

International Labour Conference, 100th Session, 2011

Report of the Committee of Experts on the Application of Conventions and Recommendations

(articles 19, 22 and 35 of the Constitution)

Third item on the agenda:
Information and reports on the application
of Conventions and Recommendations

Report III (Part 1A)

General Report
and observations concerning particular countries

mandate given to it by the Governing Body,⁹ its task consists of evaluating national law and practice in relation to the requirements of international labour Conventions. It emphasizes in this respect the importance of the principles consistently followed by the Governing Body in appointing members of the Committee. They are appointed in a personal capacity and are selected on the basis of their independent standing, impartiality and competence. The members are drawn from all parts of the world and possess first-hand experience of different legal, economic and social systems. The Committee remains conscious of the fact that its work can have value only to the extent that it remains true to its principles of independence, objectivity and impartiality. Further, the Committee has always considered that its task is carried out in the context of an ongoing dialogue with governments, enhanced by the contribution of the employers' and workers' organizations.

11. Against this background, the Committee reiterates the functional approach that it has followed with regard to its role when examining the meaning of the provisions of Conventions. Although the Committee's mandate does not require it to give definitive interpretations of Conventions, it has to consider and express its views on the legal scope and meaning of certain provisions of these Conventions, where appropriate, in order to fulfil the mandate with which it has been entrusted of supervising the application of ratified Conventions. The examination of the meaning of the provisions of Conventions is necessarily an integral part of the function of evaluating and assessing the application and implementation of Conventions. The application of Conventions being the Committee's mandate, the Governing Body has therefore chosen to ensure that the Committee is composed of persons who are capable of fulfilling such mandate. The Committee ensures that the understanding of the provisions remains constant and uniform so that all member States may be guided in fulfilling their obligations arising from ratification of a Convention.

12. In responding to the request to clarify the methods followed when expressing its views on the meaning of the provisions of Conventions, the Committee reiterates that it constantly and consistently bears in mind all the different methods of interpreting treaties recognized under international public law, and in particular under the Vienna Convention on the Law of Treaties, 1969. In particular, the Committee has always paid due regard to the textual meaning of the words in light of the Convention's purpose and object as provided for by Article 31 of the Vienna Convention, giving equal consideration to the two authentic languages of ILO Conventions, namely the English and French versions (Article 33 of the Vienna Convention). In addition and in accordance with Articles 5 and 32 of the Vienna Convention, the Committee takes into account the Organization's practice of examining the preparatory work leading to the adoption of the Convention. This is especially important for ILO Conventions in view of the tripartite nature of the Organization and the role that the tripartite constituents play in standard setting.¹⁰

13. In examining these matters, the Committee has borne in mind the comments made on **the desirability of greater tripartite involvement in the supervision of the application of international labour Conventions**. In keeping with the spirit of mutual respect, cooperation and responsibility which prevails in the Committee's relations with the International Labour Conference and its Committee on the Application of Standards, the Committee engages in a process of continuous improvement of its methods of work consequent to the comments of the Conference Committee, and, where appropriate, refers to the Conference Committee's report in its observations and direct requests. The Committee considers that it would be in the interests of both Committees to further strengthen this relationship, by creating opportunities for an additional and more in-depth exchange of views on matters of common interest. It invites the Office to examine the possibilities for that purpose. It notes in this respect that the importance of reinforcing the complementary relationship between the two Committees was also discussed during its special sitting with the two Vice-Chairpersons of the Conference Committee on the Application of Standards.

Relations with the Conference Committee on the Application of Standards

14. As it has just emphasized, a spirit of mutual respect, cooperation and responsibility has consistently prevailed in the Committee's relations with the International Labour Conference and its Committee on the Application of Standards. The Committee of Experts takes the proceedings of the Conference Committee into full consideration, not only in respect of general matters concerning standard-setting activities and supervisory procedures, but also in particular with regard to specific matters concerning the way in which States fulfil their standards-related obligations. Moreover, the Committee pays close attention to the comments on its working methods that are made by the members of the Committee on the Application of Standards and the Governing Body, which it normally considers through its subcommittee, as it has done this year.

