Should public sector workers have a right to strike? And should this include workers in essential services? Luci Nyembe* draws on international experience and argues that all workers should have a right to strike, with restricted rights only in a few exceptional cases.

the **Public Sector** *and the* **right to strike**

Public sector strikes in South Africa, as in the rest of the world, have become an inescapable social reality. Since the major transport and communications strikes in 1987 (the SARHWU and POTWA strikes) workers in the public sector have openly voiced their dissatisfaction with the dismal state of labour relations.

Municipal workers, teachers, university workers, health workers, public service workers in the homelands, airline technicians, even magistrates – all have taken part in industrial action in recent years. The current health strike has involved, at its height, up to 29 000 workers in all parts of the country.

The demands, in these public sector strikes, include the usual issues of recognition, reinstatement of dismissed workers, improvements in wages and working conditions and an end to temporary employment in the state sector. However, many of the strikes have also been in opposition to state policy. We have seen POPCRU members demanding an end to racial discrimination in the prison service, and health workers demanding the desegregation of hospitals. This has enabled them to mobilise significant public support.

In looking at public sector strikes over the past five years, one is struck by the reasonableness of the unions' demands. Who cannot sympathise when workers with 20 year's service are treated as "temporary workers" and demand to be given permanent employee status? The strikes have also taken place in a context where there is no right to collective bargaining and no effective methods of dispute resolution. One is hard-pressed to deny the moral right of state sector workers to resort to strike action in such circumstances.

No right to strike in public sector

Our law does not recognise the right to strike of public service employees, or nurses. While public sector strike action is not a criminal offence, the statutes do not legitimise strike action in any way.

The Public Service Act, covers civil

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servants in the central state departments and provincial administrations. It regards "absence without leave or a valid reason" as misconduct, a disciplinary offence which may lead to dismissal. This provision has often been used to terminate the services of "officers" on strike. Employees with "temporary" status (as many black workers with long service still are) are governed by the common law. For them strike action is regarded as a material breach of the contract of employment and they may be dismissed on 24 hours notice.

In terms of the Education and Training Act, a teacher absent from school without leave is guilty of misconduct and subject to disciplinary action, which may include dismissal. The other Education Acts for the different 'population groups' have similar clauses.

Direct prohibition on strikes by nurses were deleted from the Nursing Act in 1992. However, in the regulations to the Act, it states that nursing personnel who participate in action which constitutes a breach of contract will be subject to disciplinary measures.

Strikes are also prohibited by the Armaments Development and Production Act and the Medical, Dental and Supplementary Health Service Professions Act.

Workers from public sector unions - fighting for the right to strike

Photo: Morice

In all the above laws, the right to collective bargaining and dispute resolution is not recognised, except in the case of the Armaments Act, where an extremely cumbersome dispute settlement procedure exists. In short, public service workers have no channels to negotiate and bargain effectively and no procedures for solving disputes which arise*. Clearly this is a problem, not only for the workers affected, but for society as a whole.

Internationally accepted rights

How do other countries, and international conventions, deal with the problem? There are

* *see article by Nyembe in this issue which looks at current talks aimed at changing this situation*

three elements to be explored - collective bargaining, the right to strike, and the particular problems associated with essential services.

Collective bargaining

ILO* convention 98 promotes collective bargaining. It applies both to the private sector and to nationalised undertakings and parastatals (such as Transnet, SAPOS or Telkom). The staff of a national radio and television institute (such as the SABC), the administrative staff of a national teaching service, teachers, employees in the posts and telecommunications services and civil aviation technicians in the armed forces and employees of similar status – are all included in the provisions of convention 98.

However, it does not apply to civil servants employed in government ministries, who are covered by ILO convention no 151. This calls for the full development of machinery for negotiation of terms and conditions of employment between the public authorities and the public employee's organisations. The convention also allows for the settlement of disputes, either through negotiation between the parties or through mediation, conciliation and arbitration. In short, international convention recognises that all workers, even public servants, have a right to collective bargaining.

