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ILO principles concerning collective bargaining

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Collective bargaining, as was only to be expected, has felt the impact of the major changes affecting the world over the past 25 years: the general acceptance of the market economy following the fall of the Berlin Wall, the debate on the role and structure of the State, economic restructuring and globalization, the ready availability of efficient ways of fighting inflation, the growth of non-standard forms of work and temporary contracts, the ongoing process of political and social democratization, the growing autonomy of trade unions from political parties, and many other factors too numerous to mention.

All these factors have had a varied and significant impact on collective bargaining. The scope of collective bargaining in terms of the categories covered has diminished, owing to inter alia high levels of unemployment and the growth of the informal sector, of subcontracting and of the various forms of non-standard employment relationship (which make unionization more difficult); there has, however, been a certain tendency for collective bargaining to develop in the public sector. Collective bargaining has also lost some of its margin for manoeuvre as a result of the successive economic crises and the subjection of national economic policy to processes of rationalization and economic integration and agreements with the Bretton Woods institutions.

The increasingly harsh competition brought about by technological innovation and globalization has led to a reduction in the influence exercised in many countries by sectoral agreements and has given added importance to collective bargaining at the enterprise level (and at lower levels, such as the work unit, the factory or the workplace), strictly taking into account the criteria of productivity and output. Flexibilization and deregulation of work have thus encouraged the growth of collective bargaining at enterprise level.

At the same time, there has been an increasing need for bilateral and tripartite agreements at national level, since certain issues of collective interest cannot be treated in enterprise- or even branch-level bargaining, especially when a country displays significant regional or sectoral differences. The bilateral or tripartite pacts agreed in many countries have a scope reaching beyond conditions of work in the strict sense, given that they cover employment, vocational training, inflation and other social issues (see, for example, ILO,

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1995a; and Héthy, 1995). These agreements enhance the prestige of collective bargaining, as they settle questions formerly covered at most by non-binding consultations between the social partners.

The ILO has carried out an enormous amount of standard-setting work during the 80 years of its existence as it has sought to promote social justice (see Valticos, 1996 and 1998), and one of its chief tasks has been to advance collective bargaining throughout the world. This task was already laid down in the Declaration of Philadelphia, 1944, part of the ILO Constitution, which stated "the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve ... the effective recognition of the right of collective bargaining" (ILO, 1998a, pp. 23-24). This principle is embodied in the Right to Organise and Collective Bargaining Convention, No. 98, which was adopted five years later in 1949, and which since has achieved near-universal acceptance: as of January 2000, the number of member States having ratified it stood at 145, which demonstrates the force of the principles involved in the majority of countries.

More recently, in June 1998, the ILO took another step forward by adopting the Declaration on Fundamental Principles and Rights at Work and its Follow-up (see Kellerson, 1998). This states that "all Members, even if they have not ratified the [fundamental] Conventions, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those [fundamental] Conventions" (ILO, 1999a, p. 51). These principles include the effective recognition of the right to collective bargaining, along with freedom of association and the elimination of forced or compulsory labour, the effective abolition of child labour and the elimination of discrimination in employment and occupation.

The framework within which collective bargaining must take place if it is to be viable and effective is based on the principle of the independence and autonomy of the parties and the free and voluntary nature of the negotiations; it requires the minimum possible level of interference by the public authorities in bipartite negotiations and gives primacy to employers and their organizations and workers' organizations as the parties to the bargaining. The ILO has also encouraged tripartite national agreements which are similar to those reached within the Organization by representatives of workers, employers and governments.

History has shown that the principles contained within this framework have retained their validity ever since Convention No. 98 was adopted 50 years ago, despite subsequent radical changes in the world — which is why the present article seemed opportune.

The purpose of this article is to set out the ILO's principles of collective bargaining as they emerge from the various international standards adopted by the Organization and the comments made by its supervisory bodies (notably the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association). The definition and purpose of

collective bargaining, the workers and subjects covered will first be set out. Then follow the principles of voluntary negotiation and good faith, the intervention of the authorities and the particular case of the public service. Finally, a summary of the principles is presented along with some final observations on the degree to which the right to collective bargaining is applied across the world. [1]

Definition and purpose of collective bargaining

In the ILO's instruments, [2] collective bargaining is deemed to be the activity or process leading up to the conclusion of a collective agreement. In Recommendation No. 91, Paragraph 2, collective agreements are defined as:

> all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other (ILO, 1996b, p. 656).

The text goes on to state that collective agreements should bind the signatories thereto and those on whose behalf the agreement is concluded and that stipulations in such contracts of employment which are contrary to a collective agreement should be regarded as null and void and automatically replaced by the corresponding stipulations of the collective agreement. However, stipulations in contracts of employment which are more favourable to the workers than those prescribed by a collective agreement should not be regarded as contrary to the collective agreement (ibid., Paragraph 3, p. 657). In 1951, Recommendation No. 91 set out the binding nature of collective agreements [3] and their precedence over individual contracts of employment, while recognizing the stipulations of individual contracts of employment which are more favourable for workers.

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[1] For reasons of space, this article does not deal with the right to strike or related issues such as "social peace", workers' right to information and the duration of collective agreements, which are covered in a recent publication (Gernigon, Odero and Guido, 2000).

[2] The ILO has adopted a number or instruments dealing directly or indirectly with collective bargaining and related issues: the Collective Agreements Recommendation, 1952 (No. 91), the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Workers' Representatives Convention, 1971 (No. 135), the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), the Rural Workers' Organisations Recommendation, 1975 (No. 149), the Labour Relations (Public Service) Convention, 1978 (No. 151), the Labour Relations (Public Service) Recommendation, 1978 (No. 159), the Collective Bargaining Convention, 1981 (No. 154), and the Collective Bargaining Recommendation, 1981 (No. 163). For the sake of readability, ILO instruments will hereafter be referred to by their number. The texts of the Conventions and Recommendations are all presented chronologically in ILO, 1996b, 1996c and 1996d, and those concerning collective bargaining in ILO, 1995b.

