



The right to strike in the public sector

Spain

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This factsheet reflects the situation in June 2019. It was elaborated by Coralie Guedes (independent expert), updated by Stefan Clauwaert (ETUC/ETUI) and reviewed by EPSU/ETUI; and sent for comments to EPSU's Spanish affiliates.

1. Legal basis

International level

Spain has ratified:

UN instruments¹

International Covenant on Economic, Social and Cultural Rights

(ICESCR, Article 8)

International Covenant on Civil and Political Rights

(ICCPR, Article 22)

ILO instruments²

Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise

(ratification on 20 April 1977)

Convention No. 98 concerning the Right to Organise and to Bargain Collectively

(ratification on 20 April 1977)

Convention No. 151 concerning Labour Relations (Public Service)

(ratification on 18 September 1984).

Convention No. 154 concerning the Promotion of Collective Bargaining

(ratification on 11 September 1985)

European level

Spain has ratified:

Article 11 (the right to freedom of assembly and association) of the European Convention on Human Rights

(ratification and entry into force on 09 November 1978)

The European Social Charter of 1961

(signature on 6 May 1980). Spain declares that it will interpret and apply Articles 5 and 6 of the European Social Charter, read with Article 31 and the Appendix to the Charter, in such a way that their provisions will be compatible with those of Articles 28, 37, 103(3) and 127 of the Spanish Constitution, all articles dealing with the rights of certain public servants.³

The Collective Complaints Procedure Protocol

Spain has signed but not yet ratified the Revised European Social Charter of 1996.

National level

The Constitution of Spain

The right to strike is guaranteed in the 1978 Constitution (Article 28(2)).

'The right of workers to strike in defence of their interests is recognised. The law governing the exercise of this right shall establish the safeguards necessary to ensure the maintenance of essential public services.'

Detailed rules are to be found in the 1977 Decree on Labour Relations.

A **strike** is **defined** as a **collective work stoppage** directly related to workers' occupational interests.

No distinction is made in Spain between the central and local civil services, since the same legal provisions apply to all civil servants and public-sector workers.

The Spanish Government has the power to establish the basis and principles of these regulations, but their scope may be limited, enlarged or specified by relevant standards issued by the Autonomous Communities.

This means that, while the Law of 2 August 1984 reforming the civil service applies to the civil service both nationally and locally, the same law also states that, within this legislative framework, the Autonomous Communities may introduce provisions that apply to their own civil service.

In 2006, a new **Civil Service Statute** was agreed between the Ministry of Public Administration and the trade unions FSP (State Federation of Public Services) and FSAP (Trade Union Federation of the Public Administration). This Statute introduces a unified approach to employment conditions in the public sector, such as career paths, code of conduct and collective bargaining. The Statute recognises the right to strike as a full right, but demands that essential community services are maintained, without specifying them.

2. Who has the right to call a strike?

A strike affecting a single company may be called by trade union or workforce representatives or groups of workers. Strikes affecting an entire sector may only be called by trade unions. General strikes are also allowed as long as they are motivated by a concern related to the workers' interests.

3. Definition of strike

A strike is taken to mean the complete stoppage of work. As such, the following forms of strike are considered to be illegal:

- work-to-rule actions
- sit-ins
- workplace occupation
- staggered strikes
- strikes affecting strategic parts of the enterprise
- selective strikes
- rotating strikes

Solidarity strikes are illegal under the law, but the Constitutional Court has interpreted solidarity action as legal in cases where there exists a minimum convergence of interests among the groups of employees involved. Such legality has to be established on a case-by-case basis.

Peaceful picketing is legally protected under the right to strike in connection with the right to freedom of expression. However, the limits between peaceful picketing and unlawful coercion and intimidation are quite often not at all clear. The criminal code punishes the members of a picket line who attempt to force anyone to participate in the strike.

Furthermore, the Basic Act No. 4/2015 protecting public safety criminalises offences committed by persons who disrupt or seek to disrupt harmonious relationship among citizens, describing public order, causing damage to persons or property, blocking roads or public spaces or preventing authorities or bodies from performing their duties freely and depending on the situation at stake this might lead to fines of up to 600.000 euro.

4. Who may participate in a strike?

In the absence of specific regulations governing strikes in essential services, the Constitution, the case law of the Constitutional Court and the disciplinary rules for civil servants apply, as do the rules contained in Royal Legislative Decree No. 17/1977.

