Collective bargaining: A fundamental principle, a right, a Convention

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Convention No. 98

Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively[1]

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Thirty-second Session on 8 June 1949, and

Having decided upon the adoption of certain proposals concerning the application of the principles of the right to organise and to bargain collectively, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention;

adopts this first day of July of the year one thousand nine hundred and forty-nine the following Convention, which may be cited as the Right to Organise and Collective Bargaining Convention, 1949:

Article 1

1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

2. Such protection shall apply more particularly in respect of acts calculated to —

(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;

(b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Article 2

1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.

2. In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article.

Article 3

Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles.

[1] Ed.: This Convention came into force on 18 July 1951.

Article 4

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers'

3. Any Member may at any time by a subsequent declaration cancel in whole or in part any reservation made in its original declaration in virtue of subparagraph (b), (c) or (d) of paragraph 1 of this Article.

4. Any Member may, at any time at which the Convention is subject to denunciation in accordance with the provisions of Article 11, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of such territories as it may specify.

Article 10

1. Declarations communicated to the Director-General of the International Labour Office in accordance with paragraph 4 or 5 of article 35 of the Constitution of the International Labour Organisation shall indicate whether the provisions of the Convention will be applied in the territory concerned without modification or subject to modifications; when the declaration indicates that the provisions of the Convention will be applied subject to modifications, it shall give details of the said modifications.

2. The Member, Members or international authority concerned may at any time by a subsequent declaration renounce in whole or in part the right to have recourse to any modification indicated in any former declaration.

3. The Member, Members or international authority concerned may, at any time at which the Convention is subject to denunciation in accordance with the provisions of Article 11, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of the application of the Convention.

Article 11

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 12

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications, declarations and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 13

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications, declarations and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 14

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 15

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides,

(a) the ratification by a Member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 11 above, if and when the new revising Convention shall have come into force;

(b) as from the date when the new revising Convention comes into force, this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 16

The English and French versions of the text of this Convention are equally authoritative.

The foregoing is the authentic text of the Convention duly adopted by the General Conference of the International Labour Organisation during its Thirty-second Session which was held at Geneva and declared closed the second day of July 1949.

IN FAITH WHEREOF we have appended our signatures this eighteenth day of August 1949.

The President of the Conference,

The Director-General of the International Labour Office,

As a balancing force, as a buffer to absorb what would otherwise spill over in violent form, as a formal mechanism for arriving at written agreements between employers and workers, collective bargaining has still to find a substitute.

To the uninitiated, collective bargaining is considered to be a simple way to regulate the labour market, in turn defined as a place where agreement is reached between workers and employers on the price workers agree to be paid for their labour. On closer examination, the institution's very complexity, as reflected in the columns which follow, may in the worst instances lead the lay person to question its effectiveness as a force conducive to social justice and peace. The collection of articles which follow not only stresses the relative effectiveness of collective bargaining

ground over the past two decades (Bronstein). Supportive of this comprehensive analysis are two subregional dimensions – Central America (Tinoco / Vado) and the Andean countries (Luz Vega / Rueda / Sepúlveda) together with a national perspective (Ramírez Gamero) – which further enrich our understanding of how collective bargaining has been faring in Latin America and forecast developments for the future.

While in the Mexico experience, for instance, much store is set by the "new trade unionism" based on consensus and social dialogue, in stark contrast is the collective bargaining experience of Malaysia where the process appears more rigid, cast as it were in a straitjacket from which it cannot break through to rise to the present-day challenge of equitable income distribution (Navamukundan). Similarly, in Senegal, the trammels of history seem to run counter to any proper modern-day response to labour problems via the collective bargaining instrument (Dieng). In India, when all is summed up, workers are far less ideological in their approach to trade union membership and far more vigilant in terms of what they expect from their trade union representatives (Ratnam); but the author knowingly leaves the reader to work out the puzzle that through collective bargaining, "workers' interests can be further divided by offering more to the shrinking 'core' of workers who do less, leaving less to the growing numbers of workers in the unorganized 'peripheries' who do more." As for Korea, workers have placed their trust in a massive shift towards industrial unionism after the turbulence of the past decade (Won-bo).

In the case of Canada (Olney), the shortcomings in the application of ILO Convention No. 98 are a source of concern for the ILO Committee of Experts on the Application of Conventions and Recommendations: repeated complaints have been filed and are being examined by the Committee on Freedom of Association; while still teetering on the threshold as they prepare to cope with a market economy are the economies in transition where trade unions first need to resolve their status as independent entities not under the tutelage of the State (Aro and Makó / Simonyi).

Of special importance in this collection is the throwback we owe to Bernard Gernigon who calls to mind the successive phases traversed in addressing the question of the protection of trade union rights, in particular the adoption of Convention No. 87, before Convention No. 98 actually took shape, and then draws attention to the special status accorded Convention No. 98 which figures in the ILO Declaration on Fundamental Principles and Rights at Work because firstly, it is a major instrument which protects a fundamental right: that of freedom of association; and secondly, it provides what is still a satisfactory and present-day response to the problems besetting workers and their organizations.

We are pleased to present this edition of *Labour Education* as a joint project. Although the tableau is not as complete as we had hoped, we nevertheless propose the following selection for the benefit of our constituents, once again within our workers' education thrust. As workers around the world strive daily and universally to engage in what would always be an unequal battle in defence of their interests, we hope that this 50th anniversary of the adoption of Convention No. 98 will lead to a release of the full potential of the collective bargaining institution. More than ever, we look forward to hearing the voices of the thirty-four member States which have still to be convinced of the interest and urgency of ratifying this Convention, and no doubt the 1999 Session of the International Labour Conference will provide a choice opportunity. Lastly, it is our ardent wish that the potential of Convention No. 98 for nurturing

social dialogue will be fully acknowledged and brought into the ambit of the ongoing efforts of the social partners to forge some new parameters within which social justice could make some strides.

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Ullrich Flechsenhar
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ILO Bureau for Workers' Activities

In plenary: the 32nd Session of the International Labour Conference, Geneva, June 1949.

Advisers with the Workers' delegate of the United States to the 32nd session of the International Labour Conference, Geneva, June 1949. From left to right, Messrs. John P. Redmond, William Lane McFetridge, William J. McSorley, Martin P. Durkin (Advisers) and George Philip Delaney (delegate).

Thirty-second session of the International Labour Conference, Geneva, June 1949. Centre, Mr. David Morse, Director-General of the ILO; left, Mr. Víctor Casagrande; right, Mr. Luis Alvarado, both Government delegates of Peru.