[3] The binding nature of collective agreements can be established either by legislative means or by the collective agreement itself, according to the method followed in each country (ILO, 1951, p. 603).

On several occasions, the Committee on Freedom of Association has expressed its preference for collective agreements over individual employment contracts, objecting to equal status being given to the latter or to their being used to the detriment of workers belonging to a union (see, for example, ILO, 1996a, para. 911; and ILO, 1997a, paras. 517-518). Thus, in a case concerning the United Kingdom, the Committee on Freedom of Association indicated that avoiding a representative organization and entering into direct individual negotiation with employees is contrary to the promotion of collective bargaining (ILO, 1998e, Case No. 1852, para. 337). For its part, the Committee of Experts considers that granting primacy to individual agreements over collective agreements does not encourage and promote collective bargaining as required by Article 4 of Convention No. 98 (ILO, 1998c, p. 224).

Convention No. 98 does not contain a definition of collective agreements, but outlines their fundamental aspects in Article 4:

> Measures appropriate to national conditions shall be taken ... to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations with a view to the regulation of terms and conditions of employment by means of collective agreements (ILO, 1996b, p. 640).

In the preparatory work for Convention No. 151 (1978) the interpretation of the term "negotiation" was accepted as being "any form of discussion, formal or informal, that was designed to reach agreement", the term "negotiation" being deemed preferable to "discussion", which did not emphasize the need to endeavour to secure agreement (ILO, 1978, paras. 64-65, p. 25/9).

Convention No. 154, adopted in 1981, defines collective bargaining in Article 2 as follows:

> [T]he term "collective bargaining" extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for: (a) determining working conditions and terms of employment; and/or (b) regulating relations between employers and workers; and/or (c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations (ILO, 1996d, p. 93).

The ILO supervisory bodies have also stated that the parties to collective bargaining are entitled to choose, independently and without any interference from the authorities, the level at which the negotiation is to be conducted (central, sectoral or enterprise level), and that trade union federations and confederations should be able to conclude collective agreements (ILO, 1994a, para. 249; and ILO, 1996a, para. 783).

Subjects, parties, and issues in collective bargaining

ILO instruments, as explained above, clearly permit collective bargaining only with representatives of the workers concerned if there are no workers' organizations in the area in question (enterprise level or higher). This standard

is set out in Paragraph 2 of Recommendation No. 91 and is confirmed in Convention No. 135, which provides in Article 5 that "the existence of elected representatives is not used to undermine the position of the trade unions concerned or their representatives" (ILO, 1996c, p. 496); and in Convention No. 154, which also provides in Article 3, paragraph 2, that "appropriate measures shall be taken, whenever necessary, to ensure that the existence of these [workers'] representatives is not used to undermine the position of the workers' organisations concerned" (ILO, 1996d, p. 93).

The preparatory work for the Collective Agreements Recommendation, 1951 (No. 91), shows that the possibility for representatives of workers to conclude collective agreements in the absence of one or various representative organizations of workers is envisaged in the Recommendation, "taking into consideration the position of those countries in which trade union organisations have not yet reached a sufficient degree of development, and in order to enable the principles laid down in the Recommendation to be implemented in such countries" (ILO, 1951, p. 603).

The Committee on Freedom of Association maintained in one case that "direct settlements signed between an employer and a group of non-unionized workers, even when a union exists in the undertaking, does not promote collective bargaining as set out in Article 4 of Convention No. 98" (ILO, 1996a, para. 790). Going into greater detail, in another case the Committee on Freedom of Association stated that the possibility for staff delegates who represent 10 per cent of the workers to conclude collective agreements with an employer, even where one or more organizations of workers already exist, is not conducive to the development of collective bargaining in the sense of Article 4 of Convention No. 98 (ibid., para. 788). The Committee of Experts did not address these issues in its last general survey on freedom of association and collective bargaining of 1994 on Conventions No. 87 and No. 98 (ILO, 1994a), although it has done so in observations on the application in certain countries of the Conventions on freedom of association and collective bargaining, in which it has expressed a similar point of view to that of the Committee on Freedom of Association with regard to collective agreements concluded with non-unionized groups of workers (see, for example, the observations concerning Costa Rica, in ILO, 1993a, pp. 184-185; and in ILO, 1994b, pp. 203-204).

It is important to emphasize that, for workers' organizations to be able to fulfil their purpose of "furthering and defending the interests of workers" through collective bargaining, they have to be independent and must be able to organize their activities without any interference by the public authorities which would restrict this right or impede the lawful exercise thereof (Convention No. 87, Articles 3 and 10, ILO, 1996b, pp. 528-529). Moreover, they must not be "under the control of employers or employers' organisations" (Convention No. 98, Article 2, ibid., pp. 639-640).

In this respect, Convention No. 151 provides in Article 5 that "public employees' organisations shall enjoy complete independence from public authorities" (ILO, 1996d, p. 49), while Recommendation No. 91 indicates in Paragraph 2 that "nothing in the present definition [of collective agreements]

should be interpreted as implying the recognition of any association of workers established, dominated or financed by employers or their representatives" (ILO, 1996b, p. 656).

The requirement of a certain level of representativeness

Another issue which needs to be examined is whether the right to negotiate is subject to a certain level of representativeness. In this respect, it should be recalled, depending on the individual system of collective bargaining, that trade union organizations which participate in collective bargaining may represent only their own members or all the workers in the negotiating unit concerned. In this latter case, where a trade union (or, as appropriate, trade unions) represents the majority of the workers, or a high percentage established by law which does not imply such a majority, in many countries it enjoys the right to be the exclusive bargaining agent on behalf of all the workers in the bargaining unit.

