

**CONTRIBUTION OF THE UNION CENTRAL
“MOVIMIENTO SINDICAL, INDÍGENA Y CAMPESINO GUATEMALTECO –MSICG-“ TO THE CIVIL AND
POLITICAL RIGHTS COMMITTEE
MARCH, 2018**

A. RIGHT TO AN EFFECTIVE APPEAL (ARTICLE 2 OF THE INTERNATIONAL CIVIL AND POLITICAL PACT).

The right to an effective appeal, susceptible of guaranteeing the restoration of a violated right or the prevention of violations against human rights presupposes the need that such an appeal complies with a series of basic conditions, among which are: 1) That it should be an appeal of immediate access; 2) That it is an appeal of few formalities; 3) That it is gratuitous; 4) That it is an appeal that may prevent the effects of the violation of the right, or effectively revert it.

To allow for this to happen, the Political Constitution of the Republic of Guatemala established the mechanism of the appeal in its article 265. However, the regulation that the Law of Appeal, Habeas Corpus and Constitutionality¹ does on it and the factual modification operated on the law itself, whether through the regulatory work of the Court of Constitutionality or the lack of effective controls on the way that it is subject to legality through its resolutions, have produced that the aforementioned appeal does not comply with the prevention included in paragraph 3 of article 2 of the Pact.

Article 19 of the Law of Appeal, Habeas Corpus and Constitutionality holds the possibility of having access to an appeal subject to a principle of definitiveness that presupposes that all other administrative and judiciary procedures oriented to treat whatever violations is being dealt with have been used to the last instance, all of which have no suspensive effect on the effects of the violation, which leads to the fact that such access is not immediate. This is made evident even in the cases dealing with guarantee of immediate access, like union freedom and protections against forced labor², or protections against discrimination due to the exercise of union freedom.

This conception of the appeal as a procesal mechanism of continuity given to administrative and judiciary actions is what produces that the appeal may be used as a tool of delay in some cases and as a mechanism used to submit procedures to more than two procedural instances.

Likewise, article 21 of the aforementioned Law establishes as a requirement to have access to the appeal that the victim has the professional help of a Lawyer, member and active on its professional Bar, which implies that the appeal will turn into a highly formal process by requiring that a lawyer takes part of it as a mandatory condition. This situation is aggravated by the issuing of Agreement 1/203 of the Court of Constitutionality, Mandatory and Complementary Regulations to the Law of Appeal, Habeas Corpus and Constitutionality, which in articles 10 and 14 not only ratify the formalist essence of the appeal but implies that non-compliance with these formal requirements might mean that the appeal procedure might be denied. In this sense, national laws also do not guarantee access to an appeal of little formalities.

On the other hand, the mandatory nature of having the professional help of an attorney implies in itself that the appeal will be onerous, since to have access to it, it is necessary to have economic resources to pay the professional fee of the attorney. Articles 44, 45 and 46 reaffirm the onerous nature of the Appeal, since they establish the possibility of condemning the plaintiff to pay trial costs and the possibility to fine the attorney that is assisting the person that uses the appeal, for its inadmissibility. The onerous nature of the appeal produces an automatic exclusion of access to it by those who have no means to use it.

Also, it is not a mechanism that protects particular persons against the State, since it is admitted that the State itself may have access to it when it has been declared guilty by the country's courts, this being a condition of process advantage since the attorneys that aid it are exonerated of the payment of trial costs and professional fees as foreseen by article 48 of the Law of Appeal, Habeas Corpus and Constitutionality, and as it has been extended by the legal doctrine set by the Court of Constitutionality, in which, on one hand, just one juridical person (the State of Guatemala) is acknowledged the possibility of doubling its

¹ Decree number 1/86 of the National Constituent Assembly

² As example and evidence of such an affirmation, consult the sentence issued on July 3rd, 2017 by the Court of Constitutionality within File 129-2017 presented by Magistrate DINA JOSEFINA OCHA ESCRIBA

defense within one single process, granting attributions of juridical person to branches of the State itself³ and contravening the text of the Constitution that expressly states that the State only has one legal representative⁴ and generalizing the exoneration of costs and fees to institutions beyond those that are expressly foreseen by article 48 of the Law of Appeal, Habeas Corpus and Constitutionality⁵.

Finally, by admitting that the appeal is a defense mechanism of the State itself in the face of demands promoted against it by particular persons and making its suspension efforts subject to an unreasoned resolution of the Court, the effectiveness of the appeal is also lost since it is admitted to be used by the State itself as a mechanism to attack procedures in which it has been legally defeated in two process instances and to suspend or revert such sentences, affecting the rights of particular persons and in cases in which the particular person uses the appeal, the need to suspend harmful effects is subject to discretionary standards and preliminary effects.

Therefore, it can be stated in light of valid legislation and practices implemented by the State of Guatemala through the justice administration system, that there is a lack of an appeal that complies with basic conditions required by the Pact on its article 2. On the contrary, there is a promotion of measures tending to limit access to this protection mechanism.

