party by means of public notary or registered letter with acknowledgement of receipt (Egypt and Turkey);

- g) obligation to carry out the strike within a given period, with failure to do so removing the union's right to bargain (Turkey); and
- h) obligation of the union to prove to the court that the strike is lawful (Romania).

### Violations in Practice

While certain requirements may seem to comply with the international standards, in actual practice they result in barriers to the right to strike. In addition, excessive requirements established by legal provisions and/or case-law rulings are expanded in actual practice. In practice, these excessive requirements are manifested through:

- 1) delays by public authorities at each stage of requirements due to:
  - a. an inadequate number of labour officers required to supervise the balloting;
  - b. overburdened courts, which may cause arbitration to drag on over a long period of time;
  - c. labour inspectors' inability and/or unwillingness to verify the information provided by employers;
- 2) delaying tactics by employers, such as: additional requests for notarisation by a public notary of lists of workers willing to strike, withholding information on the number of workers from the labour inspectorate, or manipulating information to hinder ballots for a strike action; and
- 3) long periods of notice before strikes, which are used by employers to reorganize work in the company and thus minimise the impact of the strike, or to victimize striking workers.

In **Viet Nam** extensive and cumbersome strike procedures are one of the reasons why there has been not one single legal strike since 1995. In **Costa Rica**, a Supreme Court of Justice judge informed an ILO mission that of the 600 or so strikes that had occurred over the last 20–30 years, ten at most have been declared lawful; furthermore, according to the trade union federations, the procedure to set a strike in motion could last for years.

The excessive legal requirements and the delays caused by these in actual practice have the effect of either denying workers the right to strike or forcing them to go on strikes which can easily be declared illegal. Long proce-

dures and delays allow the employer to reorganize work and hire seasonal or temporary workers, issues which are closely related to acts of interference during strike action.

### 3.5 Acts of Interference During Strikes is the Area Where Most of the Violations Have Occurred in the Last 5 Years

In terms of principles involved during the strike action, the ILO supervisory bodies have established the following:

- 1) Picketing should not be subject to interference by public authorities unless »the strike ceases to be peaceful«;
- 2) Requisitioning or back-to-work orders to break a strike over occupational claims »constitute a serious violation of freedom of association«, except when these actions are taken »in circumstances of utmost gravity or to ensure the operation of essential services«;
- 3) Replacement of strikers can be justified only »in the event of a strike in essential services in which strikes are forbidden by law« and in cases of acute national crisis;
- 4) »The authorities should resort to calling in the police in a strike situation only if there is a genuine threat to public order«, and even then »the intervention of the police should be proportional to the threat of public order« (Gernigon et al. 1998: 45–48).

### Violations in Law and/or Case law

Legal provisions and/or case-law rulings which violate international principles on acceptable acts of interference have been issued in many countries (Figure 1). They include legal provisions which provide for:

- 1) police supervision during strikes in the guise of protecting and maintaining law and order;
- 2) replacement of striking workers, including lack of provisions which prohibit the use of temporary workers to replace striking workers;
- 3) requisitioning or back-to-work orders in cases of »proclamation of a state of national necessity« or »where the national economy could be affected«;
- 4) interference, and subsequent criminalization, on picketing and street demonstrations; and
- 5) closure of enterprise in the event of a strike.

In the past 5 years, new violations have been introduced through legal provisions and/or case-law rulings in 5 countries, namely: Belgium, Brazil, Egypt, Guatemala and Uganda. Said violations are related mainly to criminalisation of picketing and involvement of police during strike action.

In **Belgium**, employers have recourse to the courts of justice, by way of unilateral application, to put an end to the strike. The rulings sometimes take the form of a “general police regulation” which is not within the competence of the judiciary. Although the European Committee of Social Rights (ECSR) has ruled that the use of unilateral petition of the courts of justice respects the European Social Charter, the ECSR has recently (2015) noted the situation has not been brought into conformity with the Charter.

### Violations in Practice

The survey findings show that practices which constitute acts of interference during strike actions to break the strikes are pervasive across countries. Figure 2 reveals a very disturbing picture: such violations have taken place in 22 countries and in the last 5 years have been reported in 58 countries. Said violations range from outright repression to incentives to dissuade workers from striking.