No list of essential services or objective criteria for their definition exists: both the Constitution and the current legislation require *certain services essential* to the community to be maintained during a strike, but the power to define such services more precisely lies with the Government (or with regional executive bodies, where appropriate) and the Constitutional Court's case law. The Spanish authorities have provided many examples of decisions which declared various services to be essential in the event of industrial action, and the method adopted by the courts seems to preclude *a priori* decisions on the nature of services.

However, it is only once a strike has been called and the decision has been taken by the authorities to order the establishment of minimum services that this decision may be appealed before the civil (administrative and litigation) courts, with the possibility of suspension of the effects of the appealed act as a mechanism for 'immediate legal supervision'.

The Constitutional Court, however, has imposed certain restrictions on the notion of essential services. In particular, the level of service required must not be out of proportion to the breach of fundamental rights threatened by the strike.

Judicial review and negotiations between government and the two sides of industry to determine what staff should be co-opted to provide **minimum services** are fundamental safeguards of the right to strike in essential public and economic services.

When a strike is held in **essential public services**, a minimum level of service must be ensured. On 23 September 2010, for the first time a collective agreement was concluded between the Government and the two main trade unions to organise minimum service provision during general strike action that was due to take place six days later. The agreement mainly covered the transport sector, as negotiations in all other sectors had failed.

Exceptionally, in the event of possible harm to the national economy, the Government may end a strike by imposing compulsory arbitration.

The right to strike is not accorded to **judges, magistrates, public prosecutors** or **members of the police**⁴ and **military forces**.

5. Procedural requirements

Although a **peace obligation** may be stipulated by collective agreement, any restriction of the right to strike in an employment contract is unlawful.

The workers must establish a **strike committee** of no more than 12 representatives from among themselves.

Written notice must be given, both to the other party and to the Ministry of Employment, at least five days in advance (or 10 days when the company provides an essential service to the community). From that day forward, both parties are legally bound to negotiate. In order to end a strike, an agreement – having the same legal value as a collective agreement – must be concluded.

The Ministry of Employment may, in appropriate circumstances, order the strikers to resume work for up to two months.

Generally speaking, **strike-breakers** may not be used by the employer, the only exception being where the strike committee fails in its obligation to maintain plant and machinery.

During all strikes, there is an obligation to maintain the safety and maintenance services necessary for human safety and protection of the company's property.

6. Legal consequences of participating in a strike

Exercising the right to strike does not terminate the employment relationship, nor does it justify any penalties, unless the worker is guilty of professional misconduct during the strike action. Nevertheless, for the duration of the strike action, the work contract is suspended, and the worker is not entitled to any form of pay. The obligation to pay social security contributions is suspended. The worker is also not entitled to any unemployment benefits or compensation benefit for temporary inability to work.

Taking part in illegal strike action and refusing to work when called on to fulfil their obligation to maintain the safety and maintenance services necessary for human safety and protection of the company's property are legitimate causes of dismissal.

7. Case law of international/European bodies on standing violations

International Covenant on Economic, Social and Cultural Rights

In its Concluding observations on the sixth periodic report of Spain on the implementation of the International Covenant on Economic, Social and Cultural Rights (adopted at its 28th meeting of 28 March 2018)⁵, the **Committee on Economic, Social and Cultural Rights** expressed the following concerns and recommendations:

28. The Committee is concerned that the changes made during the 2012 labour reform could negatively influence enjoyment of the right to bargain collectively. It is also concerned by information it has received about the over-zealous application of article 315 (3) of the Criminal Code, which has resulted in the criminal prosecution of workers who have participated in strikes (art. 8).

29. The Committee recommends that the State party ensure the effectiveness of collective bargaining and of the right to union representation, both in law and in practice, in conformity with article 8 of the Covenant and with the provisions of the International Labour Organization (ILO) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and Right to Organise and Collective Bargaining Convention, 1949 (No. 98). It also urges the State party to consider the further revision or derogation of article 315 (3) of the Criminal Code in order to prevent the criminal prosecution of workers who have participated in strikes.

