

“Flexibility”: The Labor Strategy of Free Trade

AN EXAMINATION OF SIX
BASIC **LABOR RIGHTS** IN

EL SALVADOR



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Introduction

The document presented today regarding labor rights in Honduras is part of a collection comprised of seven documents which provide a general examination of the six basic labor rights: one dedicated to each country in Central America, and a general analysis of the region

The six fundamental labor rights analyzed in this series are: Decent working conditions; freedom of association; the right to collective bargaining; the elimination of forced labor and obligatory overtime; the elimination of discrimination; and the elimination of child labor.

Over the course of several years, we have deepened the understanding of different ways in which labor rights are challenged in Central America. The regional investigations and diverse case studies of countries complement our daily work with training, consulting, advocacy, and communication. Through research and action, we have linked ourselves with Central American workers' organizations and with other social sectors that are part of the Central American social movement.

The “Anti-Flexibility Collection” and the document that you have in your hands are the result of ASEPROLA's efforts to synthesize our research and that of other social and institutional organizations of the Central American region, with which we share the mission of promoting and defending labor rights in our respective countries.

In order to obtain the information—of which we provide an overview—we conducted interviews with union leaders from the public and private sector; workers, especially from the *maquila* and agro industrial sectors; labor judges; official authorities from the Ministry of Labor; as well as with labor lawyers, with the objective of identifying—in practice and from different points of view—the principal obstacles to compliance with the labor rights studied.

Additionally, we have collected related studies and information from government organizations, unions, courts, and the Ministry of Labor, in order to include reports, statistics, denunciations, decisions in cases, etc.

We visited centers that housed legal documents, as well as libraries of public institutions, universities, congress and legislative assemblies, in order to investigate various documents and projects of legal reform. This research was reinforced through a disciplined effort to gather a bibliographical normative framework regarding labor at both a national and international level (International Labor Organization [ILO] Conventions).

In the development of this research, we have obtained varied information, but also faced limitations. It is important to note the great importance of the lack of systemic information, including inconsistent record keeping of denunciations by institutions charged with overseeing compliance with labor laws. This is one of the challenges in the

enforcement of labor laws in Central America—if appropriate records, reports, and statistics do not exist, how can the government ensure the protection of labor rights?

El Salvador also has some obsolete labor laws, as well as some that are a sign of the wave of labor flexibilization that is devastating labor rights in Latin America. The existence of “State modernization processes” and the possible signing of a free trade agreement with the United States, which would then also facilitate the signing of the Free Trade Area of the Americas (FTAA), are additional dangers that threaten the existence of labor, economic, social, and cultural rights.

The clear regression of Salvadoran labor law is not only an expression of the fact that labor law has not been developed over the past several years, but also an expression of the Executive and Legislative branches’ lack of concern for the application of these laws. There are structures and “ways of doing things” set up that guarantee that the labor-related processes will be extremely lengthy or thorny, or that labor complaints will be filed away due to officials’ lack of interest in addressing these problems.

From the information that has been gathered, at least four basic conclusions can be drawn:

- First, women use the administrative, judicial, and public ministry resources less than men do, as a way to demand respect for their labor and union rights. This could indicate that it is harder for women to access these spaces, because they generally are not aware of their labor rights and are less likely to be organized into unions.
- Second, most complaints about the private sector refer to labor rights violations in the *maquilas*, industry, and commerce. Most complaints about the public sector refer to labor rights violations in the Ministries.
- Third, the judicial and administrative institutions that are intended to protect labor rights are not sufficiently utilized by the workers. In other words, workers do not file complaints about all labor rights violations that they suffer. It appears that the repeated questioning of the effectiveness of these institutions has discouraged workers from trying to make use of their services.
- Fourth, the most common complaints presented to the courts refer to compensation for dismissals, unpaid wages, and the firing of pregnant women workers and union leaders. In the public sector, most complaints refer to dismissals and reinstatement.

The number of complaints presented to the courts or the Procuraduría General does not fully represent all of the people who have suffered labor rights violations. In 2001, for example, 900 workers were fired from the Newtex Company, and 1,500 were fired from Anthony Fashion. But the labor courts did not receive 2,400 complaints from all of the workers left unemployed. What happens in practice is that the workers do not believe that these institutions will resolve their problems, so they stop trying to use their services and instead resign themselves to the continual violation of their rights.

General Information about El Salvador

The economic and social rights of the El Salvadorian population are violated daily to the extreme. The information presented here barely demonstrates the extreme crisis that exists in this country. The implementation of the neo-liberal model has brought with it a dramatic increase in the misery of thousands of El Salvadorians, and the levels of hunger, illiteracy, unemployment, and illness amongst the population. According to a 2003 United Nations Development Programme study, El Salvador ranked 105th among 175 countries in terms of human development. This fact indicates the depth of the social crisis.

The neo-liberal model has established a clear tendency with respect to labor and union rights, which has been characterized by precarious employment conditions, labor flexibility, increasing control by multinational corporations, the growth of the textile maquila industry, the privatization of public services, the weakening of institutions such as the Ministry of Labor and Social Welfare, the gradual disappearance of collective bargaining, and the death of the labor movement.

This tendency has also led to an accelerated growth of the external public debt, which increased to \$3.148 million dollars in 2001. It's important to add to this statistic the public internal debt, which is dolarized by law and which reached \$2.368 million dollars in 2001. During that year, El Salvador had a public debt equal to 42% of the GDP. This amount is equivalent to more than 2 years of remittances of El Salvadorians working in the United States, and represents 79% of all exports.

Population:

In 2002, El Salvador had an estimated population of 6,345,000 inhabitants, with an annual population growth rate of 1.3%. It is projected that in the year 2002 there will be 8 million people living in the country.

61.3% of the population lives in urban areas, and 38.7% resides in rural areas. The population is primarily young; 35.4% of the population is under age 15 and 5.2% is over 65. Women represent 51.9% of the total population.

Health:

The life expectancy of women for the year 2000 was estimated at 73 years, and for men at 66.9 years. The health situation is extremely critical in El Salvador, a country that has one of the highest global rates of infant mortality, maternal mortality, and transferable disease mortality. State spending on health scarcely reaches 3.8% of GDP. Illnesses such as dengue fever, diarrhea, and pneumonia are significant causes of death, especially among young children. Furthermore, 14% of the total population is malnourished.

At the end of the year 2000, it was estimated that 20,000 people were infected with HIV/AIDS. Of these people, 19,000 were between the ages of 15 and 49, including 6,300 women, and 830 were minors under the age of 14.

The sexual exploitation of children grew by 400% in the period between 1998 (when 700 case of sexual exploitation of children was reported) to 2000 (3,092 recorded cases). According to information collected by the ILO/IPEC, in the city of San Salvador, 32% of the minors that are sexually exploited are boys and 64% are girls.

Employment:

According to data collected by UNDP, in 2003, 6% of workingwomen were employed in agriculture, 25% in industry, and 69% in the service sector. Of workingmen, 37% worked in agriculture, 24% in industry, and 38% in the service sector.

The Ministry of Labor and Social Welfare calculated full unemployment to be 7.7%, and open unemployment (which includes the informal sector) to be 67%. Due to the economic crisis the level of unemployment is alarming; every year 50,000 people enter the labor market for the first time, but most of these people are underemployed in the informal sector. Of those underemployed in the informal sector, 50.2% receive the equivalent of minimum wage, which is about \$150 dollars a month.

One of the primary consequences of unemployment is immigration. Some 70,000 people emigrate yearly, primarily to the United States and Mexico, countries from which 140,000 Salvadorans have been deported in the past 4 years.

Half of the population makes less than enough money to cover the cost of the basic food basket (UNDP). The richest 20% of the population makes on average 18 times more than the poorest 20% of the population (in other countries with higher levels of development, the difference is only 5 times).

Education:

The illiteracy rate in 2000 was 23.8% among women and 18.3% among men. In 2001, 26 out of every 100 minors under the age of 15 were illiterate. More than 260,000 minors don't currently attend school, and only 50% of children between the ages of 3 and 6 attend nursery school.

The average level of schooling in the country is approximately 4 years. A large portion of people that are able to finish a secondary level of schooling (9th grade, baccalaureate, university) have difficulty finding a place in the economy within their specialty and frequently are forced to emigrate.