Mr. Shamaldharee Lall, President of the Governing Body of the ILO and Government delegate of India to the Conference, chairing the inauguration of the 32nd Session of the International Labour Conference in 1949.

The Right to Organise and Collective Bargaining Convention, 1949 (No. 98), is always cited together with the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). Indeed they complement each other perfectly. Although one year separates the birth of these two Conventions, it is natural and logical that they should be referred to as the *twin Conventions* on Freedom of Association and Collective Bargaining. These Conventions gave workers the most fundamental of their rights – the right to form and to join organizations of their own choosing and to promote and defend their economic and social interests.

It was on 8 June 1949 that the International Labour Conference adopted Convention No.98 in San Francisco.This Convention has the merit of being short and comprehensive, but its scope

Nos. 87 and 98. A few others are flouting both their obligations under the ILO Constitution and these Conventions in attacking the collective rights of trade unions and promoting bargaining with the workers individually instead.

On the other hand, it is gratifying to note that some countries in Asia and Africa have, at last, realized that the denial of trade union rights would certainly give rise to violent situations which can be detrimental to the interests of society at large. They have recognized the vital and important role of trade unions in society – that of contributing to the promotion of democracy, development and social justice.

Although the overall picture of international standard-setting and application of universal workers' rights over the past five decades is encouraging, history will judge the work of the ILO to the extent that the latter is successful in promoting trade union rights and social justice in all regions of the world.

If everyone agrees that the world in which the ILO is carrying out its work today has radically changed since the fall of the Berlin Wall, then it should continue to devise practical ways and means of guaranteeing the right to organize and to collective bargaining, and of promoting these and the other fundamental rights and principles at work as the global platform of rules governing the increasing globalization of the economy.

William Brett
Vice-Chairman
of the Governing Body of the ILO
and Chairman of the Workers'group

Collective bargaining is a process whereby standards are created to govern labour relations. The participants in the process are employers or their organizations on the one hand, and worker representatives, usually trade unions, on the other. The government is sometimes involved as a third player. Individual bargaining between

hostile government policies were those created by the skilled workers: the craftsmen. They were the only ones with the material and administrative resources and leadership needed to create solid institutions. Viable organizations set up by semiskilled or unskilled workers came at a later stage. The craftsmen organized themselves in an attempt to regulate supply by restricting market access for new craftsmen and to create associations that could provide basic protection against the erosion of workers' income. While not the only one, the regulation of wages and other working conditions was usually a key objective.

On occasion, it was the employers who took the bargaining initiative instead of accepting conditions imposed by the trade unions; sometimes the unions attempted to collaborate among themselves in setting wages in the face of opposition from employers, and at other times, though perhaps somewhat less frequently, the initiative came from both sides. Collective bargaining therefore did not stem from a single or uniform origin. Although it would be unfair to disregard the role played by employers and their associations in the incipient stages of collective bargaining, the brunt of the burden was undoubtedly borne by the workers and their unions, especially in industries with unskilled or semi-skilled workforces, as employers were fiercely opposed to the loss of the advantages supposedly entailed by the establishment of rules.[1]

The reluctance of many employers to engage in collective bargaining with the workers was further compounded by a powerful public policy whose philosophical justification was rooted in the principles of economic liberalism. Restrictive laws and the juridical impotence of the courts, designed to preserve the immutability of the individual work contract (*pacta sunt servanda*), had a debilitating effect on trade unions, especially those not belonging to professional organizations, and retarded the development of collective bargaining. An important shift in the attitude of the authorities towards a form of tolerance of trade unions and hence towards collective bargaining took place around the end of the nineteenth century or shortly thereafter, when some countries amended their laws to remove many of the obstacles to the formation of trade unions.[2] But legislation was not the only means by which trade unions could acquire new rights. In Sweden, it was by means of the collectively negotiated 1906 December Compromise that the main employer organization recognized the right to organize trade unions, though that concession was made in exchange for trade union agreements to concede a more substantial package of rights to company managements.

The inter-war years

The very first policies explicitly focussed on the methods, whereas the procedures for collective bargaining in industrialized countries were to emerge after the turn of the century and in the ensuing decades were to become the subject of extensive legislation, particularly in the period between the two World Wars, in an endeavour to regulate and even promote collective bargaining as a form of worker self-management. Those laws often included clauses establishing the rights and obligations of the parties, the legal status and application of the agreement, the main bargaining topics, and in some countries the rules of procedure for the parties. In some cases, provision was made for rules to be followed in case of failure to reach agreement and for dispute-settlement machinery.

In the lapse between the two World Wars, collective labour agreements were deemed to be the most normal way of setting wages and other working conditions and collective bargaining began to gather momentum and improve as an instrument with the increasing prosperity of the industrial organizations themselves affected by collective bargaining. Accordingly, in 1939, the vast majority of workers in all the highly industrialized countries were covered by collective agreements, which began to replace the traditional contractual relations between employers and workers in newly industrializing countries and even those in the nascent stages of industrialization. Furthermore, a growing trend towards the negotiation of industry-wide agreements began to emerge in many countries.

A system based on the willingness of the parties

At the time, the governments of the industrialized countries perceived their role in collective bargaining as crucial but subsidiary, as meant for maintaining peaceful and stable labour relations, easing the operation of the system of industrial relations, protecting employees in the exercise of their right of association and to bargain collectively, and applying the collective labour agreements. The parties were largely responsible for making collective bargaining work.

The system of collective bargaining was strictly voluntary and its effectiveness depended essentially on the good faith of the parties. The obligations arising therefrom were regarded as more moral than strictly legal in nature.[3] Therefore, without this being expressly prescribed by the law or the agreements themselves, the system of collective agreements entailed the obligation on both employers and workers' organizations and their members to observe their respective rights to organize and to negotiate, which constituted the very cornerstones of the system. As such, it was not considered necessary to pass a specific law guaranteeing those rights against possible infringement by parties to the labour contract.

It should nevertheless be added that the lawmaker contributed indirectly to this absence of specific laws in that regard, firstly, by granting trade unions both immunity from criminal prosecution as well as a large degree of civil immunity in the event of industrial disputes, and secondly, by setting minimum wages for "non-unionized" industries and professions and for agriculture.

In some countries, as trade unions gradually rid themselves of legal stumbling blocks, they won increasing *de facto* recognition from employers and their organizations, with both sides accepting the principle of collective bargaining. This was proof that the organizations themselves could effectively protect the exercise of the right to organize and to bargain collectively, free of any interference whatsoever by the lawmaker.