The position of the Committee of Experts is that both systems are compatible with the Convention (ILO, 1994a, paras. 238-242). In a case concerning Bulgaria, when examining the question raised by the complainant organization that some collective agreements apply only to the parties to the agreement and their members and not to all workers, the Committee on Freedom of Association considered that "this is a legitimate option — just as the contrary would be — which does not appear to violate the principles of freedom of association, and one which is practised in many countries" (ILO, 1996e, Case No. 1765, para. 100). The Committee of Experts has stated that:

> [W]hen national legislation provides for a compulsory procedure for recognizing unions as exclusive bargaining agents [representing all the workers, and not just their members], certain safeguards should be attached, such as: (a) the certification to be made by an independent body; (b) the representative organization to be chosen by a majority vote of the employees in the unit concerned; (c) the right of an organization, which in a previous trade union election failed to secure a sufficiently large number of votes, to request a new election after a stipulated period; (d) the right of any new organization other than the certified organization to demand a new election after a reasonable period has elapsed.
> [I]f no union covers more than 50 per cent of the workers, collective bargaining rights should be granted to all unions in this unit, at least on behalf of their own members (ILO, 1994a, paras. 240-241).

The Committee on Freedom of Association has upheld principles and decisions along the same lines as the Committee of Experts (ILO, 1996a, paras. 831-842), and has justified that decisions concerning the most representative union should be made "by virtue of objective and pre-established criteria so as to avoid any opportunities for partiality or abuse (ibid., para. 827).

Recommendation No. 163 enumerates various measures designed to promote collective bargaining, including the recognition of representative employers' and workers' organizations (ILO, 1996d, p. 97, Paragraph 3).

Workers covered by collective bargaining

Convention No. 98 (in Articles 4-6) establishes the relationship between collective bargaining and the conclusion of collective agreements for the regulation of terms and conditions of employment. It provides that "the extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations", and also states that "this Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way" (ILO, 1996b, p. 640). Under this Convention, only the armed forces, the police and the above category of public servants may therefore be excluded from the right to collective bargaining. With regard to this type of public servants, the Committee of Experts has stated the following:

> The Committee could not allow the exclusion from the terms of the Convention of large categories of workers employed by the State merely on the grounds that they are formally placed on the same footing as public officials engaged in the administration of the State. The distinction must therefore be drawn between, on the one hand, public servants who by their functions are directly employed in the administration of the State (for example, in some countries, civil servants employed in government ministries and other comparable bodies, as well as ancillary staff) who may be excluded from the scope of the Convention and, on the other hand, all other persons employed by the government, by public enterprises or by autonomous public institutions, who should benefit from the guarantees provided for in the Convention (ILO, 1994a, para. 200).

The Committee on Freedom of Association has made statements in the same vein (ILO, 1996a, paras. 793-795 and 798).

Subjects covered by collective bargaining

Conventions No. 98, No. 151 and No. 154 and Recommendation No. 91 focus the content of collective bargaining on terms and conditions of work and employment and on the regulation of the relations between employers and workers and between organizations of employers and of workers.

The concept of working conditions used by the supervisory bodies is not limited to traditional working conditions (working time,[4] overtime, rest periods, wages, etc.), but also covers "certain matters which are normally included in conditions of employment", such as promotions, transfers, dismissal without notice, etc. (ILO, 1994a, para. 250 including footnote 17). This trend is in line with the modern tendency in industrialized countries to recognize "managerial" collective bargaining concerning procedures to resolve problems, such as staff reductions, changes in working hours and other matters which go beyond terms of employment in their strict sense. According to the Committee of Experts, "it

[4] For example, according to the Committee of Experts, it should be possible to agree through collective agreements to a shorter working day than that envisaged by law (ILO, 1998c, p. 256).

would be contrary to the principles of Convention No. 98 to exclude from collective bargaining certain issues such as those relating to conditions of employment" and "measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with the Convention" (ibid., paras. 265 and 250, respectively).

Nevertheless, although the range of subjects which can be negotiated and their content is very broad, they are not absolute and need to be clearly related to conditions of work and employment or, in other words, matters which are primarily or essentially questions relating to conditions of employment (ILO, 1996a, para. 812). Moreover, the supervisory bodies allow the exclusion from the subjects covered by negotiation of matters which are for the employer to decide upon as part of the freedom to manage the enterprise, such as the assignment of duties and appointments (ILO, 1998c, p. 259). They also allow the prohibition of certain clauses, such as discriminatory clauses, clauses of trade union security, or clauses which are contrary to the minimum standards of protection set out in the law.

The Committee on Freedom of Association has indicated that certain matters can also reasonably be regarded as outside the scope of negotiation, such as "matters which clearly appertain primarily or essentially to the management and operation of government business" (ILO, 1996a, para. 812). In a recent case against the Government of Canada (Ontario), the Committee on Freedom of Association noted that:

> Determining the broad lines of educational policy has been given as an example of a matter that can be excluded from collective bargaining; ... However, [the Committee indicated that] policy decisions may have important consequences on conditions of employment, which should be the subject of free collective bargaining (ILO, 1998b, Case No. 1951, para. 220).

Governing principles

The principle of free and voluntary negotiation

The voluntary nature of collective bargaining is explicitly laid down in Article 4 of Convention No. 98 and, according to the Committee on Freedom of Association, is "a fundamental aspect of the principles of freedom of association" (ILO, 1996a, para. 844). Thus, the obligation to promote collective bargaining excludes recourse to measures of compulsion. During the preparatory work for Convention No. 154, the Committee on Collective Bargaining agreed upon an interpretation of the term "promotion" (of collective bargaining) in the sense that it "should not be capable of being interpreted in a manner suggesting an obligation for the State to intervene to impose collective bargaining", thereby allaying the fear expressed by the Employer members that the text of the Convention could imply the obligation for the State to take compulsory measures (ILO, 1981, p. 22/6).

The Committee on Freedom of Association, following this line of reasoning, has stated that nothing in Article 4 of Convention No. 98 places a duty on a

government to enforce collective bargaining with a given organization by compulsory means, and that such an intervention by a government would clearly alter the nature of bargaining (ILO, 1996a, para. 846).