International Labour Organisation

Committee on Freedom of Association (CFA)

Case No 3093 (Spain) - Complaint date: 25 July 2014, General Union of Workers (UGT) and Trade Union Confederation of Workers' Commissions (CCOO)

The complainant organizations allege that the legislation provides for penal sanctions in the framework of the right to strike. The complainants denounce amongst others a trend to repress the exercise of the right to strike, based on certain provisions of Spanish criminal law, and also the increasing use of those provisions by the Public Prosecutor's Office and the criminal courts. The complainants also allege, firstly, that article 315.3 of the Criminal Code (hereinafter: CC) provides for long prison sentences (from three years to four-and-a-half years) and heavy fines (from 12 months and one day to 18 months) for those who coerce other persons to begin or continue a strike.

According to the complainants, this criminal definition is being applied across the board with the aim of criminalizing the exercise of the right to strike, specific cases having occurred in which trade unionists were handed long prison terms because they had taken part in strike picketing.

The CFA invited the Governing Body to approve amongst others the following recommendations:

(a) The Committee requests the Government to invite the competent authority to review the impact of the 2015 reform of article 315.3 of the CC and to inform the social partners of the outcome of the review. The Committee requests the Government to keep it informed in this respect. (...)

(d) (...) The Committee trusts that the ongoing criminal proceedings relating to the exercise of the right to strike referred to in the present complaint will be settled as quickly as possible. The Committee requests the Government to keep it informed in this regard.⁶

Committee of Experts on the Application of Conventions and Recommendations (CEACR)

Direct Request (CEACR) - adopted 2015, published 105th ILC session (2016) on Labour Relations (Public Service) Convention, 1978 (No. 151)

Article 8. Out-of-court dispute settlement procedures. The Committee notes the observations of the UGT and the CCOO alleging the absence of a system of out-of-court dispute settlement for public employees, even though the trade unions have requested the establishment of such a system, and the possibility of its creation is envisaged in section 45 of the Public Employees Basic Statute. The Committee requests the Government to send its comments on this matter.⁷

Observation (CEACR) - adopted 2015, published 105th ILC session (2016) on Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)⁸

The Committee notes the observations of the International Trade Union Confederation (ITUC), received on 31 August 2014 and 1 September 2015, the Trade Union Confederation of Workers' Commissions (CCOO), received on 17 August 2015 and also included in the Government's report, and the General Union of Workers (UGT), received on 4 September 2015, as well as the Government's replies to them. The Committee also notes the observations of the International Organisation of Employers (IOE) and the Spanish Confederation of Employers' Organizations (CEOE), received on 1 September 2015, as well as other observations of the IOE, received on the same date, which are of a general nature.

Observations of the ITUC and the CCOO on the exercise of civil liberties. The Committee notes that the observations of the ITUC and the CCOO allege that Basic Act No. 4/2015 protecting public safety (LPSC) and the new section 557ter of the Penal Code restrict freedom of assembly, expression and demonstration, which are essential to the exercise of freedom of association.

The Committee further notes the Government's reply indicating that:

- (i) the LPSC does not restrict or violate the right to freedom of association or to strike, as it only criminalizes offences committed by persons who disrupt or seek to disrupt harmonious relations among citizens, disrupting public order, causing

- damage to persons or property, blocking roads or public spaces or preventing authorities or bodies from performing their duties freely;
- (ii) the LPSC provides greater guarantees than the previous legislation by establishing that any administrative action shall be governed by the principles of lawfulness, equal treatment and non-discrimination, opportunity, proportionality, effectiveness, efficiency and accountability, and shall be subject to administrative and judicial supervision and;
 - (iii) the LPSC establishes that its provisions on the maintenance of public safety and on penalties shall be interpreted and applied in the manner most favourable to the full enjoyment of fundamental rights and public liberties, and particularly the right of assembly and to demonstrate, freedom of expression and of information, freedom of association and the right to strike. Taking due note of the Government's reply, the Committee requests the Government to provide information on the application in practice of the LPSC with regard to the exercise of freedom of association, as well as its comments on the allegations relating to the new section 557ter of the Penal Code.

Observations of the IOE, CEOE, UGT and CCOO on the exercise of the right to strike. The Committee notes that, in their observations, the IOE and the CEOE make allegations of dysfunctions in the exercise of the right to strike in the country, which should be rectified to ensure the free individual exercise of both the right to strike and the right to work. In this regard, they call for:

- (i) the prohibition of dissemination of information on a strike in the 24 hours preceding its initiation in order to avoid situations of coercion;
- (ii) court rulings on the lawfulness or unlawfulness of strikes to be issued prior to the commencement of the strike;
- (iii) minimum services to be negotiated prior to disputes arising and to be established on a permanent basis;
- (iv) the determination of all liabilities that may be derived from participation in illegal strikes and;
- (v) the intensification of the use of dialogue and out-of-court settlement mechanisms.