Mutual recognition by the parties: The basic agreements

Such was the case, in particular, in the United Kingdom and the Scandinavian countries, where employer and worker organizations, having been free of legal impediments for some time, were able to organize themselves into powerful and unified associations. Their representativity was never questioned, whether with respect to the right to conclude collective agreements, or to participate on an equal footing in permanent joint bodies for the purpose of working out collective labour agreements. In the countries of Scandinavia, the rights of the organizations regarded as representative were further underpinned by the so-called "basic agreements", which were national agreements concluded between labour confederations and employers. One of the main purposes of those agreements was to establish a uniform dispute settlement procedure and establish rules to guide the different organizations in negotiating collective agreements.

A number of basic agreements were agreed in Sweden, engendered by the "December Compromise" of 1906 and culminating in the Basic Agreement of 1938. Under those agreements, the confederations set the guiding principles for collective bargaining, incorporating them into the agreements reached in the various branches of industry. These principles included mutual recognition among the organizations concerned, agreements for the setting of wages and other working conditions by means of a collective agreement worked out under the auspices of the confederations, which pledged to take no direct action in advance of attempts at conciliation.

The first basic agreement concluded in Denmark came in the September Agreement of 1899 establishing the principle that collective agreements reached between the two confederations concerned should be respected and implemented by the affiliated associations. The agreement further provided for other privileges and obligations with respect to employers and employees; and, in the years when ILO Convention No. 98 was in the process of being adopted, remained the basic instrument of worker-employer relations in Denmark, where industrial relations were normally regulated by collective agreements.

Similarly, an agreement was reached in Norway between the employer and worker confederations in March 1935 setting the procedure to be followed in negotiating and concluding agreements.

The role of the law

In other countries, it was the lawmaker who had to intervene to guarantee the exercise of the right of association and the right to organize and to bargain collectively. Accordingly, the Belgian law of 24 May 1921 guaranteed "freedom of association in all fields" and the Swedish law of 11 September 1936 prescribed that no act could be undertaken against the right of association.[4] In France, the law on collective agreements dated 23 December 1946 made it compulsory for collective labour agreements to contain clauses on the right of association and freedom of opinion of workers and on conditions for hiring and dismissal of workers, without these provisions in any way undermining the workers' free choice of trade union.

The problems spawned by the Second World War made it impossible for many coun-

tries to publish annual statistics on the number of workers covered by collective labour agreements, although some data was available for the United States of America, the United Kingdom and Sweden. In 1946 there were 14,800,000 workers covered by collective agreements in the United States; in 1945 there were 12,500,000 in the United Kingdom; while in Sweden the corresponding figure for 1944 was 1,063,000 workers. Though limited, these statistics are highly meaningful in terms of the progress made in collective bargaining and the collective labour agreements reached in the countries concerned.[5]

In the wake of the Second World War

The adoption by the International Labour Conference of a series of international instruments in the wake of the Second World War undoubtedly gave fresh impetus to the development of collective bargaining, the main instruments being the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). These instruments influenced the attitude of many governments towards collective bargaining in the wake of the Second World War, a time when many countries were to witness the confirmation of the system of collective bargaining, especially in the Federal Republic of Germany, Japan and Italy, where restrictions of different types had impeded its development.[6]

In many cases, the development of collective bargaining coincided with a period of economic prosperity and industrial expansion. Nevertheless, the periods of fascism contradicted the notion that the policy of collective bargaining was a function of a country's economic development level. While some European governments were displaying increasing tolerance towards or support for the development of collective bargaining, the fascist governments that were in place between 1920 and the 1970s prohibited free bargaining. Instead, they compelled both employers and employees to take part in government-established structures that controlled all decisions concerning labour relations.[7]

In several other countries, the post-war years also favoured legal reform. In France, the 1950 law on collective bargaining eliminated some of the restrictive controls imposed in 1946 under the pressure of post-war economic problems[8] in an attempt to encourage the conclusion of more collective agreements. In the United States, the National Labour Relations Act underwent extensive amendments as from 1947.

By the mid-1950s the phase of post-war reconstruction was almost complete in Japan and the European countries and the world economy entered a phase of unprecedented growth in production and trade that lasted until the second half of the 1960s.

During that period, collective bargaining in the industrialized countries developed in a context marked by economic prosperity and a favourable attitude on the part of public authorities, albeit with considerable differences in regard to the role of governments in the various countries. Nevertheless, the end of the 1960s witnessed profound social upheavals that culminated in the riots of 1968. That point in history marked a sweeping change in traditional concepts of the world of work, in particular by raising questions about Taylorism and also triggering substantial modifications in industrial relations systems.

Collective bargaining and the social and economic challenges (from the 1970s to the 1980s)

Early in the 1970s, collective bargaining was viewed as a rising phenomenon practised at all times and in all circumstances,[9] having withstood depression, recession, stagnation and the vagaries of inflation. Its regulatory function as a supplementary means of setting working conditions was not questioned and the issues surrounding its structure and diversification became markedly more complex. Some North American studies were outright euphoric in arguing that collective bargaining was at the root of the prevailing social peace.[10]

The institutional framework

This decade brought noteworthy progress in the development of the institutional framework as most industrialized countries put in place a system of rules and procedures designed to streamline it, whether by legislation (e.g. Sweden) or by means of framework negotiations (Denmark or Norway). This notwithstanding, as late as the mid-1970s, Germany and Switzerland still had very few provisions on the legal framework for collective bargaining.

The United Kingdom, still a unique case to this day, nevertheless typified the reluctance to "legalize" the nature of the agreements and rec-

ognize them as legal. Collective agreements continued to be considered as mere "gentlemen's agreements" which, apart from a very small area of law, entailed no binding obligations on the parties concluding agreements within their framework.[11]

At the same time, other countries evidenced a much more pressing need for the logistical participation of government in smoothing the way for bargaining and peaceful settlement of disputes. There was also growing concern over problems of implementation. Hence, in Canada, the law prescribed that a complaints procedure must be included in all agreements while, in New Zealand, it stipulated that all conflicts must be submitted to arbitration. In the Netherlands, it was the collective agreements themselves that voluntarily provided for the creation of bipartite dispute settlement tribunals.

It is noteworthy that the 1970s brought agreements with much more substantial content, which in Europe centred on three main topics: job security, protection of the working environment, and the investment plans of the enterprise.

Growth of bargaining in developing countries

During the decade in question, collective bargaining was also making strides on other continents. Hence, in Latin America, where in many countries it had been an exceptional mechanism up to the 1960s or even the 1970s,[12] it started to spread rather rapidly.[13] The reasons for this stemmed from economic changes (as part of the quest for economic development), political changes,[14] and those within the trade union movement (swelling trade union membership and the parallel rise of collective bargaining). Nevertheless, having set a trend that would continue through succeeding decades, collective bargaining practically never reached all sectors or all workers and large numbers were usually excluded, either because of the legal impossibility to negotiate or the difficulties of extending it to rural areas or small businesses. Government intervention was also another of its overriding features.