- 1) Under the guise of ›public order‹ and ›national security‹, public authorities and courts have frequently used any or a combination of the following:
  - a. interference with picketing and banning the use of communication resources;
  - b. systematic presence of police, often at the request of employers, to protect private property during strikes with the aim of: threatening, dislodging, attacking and arresting striking workers. It also includes cases of trade unionists being tear-gassed (including aerial spraying of toxic chemicals), beaten, wounded and even killed with firearms. Police presence during balloting or before the strike, and at homes of striking workers and trade unionists has also been used to repress strike action;
  - c. police refusal to stop the attacks of thugs and protect protestors; authorities did not prevent the hiring of workers to replace striking workers;

- d. requisitioning (sometimes only of trade union leaders as a pressure strategy on other workers) and back-to-work orders;
- e. criminalization of strike and trade union leaders for sabotage and destabilization of the state, followed by threats of dismissal, wage deduction, non-payment and other measures;
- f. dissolving trade unions involved in strikes and establishing/supporting pro-government/employer trade unions;
- g. issuing of minimum service requirements shortly before a strike to undermine strike action;
- h. deportation of migrant workers.

In **Indonesia**, strike actions in industrial areas and city centres are always accompanied by a high presence of police. In recent strikes, the number of police officers has been higher than the number of strikers. Peaceful protests in October 2013 were violently confronted with hired thugs attacking workers with iron beams, knives and machetes. Workers in Bekasi and Karawang were attacked by members of a paramilitary youth organisation who had been hired by factory managers to punish striking workers

- 2) Intimidation and coercion of workers by employers is widespread in the form:
  - a. smear campaigns against striking trade unions;
  - b. threats of (mass) dismissal and demotion, including systematic firing of striking workers;
  - c. forcing workers to resign, renounce their union membership;
  - d. frequent use of retired workers, non-standard workers and migrant workers during strike actions (in the case of the Philippines to replace up to 100 per cent of striking workers);
  - e. locking out striking workers, including refusing access to water, toilets and medical facilities;
  - f. use of thugs;
  - g. favourable treatment for non-striking workers and/or trade unions, such as smartphones, premium payment and days off; and
  - h. blackmailing and corruption to break solidarity and/or provoke conflicts among workers.

In **Madagascar**, SMOI/SOCAMAD, a seamen hiring agency, made the seamen sign a contract which stipulates that incitement to strike is punishable with imprisonment.

Acts of interferences such as criminalization of picketing, back-to-work orders, replacement of striking workers with non-standard workers and intimidation and coercion have a serious repressive effect on the right to strike. Other areas of violations of the right to strike also have the effect of back-to-work orders. For example, where essential services are defined loosely and the determination of minimum services is infringed, public authorities have made use of provisions which allow for suspension or declaration of strikes illegal or which provide for public authorities to refer the case to compulsory arbitration, thus forcing workers to go back to work. Failure to do so leads to workers being subject to severe sanctions.

### 3.6 Suspension or Declaration of Strikes as Being Illegal by Public Authorities has Further Undermined the Exercise of the Right to Strike in Several Countries

ILO supervisory bodies have emphasised that »the responsibility for declaring a strike illegal should not lie with the government, but with an independent body which has the confidence of the parties involved« (Gernigon et al. 1998: 32).

#### Violations in Law and/or Case law

Many (18) countries have already adopted law provisions, case-law rulings and/or ordinances which empower public authorities to suspend or call a strike illegal (Figure 1). Authorities empowered to suspend or declare a strike illegal include: the minister of labour or of the related ministry; the president of a country or the council of ministers; the labour inspectorate or a local administrative authority. The survey findings show that the suspension or declaration of illegality of strikes is often framed around the need to protect »national security«, »interests of national economy«, »public interest«, »public health«, and to avoid »potential harm to the welfare or interests of students«. At the same time, provisions which allow the minister to declare any service to be essential also give public authorities a free hand in suspending or declaring strikes illegal.

In recent years, new legal provisions and/or case-law rulings which give public authorities the power to sus-

pend or declare strikes illegal have been introduced in 9 countries, namely: Argentina/Corrientes, Australia, Greece, Honduras, India/Goa, Peru, Spain, Turkey and Viet Nam. Said violations take the form of (a) the government being allowed to suspend or declare strikes illegal (Turkey, Viet Nam). Here, too, (b) governments at various levels have used emergency laws and vaguely defined »essential services« to end strikes of teachers, seamen and transport workers (Australia, Greece's civil mobilization orders, India/Goa and Spain). In other countries, (c) administrative authorities have issued executive decisions to end strikes (Argentina/Corrientes, Honduras, Peru).

#### Violations in Practice

Practices which violate international principles regarding the body which is empowered to suspend or declare strikes illegal have been adopted in several countries (Figure 2). Citing »national security«, »social order and stability« and other pretexts, the said regulatory provisions have often been abused to arbitrarily suspend or declare strikes illegal. This is particularly the case with public services where government authorities make use of ordinances to put pressure on public sector workers not to participate in an industrial action or to end the strike. Suspension orders for purposes of compulsory conciliation are used more often than what is provided for by law (by claiming that it is a new conflict) with the effect of putting an end to a strike.