It cannot therefore be deduced from the ILO's Conventions on collective bargaining that there is a formal obligation to negotiate[5] or to achieve a result (an agreement). Nevertheless, the supervisory bodies have considered that the criteria established by law should enable the most representative organizations to take part in collective bargaining (ILO, 1994a, para. 245), which implies the recognition or the duty to recognize such organizations. Moreover, the Committee of Experts, when examining the application of Convention No. 98, has not criticized the prohibition of certain unfair labour practices in the process of negotiation likely to hinder the development of collective bargaining (ibid., para. 246). Similarly, the principles of the supervisory bodies emphasize that the machinery which supports bargaining (the provision of information, consultation, mediation, arbitration) should be of a voluntary nature, in spite of which many national legislations oblige the parties to follow fixed procedures setting out all the stages and phases of the negotiation process, and under which there are frequent and compulsory interventions by the administrative authorities with predetermined time limits.

However, in practice, the supervisory bodies have accepted the imposition of certain sanctions in the event of conduct which is contrary to good faith or which constitutes unfair practice in the course of collective bargaining, provided that they are not disproportionate,[6] and have admitted conciliation and mediation imposed by law within reasonable time limits.[7] These criteria have undoubtedly taken into account the objective of promoting collective bargaining in situations in which the trade union movement is not sufficiently developed. They have also taken account of the underlying concern in many legislations to avoid unnecessary strikes and precarious and tense situations resulting from the failure to renew collective agreements, particularly where they cover extensive categories of workers.

Free choice of bargaining level

In this respect, Recommendation No. 163 provides that "Measures adapted to national conditions should be taken, if necessary, so that collective bargaining is possible at any level whatsoever, including that of the establishment, the

[5] The obligation to negotiate is imposed in certain countries. See, in this respect, two documents presented to the Joint Committee on the Public Service: ILO, 1988, especially p. 25; and ILO, 1970.

[6] For example, when examining the Panamanian legislation and noting that the employer was obliged to pay the workers for days when they had been on strike, in cases where the strike had occurred because the employer had not replied to the demands which had been made and because conciliation had been abandoned, the Committee on Freedom of Association considered that the sanctions were disproportionate (ILO, 1999b, Case No. 1931, para. 371).

[7] See, for example, ILO, 1997b, Case No. 1898 (Guatemala), para. 324; and ILO, 1996f, Case No. 1822 (Venezuela), paras. 508-509; see also ILO, 1998c, pp. 252-253.

undertaking, the branch of activity, the industry, or the regional or national levels" (ILO, 1996d, pp. 97-98, Paragraph 4).

Similarly, the Committee of Experts, after recalling that the right to bargain collectively should also be granted to federations and confederations, and rejecting any prohibition of the exercise of this right, has stated that:

> [L]egislation which makes it compulsory for collective bargaining to take place at a higher level (sector, branch of activity, etc.) also raises problems of compatibility with the Convention [No. 98]. The choice should normally be made by the partners themselves, since they are in the best position to decide the most appropriate bargaining level, including, if they so wish, by adopting a mixed system of framework agreements supplemented by local or enterprise-level agreements (ILO, 1994a, para. 249).

The Committee on Freedom on Association has developed this point further along the following lines:

> According to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case-law of the administrative labour authority.[8]
> ... Thus, the Committee does not consider the refusal by employers to bargain at a particular level as an infringement of freedom of association.
> Legislation should not constitute an obstacle to collective bargaining at the industry level (ILO, 1996a, paras. 851-853).

In this respect, the Committee considers that the requirement of the majority of not only the number of workers, but also of enterprises, in order to be able to conclude a collective agreement on the branch or occupational level could raise problems with regard to the application of Convention No. 98 (ibid., para. 854; and ILO, 1997a, para. 553). The Committee of Experts shares this view (ILO, 1996g, p. 215). Furthermore, it should be sufficient for the trade union at the branch level to establish that it is sufficiently representative at the enterprise level (ILO, 1996h, Case No. 1845 (Peru), para. 516).

As regards the principle that the parties involved decide by mutual agreement the level at which bargaining should take place, the Committee has noted that, in many countries, this question is determined by a body that is independent of the parties themselves. The Committee considers that in such cases the body concerned should be "truly independent" (ILO, 1996a, para. 855).

The supervisory bodies have not established criteria concerning the relationship between collective agreements at the different levels (which may address the economy in general, a sector or industry, an enterprise or group of enterprises, or an establishment or factory); and which may, according to the individual case, have a different geographical scope. In principle, this should depend on the wishes of the parties. In practice, the supervisory bodies accept systems in which it is left to collective agreements to determine how they are to

[8] See also ILO, 1998d, Case No. 1887 (Argentina), para. 103.

be coordinated (for example, by establishing that a problem resolved in one agreement cannot be decided upon at other levels), as well as systems in which legal provisions distribute subjects between collective agreements, give primacy to a specific level, adopt the criteria of the standards which are the most favourable to the workers, or which do not establish criteria and leave these questions to practical application. Recommendation No. 163 indicates in Paragraph 4 that "in countries where collective bargaining takes place at several levels, the parties to negotiations should seek to ensure that there is co-ordination among these levels" (ILO, 1996d, p. 98).

The principle of good faith

In the preparatory work for Convention No. 154, it was recognized that collective bargaining could only function effectively if it was conducted in good faith by both parties; but as good faith cannot be imposed by law, it "could only be achieved as a result of the voluntary and persistent efforts of both parties" (ILO, 1981, p. 22/11).

The Committee on Freedom of Association, in addition to drawing attention to the importance that it attaches to the obligation to negotiate in good faith, has stated that the principle of good faith implies making every effort to reach an agreement, conducting genuine and constructive negotiations, avoiding unjustified delays, complying with the agreements which are concluded and applying them in good faith; to this may be added the recognition of representative trade union organizations (ILO, 1996a, paras. 814-818; and ILO, 1997c, Case No. 1919 (Spain), para. 325). The principle of the mutual respect for commitments entered into in collective agreements is explicitly recognized in Recommendation No. 91, which provides that "collective agreements should bind the signatories thereto and those on whose behalf the agreement is concluded" (ILO, 1996b, p. 657, Paragraph 3).