Likewise, the Court of Constitutionality has determined that the appeal does not proceed against acts of the State's ius imperium, that is, those acts that par excellence make up the essence before which the pact's protection has been established are excluded de facto by the Court of Constitutionality taking advantage of a lack of real and objective controls on the legality of its actions⁶ and producing an ad hoc repeal of the express disposition contained in literal b) of article 10 of the Law of Appeal, Habeas Corpus and Constitutionality.

EVALUATION:

To this date, the State of Guatemala has not complied with guaranteeing effective access for the population to a legal recourse when their rights have been violated, thus violating the Pact by doing ad hoc legislation through judicial criteria that is contrary even to preexisting norms, denying particular persons the possibility of using the appeal when the action in dispute has been decreed under the appeal of the State's ius imperium, that is, through actions or dispositions of administrative or regulatory nature.

SUGGESTED QUESTIONS:

1. Explain what measures has the State of Guatemala taken to guarantee that the population has access to an appeal in the frame of what the Convention establishes on article 2.
2. Explain why the Court of Constitutionality, in sentences issued within files 4122-2017 (presented by Magistrate DINA JOSEFINA OCHOA ESCRIBA); File 4121-2017 (presented by Magistrate BONERGE AMILCAR MEJIA ORELLANA); File 4312-2017 (presented by Magistrate GLORIA PATRICIA PORRAS ESCOBAR); File 4350-2017 (presented by Magistrate NEFTALY ALDANA HERRERA), File 4173-2017 (presented by Magistrate NEFTALY ALDANA HERRERA); File 4173-2017 (presented by Magistrate NEFTALY ALDANA HERRERA) and File 4355-2017 (presented by Magistrate NEFTALY ALDANA HERRERA) ruled that the appeal

³ As an example, see judicial decree dated September 18th, 2017, issued by the Court of Constitutionality within File 3456-2017 presented by Magistrate BONERGE AMILCAR MEJIA ORELLANA.

⁴ Article 252 of the Political Constitution of the Republic of Guatemala.

⁵ See sentence issued on August 21st, 2014 within File 339-2014 of the Court of Constitutionality which refers to legal doctrine set by sentences issued by that same court on files 5-2013, 1139-2013 and 5635-2013.

⁶ See resolution dated September 26th, 2017 issued by the Court of Constitutionality within File 4122-2017 (presented by Magistrate DINA JOSEFINA OCHOA ESCRIBA); resolution dated October 17th, 2017 issued by the Court of Constitutionality within File 4121-2017 (presented by Magistrate BONERGE AMILCAR MEJIA ORELLANA); resolution dated October 23rd, 2017 issued by the Court of Constitutionality within File 4312-2017 (presented by Magistrate GLORIA PATRICIA PORRAS ESCOBAR); resolution dated October 23rd, 2017 issued by the Court of Constitutionality within File 4350-2017 (presented by Magistrate GLORIA PATRICIA PORRAS ESCOBAR); resolution dated November 20th, 2017 issued by the Court of Constitutionality within File 4160-2017 (presented by Magistrate NEFTALY ALDANA HERRERA); resolution dated December 4th, 2017 issued by the Court of Constitutionality within File 4173-2017 (presented by Magistrate NEFTALY ALDANA HERRERA); resolution dated December 4th, 2017 issued by the Court of Constitutionality within File 4206-2017 (presented by Magistrate NEFTALY ALDANA HERRERA); resolution dated December 11th, 2017 issued by the Court of Constitutionality within File 4355-2017 (presented by Magistrate NEFTALY ALDANA HERRERA).

cannot be used against acts of the State's ius imperium despite the fact that those cases indicated are within the frame of proceeding validity expressly determined by literal b) of article 10 of the Law of Appeal, Habeas Corpus and Constitutionality.

3. Explain the measures taken by the State of Guatemala to comply with the observations issued by the Committee on the Application of Standards of the 99th International Labor Conference, in which the Government was required to approve an appeal that was simple and quick, or any other effective resource before competent judges or courts, to protect against actions that violate fundamental rights, and especially what course have the legislative actions pushed forward by MSICG in this sense before Congress taken.

8. RIGHT TO AN EFFECTIVE JUDICIAL PROTECTION (ARTICLE 14 OF THE INTERNATIONAL PACT OF CIVIL AND POLITICAL RIGHTS)

The right to an effective judicial protection presupposes the possibility that, in the absence of a willful respect to the person's rights contained in the law on behalf of those who have the duty of complying with them, an intervention of the judicial power may happen to bring the coercive nature immersed in the norm itself into effect.

Therefore, article 29 of the Political Constitution of the Republic of Guatemala acknowledges as a human right the free access to courts. In the case of rights linked to Labor, article 103 of the Guatemalan Constitution submits access to a privative labor jurisdiction, in charge of knowing, solving, executing and guaranteeing full compliance of article 106 of the aforementioned Constitution, a norm that also establishes the criteria of application, interpretation, integration and conflict solution of laws in time.