In Asia, agreements started to be widely adopted during this period, in particular in traditional industries and plantations (although most of the bargaining was done at enterprise level) and brought substantial benefits, especially to workers in India, Indonesia and Malaysia. Even though most countries in the continent drew up detailed laws in that regard (above all regarding wages), the fact remained that in many countries trade unions faced difficulties of recognition, especially under dictatorial regimes, and of disintegration. At the start of the 1970s, the problems connected with inflation and with possible bargaining with multinational companies shifted to centre stage,[15] as was also the case in other regions.

In English-speaking Africa, where bargaining was generally regulated in great detail, it spread at the same rate even in countries where there were no fully fledged unions. The problems were basically related to wage policies and trade union representation.[16] In French-speaking Africa,[17] collective bargaining started to gain ground shortly after the adoption of the Overseas Code (1952). After independence, most of these countries retained the old agreements and very few new agreements were reached.[18] To crown it all, the State was interventionist, preferring to regulate working conditions directly.

Inflation and the economic crises of the 1970s

Despite the general optimism that burgeoned in the post-war period, by the mid-1970s the first signs of economic crisis started to "destabilize the social peace", churning up afresh the debate as to the necessity for collective bargaining. Questions therefore arose in some countries of Western Europe concerning dispute-settlement mechanisms and their effectiveness, as well as the coordination of the different bargaining levels; in Eastern Europe, the problems focused on coordination between the provisions of labour agreements and state plans while, in the United States, the central issue was the growing number of refusals by worker organizations to sign new collective labour agreements. In all market economy countries, collective bargaining was hard hit by inflation. It was attempted to take this element into account by shortening the term of labour agreements or by linking wages to cost of living indices, a practice known as indexation.[19]

Another issue that came to the fore was the impact of collective bargaining on inflation, that is, the importance of reaching labour-management agreement on the anti-inflation policy and its application, which was easier done in centralized structures.[20] Government intervention in collective bargaining to contain the impact of inflation also became significant in some Latin American countries: in Uruguay, Law No. 13720 created the Prices and Incomes

Commission and invested it with broad powers to control bargaining and establish wage adjustments by means of administrative acts.

Thus the 1970s and 1980s were set against a backdrop of deteriorating market conditions and economic capacity. In the industrialized countries, the gathering pace of inflation combined with the exchange rate crisis, the inappropriate application of monetary and fiscal policies, and the oil crisis (1973 and 1979/80) to spawn rising numbers of jobless and of individual and collective labour disputes.

The recession brought the social players face to face with the need for changes to the system of industrial relations, as it exercised an impact on their role, their strength and ultimately on their bargaining power. In the circumstances, basic agreements once again come into their own, having originated, as we have seen, in the Nordic countries. Agreements of this kind became generalized across all regions, thanks both to the positive influence of the Danish, Norwegian and Swedish agreements (especially on European countries[21]) and to the trend towards more centralized collective bargaining as of the 1970s. The importance and social implications of the Spanish and Italian agreements are cases in point.

Another common feature of this period was the centralization that came about as a way of coping with the complexities of a modern society in the grip of a crisis and as a result of the concern on the part of governments to ward off the undesirable macroeconomic effects of a multiplicity of bargaining rounds at various levels.[22] Hence, a 1979 study by the European Community showed that national labour agreements had become more important in almost all the countries of Europe, except for Germany, Luxembourg and the United Kingdom.[23] The move towards centralization was also evident in French-speaking Africa (thanks to the influence of the Overseas Code), in Sierra Leone, Tanzania, Zambia, and in Singapore as a result of new wages and incomes policies, as well as in some Latin American countries such as Argentina.

Despite this trend, enterprise-level bargaining continued to predominate in countries such as Canada, Japan, the United States and in most countries in Latin America and Asia.

Industry-wide agreements, although widespread in many countries, tended to be complemented by parallel enterprise agreements, in particular in those countries where negotiation was not conducted in the framework of central agreements or regulated by coercive government measures. The examples of Germany and the United Kingdom in the graphic arts sector or the metalworking industry are fairly representative in this regard.

Changes in content and systems of labour relations

Crisis and joblessness led to changes in the content of agreements in a great many industrialized countries, with particular reference to salaries in the United States[24] and working hours in Europe.[25] For the first time in the industrialized countries, "job market flexibility" was being mooted in some government circles and employer organizations, inspired by the examples of Japan and the United States where more jobs were created by means of increased flexibility.

Moreover, the organization of working hours appeared more frequently, although this often meant merely establishing new technical methods of production procedures without regard for the central objectives of the basic structure of the organization, such as increased productivity, better product quality, greater intra-enterprise cooperation and enhanced job satisfaction.

Together with the economic crisis, the ongoing political ups and downs had a defining influence on the evolution of labour relations in some countries. Hence, while some countries in Europe were strongly anchored in democracy and in many cases in dialogue and modern laws, others witnessed the emergence of a new system of labour relations after protracted periods of dictatorship and corporatist regimes[26] (Spain, Greece and Portugal). Some Latin American countries were dismantling social systems left behind by military regimes of the 1970s (Argentina, Chile, Paraguay and Uruguay). In Chile, for instance, the military regime had overregulated labour relations, leading to the fragmentation of trade unions and even to the establishment of ad hoc areas for collective bargaining and to classifying as collective instruments those concluded between two or more workers and an employer. A similar trade union dismantling took place in 1973 in Uruguay, where although collective agreements existed after that time, they were no more than a reflection of pre-existing practices. Asia's authoritarian regimes had induced similar problems with respect to recognition and bargaining power of trade union organizations.

In Argentina, the negative impacts of the loss of institutional status led not only to the abrupt

suspension of bargaining (also a result of hyper-inflation), but also to a situation in which 50 per cent of the industry-wide agreements signed in 1975 continue to be in force at the present time.[27] In fact, collective bargaining cannot be deemed to have "recovered" until 1988 (five years after the restoration of democracy).

In some Asian countries such as the Philippines or the Republic of Korea, the military dictatorship left a strong imprint on the development of labour relations, especially by instituting anti-trade union policies. Nevertheless, in the mid-1980s and thanks to the influence of the Japanese model, one could begin to speak of a "limited model" of collective bargaining.