For its part, the Committee of Experts has stated that:

> In several countries legislation makes the employer liable to sanctions if he refuses to recognize the representative trade union, an attitude which is sometimes considered as an unfair labour practice. The Committee recalls in this connection the importance which it attaches to the principle that employers and trade unions should negotiate in good faith and endeavour to reach an agreement, the more so in the public sector or essential services where trade unions are not allowed strike action (ILO, 1994a, para. 243).

Voluntary procedures and compulsory arbitration

The role of machinery to facilitate negotiations

According to the Committee of Experts, the existing machinery and procedures should be designed to facilitate bargaining between the two sides, leaving them free to reach their own settlement (ILO, 1994a, para. 248). The Committee on Freedom of Association has established the following:

> The bodies appointed for the settlement of disputes between the parties to collective bargaining should be independent, and recourse to these bodies should be on a voluntary basis.
> Certain rules and practices can facilitate negotiations and help to promote collective bargaining and various arrangements may facilitate the parties' access to certain information concerning, for example, the economic position of their bargaining unit, wages and working conditions in closely related units, or the general economic situation; however, all legislation establishing machinery and procedures for arbitration and conciliation designed to facilitate bargaining between both sides of industry must guarantee the autonomy of parties to collective bargaining (ILO, 1996a, paras. 858-859).

The supervisory bodies admit conciliation and mediation which are voluntary or imposed by law, if they are within reasonable time limits (ibid., paras. 502-504) — as well as voluntary arbitration — in accordance with the provisions of Recommendation No. 92 which indicates that: "Provision should be made to enable the procedure to be set in motion, either on the initiative of any of the parties to the dispute or ex officio by the voluntary conciliation authority" (ILO, 1996b, p. 659, Paragraph 3).

Compulsory arbitration

One of the most radical forms of intervention by the authorities in collective bargaining, directly under the terms of the law or as a result of an administrative decision, is the imposition of compulsory arbitration when the parties do not reach agreement, or when a certain number of days of strike action have elapsed.[9] Compulsory arbitration may also be sought by one of the parties, but always conflicts with the voluntary nature of negotiation, since the solution which is imposed is not derived from the will of both parties, but from a third party to whom they have not had recourse jointly.

The supervisory bodies admit recourse to compulsory arbitration at the initiative of the authorities, or of one of the parties, or ex officio by law in the event of an acute national crisis, in the case of disputes in the public service involving public servants exercising authority in the name of the State (who can be excluded from the right to collective bargaining under Convention No. 98) or in essential services in the strict sense of the term, namely, those services whose interruption would endanger the life, personal safety or health of the whole or part of the population (ILO, 1996a, paras. 515 and 860-863). Evidently, compulsory arbitration is also acceptable where it is provided for in the collective agreement as a mechanism for the settlement of disputes. It is also acceptable, as the Committee on Freedom of Association, following the Committee of Experts, has recently indicated in cases where, after protracted and fruitless negotiations, it is obvious that the deadlock in bargaining will not be broken without some initiative on the part of the authorities (ILO, 1995c, Case No. 1768 (Iceland), para. 109).

[9] On the relation between strikes and collective bargaining, see Gernigon, Odero and Guido, 1998.

Intervention by the authorities

In the ILO's Conventions on collective bargaining, there are no provisions covering possible conflicts between the specific interests of the parties and the general interest of the population. This omission was deliberate, and not a result of negligence (ILO, 1981, para. 64, p. 22/8). In practice, in situations of extremely serious economic crisis (such as situations of war or in the subsequent periods of economic reconstruction) or in order to combat inflation, achieve a balance of payments or combat unemployment or other economic objectives, governments have resorted to restrictive policies on wages and incomes. These have been implemented through measures to freeze wages or confine wage rises to certain limits, and have often included mechanisms requiring the approval, modification or annulment of collective agreements that are in force. A freeze is often also imposed in prices and in guaranteed minimum wage levels which affects low-paid workers. The measures taken to pursue these policies may or may not have been adopted with the agreement of employers' and workers' organizations, which are sometimes consulted or included in commissions responsible for developing the policies (see ILO, 1974).

As will be seen below, the limitations implied by such adjustment policies are not acceptable in the view of the supervisory bodies in cases where they change the content of collective agreements which have already been concluded. However, they are admissible when they are imposed on future negotiations, provided that the situation is urgent and a series of guarantees are secured, which are enumerated below. The various types of intervention by the authorities in collective bargaining are covered below. Depending on the case, these may be adopted for technical, legal or economic reasons.

Drafting and registration of collective agreements

In the opinion of the Committee on Freedom of Association, intervention by the public authorities in the drafting of collective agreements is not compatible with the spirit of Article 4 of Convention No. 98, unless it consists exclusively of technical aid (ILO, 1996a, para. 866).

According to the supervisory bodies, refusal to approve a collective agreement is permitted only on grounds of errors of pure form or procedural flaws (ibid., para. 868), or where the collective agreement does not conform to the minimum standards laid down by general labour legislation (ILO, 1994a, para. 251). However, legislative provisions are not compatible with Convention No. 98 where they permit the refusal to register or approve a collective agreement on grounds such as incompatibility with the general or economic policy of the government or official directives on wages or conditions of work; a situation which requires prior approval of collective agreements by the authorities amounts to a violation of the principle of the autonomy of the parties to negotiation (ILO, 1996a, paras. 868-869; and ILO, 1994a, para. 251).

Nevertheless, for reasons of general interest, governments establish mechanisms so that the parties take into account considerations relating to their economic and social policy and the protection of the general interest. Both the

Committee of Experts and the Committee on Freedom of Association accept these mechanisms, provided that they are not of a compulsory nature. The Committee of Experts has indicated that:

> The public authorities could also envisage a procedure to draw the attention of the parties in certain cases to considerations of general interest that might call for further examination by them of proposed agreements, provided, however, that preference is always given to persuasion rather than coercion (ILO, 1994a, para. 253).