Now, even when article 106 of the constitution foresees the juridical and factual effects of the violations of acknowledged labor rights, according to jurisdictional security acknowledged as the duty of the State in article 2 of the Constitution and the exclusive nature of jurisdiction foreseen in article 203 of the very Constitution, juridical and factual effects foreseen for cases of simulation of the labor relation foreseen in the Guatemalan labor legislation, particularly in articles 18, 26, 81 and 156 of the Labor Code require the intervention and resolution of labor and social prevision courts as well as their actions to ensure effective compliance with what is ruled.

Even though it is true that the legislation is clear regarding fact assumptions, the consequences of these, who must declare and the faculties of labor and social prevision courts to know violations to labor and social prevision laws and to order law breakers to act within the law, the Court of Constitutionality has produced a grave exception to effective judiciary protection in the matter of protecting labor rights of the State's workers since, acknowledging compliance with the assumptions foreseen by the norm as conditions to acknowledge a right and particularly the right of not simulating a labor relation both in nature and in temporality, among other, it has in essence eliminated the fundamental attribution of jurisdictional power and the effective judiciary protection by establishing that labor and social prevision judges (natural judges) may declare facts, they may not apply the consequences foreseen in the law nor order that the State of Guatemala, acting as an employer, must adjust its actions to the law, since such an adjustment depends on the will of the State of Guatemala.

This elimination of the essence and object of jurisdictional power and effective judiciary protection has happened under the argument that jurisdictional power cannot interfere with administration procedures nor order administrative entities to apply the law and restore violated rights to workers in those cases in which the employer is the State of Guatemala, making the exclusive faculty of acknowledging or not, applying or not, respecting or not, the rights of employees working for such entities subject to the discretionary opinion of the entities themselves, acting as employers, with no possibility of judiciary intervention in case the entity does not comply with respecting such rights.

Therefore, not only the possibilities of an effective judiciary protection are eliminated, but they turn the very offender that violates these rights into the judge of its own cause, consequently leaving the person unprotected and deprived of the possibility that a judge may order and guarantee the application of such consequences, expressly foreseen by the law, acknowledging the assumptions of deeds that are determined by the law to produce determined juridical and factual consequences.

This produces, as a practical effect, the ad hoc and de facto repealing of the right that is foreseen by the law, which is expressly prohibited in this case by article 106 of the political Constitution of the Republic, eliminating faculties of the natural judge that are foreseen by article 106 of the aforementioned Constitution and illegally substituting the law by the criteria of the members of the Court of Constitutionality, becoming such substitution mandatory for the natural judge according to what article 47 of the Law of Appeal, Habeas Corpus and Constitutionality states, and in the absence of any controls that may be exerted on the legality of what the Court of Constitutionality has ruled.⁷

EVALUATION

The State of Guatemala, through the Court of Constitutionality, violates article 14 of the Pact by establishing that labor and social prevision judges in cases of workers of the State may verify violations to labor and social prevision laws, however, they may not order the State of Guatemala to adjust its actions to the law, since compliance with the law and respect to the workers' rights depends on the administrative will of the State.

SUGGESTED QUESTIONS:

1. Explain if the Guatemalan legislation establishes that labor and social prevention judges are only competent to declare violations to the rights of workers but not to order reparations for them to law violators.
2. Explain if the Guatemalan legislation establishes that the State, acting as an employer, is not forced to comply with the rights that the law establishes for workers.
3. Explain why the Court of Constitutionality considered, in sentences issued within files 4666-2017 (presented by Magistrate GLORIA PATRICIA PORRAS ESCOBAR); 2886-2017 (presented by Magistrate NEFTALY ALDANA HERRERA); 2181-2017 (presented by Magistrate DINA JOSEFINA OCHOA ESCRIBA); 2614-2017 (presented by Magistrate DINA JOSEFINA OCHOA ESCRIBA); 3470-2017 (presented by Magistrate BONERGE AMILCAR MEJIA ORELLANA); 4123-2017 (presented by Magistrate BONERGE AMILCAR MEJIA ORELLANA); 4665-2017 (presented by Magistrate DINA JOSEFINA OCHOA ESCRIBA); 5282-2017 (presented by Magistrate DINA JOSEFINA OCHOA ESCRIBA) that labor and social prevision judges have no competence to order that the State of Guatemala, acting as an employer, should hold its actions within the law when it is violating the rights of workers.