The impact on the right to strike has been particularly worrying with countries such as **Turkey**, where three strikes (in glass, mining and metal sectors covering about 30,000 workers) were suspended by the Council of Ministers in the last 5 years. In **Kenya**, the frequency of interventions declaring strikes illegal has led unions to believe that a strike can always be declared illegal.

### 3.7 Infringements in the Determination of Minimum Services Interfere with the Right to Strike Action

According to ILO supervisory bodies, »the establishment of minimum services in the case of strike should only be possible in: (1) *essential services in the strict*

sense of the term; (2) services which are not essential in the strict sense of the term, but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population; and (3) public services of fundamental importance». In addition, the term »minimum service« should meet at least two requirements: First, »it must genuinely and exclusively be a minimum service, that is, one which is limited to the operations which are strictly necessary to meet the basic needs of the population or the minimum requirements of the service, while maintaining the effectiveness of the pressure brought to bear.« Second, workers' organisations »should be able, if they so wish, to participate in defining such a service, along with employers and public authorities.« It is highly desirable that »the definition of the organization of the minimum service not be held during a labour dispute, so all parties can examine the matter with the necessary objectivity and detachment« (Gernigon et al. 1998: 30–2).

#### Violations in Law and/or Case law

The survey findings and the reports reviewed show that infringements in the determination of minimum services have taken place in a number (17) of countries (Figure 1). Said violations are related mainly to (a) broad, undefined and ambiguous definition of »essential services«; (b) ambiguous, undefined or excessively strict criteria defining minimum operational service; and (c) lack of any independent body to rule in the event of disagreement over the number and occupation of workers who are to continue working in the event of a strike in essential public services;

Legal provisions and/or case-law rulings which constitute violations of the international principles on determination of minimum services have recently been issued in 7 countries: namely: Argentina (Mendoza/San-Juan/Jujuy), Brazil, Canada (Saskatchewan and Quebec), Hungary, Italy, Mauritania and Romania.

In Jujuy, **Argentina**, provincial legislation (Law 5853, 2015) defines essential public services as those which guarantee the enjoyment or exercise of rights such as life, health, justice, transport, liberty and security of persons. The Provincial Executive authority determines which services are essential according to this principle.

The violations can take the form of:

- 1) broad, undefined and ambiguous definition of »essential services« which gives the public authority the possibility to unilaterally declare any service to be essential without any requirement to consult social partners (Canada, Italy);
- 2) ambiguous definition of the term »minimum services« which results in the suspension or declaration of strikes to be illegal. A Romanian law requiring that at least one-third of regular services have to be provided has led to problematic case-law rulings (2014) in which it has been difficult to establish whether it refers to working time or services;
- 3) unilateral definition of minimum services at the request of the employer/government without any prior consultation with workers' organisations (Canada/Quebec, Mauritania, Romania). Mauritanian law leaves the determination of minimum services to a degree up to the government; and
- 4) a very high level of minimum operational service so as to undermine the effectiveness of strike action (Argentina, Brazil, Bulgaria, Hungary). Hungarian law (2012) stipulates that the minimum level of service for local and suburban public passenger transportation services during strikes is 66 per cent.

#### Violations in Practice

Legal loopholes concerning minimum services and government refusal to negotiate terms of minimum services mean that in practice the levels of staffing are determined by the balance of power between workers and the state as an employer. Practices of imposing higher levels of staff than what is deemed necessary are common. In the case of Burundi, the government forces teachers aligned with the ruling party to work half a day, claiming that this is minimum service.

**Saskatchewan Health Authorities** designate 75–100 per cent of employees in hospitals and long-term care facilities as essential.

Finally, lack of prior determination of what constitutes »essential services« and/or »minimum services« allows governments to influence public opinion, while a strike involving public services has an impact on the public, hence weakening public support for the strike.

### 3.8 Compulsory Arbitration is Widely Used to Replace Industrial Action

According to ILO supervisory bodies, »compulsory arbitration to end a collective labour dispute and a strike is acceptable if it is at the request of both parties in a dispute or if the strike in question may be restricted, even banned, i.e. in the case of disputes in the public service involving public servants exercising authority in the name of the State or in essential services in the strict sense of the term, namely those services whose interruption which would endanger the life, personal safety or health of the whole or part of the population« (Gernigon et al. 1998: 26).