The Committee on Freedom of Association has stated that if the public authority considers that the terms of the imposed agreement are clearly contrary to the economic policy objectives recognized as being in the public interest, the case could be submitted for advice and recommendation to an appropriate consultative body, provided, however, that the final decision would rest with the parties (ILO, 1996a, para. 872).

However, these considerations must not be confused with stabilization policies which result in significant and generalized restrictions on future wage negotiations, which will be specifically examined in a separate section below.

Interference in the application of collective agreements in force

When the outcome of collective bargaining is restricted or annulled by law or by decision of the administrative authorities, industrial relations are destabilized and workers lose their confidence in their trade union organizations, particularly when this type of intervention implies wage restrictions. These interventions violate the principle of free and voluntary negotiation of agreements and take various forms, which have been strongly refuted by the Committee on Freedom of Association. These are: the suspension, interruption, annulment or forced renegotiation of the agreement, by law or by decree, without the consent of both parties (ILO, 1996a, paras. 875-880).

The compulsory extension of the validity of collective agreements by law, particularly where this occurs following previous government interventions, is only admissible in cases of emergency and for brief periods of time, since such measures amount to interference with free collective bargaining (ibid., para. 881).

Restrictions on future negotiations

The Committee of Experts has noted that, in the belief that the national economic situation requires stabilization measures, an increasing number of governments have taken steps to restrict or prevent the free fixing of wages by means of collective bargaining. In this respect, the Committee of Experts has established the following basic principle:

> [I]f, under an economic stabilization or structural adjustment policy, that is for imperative reasons of national economic interest, wage rates cannot be fixed freely by means of collective bargaining, these restrictions should be

> applied as an exceptional measure and only to the extent necessary, should not exceed a reasonable period and should be accompanied by adequate safeguards to protect effectively the standard of living of the workers concerned, in particular those who are likely to be the most affected (ILO, 1994a, para. 260).

The Committee on Freedom of Association has expressed itself in very similar terms and has added that, in any case, any limitation on collective bargaining by the authorities should be preceded by consultations with the workers' and employers' organizations in an effort to obtain their agreement (ILO, 1996a, paras. 882-884).

The Committee has indicated that the basic principle with regard to wage restrictions in the context of stabilization policies and the required guarantees are also applicable in cases in which the law obliges future collective agreements to respect productivity criteria, or the negotiation of wage increases beyond the level of the increase in the cost of living (ibid., paras. 890-892).

With regard to the duration of restrictions on collective bargaining, the Committee has considered that a three-year period of limited collective bargaining on remuneration within the context of a policy of economic stabilization constitutes a substantial restriction, and the legislation in question should cease producing effects at the latest at the dates mentioned in the legislation, or indeed earlier if the fiscal and economic situation improves (ibid., para. 886). Similarly, where wage restraint measures are taken by a government to impose financial controls, care should be taken to ensure that collective bargaining on non-monetary matters can be pursued (ibid., para. 888).

Collective bargaining in the public service

The exercise of the right of freedom of association by organizations of public officials and employees is now a reality in industrialized countries and in many developing countries. Convention No. 98, adopted in 1949, excluded from its scope public servants engaged in the administration of the State, but Convention No. 151, adopted in 1978, took an important step forward in requiring States to promote machinery for negotiation or such other methods as allow representatives of public employees to participate in the determination of their terms and conditions of employment. According to Article 1, the only categories which can be excluded (apart from the armed forces and the police, as in previous Conventions) are "high-level employees whose functions are normally considered as policy-making or managerial" and "employees whose duties are of a highly confidential nature" (ILO, 1996d, p. 48).

A few years later, in 1981, came the adoption of Convention No. 154, which promotes collective bargaining in both the private sector and the public service (with the exception of the armed forces and the police) and only allows, for the public service, the fixing of special modalities of application of the Convention by national laws or regulations or national practice (ibid., Article 1, p. 93). A state which ratifies the Convention cannot confine itself to consultations, but has to promote collective bargaining with the aim, inter alia, of

determining working conditions and terms of employment.[10] It should be pointed out, as a matter of interest which facilitated the inclusion of the public service, that, in contrast with Convention No. 98, Convention No. 154 no longer refers to the determination of terms and conditions of employment by means of formal collective agreements (which in many countries have force of law, whilst in certain countries ordinary agreements between parties are not even legally binding). Such a provision would have made it impossible for this right to be included, in view of the objections of the states which were prepared to recognize collective bargaining in the public service, but without renouncing at the same time a statutory system; see von Potobsky, 1988, p. 1890.

Characteristics of collective bargaining in the public service

Collective bargaining in the public service raises specific problems. On the one hand, there are often one or more national conditions of service designed to achieve uniformity, which are in general approved by Parliament, and which often contain exhaustive regulations covering the rights, duties and conditions of public servants, thereby prohibiting or leaving little room for negotiation. On the other hand, the remuneration of public servants has financial implications which have to be reflected in public budgets, which are approved by such bodies as parliaments and municipalities, etc. These bodies are not always the employers of public servants and their decisions have to take into account the economic situation of the country and the general interest. Associations which participate in negotiations in the public service are therefore very frequently subject to directives or the control of external bodies, such as the Ministry of Finance or an interministerial committee. Moreover, the period of duration of collective agreements in the public sector does not always coincide with the duration of budgetary laws — a situation which can give rise to difficulties.

These problems are compounded by other difficulties, such as the determination of the subjects for negotiation and their distribution between the various levels within the complex territorial and operational structure of the State, as well as the determination of the negotiating parties at these levels.