C) FREEDOM OF EXPRESSION AND ASSOCIATION (ARTICLES 9, 19, 21 AND 22)

C.1) Right to life and physical integrity of unionists:

⁷ See sentence dated August 31st, 2017, issued by the Court of Constitutionality within File 2715-2017 (presented by Magistrate GLORIA PATRICIA PORRAS ESCOBAR), sentence with date September 26th, 2017, issued by the Court of Constitutionality within File 2295-2017 (presented by Magistrate NEFTALY ALDANA HERRERA); sentence with date November 13, 2017 issued by the Court of Constitutionality within File 3892-2107 (presented by Magistrate DINA JOSEFINA OCHOA ESCRIBA); sentence with date November 30th, 2017 issued by the Court of nstitutionality within File 4666-2017 (presented by Magistrate GLORIA PATRICIA PORRAS ESCOBAR); sentence with date December 5th, 2017 issued by the Court of Constitutionality within File 2886-2017 (presented by Magistrate NEFTALY ALDANA HERRERA); sentence with date December 7th, 2017 issued by the Court of Constitutionality within File 2181-2017 (presented by Magistrate DINA JOSEFINA OCHOA ESCRIBA); sentence with date January 29th, 2018 issued by the Court of Constitutionality within File 2614-2017 (presented by Magistrate DINA JOSEFINA OCHOA ESCRIBA); sentence with date February 12th, 2018 issued by the Court of Constitutionality within File 3470-2017 (presented by Magistrate BONERGE AMILCAR MEJIA ORELLANA); sentence with date February 12th, 2018 issued by the Court of Constitutionality within File 4123-2017 (presented by Magistrate BONERGE AMILCAR MEJIA ORELLANA); sentence with date February 19th, 2018 issued by the Court of Constitutionality within File 4665-2017 (presented by Magistrate DINA JOSEFINA OCHOA ESCRIBA); sentence with date February 19th, 2018 issued by the Court of Constitutionality within File 5282-2017 (presented by Magistrate DINA JOSEFINA OCHOA ESCRIBA).

The State of Guatemala, as MSICG has documented in his research reports: "Guatemala, el Costo de la Libertad Sindical"; "Segundo Informe, Guatemala, el Costo de la Libertad Sindical"; "La maquila textil y de confección en Guatemala, ¿oportunidad y desarrollo?"; and "¿Trabajo digno sin libertad sindical?" which may be consulted and downloaded on the Union Central web page www.movimientosicg.org has kept historically a policy of denial of the human right of union freedom, which manifests itself among other aspects in the multiple acts of violence committed against unionists and the impunity that surrounds them> the criminalization and stigmatization of the right to free unionism; the discretionality in the procedures to inscribe union organizations with no possibility of recurring judiciary nor administratively; the existence of a failed and inefficient labor justice system and the lack of adaptation of legislation to international human rights norms.

In this context, Guatemala has been signaled 22 times by ILO's Committee of Experts for violating Agreement 87 since the year 1989 and questioned 20 times for violating the same Agreement by the Conference Committee on the Application of Standards since the year 1991. Both Commissions signaled the case of Guatemala with a double footnote and special calling, and with a special paragraph, thanks to the remarks presented by MSICG since the year 2012.

Likewise, up to this date there are 19 active cases before the Committee on Freedom of Association, most of them promoted by MSICG for violations to Agreement 87 against the State.

The case is that just from 2012 to this date, more than 87 union leaders and unionists have been murdered, and more than 200 acts of antiunion violence have happened, and the State has not obtained firm and executed sentences against perpetrators and intellectual authors of such deeds, which encourages the use of this mechanism of terror to prevent the exercise of union freedom.

Since MSICG is the Union Central that has denounced these violence actions the most, and the one most affected by them, it has begun a process of national and international denounce against the impunity that the Attorney General's Office maintains as State policy for these deeds, and that is why the Unit of Crimes against Unionists of the Attorney General's Office expelled all the cases related with MSICG from its unit, and moved them to other, non-specialized units, where an attempt has been made to dismiss all the criminal processes.

Even though criminal and appeal judges have ordered the Attorney General's Office to investigate the actions of the chief of the Special Unit of Crimes against Unionists, in the face of the actions promoted by MSICG, and to continue with the investigations, guaranteeing the fundamental rights of the victims, to this date the Attorney General's Office refuses to execute the criminal prosecution. An example of the judicial resolution that MSICG has obtained are those issued within files: Criminal Cause Number 01070-2015-0038 before the tenth court of criminal first instance, narcoactivity and crimes against the environment of Guatemala and Constitutional Appeal Action number 05-2017 of the Court of Criminal Appeals, of femicide crimes and other forms of violence against women and sexual violence of the department of Guatemala, standing as a constitutional appeal court.

C.2) Denial of the right to free unionizing in practice

In Guatemala the process to inscribe a union organization is established in articles 212, 218, 220, 221, which establish that interested parts must present their request by written way to the General Labor Direction, together with the act of constitution of the union and its statutes.