Moreover, the Committee notes that the UGT and the CCOO allege that public administrations issue decisions imposing minimum services that are abusive in view of their excessive scope and lack of justification, and which have been found null and void after having been challenged by trade unions in the courts (many rulings are cited).

The Committee further notes the information provided by the Government on various court rulings issued in disputes over the definition of minimum services.

Noting the differing views of the confederations of workers and of the IOE and the CEOE, including with regard to minimum services, and noting the existence of large numbers of court rulings setting aside administrative decisions establishing minimum services on the grounds mentioned above, the Committee requests the Government to address through tripartite dialogue the operation of the procedures for the determination of minimum services, as well as the other issues and concerns raised by these organizations.

The Committee takes note of the issues raised in the observations of the ITUC, the UGT and the CCOO relating to the exercise of the right to strike, criticizing penal provisions and alleging the initiation of a large number of criminal and disciplinary proceedings against trade union members, as well as the Government's reply, and notes that they are the subject of a case before the Committee on Freedom of Association (Case No. 3093).

European Social Charter

Collective complaints under article 6(4) ESC

Spain has not ratified the Collective Complaints Protocol.

ECSR Conclusions

In its Conclusions XX-3 (2014)⁹, the ECSR found the situation in Spain not in conformity with the Charter on the ground that section 10(1) of Royal Legislative Decree No. 17/1977 allows recourse to arbitration to end a strike in cases that go beyond the requirements set out in Article 31 of the Charter: according to the law in question, the Government has statutory powers to impose arbitration to end a strike in exceptional circumstances, namely when it considers that there is a threat to the rights and freedoms of others because a strike has gone on too long, the parties' positions are irreconcilable and too much damage is being done to the national economy.

The information provided with respect to some cases of interference by the Government does not show that the imposition of binding arbitration to end a strike is necessary within the meaning of Article 31.

The ECSR also took note of the comments from the Spanish Trade Union Confederations stating that the criminalisation of trade union activity in the form of informative picket lines in the course of a strike is disproportionate and unjustified and therefore constitutes an infringement of Article 6(4) of the 1961 Charter. The Committee has therefore asked the Government to provide information and comments in relation to this matter.

In its 2018 Conclusions (XXI-3), the ECSR found and concluded the following:

Specific restrictions to the right to strike and procedural requirements

The Committee recalls that pursuant to Section 10.1 of Royal Legislative-Decree No. 17/1977 of 4 March 1977 the Government may impose arbitration to end a strike in exceptional circumstances, namely when it considers that there is a threat to the rights and freedoms of others because a strike had gone on for too long, the parties' positions were irreconcilable and too much damage was being done to the national economy. According to a Supreme Court judgment of 9 May 1988, a situation permitting Government interference has to be exceptional, or there must be a cumulative series of circumstances, all of which have to be considered by the Government, before it can make use of its exceptional discretionary power. The Committee asks for more detailed description of these exceptional circumstances.

The Committee in its previous conclusions (Conclusions XIX-3 (2010) and XX-3 (2014)), found that Royal Decree-Law 17/1977 allowed the use of obligatory arbitration in circumstances that exceeded the limits established by Article 31 of the 1961 Charter.

The report states that there has been no change in this respect, therefore the Committee considers that the situation is still not in conformity with the 1961 Charter. The Committee asks to be kept informed of when and in what circumstances this procedure has been used.

The Committee refers to its general question on the right of members of the police to strike.

Conclusion

The Committee concludes that the situation in Spain is not in conformity with Article 6§4 of the 1961 Charter on the ground that legislation authorises the Government to impose compulsory arbitration to strikes in cases which go beyond the limits permitted by Article 31 of the 1961 Charter.¹⁰

8. Recent developments

Since the approval, in July 2015, of the public security law, thousands of people have been detained and fined under the provisions of what has been dubbed the 'gag law'.

Organisations such as Amnesty International have confirmed that the law is affecting rights such as freedom of peaceful assembly, expression and information. Almost 200,000 fines have been issued since the law was passed, 34,000 of which were linked to the exercise of these fundamental freedoms. During recent years, almost 300 workers have been arrested and prosecuted for exercising the right to strike.