This explains why, according to Conventions No. 151 and No. 154, it is admissible for special modalities of application to be fixed for collective bargaining in the public service. The Committee of Experts has not yet carried out a general survey on this subject and the principles set out by the ILO's supervisory bodies have focused mainly on budgetary matters and interventions by the authorities in freely concluded agreements. The question arises as to whether these specific modalities include: (a) the harmonization of an agreed system with a statutory system (von Potobsky, 1988, pp. 1888-1889, 1892); (b) the exclusion from bargaining of certain subjects; (c) the centralization of negotiation on subjects with budgetary implications or which would imply changes

[10] As of 1 January 2000, Convention No. 151 had been ratified by 36 countries and Convention No. 154 by 30 countries.

in the laws governing the conditions of service of public servants; or (d) the possibility that the legislative authority should determine certain directives, preceded by discussions with the trade union organizations, within which each exercise of collective bargaining on issues relating to remuneration or other matters with financial implications must remain. The answer to these questions is likely to be affirmative, given that the Conventions in question allow a certain amount of flexibility.

In the opinion of the Committee of Experts, the following are compatible with the Conventions on collective bargaining:

> [L]egislative provisions which allow Parliament or the competent budgetary authority to set upper and lower limits for wage negotiations or to establish an overall "budgetary package" within which the parties may negotiate monetary or standard-setting clauses (for example: reduction of working hours or other arrangements, varying wage increases according to levels of remuneration, fixing a timetable for readjustment provisions) or those which give the financial authorities the right to participate in collective bargaining alongside the direct employer are compatible with the Convention, provided they leave a *significant* role to collective bargaining. It is essential, however, that workers and their organizations be able to participate fully and meaningfully in designing this overall bargaining framework, which implies in particular that they must have access to all the financial, budgetary and other data enabling them to assess the situation on the basis of the facts (ILO, 1994a, para. 263).

This is not the case of legislative provisions which, on the grounds of the economic situation of a country, impose unilaterally, for example, a specific percentage increase and rule out any possibility of bargaining, in particular by prohibiting the exercise of means of pressure subject to the application of severe sanctions (ILO, 1993b, Case No. 1617 (Ecuador), para. 63). In this respect, during periods of prolonged and widespread economic stagnation the Committee considers that the authorities should give preference as far as possible to collective bargaining in determining the conditions of employment of public servants; where the circumstances rule this out, measures of this kind should be limited in time and protect the standard of living of the workers who are the most affected (ILO, 1994a, para. 264).

This point of view has been shared by the Committee on Freedom of Association (ILO, 1996a, para. 899), which has also emphasized that "the *reservation of budgetary powers to the legislative authority* should not have the effect of preventing compliance with collective agreements entered into by, or on behalf of, that authority" (ibid., para. 894).

Like the Committee of Experts, the Committee on Freedom of Association has considered that:

> In so far as the income of public enterprises and bodies depends on state budgets, it would not be objectionable — after wide discussion and consultation between the concerned employers' and employees' organizations in a system having the confidence of the parties — for *wage ceilings to be fixed in state budgetary laws*, and neither would it be a matter for criticism that the

Ministry of Finance prepare a report prior to the commencement of collective bargaining with a view to ensuring respect of such ceilings (ibid., para. 896).[11]

Before such ceilings are established, both the employers and the public sector trade union organizations should be consulted and be able to express their points of view to the authority responsible for assessing the financial consequences of draft collective agreements. Nevertheless, "notwithstanding any opinion submitted by the financial authorities, the parties to collective bargaining should be able to conclude an agreement freely" (ibid., para. 897).

On the subject of the provisions of collective agreements relating to remuneration and conditions of employment which have financial implications, one of the fundamental principles mentioned above is that collective agreements must be respected by the legislative and administrative authorities. This principle is compatible with the various budgetary systems, provided that they meet certain conditions and, in particular, can accommodate, on the one hand, systems in which collective agreements resulting from negotiation are concluded before the budgetary debate (provided that the budgets in practice respect the content of the agreements) and, on the other hand, systems in which the agreements are concluded after the budget, provided they are sufficiently flexible. Such budgetary flexibility can be achieved in a number of ways: by permitting an internal adjustment of the budgetary items to give effect to collective agreements; by allowing the transfer to future budgets of the debt resulting from unforeseen expenditure derived from collective agreements in the public service; by permitting the budget to be changed in subsequent additional laws which allow compliance with the collective agreements; or, if there is significant latitude for negotiation, by determining maximum levels of remuneration in terms of percentage increases or the overall wage mass, after taking into account in good faith the outcome of significant prior consultations with trade union organizations.

Finally, the flexibility permitted by Convention No. 154 means that, when negotiation covers terms and conditions of employment which involve changes in the legislation respecting administrative careers or the conditions of service of public employees, its results can take the form of a commitment by the government authorities to submit draft legislation to parliament to amend the above texts along the lines of the negotiations (see ILO, 1995c, Case No. 1561 (Spain), para. 40).

Summary of ILO principles on the right to collective bargaining

The standards and principles emerging from the ILO's Conventions, Recommendations and other instruments on the right to collective bargaining, and the principles set forth by the Committee of Experts and the Committee on

[11] This should not be confused with the requirement of a preliminary opinion issued by the financial authorities (and not by the public employer) on draft collective agreements in the public sector and their financial implications during their negotiation. In principle, such an opinion is admissible.

Freedom of Association on the basis of these instruments, may be summarized as follows:

A. The right to collective bargaining is a fundamental right endorsed by the members of the ILO in joining the Organization, which they have an obligation to respect, to promote and to realize, in good faith (ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up).

B. Collective bargaining is a right of employers and their organizations, on the one hand, and organizations of workers, on the other hand (first-level trade unions, federations and confederations); only in the absence of these latter organizations may representatives of the workers concerned conclude collective agreements.

C. The right to collective bargaining should be recognized throughout the private and public sectors, and it is only the armed forces, the police and public servants engaged in the administration of the State who may be excluded from the exercise thereof (Convention No. 98).[12]

D. The purpose of collective bargaining is the regulation of terms and conditions of employment, in a broad sense, and the relations between the parties.

E. Collective agreements should be binding. It must be possible to determine terms and conditions of employment which are more favourable than those established by law and preference must not be given to individual contracts over collective agreements, except where more favourable provisions are contained in individual contracts.