The right to strike

The ILO recognises the right to strike but accepts that it may be "restricted or even prohibited" in the public sector and essential services. The Freedom of Association Committee of the ILO has recognised the right to strike as a legitimate means by which workers and their organisations can promote and defend their interests. This not only concerns better working conditions, argues the ILO, but includes "the seeking of solutions to economic and social policy questions ... which are of direct concern to the workers". The right to peaceful picketing is also recognised.

Unfortunately it is easy to recognise the right to strike but more difficult to make it meaningful. The dismissal of strikers, court interdicts, arrest and charges ranging from trespass to intimidation – all are measures designed to deter strike action. While the ever present threat of dismissals does not stop strikes from occurring, there can be no "right to strike" which is not at the same time a "right to strike without fear of dismissal".

On this matter international convention is vague. The ILO does not call for an outright prohibition of mass dismissals, but argues that where they occur, the employer should give serious consideration to reinstatement of dismissed workers in an attempt to improve labour relations.

However, workers in many industrialised countries, including public sector workers, are able to strike without fear of dismissal. In South Africa this remains a problem, both in the public service and in the private sector.

Essential services

It is widely accepted that, in essential services, some limits can be placed on the right to strike. But what is an "essential service"? And how does one distinguish between those which are genuinely essential and those which are not?

The ILO speaks of "services the interruption of which would endanger the life, personal safety or health of the whole or part of the population".

The Freedom of Association Committee has ruled that general dock work, aircraft repairs, transport services, banking, agricultural activities, the metal and petrol industries, teaching, the supply and distribution of foodstuffs, the government printing service and other state monopolies are not essential services. It has recognised that the hospital sector and water supply services *do* constitute an essential service.

The case of hospitals reveals some of the complexities. Shutting down the casualty

* *The International Labour Organisation (ILO) is a UN agency comprised of representatives of governments, employers and unions.*

section for two days will undoubtedly endanger life. But doing the same to an outpatients section or non-emergency surgery ward need not be life-threatening. The scope and duration of strike action, therefore, is clearly implicit when defining "essential services".

Newsbill telling of conflict between police and railway workers during a major strike – if public sector workers had the right to strike, such incidents could be avoided

Photo: Cedric Nunn

Alternative dispute resolution

Where governments can restrict or prohibit the right to strike, the principles of freedom of association provide that they must establish alternative mechanisms for resolving disputes. These should include adequate, impartial and speedy conciliation, mediation or arbitration procedures with full participation of all parties to the dispute. However, conciliation and mediation are often a poor alternative to the right to strike, as the employee party has little or no power. Conciliation and mediation may be valuable when used together with a right to strike. But only compulsory arbitration begins to present an acceptable alternative when the right to strike is denied.

Compulsory arbitration, as envisaged by the ILO, obliges the employer to implement the arbitration award, which is seen as fairly and objectively determined by a third party. There has been an international trend towards compulsory arbitration in the public service, and particularly in essential services. In practice, compulsory arbitration has met with varying levels of success.

In the United States, for example, compulsory arbitration has been challenged on the following grounds:

- ☐ It does not deter strikes. Where the decision of the arbitrator frequently favoured the employer, or was seen to be unfair to the employees, then even compulsory arbitration often lost credibility and wildcat strikes followed.
- ☐ It has a "narcotic" effect on the bargaining process. It is argued that the parties make no concerted attempt to finalise negotiations, and only revise their demands to the extent they believe the arbitrator will rule in their favour.
- ☐ It is unacceptable for government to accept the authority of a third party. Arbitration, it is argued, could affect the budget, influence the amount of taxes required, and allow government executives to escape responsibility for decision-making. This objection relates to a more fundamental one, the limitation of "sovereignty", which we will examine shortly.

Compulsory arbitration is also a form of unilateralism, ie unilateralism by a third party. As such it can undermine the collective bargaining process. This problem has been dealt with by attempts to design systems of arbitration which encourage parties to bargain in good faith and attempt to reach finality before seeking arbitration. Such systems include "last-best-offer by package", and "last-best-offer issue-by-issue" arbitration.