#### Violations in Law and/or Case law

Legal provisions and case-law rulings which provide for compulsory arbitration accorded to strikes in violation of the ILO principles have existed in many (41) countries (Figure 1). In the last 5 years, new laws and/or case-law rulings have been reported in 5 countries, namely Canada, DR Congo, Norway, South Africa and Turkey. The survey findings show that violations in the guise of legal provisions which provide for compulsory arbitration take the form of:

- 1) lawful strikes settled by compulsory arbitration upon the request of only one party, usually employers. This also includes cease-and-desist orders which have the effect of back-to-work orders (Canada/Ontario);
- 2) intervention by public authorities to refer the case to industrial courts even before the strike occurs; or to submit the case for compulsory arbitration if the authorities consider that the strike action is damaging to the public order, is contrary to the public interest or compelling economic and social needs requires such (Norway, South Africa); and
- 3) pressuring unions to submit the case to compulsory arbitration for fear of sanction such as the strike being declared illegal or losing the certificate of the negotiating union (DR Congo, Turkey).

#### Violations in Practice

Cases of related violation in practice include:

- 1) workers being forced into compulsory arbitration in light of a long legal route to travel before they are able to strike, for fear of losing their job and the real

possibility that the strike may be declared illegal, and employers' tactics driving the process towards arbitration;

- 2) abusing the strike notice period to put in place an arbitration mechanism; and
- 3) compulsory arbitration governed by the labour office.

### 3.9 Excessive Sanctions in the Case of Legitimate Strikes are Pervasive

In relation to the issue of sanctions, ILO supervisory bodies have decided the following: »Penal sanctions should only be imposed as regards strikes where there are violations of *strike prohibitions which are themselves in conformity with the principles of freedom of association*. All penalties in respect of illegitimate actions linked to strikes should be proportionate to the offence or fault committed and the authorities should not have recourse to measures of imprisonment for the mere fact of organizing or participating in a peaceful strike (...) measures taken by the authorities as a result of a strike in an essential service (prohibition of trade union activities, cessation of the check-off of trade union dues, etc.) were contrary to the guarantees provided for in Article 3 of Convention No. 87. (...) In cases of peaceful strikes (...) the authorities should not resort to arrest and imprisonment in connection with the organization of or participation in a peaceful strike; such measures entail serious risks of abuse and are a grave threat to freedom of association«. With regard to wage deductions for days of strike action, »in general the parties should be free to determine the scope of negotiable issues« (Gernigon et al. 1998: 43).

#### Violations in Law and/or Case law

Sanctions which violate international principles have been imposed in several (36) countries. They are justified under the pretext of the »economic future of a company«, »social climate« or »the interest of the country«. Said violations can take the form of:

- 1) labour, civil and criminal sanctions related to strikes such as:
  - a. imprisonment of up to 5 years, including compulsory labour as punishment;

- b. cancelation of a union's recognition certificate, suspension of collection of union dues or levies and closure of trade union media;
  - c. termination of employment for striking workers or those who incite others to strike;
  - d. loss of wages for days of strike, or for more than days of strike as well as loss of other benefits for striking workers and/or for workers inciting others to strike;
  - e. employer compensation in the form of huge fines for striking workers and/or trade unions; and
  - f. double sanctions for those inciting others to strike; and
- 2) criminalization and imposition of high fines for picketing as it violates the right to work and obstructs traffic.

In **Egypt**, the Legislative Decree 34 (2011), issued by the Supreme Council of the Armed Forces, provides for criminal penalties for violating »the freedom to work«. The first article of the decree mandates that any individual who behaves in a manner that leads to the hindrance or obstruction of work at any state institution, public or private facility shall receive a prison sentence and a fine ranging between US\$2,200 and US\$ 5,600. Although the decree is only valid in emergency situations, it has been taken as a reference for court rulings recently. A Cairo court decreed on Tuesday, 28 April 2015 that all government employees participating in strikes and sit-ins would be retired from their positions for »opposing Islamic Sharia.« On Saturday, 25 July, 2015, the Supreme Administrative Court ruled against another four workers, permanently dismissing them from their jobs and forcing them into early retirement for exercising their right to strike.

In the last 5 years, new legal provisions and/or case-law rulings which constitute excessive sanctions on strike actions have been introduced in 13 countries (Figure 1), namely: Argentina, Benin, Brazil, Canada, Ecuador, Egypt, Guatemala, Honduras, Mauritania, Niger, Spain, Turkey and Zimbabwe. They take the form of:

- 1) hefty fines for disturbing traffic and the right to work of non-strikers (Guatemala);
- 2) fines and penal sanctions for striking workers (Argentina, Canada, Spain);
- 3) imprisonment of striking workers (Ecuador);
- 4) withholding wages and benefits (Mauritania, Niger);
- 5) termination of employment (Benin, Turkey, Zimbabwe); and
- 6) extension of the school year in the event of strikes in the education sector (Honduras).