If those documents fit with the legal dispositions, the General Labor Direction of the Labor and Social Prevision Ministry will dictate a favorable resolution that must contain the acknowledgement of the juridical personality, approval of statutes and inscription order in the public registry of unions, and this may process may not take longer than 10 days, or the person responsible of the delay shall be removed. Only if mistakes or unsolvable defects are proven, may the resolution be deemed unfavorable, and its text must be transmitted without further delay to the interested parties so that they may oppose the corresponding action for revocation.

Although this right should be positive, in practice the State of Guatemala, through the Ministry of labor and Social Prevision, has implemented several discretionary criteria through resolutions that are called PROVIDENCES, by which it orders unions in process of formation that, among other things, they must

eliminate from their statutes the right to unionize certain categories of workers, to eliminate articles from their statutes which allow them to negotiate collectively and represent the workers, to establish if the workers are temporary or permanent, in which case the right to unionize temporary workers is denied, to forbid unionizing to certain workers, and audiences are set for employers so that they may pronounce themselves about the workers having or not the right to unionize. If employers are against the workers' right to unionize, the inscription of the union is denied, etcetera.

The requirements imposed through the PROVIDENCES that deny the workers the right to unionize cannot be impugned by administrative or judiciary ways, that is, there is no resource against them as the Minister of Labor and Social Prevision and the Court of Constitutionality, among others, have foreseen in sentences dated January 13th, 2015, issued within File 2374-2014; Sentence of date January 18th, 2018, issued within File 4089-2017 with presentation by Magistrate NEFTALY ALDANA HERRERA, sentence with date January 25th 2018, issued within File 4051-2017, presented by Magistrate DINA JOSEFINA OCHOA ESCRIBA.

In this frame, the workers cannot organize unions without the authorization and approval of the State of Guatemala, and if they are denied inscription of their unions or imposed arbitrary or discretionary requirements they cannot turn to courts or administrative instances, despite the fact that the law expressly stipulates that revocation actions are possible against resolution that deny union rights, and after those the corresponding judiciary ways.

It must be highlighted that the resolutions of the Court of Constitutionality refer that, on a first instance, PROVIDENCES cannot be impugned because they are not binding, and on a second instance that if particular persons do not comply with the requirements ordered by the Ministry of Labor and Social Prevision through PROVIDENCES, even though they are not based on the law, the delay in the inscription of union organizations is their responsibility, without any responsibility on behalf of the State.

C.3) Campaigns of discredit, stigmatization and criminalization of the right to union freedom and collective negotiation.

The State of Guatemala, acting as employer and State, has historically implemented a policy of criminalization and stigmatization of the right to union freedom, which has become more aggressive in the last years.

Aside from the antiunion lists that prevent workers that have made use of their unionizing rights to find jobs, in later years the State of Guatemala, acting as employer and as State, has criminally charged workers for constituting union organizations, has signaled them in the mass media accusing them of being part of criminal structures and embezzling the State or private institutions, of seeking personal privileges, of being lazy thieves, thus seeking to send a clear message to all workers, and that is that if someone unionizes he or she will be socially stigmatized and it will be impossible for them to find a job.

This policy, added to the ones that have already been mentioned, has made an impact on the unionizing rate, that went from representing 10.74% of the economically active population in 1954, to 2.43% in February 2018.

A clear example of this criminalization and stigmatization are the acts executed against MSICG and STRAPDH (Union of workers of the Ombudsman's Office, affiliated to MSICG) by the last Ombudsman, Jorge Eduardo de Leon Duque who, through other public officials, accused the leaders of MSICG Lesbia Amézquita and Efrén Sandoval of being part of the criminal structures of the IGSS PISA and SAT cases, and of terrorism, by destabilizing the Ombudsman's Office by creating the first union of workers in the institution, and having planned a collective negotiation.

This criminal accusations and stigmatization were given since the year 2015, through the profit media El Periódico and Prensa Libre, and even though both SITRAPDH and MISCG and lawyers Lesbia Amézquita and Efrén Sandoval presented their right of clarification and rectification in the Prensa Libre media, this refused to publish them so they had to go to the corresponding courts, which denied the process of the actions that were presented, because of which the companions had to go for more than three years to the corresponding judicial instances so that the judges would be ordered to process the rights of clarification and rectification that were presented.

Even though all the sentences were declared in favor of SITRAPDH, Lesbia Amezquita and Efren Sandoval, on February 24th, 2016, January 7th, 2016, November 8th, 2017 within files 3831-2015, 4500-2015, 3196-2917 of the Court of Constitutionality, up to this date the rights of clarification and rectification have not been complied with, as a part of the antiunion policy of the State, and the social, personal and family damage of the victims and union freedom has been accomplished.

EVALUATION

The State of Guatemala, through the Ministry of Labor and Social Prevision, the Attorney General's Office and the ordinary and constitutional courts of justice obstructs the right to free unionizing of workers and promotes and facilitates policies that are aimed at weakening, destroying and disarticulating the union movement.