Although collective bargaining made most headway in the private sector, many countries passed regulations during the 1970s to govern collective bargaining in the public sector,[28] although their introduction provoked controversy over the manner of reconciling labour relations with certain basic principles typical of the public service (budget restrictions or certain aspects of working conditions).[29]

Finally, it should be pointed out that the 1980s saw the first, albeit unsuccessful, attempts at supranational bargaining (although the first trade union attempts date back to the 1970s) in a context of accelerating economic integration processes. Collective bargaining may be deemed to have become more widespread in the 1970-80 period, even against a backdrop of economic and political turbulence. Collective bargaining had undoubtedly come of age and was considered in most countries as an indispensable complement to the law for the purposes of improving working conditions, the best proof of this being the increasingly broad spectrum of topics covered in the various clauses of these agreements.

Furthermore, the period in question also brought a change of attitude on the part of the industrial partners towards collective bargaining. From the employer side, it ceased to be a traumatic experience and was perceived instead as an element of economic progress and human resource management; from the trade union perspective, collective bargaining afforded the trade union movement a new awareness of its own role in the system of labour relations[30] beyond that of a mere political player.

Even though on balance collective bargaining registered more progress than setbacks, not least of all considering the unfavourable economic and social climate, in the 1970s and 1980s it remained an institution with shortcomings as it still failed to reach vast swathes of the economically active population or even wage-earners in some countries. Besides, it was still viewed with misgiving in some non-industrialized countries and was therefore the first victim of economic policies, particularly in authoritarian countries (which explains why

used to operate and make flexibility at the enterprise level essential for responding to rapid product market changes. Enterprises have responded by transforming how they organize work and production. In the process, industrial relations structures have come under pressure to adapt."[31] The typical way of adapting has been via the decentralization of collective bargaining and, more broadly speaking, of labour relations.

Accordingly, throughout most of the world, labour is becoming more diversified and the average size of enterprises is being reduced by restructuring. This has placed greater pressure on traditional collective bargaining by eroding the base of trade union organizations. All these changes have helped to shift the balance of power between management and workers, with the result that trade unions are losing power while company managements are strengthening and buttressing their position.

Nevertheless, even if the search for flexibility in a context of economic globalization would seem to be a widespread phenomenon spurred by international pressures, the way in which each country responds to these pressures through its various institutions is dependent on each national context.

Decentralization of collective bargaining in the industrialized countries

In the 1990 decade, the trend toward the decentralization of collective bargaining became more pronounced, though varying in extent from country to country. Therefore, while in the United States and the United Kingdom enterprise-level collective bargaining had typified labour relations, decentralization has been gathering momentum over the past decade with the gradual disappearance of bargaining models in the United States,[32] and through the implementation of certain policies (e.g. privatization) and new management models in the United Kingdom. In New Zealand, the change has been more sweeping, especially with the passing of the Employment Act promoting the use of individual contracts and curtailing the power of collective bargaining.

This process has not spared the European countries, and the cases of France or Italy, to name but two, have also borne evidence to this trend towards decentralization. In Sweden, where centralized economic bargaining had been the norm, the traditional bases of national bargaining are being whittled away. Hence, although certain issues still fall into the ambit of national-level bargaining, industry-wide agreements now largely prevail in determining wage levels as well as in addressing the general problems of larger enterprises.

There are also appreciable signs of decentralization in Germany, where industry-wide bargaining opens the way for more enterprise-level bargaining through works committees, on such matters as training, new technologies, organization of work and job flexibility, which are becoming increasingly important.[33] Although traditional bargaining structures generally preserve the neutrality of the enterprise during bargaining, a growing number of works committees are being created to encourage dialogue and cooperation at the industry level and to implement human resource policies. The aim of these committees is most often to restructure work methods in the wake of technological changes and in accordance with the demands of competition, as well as job preservation.

In the same way, the French government's 1997 report on collective bargaining also showed a more than 27 per cent increase in the number of enterprise-level agreements in comparison with the previous figure.[34] In Japan, the spring offensive or *Shunto*[35] made up for the weakness of enterprise-level bargaining by coordinating inter-union strategies for sectoral and national bargaining. Nevertheless, the current worsening of the economic situation and the intensification of competition are placing great pressure in the *Shunto* and diminishing its coordinative function.[36]

It should be mentioned, however, that enterprise-level collective bargaining is still limited in most countries of Western Europe. In fact, industry-wide agreements have much larger coverage than enterprise agreements.[37] As a general rule, there has been no central dismantling of labour relations in those European countries with a tradition of participation by the social players. In that regard, it is of interest to note that the aforementioned evolution of collective bargaining at the enterprise level in France is largely due to the impact of the national agreement on working hours concluded in 1995 inviting the dialogue partners to engage in enterprise-level bargaining on the reorganization and reduction of working hours.[38] There is no doubt that central negotiation by industry has been somewhat weakened, as shown by the recent failures of consultations or central negotiations or the paucity of their content, although they continue to play a significant role. Besides, practically all countries in continental Europe have seen attempts in

recent years – generally by governments and sometimes by worker and employer organizations – to conclude some form of "social pact" resolving labour issues. For instance, the viability of Austrian tripartitism was clearly demonstrated with the adoption in 1992 and 1993 respectively of the Declaration of Principles of Social Association (bipartite) and the Stability Pact (tripartite). In the Netherlands, where there was a period marked by severe economic and social problems from the late 1970s to the early 1980s, a major milestone was reached with the 1982 signing of the tripartite agreement (Wassenaar Agreement) in which employers and workers established a link between standard of living (e.g. the level of social benefits and wages, including social security benefits) and job creation. In Ireland, there was a move towards tripartite central bargaining and this has been shown to benefit the country's economic development as reflected in the low level of inflation and interest rates, the falling debt/GDP ratio and joblessness, as well as the high economic growth rate. Let us not forget that central bargaining and consultation continue to play a fundamental role in countries like Denmark and Norway, where industry-wide bargaining is still closely coordinated by the central organizations.[39]

Evolution and problems of collective bargaining in developing or transition countries

The most significant changes in labour relations systems have taken place in the countries of Central and Eastern Europe as a result of the major economic and political changes. Many countries in transition have already passed new laws along the lines of the Western European model which allows for bargaining at various levels, that is, by enterprise, industry or occupation. Enterprise-level collective bargaining is becoming increasingly important in these countries, although not on the same scale as in Western Europe. Hence, in Poland, Hungary and the Czech Republic for example, the number of enterprise-level collective agreements has increased significantly since the early 1990s. At this level, bargaining is relatively well established in state enterprises and to a somewhat lesser extent in large private companies. In contrast, it is extremely rare among small and medium-sized enterprises.[40] Industry-wide collective bargaining is not sufficiently developed. In the Czech Republic for instance, collective bargaining at that level regulates only the minimum social and working conditions and the number of agreements reached is falling as a result of scant participation by employers and their lack of proper organization.[41]

In Latin America, where the tradition of state intervention is still thriving, collective bargaining plays only a limited role as a regulator of working conditions. Although there is no doubt that enterprise-level bargaining is on the rise in Argentina, Brazil, Chile and Mexico, the formal regulation of working conditions is effected predominantly through labour law. Broadly speaking, in these countries there is a vacuum in the development of the law with respect to enterprise-level bargaining.