Housing:

1.7 million Salvadorans don't have their own housing.

There are 7,000 houses that have been built but not sold, despite the fact that the housing shortage has increased to about 718,000 houses (550,000 before the earthquakes). Given the pace of construction of houses and population growth rates, it would take 89 years to overcome the housing shortage.

Decent working conditions

Legal Recognition of the Right

Political Constitution

- Article 44: Regulates conditions in workshops, factories, and other places of work.
- Article 50: Social security is an obligatory public service. The law regulates its scope, extension, and form.
- Article 38, No. 5: Employers give workers a bonus for each year of work. The law establishes the form and quantity based on salaries.

Labor Code

- Article 314-315: All employers should adopt and put into practice adequate of safety and hygiene measures in all work places.
- Article 50: Responsibilities of the employer when he puts the life or health of a worker in grave danger.
- Article 196-202: Right to a year-end bonus.
- Article 29: Employer's obligations not to mistreat workers through actions or words. Payment of salary must be timely, complete, and personal.
- Article 30: Prohibits discrimination against unionized workers.
- Article 175: Right to a paid break.
- Article 177-189: Recognizes the right to paid annual vacations.
- Article 58: Right to severance pay for workers that have lost their jobs due to the fault of the employer.

Penal Code

- Article 245: If the employer retains social security funds it will be sanctioned with a fine of 100-300 day's pay.
- Article 165: Imprisonment for those guilty of unwelcome sexual conduct or sexual actions directed at a minor under the age of 12.

Worth and Social Welfare Laws

- Article 61: The Social Welfare Department proposes and evaluates welfare benefits, safety, and health regulations, work environment, and recreation policies. Social Security Law.
- Article 56: Employer violations of health regulations. Obligation of the employer to reimburse Social Security for the costs of employees' accidents or sickness.

ILO International Conventions

- Convention 99: Discusses methods to fix minimum wage in agriculture, 1951. Ratified June 15, 1995.
- Convention 131: Discusses fixing minimum wage with special reference to developing countries, 1970. Ratified June 14, 1995.

Other Ratified International Treaties

- American Convention of Economic, Social, and Cultural Rights (San Salvador Protocol) regards the right to social security and maternal leave.

What happens in practice with decent working conditions?

This report will study four significant material conditions of work: safety and occupational health, access to medical services, abuse and harassment at work, and the closing of businesses without payment of liabilities.

When analyzing existing legislation addressing the daily practice of Salvadoran businesses, one may conclude that what should be occurring with regard to health standards is far from what is actually occurring in reality. For example, the unexpected closure of companies that still owe salaries, vacations, bonuses, compensation, and social security payments, has become common in El Salvador. Additionally, there are constant complaints of abuse in workplaces, including discrimination due to union affiliation, and sexual harassment. Workers are pressured to comply with high productivity standards, for which the supervisor or foreman will imprison, threaten or intimidate workers.

The gravest cases of violations of the right to decent work can be seen in the textile maquilas where women are over represented. Most women in these factories are younger than 25, and have low levels of education and great economic need. Few labor rights violations are reported, due to workers' lack of knowledge of the legal process; fear of being fired, or due to pressures from company lawyers.

Between January 1998 and June 2003, the seven labor judges received a total of 26,993 complaints, of which men filed 15,998 and women filed 10,995. During this same time period, the labor judges of San Salvador alone received 20,828 complaints, of which 12,198 were filed by men and 8,630 by women. The labor tribunal that received the fewest complaints, which is the Sonsonate tribunal, received 1,424 complaints, of which 1,009 were filed by men and 415 by women.

The sector most frequently mentioned in the complaints is the maquila sector, which received a total of 4,860 complaints in the said period, of which 1,237 were filed by men and 3,623 by women. Industry received the second highest number of complaints, with 5,082.

Between January 1998 and June 2003 there were a total of 767 complaints filed before the Civil Service Tribunal, regarding work in the public sector. Of these, 564 were from men and 203 from women.

One may conclude that the maquila sector (which according to our governments is the sector which generates the most employment) has the highest level of dismissals and greatest level of legal insecurity in labor related matters.

In this context, it's interesting to see how the Civil Service Tribunal decisions have evolved to increasingly favor management over workers, which we present in the following chart:

Decisions issued by the Civil Service Tribunal in El Salvador

Year	Decisions in favor of workers	Decisions in favor of employer (private or public sector)
1998	53.75%	46.25%
1999	53.33%	46.67%
2000	44.26%	55.74%
2001	24.51%	75.49%

In 2002 the percentage of decisions in favor of management increased dramatically. At this time there were also a considerable number of dismissals in the public sector.

Deregulation of pensions

In 1996 there was an important shift in the system of social security and pensions assumed by the state since 1953 with the passing of the Social Security Law and its consequent 8 reforms. The reforms were made in the pension savings system, with the passing of two laws that opened a system of individual investment and directed by an administration of pension funds: the Organic Law of Pension Supervision and the Pension Savings System Law.

These laws were passed without a national debate and despite the opinion of an ILO expert, who warned in a detailed report of the disadvantages of these reforms, and said they would endanger existence of the Salvadoran pension system.

Among the disadvantages of the new system, we point out the following:

- Large increase in the price of insurance, but not for the employer, with possible negative effects given the increased informality of the economy and capital flight.
- Greater difficulties in extending coverage of the new system to more of the population, particularly given the increase in cost.
- High fiscal cost with regressive impact.
- Lack of state guarantee in the case of the default of an insurance company,
- Subjugation of pensions to unpredictable macro-economic variables.

Seven years after the forceful introduction of the new system of pension savings, there are numerous problems: low pensions, excessive bureaucracy in pension procedures, low returns from pension savings, the disappearance of technical reserves in Social Security and INPEL, and an increase in the number of years workers must contribute to the system.

Flexibility in practice

1. **Health and safety at work** refers to the norms related to the prevention of occupational risks and illnesses. Article 44 of the Salvadoran Constitution refers to the health in the workplace when it says: *“The law regulates the conditions that workshops, factories, and workplaces should offer. The state will maintain a technical inspection service charged with ensuring faithful compliance with legal norms related to work, assistance, prevention, and social security, in order to document its results and suggest appropriate reforms.”*

El Salvador has ratified ILO Conventions 12, 77, and 155 relating to occupational health and safety. The Labor Code, in the 3rd book, “Prevention and Social Security,” notes the obligations of employers (Article 314) and obligations of workers (Article 315), signaling that all employers should adopt and put into practice adequate measures of health and safety to protect the lives, health, and physical integrity of their employees. In administrative matters, the Ministry of Labor and Social Welfare is responsible for monitoring the application of this regulation through the General Department of Social Welfare.

This broad and protective regulation contrasts with the statements of workers interviewed by the Unit of Monitoring and Analysis of Labor Relations of the Ministry of Labor and Social Welfare in June 2000. Problems of health and occupational safety discussed in the report included the following:

- Workers are not given sufficient safety equipment to protect their health and personal safety, including: masks, rubber gloves, respirators for handling chemicals, ergonomic belts for lifting heavy objects, mechanical equipment to facilitate their tasks, etc.
- There are also problems regarding the physical working environment, such as excessive heat generated by both external (solar light) and internal sources (machine radiation), overcrowding of machinery and people, ironing equipment and bad interior ventilation). These produce stress, fatigue and sickness, which can turn into occupational illnesses if the causes of these conditions are not addressed.
- Excessive dust and particles accumulate in the walls, ceiling, and people in the plant, since many companies still lack a dust-collection system, which would solve this problem. Furthermore, extensive contact with these particles causes pulmonary fibrosis and other illnesses.
- There is a lack of ergonomic studies regarding how the type of work corresponds with the position of various workers. This leads to a loss of productive time in the handling of unnecessarily displaced articles, which creates muscular fatigue amongst the operators due to the bad positions and forced movements they must make while working.

These conclusions are revealing and demonstrate the inefficiency of labor legislation on this matter.

2. For access to medical services, the Constitution establishes workers' right to social security. The social security law also recognizes the right to medical attention for workers that have accidents or health problems resulting from their work. However, these protective rules have no practical effect, given that many workers feel they are prevented from attending social security clinics when they suffer a work related injury or health problem.