SUGGESTED QUESTIONS:

1. Which are the cases of murders of unionists that are currently under investigation by the Attorney General's Office with indication of file number, name of victim, date of occurrence and state of the investigation.
2. Which are the cases of antiunion violence acts that are currently under investigation by the Attorney General's Office with indication of file number, name of victim, date of occurrence and state of the investigation.
3. Please send copy of the firm and executed sentences that have been issued against material and intellectual authors of unionists' murders.
4. Please send copy of firm and executed sentences that have been issued against material and intellectual authors of the crimes that have been denounced by unionists.
5. Explain the reasons why the MSICG cases were expelled from the Special Attorney's Unit for Crimes against Unionists, if the denounces presented by MSICG against the chief of this unit were investigated, if the victims of the investigation were notified and if they were allowed to offer evidence and fulfill requirements for it within the investigation that was practiced, if any.
6. Explain the measures that the Attorney General's Office has taken against Attorneys that have been ordered by competent judges to continue with the criminal investigation of crimes committed against unionists after their failed attempts to dismiss criminal processes and the state in which such processes are.
7. Indicate the number of denounces presented by unionists for alleged crimes committed against them starting on the year 2010, the number of these denounces that have been dismissed and the number of firm and executed sentences that have been issued against perpetrators and intellectual authors of such crimes, individualized by the investigations of the Attorney General's Office.
8. Explain why unionists are denied to recur the providences issued by the General Labor Direction, through which they are ordered to comply with requirements previous to inscribe their union organizations, or are prevented from exercising the right to unionize, even though there are resources that can be used in the national legislation for such cases.
9. Explain what is the current unionizing rate in the country and the measures taken by the State of Guatemala to guarantee the right of free unionizing for workers.
10. Explain which are the measures that have been implemented by the State through its three powers to avoid the criminalization and stigmatization of union freedom and to make effective the right of clarification and rectification obtained judicially by SITRAPDH, MSICG, and Lesbia Amezquita and Efren Sandoval in their particular cases.

D) RIGHTS OF INDIGENOUS PEOPLES (ARTICLES 2, 26 AND 27)

In its research report: "El Derecho de Consulta de los Pueblos Indigenas en Guatemala: La Ruptura entre el discurso y la practica, 1996-Marzo 2010" and "Del requerimiento al reparto en el siglo XXI" which can be downloaded from the MSICG website, www.movimientoscig.org, MSICG documented the systematic violation of the right of consultation of the indigenous peoples in matters of license granting for exploration and exploitation of natural resources that was done by the State of Guatemala.

Despite the many observations of human rights organisms on this issue, the State of Guatemala has kept implementing projects of exploration and exploitation of natural resources without implementing

consultation mechanisms in good faith, to the point that between the years 1996 and 2017, the State of Guatemala has implemented more than 90 licenses for exploration and exploitation of natural resources in territories of indigenous peoples without fulfilling the corresponding process of consultation.

In the face of this, MSICG, jointly with a member of the Congress of the Republic, have presented the due appeal actions, requesting that the exploration and exploitation projects that were granted are left without effect until the right of consultation to indigenous peoples is respected. The process of these legal actions has been unjustifiably delayed by the Supreme Court of Justice within File 91-2018 and by the Sixth Court of the Tribunal of the Contentious Administrative procedures, turned into appeal court within file 01190-2018-00017.

On the other hand, the Minister of Labor and Social Prevision recently gave validity to the Operative Consultation Guide for Indigenous Peoples, which does not comply with any of the provisions regarding the right of consultation of indigenous peoples.

EVALUATION

The State of Guatemala keeps violating systematically the right of consultation of indigenous peoples regarding the granting of licenses to explore and exploit natural resources in their territories, and issues dispositions that have not been consulted with indigenous peoples, trying to limit their right to previous and informed consultation in good faith.

SUGGESTED QUESTIONS

1. Explain what process has been given to the appeal actions promoted within files 91-2018 of the Supreme Court of Justice and by the Sixth Court of the tribunal of Contentious Administrative Processes constituted in Appeal court within file 01190-2018-00017, indicating, in each case, if they have complied with the deadlines of resolutions and notifications.
2. Explain the measures that have been adopted to comply with each of the recommendations made by ILO's Committee of Experts to the State of Guatemala and by the other instances of the United Nations on the subject of consultation to indigenous peoples.

E) NON/DISCRIMINATION, EQUITY OF RIGHTS BETWEEN MEN AND WOMEN (Articles 2, 3, 6, 7, 17, 26)

E.1) Rights of household workers

For many decades the State of Guatemala has kept a discriminatory labor regime that may be considered as conditions of legalized slavery to domestic workers, and despite constant denunciations and actions taken by workers and by MSICG and its affiliated union, SINTRACAPGUA (Union of Particular Household Workers, in Spanish), in this field the State of Guatemala has refused to take necessary measures to derogate the dispositions contained in articles 161 to 166 of the Labor Code, not to adopt a legislation that does not imply discrimination for this sector of the population that represents more than 200,000 workers.