## Violations in Practice

Practices of excessive sanctions are pervasive: 21 countries are reported to have adopted these practices in the past and 59 countries have done so in the last 5 years (Figure 3). In practice, the impact of legal provisions and/or case-law rulings which provide for sanctions for striking workers and trade unions is severe. Respondents report frequent cases of:

- 1) non-payment of wages and/or benefits beyond the striking period (in one case even for three months);
- 2) imposing penalties and employer compensation on workers participating in strikes;
- 3) violent attacks, threats of arrest, detention for advocating crime, sedition and terrorist activity, imprisonment, torture, lawsuit against unionists, forced community work for striking unionists;
- 4) blacklisting, demotion and transfer of workers to other provinces, suspension and/or dismissal of striking workers, non-renewal of contracts for non-standard workers;
- 5) union dissolution and/or illegal election of new leadership, blocking members' dues, and seizing/ransacking of trade union property;
- 6) agitating communities against striking workers;
- 7) closure of enterprises and massive dismissals;
- 8) killing of striking trade unionists, with some cases involving workers in EPZs; and
- 9) deportation of migrant workers involved in strike action.

In some cases, sanctions have taken the form of downsizing the workforce on the pretext of losses occurring because of the strike action.

In **Mauritania**, SNIM (*Société Nationale Industrielle et Minière*) workers who conducted a strike in January 2015 were faced with a number of sanctions such as suspension from work of three workers' representatives for eight days; workers' representatives subjected to harassment, intimidation and threats of all kinds.

The imposition of sanctions against individual workers (dismissal, fines, and criminal sanctions) and trade unions (cancellation of union's recognition certificate and suspension of collection of union dues) for strikes declared illegal ex post is being described as a major abuse

of power which has a strong repressive effect on the effective exercise of the right to strike. This is true especially in light of the survey finding that several countries have empowered public authorities to suspend or declare strikes illegal. The repressive effect of these violations is worsened due to lack and/or ineffective mechanisms which could guarantee due process and justice regarding violations.

### 3.10 Denial of Due Process and Justice Regarding Violations is Widespread

In the view of ILO supervisory bodies, »respect for the principles of freedom of association clearly requires that workers who consider that they have been prejudiced because of their trade union activities should have access to means of redress which are expeditious, inexpensive and fully impartial; legislation must make express provision for appeals and establish sufficiently dissuasive sanctions against acts of anti-union discrimination to ensure the practical application of Articles 1 and 2 of Convention 98« (Gernigon et al. 1998: 41).

#### Violations in Law and Practice

Survey respondents and the reviewed reports provide limited insights on legal provisions which provide for due process and/or justice regarding violations. This may reflect the fact that even where such provisions exist, they are often violated in practice, as indicated by several respondents. Some of the main reasons cited for these violations include:

- 1) lack of institutional mechanisms which can remove restrictions on the right to strike in a timely fashion: legal claims against violations of the right to strike apply for a very long time, in some instances for several years;
- 2) expensive legal cases which leave workers and their organisations without any access to justice;
- 3) authorities' and courts' bias against workers;
- 4) corrupt justice system, as legal provisions providing for due process are often not respected and workers' complaints are often dismissed for lack of evidence; and
- 5) very low levels of penalties which have no deterring effect on employers.

#### Justice delayed – Justice denied

Due process is guaranteed by law, but not implemented. Cases of unfair dismissal of workers due to strike action have been brought before the Supreme Court, but they take years, in one case 10 years, and workers have passed away before the final ruling. Such delays leave workers uncertain and under high pressure to meet basic family needs.

*Filipino respondent*

Finally, even when the courts have issued decisions in favour of workers, public authorities have been unable or unwilling to implement those decisions. This stands in stark contrast to the readiness and intensity with which governments have engaged the public machinery to preempt, interfere, interrupt and end strike actions.

## 4. Right to Strike Discourse: Trends and Actors

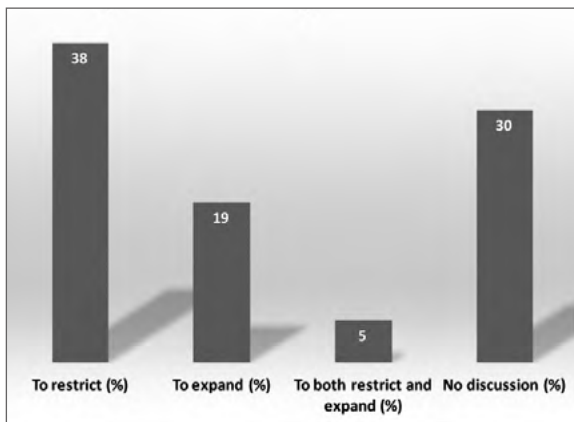
Violations in the form of legal provisions and/or case-law rulings have been accompanied, and perhaps reinforced, by a public discourse which has favoured restrictions on the right to strike (Figure 4). Championed by governments and employers alike, arguments to restrict this right revolve around competitiveness, access to markets, the global financial crisis and national security and interest. Underlying themes in such debates have included »freedom to work« versus the »right to strike« and equating the »right to strike« with the »right to lock-out«.