The Ministry of Labor is familiar with this situation and fails to fulfill its duty to monitor compliance with these laws.

In a report released by the Unit of Monitoring and Analysis of Labor Relations of the Ministry of Labor, the government recognized the existence of restrictions that affect workers who try to obtain permission from their supervisors to attend the Social Security Institute. This has the effect of workers missing their appointments and the loss of medical control over workers. Employers argue that workers aren't able to make their appointments because they are needed to be able to meet production goals at work.

3. Abuse and harassment at work: The Salvadoran Labor Code provides a cause of action for workers against management when the manager physically or verbally abuses workers. However, in reality this is rarely complied with, and workers are frequently mistreated and abused by their employers.

This situation is common in the textile maquilas, where there are three main types of abuse:

- Foremen pressure, scare and threaten their subordinates into meeting high production goals.
- Discrimination against unionized workers, which violates Article 30 of the Labor Code. This Article prohibits managers from directly or indirectly discriminating against workers for their union affiliation or retaliating against them for the same reasons.
- Sexual harassment at work in violation of the Criminal Code, which has a clause punishing violations with prison. In the maquila industry, the women workers are frequently sexually abused or harassed. In practice these types of incidents are rarely reported due to workers' lack of knowledge about the legal process, or their fear of being fired. It may also be because of pressure by company lawyers, or because of the victims' status as single mothers who support children. The *machista* culture conditions this reaction among women in this type of situation.

4. The closing of businesses without payment of liabilities. Despite the regulations clearly established by national and international law, in the past three years employers have been fleeing the country without paying everything they owe to their workers. In the last two years, maquila companies such as Laitex, Newtex, Tainan, Anthony Fashion, and

Mai have closed their operations without giving notice to workers. These businesses fled the country undercover, owing salaries, vacation time, bonuses, and severance pay. With these five companies alone, El Salvador's textile industry lost 3,500 jobs. It is censurable that when faced with these cases, the Minister of Labor and Social Welfare reacted with a lack of enthusiasm about its duties, acting in complicity with the companies.

Cases of noncompliance

The closing of maquila textile plants without previous warning: Laitex, Newtex, Tainan, Anthony Fashion, and Mai owed their workers salaries, vacation pay, bonuses, and various other payments.

According to a report by the Unit of Monitoring and Analysis of Labor Relations of the Ministry of Labor and Social Welfare, workers of different companies **do not possess the same health and safety conditions**. Workers also face substantial obstacles to obtain permission to resolve social security issues.

A case of massive poisoning: On July 5, 2002, there was a massive crisis of poisoning in a free trade zone due to the rupture of a pipe carrying chlorine to the ironing area of the maquila Hoons Apparel, which affected six factories in the industrial complex. Two hundred and sixty workers were transported to the hospital, including 12 pregnant women in critical condition.

To understand the cause of this accident, the Salvadoran organization ORMUSA conducted a study amongst workers of the same business who had reported problems such as the following:

- The factory lacked air conditioning and adequate ventilation, causing excessive heat.
- The dust that the cloth released caused serious respiratory problems for workers in the plant.
- Despite the fact that the company served potable water provided by AND, some workers complained that the water had a bad smell and taste. The workers believed that this was because it came from tanks owned by the company.
- Many businesses and export processing zones have their own clinics to prevent workers from having to go to public social security clinics. The services provided by these clinics are deficient and inadequate. They lack the proper supplies and knowledge, medicine, and infrastructure to provide prompt and efficient treatment to workers.

A report by the Ministry of Labor points out that most interviewed workers mentioned that they have been the victims of mistreatment by their supervisors. These supervisors are overbearing and use offensive expressions, which infringes upon workers' rights as established in Article 29 of the Labor Code.

Workers in the textile maquila Doal Enterprises S.A. de C.V. have reported cases of sexual harassment by Korean bosses and supervisors to the Fiscalía. The harassment is accompanied by dismissals or discharge in duties.

Obstacles to compliance

Legal Obstacles

- The Labor Code, the law governing export processing zones, the law regarding the organization and functions of work and social prevention, and the Criminal Code have been unable to prevent foreign investors from leaving the country while still owing salaries and benefits to their workers. By not addressing this problem, these laws and institutions in effect approve of it.
- The same thing happens with sexual harassment cases. There is no clear legal provision to hear the workers complaint, quickly investigate the matter, adopt measures to protect the victim, or punish the perpetrator
- In cases of health or safety at work the rule that governs is the General Rule of 1971, which is obsolete and lacks sufficient elements to avoid health risks and sanction violators.

Political Obstacles

- Attempts to hide problems: Grave violations of human rights are addressed by the media, the authorities promise an investigation and punishment for those responsible, but this is never carried out. In other instances, the mistake is attributed to the political opposition.
- Disinterest among government employees about addressing problems and confronting those who are responsible.

Practical Obstacles

- A culture that institutionalizes disrespect for labor rights.
- Employment is scarcer every day, which encourages exploitation and mistreatment of workers, who submit to the abuse and do not organize. This process becomes institutionalized when there are few legal protections or administrative, political, or jurisdictional spaces to raise these issues.

Freedom of Association

Legal Recognition of the Right

Political Constitution

- Article 47: Right to freedom of association. This prohibits public sector workers from striking.
- Section 4: Establishes protection against union-based discrimination.

Labor Code

- Article 205: Prohibits coercion in joining or leaving a union, as well as forming a union.
- Article 627: Establishes a fine for coercion of union members or the union.
- Article 219: Approving a union's legal status.
- Article 248, 249, 250, 205: Establish protection against union-based discrimination.

Criminal Code

- Articles 246 and 247: Establish criminal sanctions for people that discriminate against workers for their union affiliation.
- Article 246: Labor discrimination: Establishes a penalty of 6 months to 2 years of incarceration. To apply this penalty, the Ministry of Labor must issue a resolution reporting a violation of freedom of association, the sanction that's been imposed and the level of resistance of the employer.

ILO Conventions:

Ratified:

- Convention 141: Discusses rural workers organizations, 1975. Ratified on June 15, 1995.

Non-ratified:

- Convention 87, about the freedom to unionize and the protection of the right of unionization (1948), has not been ratified, given that it conflicts with various constitutional provisions.

Other ratified international treaties:

- Universal Declaration of Human Rights (1948)
- Covenant of Economic, Social, and Cultural Rights (1948)
- International American Charter on Social Guarantees (Bogotá Charter 1948)

All of these declarations recognize the right to freedom of association.

What happens in practice with freedom of association?

Freedom to unionize in El Salvador is a delicate subject. These topics have led to conflicts and differences between the organized labor sector and employers throughout history. One can see the difference in the affirmations of these groups in the legal theory and case analysis. As the right to unionize becomes more difficult to enforce in El Salvador due to increasing anti-union sentiment, this anti-union attitude becomes institutionalized not just among companies, but also at the governmental level, in the Ministry of Labor and Social Welfare.

In the year 2003 there were 129 active unions in El Salvador, of which 42 were industry-wide (32.55%), 35 were company-specific (27.13%), 32% were professional unions (24.81%) and 20 were unions of independent workers (15.5%).

Despite the protective laws in the books, a significant obstacle to unionization is that the laws don't clearly specify the applicable penalties for violations. Article 627 of the Labor Code indicates that all violations of the Labor Code will result in a fine of up to 500 colones for the violator (US \$50-60). This is laughable and demonstrates the problem of protecting the right to unionize in El Salvador.

Deregulation as the subject of international treaties

El Salvador is the only Central American country that has systematically refused to ratify ILO conventions 87 and 98. This situation is notable since these treaties are fundamental instruments that recognize the international right to unionize, understood as having three components: the right to union affiliation and constitution, the right to collective bargaining, and the right to strike.

The excuse put forth by the Ministry of Labor and companies organized in the National Association of Private Enterprises has been that it is not possible to ratify Conventions 87 and 98 because they conflict with provisions of the Constitution. According to these groups, Article 47 of the Constitution limits the right to unionize to the defense of workers' or managers' common professional interests. In their opinion, the Constitution does not provide for the right to form any organizations that workers deem desirable, as Convention 87 states.