In its time, MSICG and SINTRACAPGUA presented to the Congress of the Republic the Bill of Law that oriented to approve the Law that regulates work in particular households, initiative 4963, and to this date Congress has still not taken the necessary measures to approve it and leave behind the precarious and discriminative conditions that the Guatemalan Labor Code regulates for this work category.

E.2) On the salary breach between men and women and the submission of women to conditions of poverty and extreme poverty.

The State of Guatemala implements salary policies to keep the population submerged in social exclusion and misery, especially women.

According to the last update published by the National Institute of Statistics for the month of September, 2017, the cost of the basket of basic food (BBF) is of Q2,893.21 (EU352.83) for agrarian and non-agrarian activities and Q2,667.52 (EU352.83) for exportation and sweatshop activities, which implies a considerable deficit towards the basic needs of workers and their families.

According to the official poll ENEI 2-2017, in practice women who earn wages in the rural ambit earned a monthly average salary of Q1,372.00 in face of the Q1,658.00 that men earned; in the metropolitan urban ambit, women earned a monthly wage of Q2,821.00 in face of the Q3,521.00 earned by men; and in the rest of urban ambits women earned a salary of Q2,190.00 in face of the Q2,327.00 earned by men. It should be noted that in no case these salaries are close to the cost of the Basket of Basic Food, and that both on the rural and in the urban ambits women earn the minimum wage legally fixed by the State, this due to the policy of impunity that the State allows to employers.

This situation has been made worse since the State has approved Decree Number 2-2017 of the Congress of the Republic with date January 17th, 2017, which approves and incorporates to the national juridical system ILO's Agreement 175, Agreement over Partial Time Labor, a norm that crashes with the provisions that are expressly contained in article 102 literal g) and 106 of the Political Constitution of the Republic.

In Guatemala, the system of protection of rights related to labor and social security, have been set upon the basis of three basic principles, among these, primacy of reality, non-waver and intangibility, and continuity. Therefore, rights such as the weekly day/off, vacations, reparations for dismissal, pre and post birth protection, breastfeeding, Christmas bonus, yearly bonus for workers of the private and public sector, labor immobility and union status guarantees, as well as conditions of access to social security rest upon a base that is incompatible with the fractioning of wage and with the benefits that ILO's Agreement 175 regulates.

To this, we should add that pre and post birth protection and breastfeeding make no sense if they are fractioned, since their purpose is guaranteeing the health, life and economic and social stability both of the worker and of the son or daughter during their first months of life; likewise, the setting of a pension for disability or old age, as well as protection during a suspension due to accident or disease make no sense in a fractioned manner. To this we should add the material impossibility that a person may have access to a pension due to old age that may guarantee a dignified retirement in such conditions, and it should be noted that, even in present day conditions, the retirement systems do not cover the vital minimum.

The approval of this Agreement has fragmented the labor market even more, making women's salaries even more precarious, and even though MSICG impugned the ratification of this Agreement for unconstitutional reasons, the Court of Constitutionality, in order to evade making a statement on the contents of the proposal, despite there was an argument on why this ratification crashes with constitutional guarantees and produces a regression that is prohibited by article 106 of the Constitution, reasoned that no confrontation had happened, despite that this is a subjective argument, since there is no objective norm or parameter that allows to evaluate the level of comprehension that a Magistrate may have to set the proposal within such parameters, and it does not release the Court of the legal duty of making its own contrast with the Constitution, which is the legal duty of the constitutional law as is established in the Law of Appeal, Habeas Corpus and Constitutionality in articles 142 and 44.⁸

E.3) About the policy of differentiated minimum salaries:

As a part of the employment insecurity policy implemented by the State to guarantee precariousness and discrimination against women, certain policies have been implemented in order to deepen these conditions through specific measures for sectors in which a good deal of the women workforce is concentrated. As we have seen, precarious conditions of household work have been maintained, there has been an approval of norms that are incompatible with the level of precariousness that exists in the country and whose effects in other societies in which it has been applied have been the feminization of partial time labor, just like since the year 2008 there has been an implementation of differentiated and inferior minimum wage for activities labeled as exportation and sweatshops, which is another of the sectors in which women-s workforce is largely affected. This has meant an inferior wage whose breach has grown constantly year after year, as the following chart shows:

⁸ See resolution dated November 9th, 2017 issued by the Court of Constitutionality within File 898-2017 (presented by Magistrate DINA JOSEFINA OCHOA ESCRIBA).