This section, which is based on the survey findings, explores developments in the discourse on the right to strike over the last 5 years.

Most of the survey respondents, 62 out of 87, indicated that debates on the right to strike have been taking place in many countries over the last 5 years. As the Figure 4 shows, the dominant trend has been to restrict the right to strike. The main actors involved are governments and trade unions (as stated by nearly 1 in 4 respondents), followed by employers (stated by more than 1 in 5 respondents), academia (1 out of 10 respondents) and other actors such as consumers' associations, media, members of parliament and labour-oriented NGOs.



Figure 4: Trends in the Right to Strike Discourse



#### 4.1 Arguments to Restrict the Right to Strike

Both governments and employers have put forward similar arguments in restricting the right to strike. In addition to employers' arguments citing the economic impact of strikes, governments are increasingly using the language of ›national security and safety‹, ›public order‹ and ›political stability‹.

The arguments of governments and employers in restricting the right to strike can be summed along the following lines:

- 1) *Economic arguments to restrict strikes* are made in the context of globalisation and financial crisis. Reference is made to the negative effect of strikes on international and labour markets, investment climate, production, productivity, competitiveness, profitability, worsening image of corporations in the eyes of banks and clients, and companies' constraints in offering more to workers due to their position of price-takers in international markets.
- 2) *Governments' arguments for restricting strikes in the public sector* revolve around the effect of strikes on public services and citizens. Language commonly used against strikes and striking workers are: they ›take patients hostage‹; ›threaten public health‹; ›violate the right of parents and students to national examinations without internal or external disturbances‹ (Bill 115, *Putting Students First Act, 2012* – Ontario, Canada); ›are a cost to tax-payers‹; and ›workers, especially in the education sector, always exceed their

right to strike«. It is also argued that the ILO definition of essential service does not work to serve the public interest (Canada).

- 3) Similarly, *employers' language against trade unions and their actions*, which is used to influence public opinion, includes such arguments as: ›Most strikes are illegal and don't follow the procedures‹, ›Strikes are violent‹, and ›Class struggle is an obsolete concept‹.
- 4) Unsurprisingly, *employers have called for further legal restrictions on the right to strike*, as existing arrangements are supposedly biased against employers and give trade unions too much power. Proposals have been made to: tighten legislation regulating strikes by e. g. prohibiting sympathy strikes; lengthening of the period of notice; restricting the right to strike to the most representative organisations; and making trade unions responsible for workers' action during strikes. Related proposals include: broadening the scope of essential services or of minimum services from those services that ›can endanger lives‹ to being ›medically responsible‹; better implementation of arbitration legislation; and laws which provide for easy hiring and firing at the workplace.

The Productivity Commission's recent review of **Australia's** Workplace Relations Framework recommended both the removal of some procedural restrictions for the taking of ›protected industrial action‹ but also an increase in penalties, and stricter enforcement of ›unprotected industrial action‹.

*Productivity Commission Inquiry Report, Workplace Relations Framework Report, 30 November 2015*

#### 4.2 Arguments to Strengthen the Right to Strike

Arguments in favour of the right to strike have been articulated mainly by trade unions, and in some cases academia as well. Such arguments mainly focus on respect for constitutional rights, and national and international labour standards. As the only countervailing power workers have in the unequal relationship of bargaining with the employers, the right to strike is crucial to a development model centred on human rights and decent work. Thus, trade unions have argued for the removal of all restrictions on the right to strike, including extend-

ing the right to strike to all groups of workers and to all trade unions, and a ban on the use of scab labour, which has led to long and sometimes violent strikes.

#### 4.3 Academia's Arguments

Survey findings show a mixed picture of arguments put forward by academia and think-tanks, with some fully supporting the right to strike as a fundamental right of workers that is key to their bargaining power. Other respondents point to arguments which echo more the concerns of governments and employers and which see the right to strike as undermining economic progress.

### 5. The Battle Over the Right to Strike: Taking the Fight to the Courts and to the Streets

Courts have become a dynamic terrain challenging restrictions on the right to strike. From Argentina to Germany and Canada, the survey findings show that workers are fighting for their right to strike in the courts. In January 2015, the Supreme Court of Canada, the country's highest court, in *Saskatchewan Federation of Labour (SFL) vs. Saskatchewan* reversed its own prior jurisprudence from the mid-1980s and ruled that Freedom of Association (FOA) includes the right to strike because the strike threat is an indispensable part of effective collective bargaining. The SFL decision is binding on all of Can-

ada and will have an effect on labour law, jurisprudence, and practice throughout the country. Similarly, some of the Argentine trade unions have taken action with the courts to confirm that all workers, regardless of the status of their organisation, have the right to strike (Box 1). The case of Argentina is illustrative of the way contesting arguments are being played out in the public debate.