Some countries, like the UK, have introduced the system of pendulum arbitration. The employer's final offer is awarded every

second year and, in alternate years, the employee's final demand is awarded. It is doubtful whether pendulum arbitration has achieved its goals.

In Canada and the USA, where compulsory arbitration is regulated by law, most collective bargaining agreements are in fact reached without resort to arbitration. Access to compulsory arbitration appears to have had the desired effect of encouraging the parties to reach finality, while discouraging illegal strikes and employer unilateralism.

In Europe, compulsory arbitration is not well-known. In Germany, arbitration exists but is not binding. The arbitrator does, however, make a public advisory finding. In France, there are no specific procedures for the settlement of interest disputes. The right to strike is guaranteed constitutionally and this has the effect of encouraging finality in the bargaining process.

Arguments against the right to strike

There are a number of arguments against the right to strike in the public service. Most revolve around the belief that "to allow government employees to strike permits subversion of the political process".

The most traditional argument, the "sovereignty" concept, holds that the state is the guardian of the public interest and has absolute authority to act in that interest. The state as employer cannot delegate authority for decision-making on fiscal issues to employees or their representatives. This argument for state (as employer) unilateralism has lost credibility in many countries as incompatible with democratic forms of government.

Another argument is that government has certain budgetary constraints. This argument carries little weight as processes can and have been designed, which allow the bargaining process to reach finality prior to decisions on budget votes by cabinet. Such systems can incorporate concerted strike action or compulsory arbitration as forms of dispute resolution.

A third argument is that all government services are essential services and should, therefore, be restricted from striking. There are no facts to support this view and the ILO approach, based on danger to life, provides the fairest framework for defining what is, and is not, essential. For example, in the 1991 municipal workers strike in Cape Town, residents were asked to dump their refuse at selected sites on the periphery of residential areas. This presented a certain measure of discomfort but did not involve danger to the life, personal safety or health of the affected people.

On the other hand a month-long refuse collection strike in a squatter area or a week-long strike in an emergency ward could have serious consequences. The issues of duration and scope, mentioned earlier, are important.

A fourth argument is that to interrupt an essential service allows the employee parties "excessive bargaining power", holding government and the public hostage to employee demands. This cannot be a general argument against the right to strike as not all government services are essential. Also, in practice, real "excessiveness" has not been conclusively proved.

While there may be some validity in the argument against "excessive bargaining power", the problem, where it exists, can be dealt with by placing reasonable restrictions on the right to strike and providing alternative dispute resolution mechanisms.

Options for dealing with the right to strike in the public service

There are four options for approaching the problem:

a) *No right to strike and, no access to compulsory arbitration* – this is the South African government approach. Experience shows that it neither prevents strikes nor provides fair procedures to resolve problems.

b) *An extensive right to strike, subject only to minor limitations* – the right to strike is guaranteed constitutionally in a number of countries (France, Spain and Italy) and legislation protects strikers against victimisation, disciplinary action or dismissal.

Problems have been dealt with mainly by introducing a number of limitations on the right to strike. These include:

- ☐ prohibitions on striking for certain categories of employees in essential services, eg the police (Ireland, Italy and the UK);
- ☐ employees/unions need to give advance notice of strikes (between 5 - 15 days), either in essential services only or in the public service as a whole, as the case may be (Italy, Spain, France);
- ☐ the employer may recall certain categories of employees and may requisition workers to maintain essential services or supplies (France, Portugal, UK) or may require employees to maintain a minimum service (Italy).

An interesting case is Montana in the United States, where nurses have a statutory right to strike. However, ten days notice of strike action must be given and nurses at hospitals within a 150km radius of each other may not strike at the same time.

In practice, therefore, even the most extensive rights to strike have some limits placed on them.

c) *A limited right to strike, with no right to strike in essential services, and no access to either mediation, conciliation or arbitration.* This is the approach of the South African government in its recent proposals for new public sector labour legislation.

d) *Restrictions on the right to strike in the public service, particularly in essential services, with compulsory arbitration where the right to strike is denied.*

Providing a minimum service

The ILO's Freedom of Association committee has decided that it is fair to require the maintenance of a minimum service, where the scope or duration of a strike may result in a national crisis endangering the normal living conditions of the population. Such a minimum service should be defined within the general definition of essential services.