In Argentina, Brazil and Uruguay and to a lesser extent Mexico, the predominant form of bargaining is industry-level bargaining and in general the coverage of those agreements is relatively high. In the remaining countries in the region, industry-level negotiation is marginal and decentralized bargaining takes place mainly in the large enterprises. Another widespread problem is that the agreements cover only the structured sector of the economy and focus on specific economic areas. So what appears here is a dichotomous model of labour regulation in which the legislative system predominates on the one hand and individual employee-employer relationships on the other.[42]

Although collective bargaining in Asia continues to vary considerably from one country to the next based on differences of culture and economic development level across the region, some traits are common to all of them, for example the rare occurrence of bargaining and the predominance of decentralized, enterprise-level bargaining. Several factors underlie this relative underdevelopment: trade union fragmentation (countries in South-East Asia), restrictions on the right of association in some countries (until recently Indonesia and Korea), or the difficulties stemming from the process of transition to the market economy (China, Vietnam). Nevertheless, there is also little doubt that in countries such as the Republic of Korea or Indonesia where authoritarian regimes have been gradually replaced by democratic governments, the last decade has also brought a certain democratization of institutions, especially in terms of a more widespread recognition of freedom of association and collective bargaining.[43] Enterprise-level bargaining still predominates in the region.

Generally speaking, it should be borne in mind that there is an emerging trend towards higher-level bargaining in the region. For exam-

ple, the Republic of Korea's trade union movement is now launching sectoral negotiations in the hospital and metalworking sectors. At the same time, the labour-management partners in that country are setting up national tripartite structures in an attempt to come to grips with the financial crisis.

The predominance of the informal and agricultural sectors in Africa limits the potential impact of tripartite and bipartite bargaining. As in other regions, structural adjustment programmes have seriously affected labour relations on that continent over the past decade, with cutbacks in the public sector workforce; and it was precisely in the public sector that trade unions had the strongest presence and where collective bargaining was most developed. The privatization of the public sector was to have a negative impact on the already enfeebled bases of collective bargaining in those countries. Apart from that sector, collective agreements were reached in some major enterprises. As regards sectoral bargaining, while it is indeed practised, it concerns only a handful of companies and agreements are not regularly renewed.

Recent development of tripartite labour-management dialogue

Over the past decade, it is the national-level tripartite labour-management dialogue that has displayed the greatest impetus within bargaining processes outside of Europe. A range of factors explain this development: the transition from authoritarian regimes to democratic governments (in some Latin American countries and South Africa); the changeover from planned to market economies (in Central and Eastern Europe); and the economic crisis (in East Asia and Mexico).

In Latin America, the recent development of tripartism has had a favourable impact on the transition to democracy. The example of the agreement "Chile, a historic opportunity" (*Chile, una oportunidad histórica*), signed by both sides of industry in April 1990, is undoubtedly an eloquent example since it meant labour-management endorsement of the transition from autocratic governance to political pluralism: between 1990 and 1995 there were hardly any industrial disputes or strikes. In this region, tripartitism was a basic instrument for accommodating new economic conditions at a time when social cohesion had been strained by structural adjustment policies.[44] In this same connection, several tripartite agreements contributed significantly over the last decade to social stability in Mexico, a country hard-hit by the economic crisis. The Alliance for Economic Renewal (*Alianza para la renovación económica*), signed in 1995, envisaged a series of tripartite measures to safeguard the purchasing power of workers: raising minimum wages; providing unemployment benefits; and ensuring support for enterprises in the form of fiscal incentives. In some countries in the region (e.g. the Dominican Republic), tripartism has cleared the way for discussion of legislative reforms.

Because of the weakness of the trade union movement in Asia, national-level tripartism has been negligible or hardly more than a formality, except in some countries such as Singapore. This notwithstanding, the recent economic crisis has generated opportunities for strengthening national tripartite dialogue in some countries. Hence, in the Republic of Korea, the Tripartite Agreement (February 1998) eased the restrictions on suspending employment for reasons of economic restructuring, though it simultaneously improved social protection by expanding social security. In the Philippines, the labour agreement on industrial harmony and stability (*Acuerdo Social sobre Armonía Industrial y Estabilidad*) of February 1998 provided for a six-month period during which the social partners would refrain from dismissals and labour disputes. In Singapore, the Tripartite Panel on Retrenched Workers (February 1998) envisaged: (i) development of an information network on job offers that could be of interest to workers being made redundant; (ii) exploring alternatives in the event of dismissal such as new placements, adjusted working hours and wages, and training possibilities; and (iii) advice on training opportunities. In general, dialogue has seemingly increased the flexibility of the job market while giving equal consideration to the need for worker protection and social stability.

The case of Africa is less promising when it comes to tripartite social dialogue. Although the problems of economic adjustment tend to create new opportunities for developing national-level tripartite agreements, this rarely occurs in the region. Limited resources, powerless trade unions, a predominantly rural economy, a small formal sector and political instability have been the overriding features of these countries and have therefore thwarted effective tripartitism. Nevertheless, there are some encouraging cases, such as South Africa and Mauritius, where tripartitism and collective bargaining are showing some dynamism. South Africa, for example, has based its reconstruction on these institutions. Its democratic transition has been underpinned by

a strong trade union presence, as manifested by the creation in 1994 of the Tripartite National Economic Development and Labour Council (NEDLAC). Besides, in the Labour Relations Act of 1995, this institution "encouraged the spread of industry-wide bargaining in bargaining councils, in which the social partners have, initially, to define the coverage of future industry agreements".[45]

The content of collective bargaining: Importance of flexibility and employment

With rising unemployment in most countries and the conviction that labour market flexibility is an essential condition for the competitiveness of both enterprise and country, it is precisely these two topics – flexibility and employment – that have dominated bargaining over the past decade.