However, these arguments are not valid when one considers the fact that El Salvador has already ratified other international instruments such as the Universal Declaration of Human Rights (1948), the Covenant on Economic, Social and Cultural Rights (1948) and the International American Charter of Social Guarantees (Charter of Bogotá 1948), among others, all of which widely recognize the right of all workers to unionize without exception or distinction.

If there is a range of international instruments that supports that position, what is the technical reason for rejecting Convention 87, which recognizes the right to unionize? This denial is not logical in light of the international agreements El Salvador has subscribed to and constitutes a legal void that restricts freedom of association.

Legal Flexibility

Article 47 of the Salvadoran Constitution expressly recognizes the right to freedom of association for private sector workers and employers and official autonomous organizations. The only restrictive provision of the right to unionize is in Article 221 of the Constitution, which prohibits public sector workers from striking and abandoning their jobs. There is no express prohibition of unions in this sector.

However, public officials and companies have promoted a restrictive interpretation of this Constitutional right. They adduce that if the will of the constituents had been that the right to unionize be recognized for public sector workers, it would have been recorded in the same context as Article 47, but it's not. They also argue that there are specific labor rules governing public sector workers (Articles 218 to 222 of the Constitution).

Given this restrictive interpretation of the law, El Salvador has two recognized and distinct constitutional systems of labor rights: work in the private sector and work in the public sector. The right to unionize is not seen as a universal human right applicable to all workers, but rather is a right to the private sector.

In this sense, if the exercise of an individual right is not prohibited or restricted by the Constitution, there is no reason to restrict the application of this right in practice, being consonant with the Legal Principle of interpretation established in Article 8 of the Constitution which states that *"No one is obliged to do what the law does not mandate nor to be deprived of what is not prohibited."*

In short, the Constitution of El Salvador does not prohibit the unionization or collective bargaining of public sector workers. However, it does expressly recognize this right for workers of the private sector and autonomous organizations.

The **restrictive interpretation** of the constitutional right, which we call flexible jurisprudence and which is performed by judicial bodies and Salvadoran administrative agencies, results in the continuous violation of public sector employees' right to unionize. To correct this error, it is necessary to amend the section of the Constitution that discusses labor rights so that it expressly establishes public sector employees' right to form unions.

Flexibility in practice

In El Salvador there is flexibility in practice regarding the right to unionize in ways such as the following:

a) Violation of the right to freely pursue union activities

Articles 2 and 3 of ILO Convention 98 indicate the state's obligation to implement policies necessary to protect the formation, functioning, and administration of unions, and to prevent external interferences. This legal arrangement is supported by Article 47, section 4 of the Constitution, Article 248, 249, 250 and 205 of the Labor Code, and Articles 246-247 of the Criminal Code. All of these offer protection in the form of *fuero sindical* (special protection for union leaders from unjust dismissals) or the prohibition of acts of interference or discrimination based on union membership or activity. However, in practice, many incidents violate these legal provisions.

b) Violation of the right to constitute a union

Article 2 of ILO Convention 87 recognizes the unrestricted right to constitute union organizations. This same recognition (with the biased interpretation already discussed regarding the rejection of public sector employees' right to unionize) is established in Sections 1 and 3 of Article 47 of the Constitution and in Articles 204, 208, and 214-248 of the Labor Code. But despite the fact that the right to union constitution is legally recognized and the Ministry of Labor and Social Welfare is obligated to facilitate this, numerous cases demonstrate the obstruction of the exercise of this right.

Cases of Noncompliance

1. The ATRAMEC Case

On March 24, 2000 a group of workers from the Ministry of Education formed the union ATRAMEC. These workers presented the proper paperwork as required by law to the Ministry of Labor and Social Welfare on April 5, 2000. One month later, the Ministry of Labor denied their petition for legal status based on the argument that it conflicted with the Constitution and the Labor Code, since the employees on the list of new union members were public sector employees.

ATRAMEC consequently presented an amended appeal at the same office on May 5, 2000, which the Ministry of Labor ignored. On August 9, 2000 the office again denied without explanation the amended appeal; this was 96 days after the filing of the appeal, despite the fact that the law requires a response within 5 days. As the Ministry of Labor was aware of this requirement, they stamped his response with the date of May 8, 2000. The union considers that the Ministry of Labor was showing disrespect for the union and for the rule of law.

On June 5, 2000, ATRAMEC filed a complaint with the Administrative Counsel of the ILO, which was classified by the Committee on Freedom of Association as case number 2085. This request prompted the resolution contained in report number 323 in June 2001, which stated: *"The Committee would like to highlight that the rejection of the right of public sector employees to unionize constitutes a grave violation of the most elemental principles of the right to unionize. As a consequence, the Committee urges the government to take note given the urgent nature of this request and amend the national legislation of El Salvador to recognize the right of public sector employees to unionize, with the only possible exception being the armed forces or police."*

2. The SITRAMH Case

On May 1, 2001 a group of workers from the Treasury formed the Union of Treasury Employees (SITRAMH). The proper paperwork required by law was presented to the Department of Labor on May 15, 2001. On June 26, 2001, the Department notified the union of the denial of their petition for legal status.

SITRAMH presented a petition on October 4, 2001 to the division of administrative conflicts of the Supreme Court. This petition was identified by number

132-S-2001, and named the Ministry of Labor and Social Welfare as defendant for issuing a resolution that violated the law.

3. The Case of STSEL leaders

On August 30, 2001, the legal representative of the Executive Hydroelectric Commission of the Lempa River (an official autonomous organization and one of the primary generators of power in the country) asked the National Department of Social Organizations to reconsider the person named as Secretary of Finance of the local Union of Electrical Employees (STSEL), Mario Roberto Carranza Hernandez.

The Ministry of Labor and Social Welfare responded on September 21, with a resolution that removed this union leader from his position as Secretary of Finance. The Commission used this resolution as the basis for firing Mr. Carranza Hernandez. With the support of STSEL, the affected unionist filed a complaint before the division of administrative conflicts of the Supreme Court. On November 7, 2001, after looking at the case and the initial allegations, the Supreme Court, ordered the head of the National Department of Social Organizations to give the unionist his credentials back. This reconfirmed that the Ministry of Labor had acted illegally, this time to the detriment of the union.

Today, they are still waiting for a resolution in favor of the union, even more so now that the aforementioned union member has come to join the list of the underemployed.

This is not the only case that has affected the leaders of STSEL. Between September 2001 and August 2003, a total of 22 union leaders were fired. This happened despite the protection supposedly granted by law and the fact that all the local STSEL unions have collective bargaining agreements. The union filed legal complaints after each of these firings.

4. The case of the militarization of the airport and dismissal of union leaders (SITEIAES)

On September 24, 2001, the government of El Salvador ordered the militarization of the International Airport. Meanwhile, the Executive Commission of Ports, which is responsible for the administration of the International Airport, ordered the suspension of all individual employee contracts and laid off more than 200 workers. Among the workers laid off were 4 union leaders, and 75% of those laid off were union members. These workers did not get back their jobs, which remained outside of the business because of a decision made by the government of El Salvador.

The union presented a complaint before the Human Rights Prosecutor, who determined that there had been a violation of labor and union rights by the Port, the Department of Labor and Social Welfare and the President of the Republic. Despite this finding, the authorities of the Executive branch made no changes in their practices or any attempt to correct their violations of the Labor Law.

5. The Case of SETDESA

On November 20, 1999, a group of 25 workers and 11 members of the textile maquila “Doall Enterprises Anonymous Society of Variable Capital,” located in the export-processing zone of San Marcos, formed the union SETDESA. This union was not welcomed by the Korean employers, who fired all of the union members, including many pregnant women, on November 22, 1999. This demonstrates the anti-union sentiment that exists among employers in the maquila sector.

The fired union members reported this discriminatory treatment to the Ministry of Labor and Social Welfare. But rather than redressing the wrongs and inspecting the company, the Ministry instead emphasized the fact that the affected workers were no longer employees of the maquila, and used this as the basis for refusing to register the union.

6. The Case of FESTSA

On March 4, 2000 the Union Federation of Food Sector Employees (FESTSA) was formed, and presented its petition for recognition before the Ministry of Labor and Social Welfare. On May 8, 2000, the Ministry of Labor notified the federation that its petition for legal recognition had been denied, attributing this to noncompliance with the formalities in its certificate of constitution.