In Germany, too, where public servants (*Beamte*) are denied the right to strike, a 2014 ruling handed down by the Federal Administrative Court held that the ban on teachers' strikes was incompatible with the European Convention on Human Rights. The ruling followed a decision issued by Düsseldorf Administrative Court in 2010, which held that since the general prohibition against strikes for civil servants in Germany is contrary to international law, the imposing of disciplinary measures for participation in a strike is unacceptable to teachers, as such measures do not pertain to the administration of the State (CEACR Observations 2015). While court cases on the right to strike are pending, the fight for the right to strike is being taken to the streets. In response to a teachers' strike in Hesse, more than 1,500 teachers were subjected to disciplinary measures for participating in a civil servants' strike. The teachers' strike received the support of other unions and the broad public. An online petition organised and signed by more than 50,000 parents stated: »We parents would like to express our solidarity with educators because we are partners in raising our children«. Faced with this public protest, the government has put all trials against striking teachers on hold.

#### Argentina – Where the Battle Over the Right of Workers to Strike is Far from Over

On June 7, 2016, the Argentine Supreme Court ruled in the case »*Orellano c. Correo Argentino*«. Orellano was a former worker of the Public Post Office Correo Argentino, who together with his 46 co-workers was fired in 2009 for organising a strike without the authorization of the most representative union at the workplace.

Orellano claimed that he was discriminated against because of his participation in industrial action. The first and second ruling (in the lower courts) upheld Orellano's claim and he was reinstated by his employer. The Supreme Court, however, ruled to dismiss Orellano's case without any legal consequences.

The employer/government argued that the right to strike is the domain of the trade unions. Thus, Orellano and his co-workers, who did not receive authorisation from the most representative union to engage in industrial action, were not on strike. They failed to meet their legal obligations as workers and had to be punished in accordance with labour law, i.e. dismissal without compensation.

On the workers' side, Orellano argued that his dismissal was in retaliation for his participation in industrial actions, and thus it was a violation of anti-discrimination law. Argentine law forbids discrimination of any kind (including political opinion) and it lays down a right on the part of a victim of discrimination to seek redress before a court and claim for the nullification of the discriminatory act.

During the proceedings, the Supreme Court called for a public hearing, a procedure introduced recently to allow for open discussions in cases of public interest. Several trade unions – CTA-A (Workers Central of Argentina, Autonomous); CTA-T (Workers Central of Argentina, Trabajadores); and ATE (Union of Public Employees) and associations and institutions (Labour Lawyers Association, the Buenos Aires Lawyers Association and the University of La Plata) presented their legal arguments in support of Orellano's claim. The Argentine Industrial Chamber also participated in the public hearing, supporting the employers' position. Regrettably, the public hearing turned into a mere formality without any impact on the rulings of the Supreme Court.

The Supreme Court reasoned that the right to strike is recognized in the Argentine Constitution and that ILO Convention No. 87 has constitutional priority. The Court stated that the right to strike is included in ILO Convention No. 87 and it considered the work of the Committee of Experts on the Application of Conventions and Recommendations to offer precedence in the interpretation of the text of the Convention. The Supreme Court also argued that according to the CEACR it is possible to restrict the right to strike to trade unions and thus exclude informal groups of workers.

The main achievement of the ruling is that, based on the argument that the right to strike is included in ILO Convention No. 87, the Court recognized the right to strike to all recognised trade unions and not only to those recognised as the most representative ones\*.

The ruling, however, poses a significant challenge to the recognition of the right to strike in Argentina. The Court's argument weakens the position of workers to the extent that a recognized trade union is absent or a local group of workers is not able to obtain the approval of an official trade union to engage in industrial action. The repercussions for exercising the right to strike in practice are severe: for a group of non-unionised workers to go on strike, it has to first be recognised as a trade union, which usually takes years in the Argentine context. The argument is considered by trade unions and labour scholars to be a setback in the history of labour relations, where the right to strike always had priority over official trade union recognition.

Despite the Supreme Court ruling, the battle over the right of workers to strike is not over. Trade unions are planning to take the case to international courts, such as the Inter American Commission of Human Rights. Labour lawyers are also developing legal strategies to minimise the negative effects of this ruling in the labour relations system, particularly in labour conflicts which are not organized by recognised trade unions.