In the United States, for example, the content of bargaining has focused increasingly on the conditions necessary for improving the competitiveness of enterprises and preserving jobs. These concessions initially went hand in hand with measures such as wage moderation, job flexibility, and agreements to bring down health insurance costs in exchange for job and training guarantees and/or assistance in placing dismissed workers in new jobs. The same phenomenon can be observed in most countries of Western Europe where high joblessness has been the foremost concern of both sides of industry in recent years. For this reason, the main focus of interest has been bargaining on working hours, which includes reducing and reorganizing them, job-sharing and early retirement agreements, as well as other steps related to job preservation. In France, for instance, working hours have been a central topic of enterprise-level bargaining. Of the 6,100 agreements in force in 1997, some 2,500 (i.e. 80 per cent) included clauses on working hours and employment.[46] In Belgium, a number of companies recently negotiated agreements combining working time and flexibility clauses, thus reinforcing the trend towards job flexibility as a means of job creation.[47] Working hours are not always negotiated to guarantee employment; in Sweden's 1998 collective bargaining round, the participants viewed working hours more as a matter of occupational health and safety and quality of life than a means of job creation.[48]

Naturally, the subject of wages continues to top the European bargaining agenda, although in dealing with it the dialogue partners do so from the standpoint of guaranteeing employment through wage moderation or even shorter working hours with the corresponding wage cut. These provisions are accompanied by a number of measures to facilitate access to employment such as hiring with reduced wage rate or an increased quota for apprentices. As regards employment and flexibility, a central topic has been the development of vocational skills. In Sweden, for instance, this has been a component of most of the 1998 agreements, since the bargaining partners have been aware that the upgrading of skills is fundamental to maintaining workers' vocational qualifications and enhancing their eligibility for future jobs.[49]

In some Asian countries (Japan, Republic of Korea and Thailand, to name a few), the economic crisis and the accompanying loss of jobs have made employment the central topic of enterprise-level bargaining, while wages – having been the dominant subject before the crisis – have now become a subject of secondary importance. In some cases (Japan, Republic of Korea) the benefit plans worked out at the enterprise level are being advanced as an alternative to job flexibility, and include training, unpaid leave of absence or early retirement.

In Latin America, traditional topics such as wages, vacation and occupational safety and health are still on the bargaining agendas. In some cases, new agreements merely reproduce former ones, which is evidence of the weakness of the bargaining bodies in the region. In the circumstances, it is important to point out that most transnational corporations in the continent have been able to set up stable collective bargaining rounds and that agreements combining flexible working hours and work organization to increase productivity in exchange for job security have been concluded in the automotive sector in Brazil and Argentina by companies such as Ford, Toyota or GM.[50]

From its beginnings over a century ago, collective bargaining has evolved to the point of being today's main vehicle for setting working conditions and for worker participation in company decision-making. The social, economic and political context of collective bargaining has changed, bringing new challenges.

Several events have been milestones in the history of collective bargaining: the adoption of the ILO Right to Organise and Collective Bargaining Convention, 1949 (No. 98); the spread of Taylorism in the industrialized countries in the years following the Second World War; the violent demonstrations of the late 1960s and early 1970s, together with high levels of job

absenteeism, which mirrored workers' discontent with the prevailing production model; and the growing globalization of the economy in the 1990 decade. Collective bargaining has demonstrated its full worth based on its considerable capacity to adapt to changes in the contexts in which it has developed.

In recent years, collective bargaining has faced the challenges stemming from falling trade union membership, increasing individualization of labour relations and the difficult quest for greater competitiveness and flexibility in a situation of economic globalization. Changes have taken place both at the level of negotiation and the topics covered. The ability to adjust has endowed collective bargaining with the virtues of an increasingly valuable instrument for introducing changes into the enterprise and work organization.

Thus, in addition to its traditional role as a regulatory mechanism for labour relations, collective bargaining is now becoming a more important factor in driving company competitiveness and productivity. Since the measures designed to improve competitiveness often require sacrifices on the part of workers, at least in the short term, the success of changes depends largely on the latter's willingness to accept them. Thus, collective bargaining gives legitimacy to the measures taken, since worker representatives participate autonomously in decision-making. In this regard, collective bargaining offers a distinct advantage over other methods of introducing changes, such as amendments of work contracts or unilateral decisions by employers. When it comes to legislative changes, collective bargaining has the advantage of being more flexible, giving the parties concerned the possibility of choosing the type of changes and deciding how quickly and in what form they are to be effected.

The role of collective bargaining today therefore differs considerably from that played at the turn of the century and it is to be hoped that it will grow in importance during the next millennium.

Notes

[1] ILO: *Collective bargaining in industrialised market economies*, Geneva. 1974.

[2] In the United Kingdom, the Parliament passed the Trade Union Act of 1871 and the Conspiracy and Protection of Property Act of 1875, and later the even more important Trade Disputes Act of 1906, which all together granted immunity from persecution to trade union members and officers; in France the 1884 law allowed freedom of association; in Imperial Germany, the Reichstag allowed the representative anti-socialist law to expire in 1890.

[3] *Application of the principles of the right to organize and bargaining collectively, collective agreements, conciliation and arbitration, and cooperation between public authorities and employers' and workers' organisations*, Report VIII (I), International Labour Conference, 31st Session, San Francisco, 1948.

[4] Ibid., p. 9.

[5] Department of Labour, Bureau of Labour Statistics, USA. 1947. *Monthly Labour Review*, Vol. 64, No. 5, May 1947, p. 765, cited in Report VIII (1) of the 31st Session of the International Labour Conference, San Francisco, 1948, p. 40.

[6] Under its Basic Law of 1949, the Federal Republic of Germany allowed freedom of association and reintroduced collective bargaining by means of laws enacted in 1949 and 1952; the Japanese Constitution of 1946 guaranteed workers the right to organize, act and negotiate collectively as a basic and inviolable human right.

[7] Adams, J.R.: 1993. "Regulating unions and collective bargaining: a global, historical analysis of determinants and consequences", in *Comparative Labour Law Journal*, Vol. 14, No. 3, spring 1993, p. 279.

[8] Law 50-205 on collective labour agreements and industrial dispute settlement procedures, 1950.

[9] See Córdova, E.: "Collective bargaining in industrialized countries, recent trends and problems; Summary of discussions", Vienna Symposium, November 1977, Labour-Management Relations Series, No. 56, Geneva, ILO.

[10] See Bronstein, A.: "Trade unions, critics and collective bargaining", in *Labour Law Journal*, Chicago, 27 (10) October 1976, pp. 614-622. The article states that 99 per cent of the agreements in force in 1975 had been signed without conflict and that they covered 20 million workers in the United States.

[11] The Carr Act ratified this feature in the course of the decade.

[12] Bronstein, A.: 1985. *La negociación colectiva en las relaciones de trabajo en América Latina,* Geneva, ILO, 1985.

[13] This could be observed (Bronstein, op. cit., p. 84) particularly in Central America and above all in Honduras and Panama, as well as in Ecuador and Peru.