Presented with the complaint of FESTSA, the ILO Committee on Freedom of Association released a resolution noting that it was a situation related to easily fixable missing formalities, and lamenting that the authorities had not simply requested the missing documentation and information, giving the federation’s founders a reasonable amount of time to fix the anomalies. The ILO Committee reminded the Salvadoran government that while it was true that the union had to comply with the formalities established by law, such formalities should hinder freedom of association. It asked the government to keep the Committee informed about FESTSA’s new request, with expectations that this time it would be legally recognized.

The Ministry of Labor and Social Welfare ignored the ILO’s requests and resolution. It continued to deny the union’s legal status. Finally FESTSA reported the labor department to the division of administrative conflicts of the Supreme Court for violating their right to form a union.

7. The Case of STITHS

On March 24, 1998, the Union of Hotels, Tourism, and Hospitality (STITHS) was formed. On May 19, 1998 they presented their petition for recognition to the government. The Ministry of Labor notified the union on July 1, 1998 that they could not be legally recognized for two reasons: first, since it was an industry-wide union, it should be composed of members employed at different companies, and this union was instead composed of people that worked for an official autonomous organization (the Salvadoran Institute of Tourism), and others from the private sector. After some consideration, the Ministry of Labor concluded that employees at autonomous institutions can only form company-specific unions; employees from autonomous institutions and workers from

private companies can not be mixed to create a single union. This therefore made legal recognition of STITHS impossible. Another objection was that tourism was not an industry, so there could be no industry-wide tourism union.

Faced with this rejection, STITHS presented a complaint to the division of administrative conflicts of the Supreme Court of Justice, which declared the resolution of the Ministry of Labor illegal and ordered the registration of STITHS.

STITHS had to wait 26 months to obtain legal recognition by means of a resolution from the Ministry of Labor and Social Welfare, which they were forced to issue to comply with the order of the Supreme Court of Justice.

8. The Case of SUTTEL

On May 24, 1998 the Union of Employees of the Telecommunications Company of El Salvador (SUTTEL) was formed. The Ministry of Labor and Social Protection denied it legal recognition without explanation. This arbitrary act led SUTTEL to file a complaint with the division of administrative conflicts of the Supreme Court of Justice, which declared on September 11, 2000 that the decision of the Ministry of Labor was illegal, and the union merited legal recognition. However, SUTTEL had to wait 29 months to obtain legal recognition.

These irrefutable facts demonstrate the obvious misapplication and inefficiency of law on the matter of freedom of association in El Salvador.

Obstacles to compliance

Legal Obstacles

- El Salvador does not recognize the unrestricted exercise of the right to unionize and this leads to limitations on collective bargaining.
- The design of rules with burdensome procedures.
- The Ministry of Labor and Social Welfare ignores ILO resolutions, despite the fact that El Salvador is a member of the Committee on Freedom of Association.

Political Obstacles

- The restrictive constitutional interpretation makes public officials and companies object that if the lawmakers had wanted to grant public sector workers the right to unionize, it would have been recorded in the same context as Article 47. They also argue that for public sector workers there are specific labor regulations contained in Title VII of the Constitution “Administrative Regulations” in Chapter 1 of “Civil Service”(Article 218-222).
- The Constitution is precise regarding the objectives that professional associations, or unions, should pursue. It is not open to considering any other purpose.
- The Ministry of Labor and Social Welfare has adopted a complacent, careless and negligent attitude when faced with acts that violate the freedom to form a union. This means that the very officials entrusted with the duty of guaranteeing

compliance with labor rights are at an institution that has adopted a contradictory attitude.

Practical Obstacles

- The anti-union culture in the country has become institutionalized in the Ministry of Labor and Social Welfare, whose job should be to insist on respect for the right to unionize.

Collective Bargaining

Legal Recognition of the Right

Political Constitution

- Article 39: The right to bargain collectively
- Article 47: Recognizes both private and public sector employees' right to unionize.

Labor Code

- Articles 483-488: Indicate the procedure for accepting or rejecting a request to begin an economic conflict or conflict of interests.

ILO Conventions

- El Salvador has not ratified any ILO Conventions regarding collective bargaining.

What happens in practice with collective bargaining?

In El Salvador the right to bargain collectively has Constitutional standing (Article 39). In Articles 269-287, the Labor Code develops the legal processes required for the formation of a collective bargaining contract, and in Articles 480-566, the relative procedures of collective bargaining. This demonstrates the importance of this right in national law.

However, in practice the reality is quite different from the law and reflects little goodwill on the part of the government in defending and promoting the right to collective bargaining. The misapplication of this right by the authorities has meant that in 2002, negotiations processes concluded with the disappearance of the unions that promoted them. This leads us to declare that in El Salvador there is legal flexibility in practice in the matter of collective bargaining.

Legal flexibility

Legal sophisms hinder the processes of collective bargaining; an example of this is the case of the Union of Railroad Workers of El Salvador (SIFES). To illustrate this type of flexibility we detail two more cases below:

1. The SELSA Case

In May 2002 the Lido Company Union began a collective conflict, which by law led them to begin collective bargaining. The response of the Lido S.A. company was to fire 51 workers, which included members of the union's Board of Directors, who were not protected by the Ministry of Labor or by the courts.

In this case, the company adopted three "legal" concrete actions to destroy the union and the collective bargaining agreement, including: 1) according to the provisions of Article 464 of the Labor Code, a company can pay the salary of union leaders without them having to come to work, which they can do to prevent union leaders from performing union-related activities on company property; 2) the company fired the workers associated with the union that constitute the rank and file of the union, along with the corresponding severance pay required by Article 58 of the Labor Code; and 3) violating part a of Labor Code Article 205, the company forced less militant union members to notify the Ministry of Labor of their resignation from the union, as a basic condition to keep their jobs.

Without the effective existence of the union at Lido S.A. due to the exile of the union leaders, noncompliance with the collective bargaining agreement became an undeniable reality.

2. The STITHS Case

The Union of Workers of the Tourism and Hospitality Industries (STITHS)'s local union at the Institute of El Salvadorian Tourism (ISTU) started the paperwork before the Ministry of Labor to begin the process of collective bargaining on August 21, 2000. Throughout the next eight and a half months, the union negotiated their contract through tense discussions until they reached a final agreement.

The Labor Code indicates in Article 287 that "*all contracts realized with an official autonomous institution require approval by the Minister to be valid, after first hearing the opinion of the Department of the Treasury. Any official autonomous institution that realizes such a contract is obligated to communicate the substance of the contract to the Accounting Court of the Republic.*"

After finalizing the collective bargaining process, the collective bargaining agreement was passed to the Ministry of the Economy on June 17, 2001. The Ministry examined the contract for 13 days and approved it, sending it to the Department of the Treasury on August 22, 2001 (the one-year anniversary of the date that the Ministry of Labor and Social Welfare had received the documents from STITH to begin collective bargaining). From this date on the collective bargaining agreement remained in the hands of the Department of the Treasury, which made it impossible to validate and enforce. This abuse of discretion by the Department of the Treasury prevented the members of STITH from enjoying the benefits of their collective bargaining agreement.

Faced with this illegal behavior, the union decided to go to the Supreme Court of Justice to file a complaint against the Treasury Minister, Dr. Juan Jose Daboud Abdala, for violating Article 39 of the Constitution, which establishes the right to bargain collectively. The complaint was registered as Ref. # 260/2003, and is under consideration by the Constitutional division of the Supreme Court of Justice.

Flexibility in Practice

Flexibility in practice can be seen from the first moment that collective bargaining agreements are prevented from taking effect, particularly due to interference by the State or private companies to modify already-signed collective bargaining agreements. Here are a few examples:

Cases of Noncompliance

1. The SIFES Case

The SIFES Union is composed of workers from the Salvadoran National Railway (FENADESAL), a branch of the Autonomous Executive Commission of the Port (CEPA). Over the course of a decade the Ministry of Labor and Social Welfare recognized the legal existence of SIFES, provided credentials to its leadership, approved reforms to its statutes and attended to its requirements. SIFES was the younger brother of 3 unions in the alliance. The provisions contained in the collective bargaining agreement that had been reached between CEPA and SIPES were applied to the other unions.

On July 16, 2002 the general secretary of SIPES presented the documentation that the Labor Code required to begin a collective conflict. Articles 483-488 of the Labor Code document the procedures to follow for accepting or rejecting the petition to begin economic or conflict of interest negotiations.