Year	Agrarian	Non agrarian	SwtsHPAnd y Exp ⁹	Monthly Impact for women workers
1998 ¹⁰	535.80	591.30	591.30	0
1999 ¹¹	589.50	650.40	650.40	0
2000 ¹²	648.60	715.50	715.50	0
2001 ¹³	752.40	830.10	830.10	0
2002 ¹⁴	825.00	900.00	900.00	0
2003 ¹⁵	957.00	1026.00	1026.00	0
2004 ¹⁶	1158.00	1190.10	1190.10	0
2005 ¹⁷	1158.00	1190.10	1190.10	0
2006 ¹⁸	1273.80	1309.20	1309.20	0
2007 ¹⁹	1337.40	1374.60	1374.60	0
2008 ²⁰	1410.00	1455.00	1432.50	22.50
2009 ²¹	1560.00	1560.00	1432.50	127.50
2010 ²²	1680.00	1680.00	1552.50	127.50
2011 ²³	1911.00	1911.00	1783.50	127.50
2012 ²⁴	2040.00	2040.00	1875.00	165.00
2013 ²⁵	2142.00	2142.00	1968.90	173.10
2014 ²⁶	2249.10	2249.10	2067.30	181.10
2015 ²⁷	2361.60	2361.60	2170.80	190.80
2016 ²⁸	2456.10	2456.10	2246.70	209.40
2017 ²⁹	2607.00	2607.00	2384.40	222.60
2018 ³⁰	2704.80	2704.80	2473.80	231.00

EVALUATION:

The State of Guatemala keeps a discriminative and slave legal regime towards household workers, omitting to implement measures and public policies to guarantee the payment of the minimum wage that is legally fixed for women and to guarantee a salary in accordance to the cost of the Basket of Basic Food, which would allow them to overcome the levels of poverty and exclusion in which they are submitted, and it implements judicial and legislative measures tending to perpetuate the inequity of women with regards to men in work places, turning it more precarious.

⁹Until the Emmission of Government Agreement number 625-2007, minimum wages for what is now called sweatshop and exportation activities wer the minimum wages for the so-called "non-agricultural activities".

¹⁰ Government Agreement No. 841-97 dated December 10th, 1997.

¹¹ Government Agreement No. 23-99 dated January 13th, 1999.

¹² Government Agreement No. 20-2000 dated January 13th, 1999.

¹³ Government Agreement No. 838-2000 dated December 15th, 2000.

¹⁴ Government Agreement No. 494-2001 dated December 18th, 2001.

¹⁵ Government Agreement No. 459-2002 dated November 28th, 2002.

¹⁶ Government Agreement No. 765-2003 dated November 27th, 2003.

¹⁷ Government Agreement No. 378-2004 dated December 15th, 2004.

¹⁸ Government Agreement No. 640-2005 dated December 1st, 2005.

¹⁹ Government Agreement No. 624-2006 dated December 26th, 2006.

²⁰ Government Agreement No. 625-2007 dated December 27th, 2007.

²¹ Government Agreement No. 398-2008 dated December 29th, 2008.

²² Government Agreement No. 347-2009 dated December 29th, 2009.

²³ Government Agreement No. 388-2010 dated December 29th, 2010.

²⁴ Government Agreement No. 520-2011 dated December 28th, 2011.

²⁵ Government Agreement No. 359-2012 dated December 23rd, 2012.

²⁶ Government Agreement No. 357-2013 dated December 26th, 2013.

²⁷ Government Agreement No. 470-2014 dated December 19th, 2014.

²⁸ Government Agreement No. 303-2015 dated December 29th, 2015.

²⁹ Government Agreement No. 288-2016 dated December 29th, 2016.

³⁰ Government Agreement No. 297-2017 dated December 27th, 2017

SUGGESTED QUESTIONS:

1. Explain the measures that have been taken by the Ministry of Labor and Social Precision to ensure that women will earn in the practice the legally fixed minimum wage and that they will not suffer wage discrimination with regards to men.
2. Explain the measures taken by the State of Guatemala to leave articles 161 through 166 of the Labor Code without effect, since they contain a regime that is discriminative for household workers, among them the measures taken with regards to Law Bill 4963 that looks to approve the Law that regulates work in particular households.
3. Explain the measures taken by Congress to approve and give validity to ILO's Agreement 189.
4. Explain the measures taken to guarantee that the approval of ILO's Agreement 175 will not imply more salary discrimination for women, and that their rights to social equity, minimum wage, pre and post birth rights, among others, will not be affected.
5. Explain whether the Court of Constitutionality, in accordance with articles 42 and 144 of the Law of Appeal, Habeas Corpus and Constitutionality has the duty, in the unconstitutionality cases that are set before it, to pronounce itself and examine each and every one of the foundations of the law that may be applied to the case that is presented, whether or not they have been alleged by the parts, contributing with its own doctrine and jurisprudence analysis, and extensively interpreting the Constitution with the goal of providing maximum protection.
6. Explain why the Court of Constitutionality did not do the corresponding analysis within File 898-2017, in accordance with articles 42 and 144 of the Law of Appeal, Habeas Corpus and Constitutionality.

FOR THE MOVIMIENTO SINDICAL, INDIGENA Y CAMPESINO GUATEMALTECO - MSICG



Efrén Emigdio Sandoval Sanabria
Political Council, MSICG