*\* According to Argentine labour, the most representative trade union has a monopoly on formal recognition, including the right to bargain. This union holds a ›trade union registration status‹. The other unions, which have a ›simple registration status‹, are recognised as organisations of civil society, but have no mandate to negotiate formally.*

## 6. Conclusions: Now as Then, the Struggle Over the Right to Strike Continues

The right to strike has been won through the decades-long struggles of workers throughout the world. National legislation and international instruments have recognised that the right to strike is a fundamental right of workers and their organisations to promote their economic and social interests. Through the years, the ILO has developed a number of internationally recognised principles which regulate this right.

This study has shown, however, that many countries have long been enacting restrictions which violate ILO principles on the right to strike. It also shows that restrictive legal measures, administrative procedures and practices are increasingly being applied in more and more countries regardless of their status of economic development or political system.

The analysis of the report suggests the existence of two notable trends: a continuation of the trend of excluding workers from the right to strike and a trend of increasing repression against striking workers.

On the one hand, several groups of workers continue to be excluded from the right to strike in clear violation of international standards. Whereas many of these exclusions existed prior to the 2012 ILC controversy, new exclusions have been introduced in the last few years. They pertain mainly to the application of broad and vague categories of ›essential services‹, ›civil servants‹ or ›strategic or vital establishments‹ and provisions which empower administrative authorities to declare a wide range of services as essential and thus ban strikes or impose minimum services. In particular, the right to strike in the public sector continues to be severely curtailed; striking public sector workers are subjected to more repression in the form of acts of interference and severe sanctions.

On the other hand, the right to strike of workers who are allowed to engage in industrial action is being curtailed by legal measures which provide employers and the state with powerful instruments to effectively repress the right to strike. Indeed, the fact that excessive sanctions have topped the list of violations in the last 5 years indicates a noticeable trend towards repression among those measures regulating the right to strike over this period. Such measures are being reinforced by provisions which allow public authorities to suspend a strike or declare it illegal, impose compulsory arbitration in violation of international standards and infringe the determination of minimum services. In addition, bureaucratic procedures and requirements add up to make it virtually impossible to legally go on strike. Far from being neutral, such procedures and requirements are used to suppress strike action. Taken together, many of the measures ›regulating‹ industrial action often constitute serious acts of interference with the right to strike. When widespread practices of excessive sanctions and acts of interference which violate this right – such as hiring non-standard and migrant workers to replace strikers, arbitrary dismissals and imprisonment, hefty fines, shocking police repression during industrial action and lack of access to justice – are taken into consideration, it is very amazing that there are any workers at all who are still striking.

The dominance of repressive measures and practices in ›regulating‹ the right to strike needs to be understood as part and parcel of a broader global trend of state authoritarianism and ›securitizing‹ of politics and society, with fundamental democratic rights of freedom of speech and assembly at stake in many countries. It also needs to be seen as a continuation of the assault on unionisation and collective bargaining, and of narrowing space for workers' participation in decision-making at the workplace and in local, national and international politics. The erosion of the right to strike represents a major setback for the labour movement, further weak-

ening it and the means to challenge rising inequality and other economic and social problems. In times of concerted attack on workers' rights, including the right to strike, the vision of ›economic democracy‹ has become a distant utopia.

Against this background, the 2012 ILC controversy – the challenge to the existence of an internationally recognised right to strike protected by the ILO Convention No. 87 and questioning of the role of supervisory machinery – is not a remote debate taking place in distant Geneva. In the absence of any binding international grievance mechanism, the weakening of the ILO supervisory mechanism threatens to remove one of the few international instruments available to workers to challenge violations of international norms by national governments or employers and pressure them to respect and protect these norms. At the same time, the controversy may undermine the reception of ILO ›jurisprudence‹ by supranational and national courts (Hofmann and Schuster 2016: 11–12), calling into question the benchmarks for national legislation and practice on the right to strike. Indeed, the Supreme Court ruling in Argentina highlights the crucial role of ILO jurisprudence at the national level.

While the right to strike is increasingly becoming a ›precarious right‹, the remarkable courage of workers around the world who continue to strike despite enormous restrictions and alarming repression shows that the verdict over the right to strike is far from over and it is being decided every day. Now, as in the past, workers will have to struggle to ensure that all workers in all countries can exercise their fundamental right to strike. Facing this concerted attack on this right, however, requires building power for a long-term struggle. It requires, among other things, a strengthening of alliances among workers, communities, academia and other democratic forces to expose and resist this attack as an assault on the democratic sphere needed to build a more just society.



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### Imprint

Friedrich-Ebert-Stiftung | Global Policy and Development  
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This publication is printed on paper from sustainable forestry.



ISBN  
978-3-95861-608-0