However, at 2 pm on August 20, 2002 the General Director of Labor issued a resolution far from that allowed by law. CEPA alleged that the members of SIFES worked with FENADESAL (a branch of CEPA), which is an official autonomous institution of the central government, and that therefore those workers were State employees and could not form a union, much less negotiate a collective bargaining agreement. The response of the Ministry of Labor was to reject SIFES' s request.

CEPA decided to fire all of the SIFES union leaders and warned the rest of the members not to elect a new board of directors since the Ministry of Labor would not legalize it and they would run the risk of being fired also. Since September 2002, SIFES has been leaderless.

Obstacles to compliance with the right

Legal Obstacles

- **Loopholes in legal regulation:** The procedures for resolving a collective bargaining conflict, just like achieving a successful collective bargaining agreement, have various legal loopholes and voids that permit the abuse of discretion in the conduct of public officials. In the cases presented there is evidence of processes that imply years of wait. The lack of precision regarding time periods and processes for officials of the Ministry of Labor encourage the exercise of discretion in their actions.
- **Obsolescence of the law:** The Labor Code has been in existence for 31 years. As a result, the processes for collective bargaining, like the means of protection for its promoters, and the necessary promotion of collective bargaining at workplaces, do not reflect reality. It is essential to reform the labor regulations to adjust to changing practices and to more clearly promote collective bargaining, reflecting ILO Convention 98, relative to the application of the principles of freedom of association and collective bargaining.
- **Politics of austerity** proposed by the government: in the context of scandalous corruption cases and squandering of accounts, three years ago the President of the Republic ordered the implementation of austerity policies in the government, which include not raising salaries or approving or revising new collective bargaining agreements. This austerity policy has taken the form of the National Budgetary Law and has prevented the passing of collective bargaining agreements for autonomous institutions.

Political Obstacles

- **The neo-liberal project has institutionalized illegality in violation of the right to bargain collectively:** Various branches of the government have a negligent and complacent attitude towards violations of the law that should protect the right to bargain collectively, which has resulted in the institutionalization of illegality from within those institutions charged with enforcing labor rights.

Practical Obstacles

- **Prevention of concrete union victories:** The inability to make union victories effective implies in practice a message for workers: unions have lost their capacity to improve working conditions at companies or official autonomous institutions. Unions have lost their effectiveness, their era has passed, and it is the market that now imposes the labor rules.
- If this is the way it is, what purpose does it serve to be a union member?

The Elimination of Forced Labor and Obligatory Overtime

Legal Recognition of the Right

Political Constitution

- Article 144: The international treaties with other states and international bodies constitute laws of the Republic upon entering into these agreements. The national law cannot modify or derogate from El Salvador has agreed to by signing treaties. In the case of a conflict between the treaty and national law, the treaty prevails.
- Article 4: All people are free and no one can be committed to servitude or slavery under any condition that harms their dignity.
- Article 9: Reiterates the prohibition established by ILO Convention 105.

Labor Code

- Article 13: Prohibits the use of any kind of forced or obligatory labor.
- Article 169 and 170: Stipulate the possibility of overtime and establish legal parameters.

Prison Law

- Articles 105 and 107: The nature of work that inmates may perform in Centers of Prison Rehabilitation should not cause suffering and should confer some economic benefit on the prisoners that do the work.
- Articles 106 sections 3, 109, and 110: Inmates that do handiwork must also derive some sort of economic benefit from their work.
- Articles 112 and 113: Establish adequate regulation of competent authority to monitor compliance with this exception to forced labor.

International ILO Conventions

- Convention 29: Details what is considered forced or obligatory labor and several exceptions, 1930. Ratified June 15, 1995.
- Convention 105: No one may be forced to work or provide personal services without just compensation and without plain consent, except in cases of public emergency or other situations designated by law, 1957. Ratified November 18, 1958.

What happens in practice with forced labor and overtime?

El Salvador has ratified ILO Conventions 29 and 105, which discuss the abolition of forced or obligatory labor. Article 13 of the Labor Code also prohibits forced or obligatory labor. In Salvadoran law, the exceptions to forced labor refer to prison work, which is discussed in Articles 105-113 of Title IV, “Prison Regulations,” Chapter III. “Prison Labor,” is part of the Prison Law.

The Labor Code establishes employers' legal right to set the work schedule (Art. 165) within defined parameters: 8 hours per day for daytime shifts and 7 hours for night shifts. It also discusses the possibility of overtime (Art. 169 and 170) and establishes legal limits, which include:

- Overtime is always agreed to freely between both sides and is never mandatory;
- Overtime is not permanent or systematic but may only occur when there are unforeseeable special or necessary circumstances;
- Permits working an extra hour daily permanently if it is accompanied by a rest of 2 days per week;
- Permits working an extra hour permanently to allow for three daily shifts at companies that work uninterrupted 24-hour days;
- The extra hour is paid overtime at 200% of the normal hourly wage;
- If the extra hours occur due to extreme circumstances such as a fire at the company, or the need to pick up pieces of rubble from an earthquake or other disaster, this need only be paid at the basic hourly rate and not the double rate.

This confirms that there is no legal problem with respect to mandatory overtime. The Achilles heel is the fact that the law fails to provide sanctions for employers that require employees to work overtime. It also fails to protect workers against the threat of being fired for refusing to work overtime.

This comprehensive legislation contrasts sharply with what actually happens in practice; every day there are numerous instances of forced labor. In the maquila sector in particular, there is a permanent violation of the right not to work mandatory overtime, which allows us to conclude that flexibility prevails in practice.

Flexibility in practice

This type of flexibility is produced in 2 forms:

- 1) The first is when the employer allocates mandatory overtime to all workers due to the high volume of existing work and the urgency of the delivery date. It is common to see young workers at maquilas in the export processing zones that work 10-12 hours daily; they do not leave on time because the employers demand that they work late. In some instances there is no overtime pay; instead the employer will grant compensatory rest time equal the overtime worked, which is illegal. In practice, to refuse to work overtime implies that the worker will be fired immediately.
- 2) The other form of flexibility occurs when the employee requests overtime hours because their normal monthly salary does not cover their basic needs. Precarious living conditions, low salaries, high cost of living, the loss of purchasing power, and paternal irresponsibility encourage primarily single mothers to voluntarily submit themselves to work more than 8 hours per day in order to increase their very low income.

In the first case, the employers impose mandatory overtime as a basic requirement to maintaining employment. In the second, the economic crisis requires workers to work overtime to earn something resembling a living wage.

The practice of overtime in El Salvador isn't exclusive to the maquila sector. Here are some other examples:

- In the financial sector, the bank employees do not leave work until the cash register is tallied, even though normally this requires more time, which is often unpaid.
- Private security guards experience the same problem.
- Company accounting departments use this practice due to the lack of personnel or erroneous design of their procedures.
- Public transportation drivers work up to 12 hours per day and their fatigue is a major cause of transportation accidents.
- Commercial employees frequently find that their break time is sacrificed when demand is high.

Obstacles to compliance with this right

Legal Obstacles

- The absence of a specific sanction for non-compliance with the law.
- The law does not specify sanctions to be applied to employers that require their workers to perform mandatory overtime, nor protections against the threat of being fired for refusing to work overtime.

Political Obstacles

- Forced overtime is allowed because it is believed to attract investment. The government does not specify what type of employment it brings into the country, as its political objective is to show that it is decreasing unemployment.

Practical Obstacles

- A culture tolerant of labor rights violations: the Ministry of Labor maliciously ignores such violations and promotes a culture of tolerance of the new and modern idea of "mandatory overtime."
- The familial economic crisis: The scarcity of employment, low salaries, high cost of basic needs, and loss of purchasing power subject workers to shameful work.
- Labor flexibility: In practice, flexible conditions of work have been imposed. A primary sign of it is the change in work schedules and ordinary workday, which are defined by the employer's needs and the fluctuation of supply and demand.

The Elimination of child labor

Legal Recognition of this Right

Political Constitution

- Article 38: Section 10 requires that minors under the age of 14 and those over age 14 who have not yet completed mandatory schooling may not be employed in any type of work. Paragraph 4 establishes prohibits minors under the age of 18 and women from working at unhealthy or dangerous jobs. It also prohibits night shifts for minors under the age of 18.