15. In this context, the Committee again welcomed the participation of Ms Bellace as an observer in the general discussion of the Committee on the Application of Standards at the 99th Session of the International Labour Conference

⁹ The Committee of Experts and the Conference Committee were established in 1926 under the same resolution by the International Labour Conference (see Appendix VII, proceedings of the Eighth Session of the International Labour Conference, 1926, Vol. 1). The Committee of Experts' terms of reference were extended by the Governing Body in 1947 (see Minutes of the 103rd Session of the Governing Body (1947), Appendix XII, para. 37).

¹⁰ An example of this approach can be found in the Committee's general observation on the application of Convention No. 169 which appears in Part II of the present report.

Indigenous and tribal peoples

General observation

Indigenous and Tribal Peoples Convention, 1989 (No. 169)

The Committee has been examining detailed reports on Convention No. 169 since the Convention came into force in 1991. The Committee notes that to date 22 countries have ratified the Convention. It also notes that one of the issues that it has most often examined since the Convention has been adopted relates to the “obligation to consult”.

The Committee has taken note of the comments made in June 2010 during the 99th Session of the International Labour Conference (ILC) in the Committee on the Application of Standards concerning the comments made in respect of the application of Convention No. 169 by a number of member States and the Employer members and, in particular, the comments made on the meaning and scope of “consultation” as provided for by the Convention. The Committee considers that it is important, in view of the significance of this concept under the Convention for the indigenous and tribal peoples, for governments and the social partners to further clarify its understanding of the concept.

The Committee of Experts has, on a number of occasions, stated that, although its mandate does not require it to give definitive interpretation of ILO Conventions, in order to carry out its function of determining whether the requirements of Conventions are being respected, it has to consider and express its views on the legal scope and meaning of the provisions of Conventions, where appropriate.¹ In doing so, the Committee has always paid due regard to the textual meaning of the words in light of the Convention’s purpose and object as provided for by Article 31 of the Vienna Convention on the Law of Treaties, giving equal consideration to the two authoritative texts of ILO Conventions, namely the English and French versions (Article 33 of the Vienna Convention). In addition and in accordance with Articles 5 and 32 of the Vienna Convention, the Committee takes into account the Organization’s practice of examining the preparatory work leading to the adoption of the Convention. This is especially important for ILO Conventions in view of the tripartite nature of the Organization and the role the tripartite constituents play in standard setting.

In examining this question, the Committee has taken special note of the comments made by the Employer members of the Conference Committee on the Application of Standards that it had interpreted the right to consultation in such a way as to impose a more exacting requirement upon the government beyond that envisaged by the Convention.² This comment was made in the context of the request made by the Committee of Experts in a case concerning the application by the Government of Peru of Convention No. 169 and which was discussed by the Conference Committee in June 2010.³

In light of the above, the Committee makes this general observation in order to clarify its understanding of the concept of “consultation” in the hope that this will result in an improved application of the Convention particularly as it concerns this right. This would be a follow-up to the general observation made by this Committee in 2008. It notes the statement made by the Employer spokesperson during the general discussion of the Conference Committee in June 2009 that “the general observations on social security and indigenous and tribal peoples did not raise any particular issues and were an illustration of the correct approach to making general observations that were useful and contributed to the implementation of the Conventions concerned”.⁴

As a general matter the Committee notes that, in view of the tripartite nature of the ILO, most of its Conventions make specific provision for consultation between governments and representatives of employers and workers or their organizations and of those concerned by the issues involved on the matters covered by the Conventions. Convention No. 169 is no exception. However, the provisions relating to “consultation” in Convention No. 169 specifically address consultation with indigenous and tribal peoples. The relevant provisions of the Convention are *Articles 6, 7, 15 and 17*.⁵ *Articles 27 and 28* also refer to consultation specifically regarding education.

¹ See ILC, 63rd Session, 1977, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, para. 32; ILC, 73rd Session, 1987, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, para. 21; ILC, 77th Session, 1990, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, para. 7; ILC, 78th Session, 1991, Report III (Part 4A), Report of the Committee of Experts on the Application of Conventions and Recommendations, paras 11 and 12.

² See ILC, 99th Session, 2010, *Provisional Record* No. 16, Part One, para. 54; Part Two, pp. 103–107.

³ *ibid.*, Part Two, p. 106.

⁴ See ILC, 98th Session, 2009, *Provisional Record* No. 16, Part One, para. 50.

⁵ *Article 6*

1. In applying the provisions of this Convention, governments shall:

- (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
- (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;