A number of these trials were held during 2017, after unjustified delays, in excess of the limits set by the European Convention on Human Rights, creating immense concern and anxiety over the plight of these workers and representatives. A number of the trade unionists prosecuted were convicted under Article 315.3 of the Penal Code. It is against this background that the most representative trade unions launched a campaign, directed mainly at the political parties, for the repeal of Article 315.3 of the Penal Code and the decriminalisation of certain aspects of the right to strike.

It has not, however, as yet been repealed and the power to repress strike action, together with the persecution of the right to protest and constraints on freedom of expression, is bringing about a rollback of fundamental rights and freedoms in Spain, impacting particularly heavily on the exercise and development of trade union rights and freedoms.¹¹

9. Bibliography

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- Miscellaneous: <https://www.boe.es/>, <http://www.wk-rh.fr/>, <http://www.labourlawnetwork.eu/>

Notes

1 Status of ratification by Spain of UN instruments:

<https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=en>.

2 Status of ratification by Spain of ILO conventions:

https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102847.

3 Article 28 foresees the possibility to limit (and waive) the right to join a trade union for members of the armed forces and other groups subject to military discipline, as well as the possibility to regulate the exercise of this right for civil servants. It further stipulates that the law governing the right to strike also foresees the safeguards necessary to ensure the maintenance of essential services.

Article 37 provides for a similar possibility with regard to the right to bargain collectively, especially with respect to the maintenance of essential services.

Article 103(3) states that the law that lays down the status of civil servants also lays down the special features of the exercise of the right to join a trade union.

Article 127 prohibits judges, magistrates and prosecutors from joining a trade union.

4 However, Basic Law No. 9/2015 revised the regulations on the freedom of association of the National Police Corps, a body of public officials. As in the previous regulations (Basic Law of 1985), the national police force are entitled to a special system of freedom of association, because members of the police may establish their own unions, but are not permitted to join general unions. Facilities and guarantees for the exercise of trade union activities are also regulated, and responsibilities are established for the activities of these trade unions. The police may also appoint representatives for safety and health at work and may participate in the Police Council, a body of equal representation of management and staff that aims, among other functions, to mediate and conciliate in collective action measures and participate in the establishment of working conditions.

5 Available at

https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fESP%2fCO%2f6&Lang=en

6 Full report by CFA available at:

https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3302020

7 Available at:

https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3252715,102847,Spain,2015

8 Available at:

https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3252723,102847,Spain,2015

9 Available at:

[https://hudoc.esc.coe.int/eng/#{%22sort%22:\[%22ESCPublicationDate%20Descending%22\],\[%22ESCArticle%22:\[%2206-04-000%22\],\[%22ESCDcType%22:\[%22Conclusion%22\],\[%22ESCStateParty%22:\[%22ESP%22\],\[%22ESCDcIdentifier%22:\[%22XX-3/def/ESP/6/4/EN%22\]}](https://hudoc.esc.coe.int/eng/#{%22sort%22:[%22ESCPublicationDate%20Descending%22],[%22ESCArticle%22:[%2206-04-000%22],[%22ESCDcType%22:[%22Conclusion%22],[%22ESCStateParty%22:[%22ESP%22],[%22ESCDcIdentifier%22:[%22XX-3/def/ESP/6/4/EN%22]})

10 ECSR Conclusions XXI-3 (2018), available at:

[https://hudoc.esc.coe.int/eng/#{%22sort%22:\[%22ESCPublicationDate%20Descending%22\],\[%22ESCArticle%22:\[%2206-04-000%22\],\[%22ESCDcLanguage%22:\[%22ENG%22\],\[%22ESCDcType%22:\[%22Conclusion%22\],\[%22ESCStateParty%22:\[%22ESP%22\],\[%22ESCDcIdentifier%22:\[%22XXI-3/def/ESP/6/4/EN%22\]}](https://hudoc.esc.coe.int/eng/#{%22sort%22:[%22ESCPublicationDate%20Descending%22],[%22ESCArticle%22:[%2206-04-000%22],[%22ESCDcLanguage%22:[%22ENG%22],[%22ESCDcType%22:[%22Conclusion%22],[%22ESCStateParty%22:[%22ESP%22],[%22ESCDcIdentifier%22:[%22XXI-3/def/ESP/6/4/EN%22]})

11 ITUC Global Rights Index: Spain (<https://survey.ituc-csi.org/spain.html#tabs-3>).