Labor Code

- Article 105: Prohibits minors under the age of 18 from working at dangerous or unhealthy jobs. It does allow 16-year-olds to work provided that the job protects their health, safety, and morality.
- Article 106: Defines what jobs are considered dangerous as those that can cause death or immediate harm to the worker. It establishes a list of dangerous activities.
- Article 107: Work in bars is considered dangerous for minors under the age of 18.
- Article 108 considers jobs that can cause damage to health, such as those that cause poisoning, to be unhealthy.
- Article 114: Prohibits children under the age of 14 who are still completing the minimum required schooling from working. However it allows minors over age 12 to perform light duties that do not put their health at risk.
- Article 115: Minors under age 14 can only sign contracts through a legal representative, the person(s) they are economically dependent on, or the Procuraduría General de Pobres.
- Article 116: Shifts for workers under age 16 may not exceed 6 hours per day or 32 hours per week, nor can they work more than 2 extra hours per day. It prohibits night shifts for workers under age 18.
- Article 117: Requires companies to register the names of the minors they employ and provide them with free medical exams.

Criminal Code

- Articles 173 and 205: Criminal restriction on using minors for pornography or begging, ratifying ILO Convention 138, Article 9.

Family Code

- Article 38, subsection c): Establishes that minors at least 14 years old can work with prior authorization from the Ministry of Labor and Social Welfare, on the condition that they perform only light work.
- Articles 351 and 380: Establish protection for minors under age 18 who work in dangerous or unhealthy conditions. Establishes the obligation to avoid employing children while they are of the age when they should be in formal education.

ILO Conventions

- Convention 138: regarding minimum age to work, 1973. Ratified January 23, 1996.
- Convention 182: regarding the prohibition of the worst forms of child labor and immediate actions for its elimination. There is no legal reference in primary or secondary legislation. 1999. Ratified October 12, 2000.

What happens in practice with child labor?

According to data collected by the ILO-IPEC, in El Salvador there are more than 170,000 working children. According to the General Department of Statistics and Census (DIGESTIC), in the year 2001, 56,271 children became incorporated into the labor market, which represents an increase of 34% with respect to the year 2000.

According to the data of DIGESTIC, in 2001 there were a total of 222,254 minors working in El Salvador, which annually supported their families with \$124 million dollars. Of this number, 67% of children worked in the agro industry and some 2,500 were employed in handcraft workshops making fireworks. Close to 1,000 children worked every day in the dumps making money by recycling, and 1,300 collected mollusks from the swamps of Jiquilisco and the mangroves on the coast.

The Constitution prohibits minors under the age of 14 from working since they are supposed to be in school. Also, Article 351 of the Family Code protects minors from working in dangerous or unhealthy work conditions.

El Salvador has ratified ILO Conventions 138 and 182, which discuss the elimination of child labor. In accordance with this convention, Article 380 of the Familial Code reaffirms the position of the state that employers should avoid employing children who are still of an age for formal education.

In 2003 the Legislative Assembly began to work on a new Code of Childhood and Adolescence, which will further address the problem of child labor.

Legal Flexibility

It can be said that El Salvador has advanced significantly in the area of legislation addressing child labor, however this same legislation leaves open the legal possibility of

work for minors between the ages of 14 and 18. Even though child labor is subject to restrictions, these are rarely complied with in practice. Until Salvadorans show the political will necessary to abolish child labor, such work will continue to be considered necessary and normal.

Flexibility in practice

Once can see without a doubt the misapplication and inefficiency of regulations protecting childhood and prohibiting child labor.

Given these facts, one can conclude that the state of El Salvador does not strongly support a policy that would support the abolition of child labor.

Obstacles to compliance with the right

Legal Obstacles

- Article 380 of the Familial Code reaffirms the position of the Salvadoran state of not abolishing child labor, but rather discouraging children from working while they are of the age for formal education.
- Legally there is no complication with respect to legal protection on the theme of child labor other the stance of abolishing it. The country has ratified the Convention on Rights of the Child and is currently working on a new Code of Childhood and Adolescence that will focus on this problem.

Political Obstacles

- The Salvadoran government has not expressed a real interest in eradicating child labor. The Ministry of Labor, in coordination with IPEC, has developed a program to combat the worst forms of child labor, which has had some success.

Practical Obstacles

- The extreme subsistence crisis of many families: Unemployment, the loss of purchasing power, low incomes and dollarization have brought with them extreme poverty. This has required families to find sources of income beyond that of the father; in those cases in which the mother is head of the family, child labor is a necessary condition for survival.
- There are some sectors of societies that believe that child labor is good and necessary for the children to learn responsibility. From this perspective, the children should begin to work when they are young, which educates them and allows them to save. This vision ignores access to schools, continuing the cycle of poverty.

Elimination of Discrimination

Legal Recognition of this Right

Constitution:

- Article 3: All persons are equal under the law.
- Article 38, num. 1-3: Criteria for equal pay for equal work.

Labor Code:

- Article 12: The State will monitor compliance of equal opportunities and treatment in the workplace, including access to professional training.
- Article 30: Prohibits employers from using indirect or direct means to discriminate or retaliate against workers because of their union activities.

ILO Conventions:

Ratified:

- Convention 111, related to discrimination in employment. Article 1 details what is considered discrimination, and Articles 2 and 3 establish national governments' obligation to adopt a policy that promotes equal opportunities and treatment in employment. 1958.
Ratified June 15, 1995.

Not ratified:

- Convention 100, on equal pay, 1951.
- Convention 159, concerning Vocational Rehabilitation and Employment (Disabled Persons), 1983.

What happens in practice with discrimination?

The international norm addressing employment discrimination is ILO Convention 111, the Discrimination (Employment and Occupation) Convention, which was ratified by El Salvador in 1994 in the context of the signing of the Peace Accords.

The Salvadoran Constitution does not establish a definition equivalent to the definition in this Convention, however Article 3 of the Constitution does say: "*All persons are equal before the law. To enjoy civil rights there can be no restrictions based on differences of nationality, race, sex, or religion. Hereditary jobs or privileges are not recognized.*"

Article 30 of the Labor Code refers to Convention 111 when it states: “*Employers are prohibited...12) from establishing any distinction, exclusion, or preference based on race, color, sex, religion, political opinion, nationality, or social origin, except for cases anticipated by the law that are intended to protect the worker.*”

In recent years a section was included in the Criminal Code (Articles 244-248) regarding crimes related to labor rights. This section includes a definition of “labor discrimination”. Although the definition establishes many requirements that must be fulfilled in order to apply this clause, the fact that it is listed as a crime is an important step.

Deregulation

El Salvador has not ratified ILO Convention 100, which establishes equal pay for men and women when they do work of equal value.

The Convention states that equal pay has two aspects. The first refers to the fact that there should be equality between men and women when they apply for the same job, and in the payment that they receive for that job (equal pay for equal work). For example, both men and women should be able to have access to mechanic jobs, and a female mechanic and a male mechanic should earn equal salaries.

The second aspect refers to the fact that there should be equality between men and women who do jobs that are different but of equal value (equal pay for work of equal value). An example would be if two jobs are open, one for a night watchperson in a neighborhood, which is only offered to men, and one for a domestic servant, offered only to women. For both cases, there are requirements that turn out to be equivalent: for example, both must have basic levels of education, specific knowledge in that field, adults, and must present recommendations. While these two jobs are not the same, they have equivalent requirements, so they are considered jobs of equal value, and therefore should receive the same salary.

Salvadoran labor law only includes the first aspect, of equal pay for equal work (Article 38 of the Constitution). The Salvadoran government has not wanted to adopt the criteria of “equal pay for work of equal value.”