F. To be effective, the exercise of the right to collective bargaining requires that workers' organizations are independent and not "under the control of employers or employers' organizations" and that the process of collective bargaining can proceed without undue interference by the authorities.

G. A trade union which represents the majority or a high percentage of the workers in a bargaining unit may enjoy preferential or exclusive bargaining rights. However, in cases where no trade union fulfils these conditions or such exclusive rights are not recognized, workers' organizations should nevertheless be able to conclude a collective agreement on behalf of their own members.

H. The principle of good faith in collective bargaining implies recognizing representative organizations, endeavouring to reach an agreement, engaging in genuine and constructive negotiations, avoiding unjustified delays in negotiation and mutually respecting the commitments entered into, taking into account the results of negotiations in good faith.

I. In view of the fact that the voluntary nature of collective bargaining is a fundamental aspect of the principles of freedom of association, collective

[12] Nevertheless, when a state ratifies the Collective Bargaining Convention, 1981 (No. 154), the right to collective bargaining is also applicable in the context of the public administration, for which special modalities of application may be fixed. By contrast, the Labour Relations (Public Service) Convention, 1978 (No. 151), provides a lower level of international protection for collective bargaining, since it permits, in the context of the public administration, the possibility of opting between collective bargaining and other methods for the determination of terms and conditions of employment.

bargaining may not be imposed upon the parties and procedures to support bargaining must, in principle, take into account its voluntary nature; moreover, the level of bargaining must not be imposed unilaterally by law or by the authorities, and it must be possible for bargaining to take place at any level.

J. It is acceptable for conciliation and mediation to be imposed by law in the framework of the process of collective bargaining, provided that reasonable time limits are established. However, the imposition of compulsory arbitration in cases where the parties do not reach agreement is generally contrary to the principle of voluntary collective bargaining and is only admissible: (1) in essential services in the strict sense of the term (those whose interruption would endanger the life, personal safety or health of the whole or part of the population); (2) with regard to public servants engaged in the administration of the State; (3) where, after prolonged and fruitless negotiations, it is clear that the deadlock will not be overcome without an initiative by the authorities; and (4) in the event of an acute national crisis. Arbitration which is accepted by both parties (voluntary arbitration) is always legitimate.

K. Interventions by the legislative or administrative authorities which have the effect of annulling or modifying the content of freely concluded collective agreements, including wage clauses, are contrary to the principle of voluntary collective bargaining. These interventions include: the suspension or derogation of collective agreements by decree without the agreement of the parties; the interruption of agreements which have already been negotiated; the requirement that freely concluded collective agreements be renegotiated; the annulment of collective agreements; and the forced renegotiation of agreements which are currently in force. Other types of intervention, such as the compulsory extension of the validity of collective agreements by law are only admissible in cases of emergency and for short periods.

L. Restrictions on the content of future collective agreements, particularly in relation to wages, which are imposed by the authorities as part of economic stabilization or structural adjustment policies for imperative reasons of economic interest, are admissible only in so far as such restrictions are preceded by consultations with the organizations of workers and employers and fulfil the following conditions: they are applied as an exceptional measure, and only to the extent necessary; do not exceed a reasonable period and are accompanied by adequate guarantees designed to protect effectively the standards of living of the workers concerned; and particularly those who are likely to be the most affected.

Final observations

The observations made by the Committee of Experts on the application of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), show that the large majority of states which have ratified the Convention apply it in a satisfactory manner. This demonstrates that it is a right which enjoys almost universal recognition.

By way of example, it may be pointed out that in its 1998 and 1999 reports the Committee of Experts made critical observations on 47 out of the 145 governments which have ratified Convention No. 98 (ILO, 1998c, pp. 249-299; and ILO, 1999c, pp. 322-351).

The problems noted most frequently in the observations of the Committee of Experts relate in particular to the denial of the right to collective bargaining, to public servants who are not engaged in the administration of the State, as well as the requirement for trade union organizations to represent too high a proportion of workers to be recognized or to engage in collective bargaining. Immediately afterwards comes the significant number of countries in which collective bargaining is subjected to the government's economic policy. Finally, certain countries exclude some subjects from collective bargaining, submit it to compulsory arbitration in certain cases, restrict the right of the parties to determine the level of bargaining, or prohibit collective bargaining by specific categories of workers in the private sector or of federations and confederations.

The near-universal endorsement of collective bargaining is due not only to the strength of the fundamental principles underlying it but also to its powers of adaptation. The contracting parties, that is, the employers and workers, are best placed to know their own aspirations and potential so that, in a bargaining process undertaken freely and in good faith, they can each make concessions, negotiate provisions satisfactory to all the parties involved, and arrive at mutually beneficial agreements. Thanks to its inherent nature, therefore, collective bargaining has been able to adapt to the major political and socio-economic changes outlined in the introduction. However, the impact of these changes, at the start of the year 2000, in no way diminishes the raison d'être, significance or achievements of collective bargaining, as proved by the very large network of collective agreements, at different levels and with a vast scope, to be found in many countries.

Will the picture be completed in the near future by the emergence of international collective bargaining within a context of multinational enterprises and regional economic integration? Up to now, the few instances of international collective bargaining have occurred only in certain transnational enterprises. It should be noted that Directive 94/45, adopted by the Council of Ministers in 1994, promotes consultation and collective bargaining in thousands of transnational enterprises and groups of enterprises with headquarters or branches in the European Union (European Communities, 1994). The first European works councils within the framework of this Directive have now been set up (see ILO, 1995d) and the social partners have also managed to conclude a number of European Union-wide agreements.

Though in recent years a radical view has been heard arguing for labour law to be abolished and replaced with civil and commercial laws, and though some legislations still place — sometimes severe — limits on collective bargaining, such ideas and practices are clearly only those of a minority and do not cast doubt on the ILO's principles on collective bargaining. On the contrary, as pointed out earlier, in the Declaration on Fundamental Principles and Rights at Work adopted by the ILO in 1998, the international community declared collective bargaining to be a fundamental right.

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