Employees' organisations should be able to participate in deciding minimum services on the same basis as the public authorities. This may, for instance, apply to the provision of sanitation or other municipal services, but does not apply, in the opinion of the ILO committee to the provision of transport, railway, telecommunication or electricity services.

In Peru, in addition to certain services being deemed essential, the unions are obliged to maintain certain core services in the event of a strike. What these minimum services are, and who will maintain them, is agreed beforehand. It is interesting to note that in the current South African hospital strike, NEHAWU offered to supply emergency services, but the offer was rejected by the Provincial authorities on the grounds that the union could not tell them how to run the hospital.

Teachers - not covered by labour legislation and not permitted to strike

Photo: Rafs Mayet

Community and public support

In practice public service strikes will take place, whether or not a legal right exists, although perhaps less frequently where there are effective and fair arbitration systems. One of the most important constraints on public service strikes is public opinion.

We find the anomaly that many members of the public support public sector strikes, even in cases where essential services are affected. One American survey found that "strikes by

public employees are most likely to be tolerated by younger people, by citizens who feel city wages should be higher, by blue-collar workers, by black people and by citizens dissatisfied with their treatment by police officers." In South Africa we find similar support, with the current public service strike generating a fair amount of public sympathy.

The recent public service strike in Germany also reveals the importance of public opinion. The strike lasted 11 days, with more than 435 000 workers out at the height of the strike. There were also a number of support strikes, of shorter duration, in various branches of industry. The issue at stake was government pay increases below the level of inflation and, ultimately, who would bear the enormous costs of German re-unification. In the strike ballot over 90% of union members in the public service, transport and communications services, the post office, railways and policemen voted in favour of strike action.

The German strike tactic was to commence action at a limited number of enterprises, with the threat that the strike would grow larger every day. The unions also sought public support. Strike action stopped short of a total collapse of services, while essential supplies and services were maintained. The measures taken were successful in winning public sympathy. After ten days the public employers agreed to enter into negotiations once more, and settlement was reached.

In reality, strikes in the public service have a number of constraints (quite apart from legal restraints). These create an environment in which the public service strike conforms to its own inner pressures and forces, which tend to restore the balance in labour relations. Countervailing forces act on both employer and employee parties to restore this balance. Such forces include political pressures and accountability of both parties to the public will.

The recent hospital strike in South Africa, provides another example. Both employer and union representatives made nightly attempts through national television, to capture public sympathy. Even in the most undemocratic countries, these pressures are at work and may produce either a positive or negative result. In Germany, we see a relatively positive outcome to the strike. Widespread public sympathy was impossible for an elected government to ignore. In South Africa, given the government's complete lack of answerability to black workers and their accountability instead to white civil servants, we have an extremely negative result.

All should have the right to strike

Given the wide scale of negotiations currently underway, addressing everything from constitutional issues to macro-economics to a Bill of Rights, it is essential that civil servants (both as citizens and workers) should not be sold short. A number of rights should be extended to civil servants, including extension of the right to strike. Both the legal and the social environment must be considered.

The legal environment within which such "right to strike" would operate includes, among other things:

- ☐ minimum possible limitations in respect of essential services and the maintenance of core services;
- ☐ a definition of "essential services" compatible with that of the ILO;
- ☐ speedy, effective and fair arbitration procedures for those denied the right to strike;
- ☐ a stipulation that negotiations take place before the budget is finalised, and that the wage agreement, or joint recommendations of the negotiating parties, be included in motivations for budget votes;
- ☐ access to the Industrial Court for both parties where strikes or strike-related issues are contested.

The "right to strike" in the public service also requires the correct social environment. Employers and unions should find their own balance for productive collective bargaining, and be constrained mainly by public opinion, in their use of strikes, lockouts and interdicts. For the social regulation of labour disputes to work effectively, a democratic constitution is a minimum requirement. ☆