Flexibility in practice

In El Salvador, there is a high occurrence of discrimination in offering jobs. This affirmation is supported by evidence found in reading job descriptions published in two major newspapers. We looked at *La Prensa Grafica* in the month of June, and *El Diario de Hoy*, in July 2002, and found the following results:

- 44% of the job announcements discriminated based on sex. For example, job announcements for watchmen and managers required applicants to be male. Job announcements for salespersons, secretaries, or domestic services required

- applicants to be female. Conditioning access to jobs on the applicants' sex, when either men or women could adequately carry out the job, is discrimination.
- 18% of the newspaper job announcements discriminated based on age. Most sought women between the ages of 18 and 28, or men between the ages of 18-35.
 - 5% discriminated based on religious practices. Some job announcements included a requirement that to get the job, applicants had to belong to a church and have a letter of recommendation from an evangelical pastor or a priest.
 - Finally, 3% of the job announcements discriminated based on civil status, requiring females to be single to get a secretarial job, or to be "young, unmarried, and without family responsibilities" to be a salesperson.
 - The most common type of job offered in the country is for private security agents, and these are almost always exclusively open to men. Domestic servant positions are also common, and these are only available to women. Other regular openings are for salespersons (mainly for books and beauty products), mechanics (only open to men), cooks, and secretaries.
 - Other frequently mentioned requirements in job postings are to "not have restrictions on working hours" or to "not have difficulty staying later than normal working hours", or to "be available to work flexible hours". These demonstrate the ineffectiveness of the labor law in regulating discrimination in employment.

Obstacles to compliance

Legal obstacles:

- Incipient development of the norm: ILO Convention 111 sets forth general guidelines against discrimination. This idea was included as part 12 of Article 30 of the Labor Code; however, the laws are still insufficient. Discrimination based on gender is an obstacle to women's development and a violation of their rights.

Political obstacles:

- Absence of an institutionalized vision against discrimination: The Ministry of Labor has not done any campaign against discrimination in employment, or addressed this practice.
- For many companies, "freedom in hiring" is the highest principle, even though it implies adopting measures of discrimination.
- The Nicaraguan government has not adopted the principle of "equal pay for work of equal value".

Practical obstacles:

- A *machista* and exclusion-based culture: Certain jobs are thought of as belonging to workers of a certain age or sex. Experience, capacity, and suitability are not considered.
- Discrimination based on workers' religion, political beliefs, or union activism.

- The Ministry of Labor's statistics do not categorize violations and complaints based on the worker's sex.

Final Reflections

With this general look at labor rights in El Salvador, it has become clear that labor flexibility is increasingly common. The labor rights we have studied are in danger of disappearing, because the free trade model demands their elimination to allow the market to determine supply and demand.

As a result, we believe it is timely to propose three conclusions and recommendations for inclusion in the debate.

Challenge No. 1: Revision and development of the labor law

The legal framework must be reviewed, in order to preserve the protective function of labor law. One of the main objectives of labor flexibility is to deregulate labor relations. In other words, it intends to minimize the laws that currently regulate labor relations, so that the market can play a larger role in regulating these relations.

Companies, the Ministry of Labor, and some legislators from the ARENA party have made a series of proposals aimed in that direction. These include:

- The proposed "Special Law to Reactivate Employment" (LERE) which would completely change over to individual labor contracts.
- The proposed "Law of Professional Training" which would require a constitutional reform of Article 41. If this law is passed, the entire Labor Code chapter referring to apprentices (Articles 61-70) would disappear.
- The Salvadoran Clothing Industry Association (ASIC) has proposed establishing a minimum wage of 700 colones (US\$80) in the maquilas in the country's export processing zones, arguing that they would then save on transportation, food, and other expenses.
- Finally, different administrations have refused to ratify fundamental ILO conventions, such as those referring to freedom of association and collective bargaining.

To address this situation, we propose legal changes that provide better and greater defense for workers' rights and freedom of association. It would doubtless be complicated to find legislative support for such a proposal.

The union movement plays an important role in the defense of these rights, but it should consider doing the following activities to further promote labor rights:

- An exhaustive study of labor law in order to propose changes in labor-related administrative and judicial procedures.

- Do justified, and well-supported parallel reports on the application or violation of ILO Conventions and other ratified international agreements, and send them to the relevant institutions.
- Permanent lobbying of legislators to make them aware of the union leaders' objectives.
- Direct participation by union leaders in administrative processes (at the Ministry of Labor and courts) to ensure the defense of union affiliates' rights and liberties.
- Establish a direct contact with the Department of Labor Law and other divisions of the Procuraduría to share information that could be of common interest.
- Establish a relationship and dialogue with labor judges.
- Create a strategic relationship with the Lawyers' Federations and with the most prestigious law schools.

Challenge No. 2: Recover institutionally in the labor context

The facts we have presented –which are only a summary of the known cases— allow us to affirm that the officials, directors, and inspectors at the Ministry of Labor are some of the worst violators of labor rights and union freedom in El Salvador. By failing to comply with their legal responsibilities, or committing illegal acts (by action or omission), they contribute to decreasing protection for rights and increasing labor flexibility.

This is added to the fact that business owners also violate labor and union rights; there are many cases and facts that show this to be true.

The seriousness of this situation directly affects the state of law in El Salvador, because the public institution that has the obligation to monitor and ensure compliance with labor rights is itself a frequent violator or accomplice to violations. This is confirmed by decisions issued by the Supreme Court, resolutions from the Procuraduría, and ILO recommendations.

It is therefore logical and crucial to reform the Ministry of Labor by adopting a series of measures. To begin the debate, we can mention a few:

- Do an exhaustive evaluation of the personnel at the Ministry of Labor, to ensure that these employees know the relevant material and are not involved with corruption. This evaluation should focus on the Labor Inspectorate, where inspectors are often accused of corruption.
- Workers and their organizations should supervise the Ministry of Labor's activities and file complaints on any crimes and abuses that they observe.
- The Minister and Vice-minister should seek to understand the positions, criticisms, actions, and proposals of individuals and organizations. This will require a permanent dialogue.
- The Ministry of Labor should adopt measures to allow them to attend to cases more rapidly. Conciliation and arbitration are poorly utilized for labor problems,

showing officials' lack of training or disinterest in their work, and resulting in inappropriate resolutions.

- Tripartite commissions (government-company-workers) should develop proposals and share them with the public, to know whether or not they have support from the sectors they represent.
- The Ministry of Labor needs a larger budget, because their funds are insufficient to allow them to address all of the challenges they face.

These same kinds of ideas should be applied to the courts, since the Supreme Court and labor courts carry out delayed judicial processes. Rather than guaranteeing correct administration, they prolong the processes, and as we have said before, "*justice given late, is a manifestation of injustice itself*".

The norms for the labor and Supreme Court judges should be reformed, to permit and guarantee the more rapid resolution of workers' complaints.

The same could be said for the Civil Service Tribunal, the Procuraduría, the Fiscalía, and the Human Rights Procuraduría. These institutions do not have budgets large enough to allow them to efficiently and adequately deal with labor cases.

Structural adjustment and free trade promote low levels of governmental involvement. In practice, our institutions are being financially "suffocated" and therefore no Central American government's institutions can adequately protect and enforce legal rights, except for commercial rights. In the end, with this financial suffocation, the institutions that should enforce human and labor rights become obsolete because of their inability to fulfill the role for which they were created. They are then "legally" dismantled, through a process of deregulation that leads to the disappearance of both the institutions and the rights they should protect.

Reforming Salvadoran institutions is crucial to respond to the institutionalization of injustice.

Challenge No. 3: Recovery of the union movement

One other situation that merits close attention and profound change is that of the Salvadoran union movement.

Some manifestations of the crisis that is leading to the disappearance of the union movement include:

- The loss of organizational force;
- The absence of a proposal to counter the neoliberal changes promoted by private companies and the government;
- Corruption of some union leaders, who maintain the *status quo*;
- The lack of significant participation by women;
- The lack of a younger generation of union leaders;

- Insufficient knowledge of the processes and legal institutions available to defend their rights;
- The lack of real spaces for dialogue between union members and their leaders.

To advance democracy and processes of political maturation, it is necessary to have and develop the union movement in El Salvador.

The formula for excluding workers and unions in order to impose the vision of capital was already attempted in the 1960s-1970s and it provoked violence. Insisting on continuing in this same direction means refusing to learn from past mistakes.

The seed of poverty brings with it the culture of violence. This is not the road that El Salvador should follow, for the sake of its children. It is crucial to begin the struggle for change, and take firm positions against the institutionalization of the injustices that we observe.

Bibliography

This document is an adaptation of:

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These documents and other related documents can be found on our website, www.aseprola.org

Information was also taken from the following report published by ASEPROLA