[14] This is nonetheless a variable factor, for while some democracies were consolidated in the 1970s, it was also time of military dictatorships in the Southern Cone in particular.

[15] For further information, see *Industrial relations in Asia,* Labour-Management Relations Series, No. 52, Geneva, ILO, 1975.

[16] For further information, see *Industrial relations and personnel management in English-speaking Africa,* Labour-Management Relations Series, No. 40, Geneva, ILO.

[17] Even though it had already been recognized by the law of 1937.

[18] The situation did nonetheless evolve thanks mainly to new legislation.

[19] Technique used in Australia, Canada, Denmark, Italy, Norway, Switzerland and United States.

[20] Hence, Austria and the Netherlands, which are highly centralized and where wage policies are at the same time set on a tripartite basis, are examples of success.

[21] Such was the case of Belgium's social planning agreements (*convenios de programación social*), the general agreement on vocational training and job security in France, and Holland's 1972 social agreements.

[22] Opinions vary concerning centralization so that, while in Italy and Sweden they are the outcome of pressure exerted by employer organizations, in France and Germany the latter organizations reject them for fear that they may lead to

increased trade union power. In this regard, see Sisson, K.: *Management of collective bargaining: an international comparison*, Warwick Studies in Industrial Relations, New York, 1987.

[23] Commission of the European Communities: "Problems and prospects of collective bargaining in the EEC member States", in *Collection Studies*, Social Policy Series, Official Publications Office of the European Communities, Luxembourg, 1980, p. 14.

[24] The so-called concession agreements (e.g. wage reduction agreement between United Automoblile Workers (UAW), Ford and GM in 1982, or the agreement on the reduction of wages and vacations in the steel industry of that same year, giving workers job security and income guarantees in exchange for wage cuts.

[25] Trade unions demanded this reduction as an effective way of eliminating joblessness (although in reality they took the form of "classic reductions", a far cry from the proposed job-sharing). In this regard, see Pankert, A.: "Recent developments in labour relations in the industrialized market economy countries: some benchmarks", in *International Labour Review* (Geneva) Vol. 124 (5), Sep.-Oct. 1985.

[26] Brazil could be counted among this group in the Latin American region since it was only in 1967 that the collective agreement was introduced, breaking with the corporatist principle of bargaining by professional groups.

[27] In Argentina the principle of extensive collective agreements is enshrined in the law.

[28] Belgium (1974), Canada (1967), Finland (1979), Italy (1970), Sweden (1965), United States (1969), among others.

[29] These discussions are recorded in the preparatory Conference documents for the adoption of Convention No. 151 on labour relations in the public service. See *Freedom of association and procedures for determining conditions of employment in the public service*, Report VII (1), International Labour Conference, 63rd Session, ILO, 1977.

[30] Although this characteristic had already obtained in some industrialized countries.

[31] *World Labour Report*, ILO, 1997, p. 82.

[32] In the United States, the trade unions in some sectors such as steel try to secure favourable collective agreements from one employer, thus establishing a model to be used by other unions to exert pressure on other employers.

[33] Locke, R.; Kochan, T.; Piore, M.: "Reconceptualizing comparative industrial relations: lessons from international research", in *International Labour Review*, Vol. 134, No. 2, 1995.

[34] *European Industrial Relations Review*, London, Vol. No.296, Sep. 1998, p. 27.

[35] At the end of the 1950s, "quasi-industrial" collective bargaining was established in Japan vis-à-vis the predominating bargaining structures, whereby bargaining rounds were launched simultaneously throughout the country and in all sectors and common demands put forward. This annual round is held in the spring, whence its name.

[36] On recent changes in the Japanese system of labour relations, see Sako, M. and Sato, H. (eds.): *Japanese labour and management in transition: Diversity, flexibility and participation*, Routledge, London and New York, 1997.

[37] In 1995, enterprise-level agreements covered only 6 per cent of the private sector in the Netherlands (compared with 75 per cent in the case of industry-wide agreements), 14 per cent in Spain (as against 70 per cent for industry) and 25 per cent in France (compared to 80 per cent by industry). See in this connection ILO: *World Labour Report*, Geneva, 1997, p. 120.

[38] *European Industrial Relations Review*, op. cit., p. 27.

[39] See "Negotiating flexibility: The role of collective bargaining in labour market flexibility", Geneva, ILO, forthcoming title.

[40] On recent changes on the collective bargaining front in these countries, see Casale, G.: *Collectivebargaining and the law in Central and Eastern Europe: Some comparative issues*, Budapest, ILO, 1997, Report No. 20, as well as the *World Labour Report*, Geneva, ILO, 1997.

[41] *European Industrial Relations Review*, op. cit., p. 21.

[42] *World Labour Report*, op. cit., p. 159.

[43] On recent changes in industrial relations in the Republic of Korea, see Chang-Hee Lee: "New unionism and the transformation of the Korean industrial relations system", in *Economic and Industrial Democracy*, Vol. 19, pp. 347-373.

[44] See Bronstein, A.: "Societal change and industrial relations in Latin America: trends and prospects", in *International Labour Review*, Vol. 134, No. 2, 1995.

[45] *World Labour Report*, op. cit, p. 171.

[46] *European Industrial Relations Review*, op. cit., p. 27.

[47] *European Industrial Relations Review*, Vol. 288, Jan. 1988, p. 23.

[48] *European Industrial Relations Review*, Vol. 293, June 1998, p. 30.

[49] *World Labour Report*, op. cit. p. 122.

[50] *World Labour Report*, op. cit. p. 159.

ILO Convention No. 98: An instrument still topical 50 years after its adoption

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It was in 1948, some 50 years ago now, that the International Labour Conference in San Francisco adopted Convention No.87 concerning freedom of association and protection of the right to organize. The following year, the Conference adopted the Convention (No. 98) concerning the application of the principles of the right to organise and to bargain collectively.

As the first standards of paramount importance as regards freedom of association, the two Conventions referred to are aimed primarily at promoting the free exercise of the right to organize while safeguarding the independence of employers' and workers' organizations. The motive idea of ILO philosophy on freedom of association – that of independence – has thus been posited. Independence, of course, but independence in relation to whom?

Article 3 of Convention No.87 provides that the public authorities shall refrain from any interference that would restrict the rights of organizations. This necessary absence of interference entails a range of obligations for governments: no requirement of prior authorization in order to constitute organizations, the free choice of their structure by workers and their organizations, the free election of leaders, the untrammelled drafting of the constitutions of the said organizations, financial independence and the protection of trade union funds and goods – in short, respect for certain civil liberties essential to the exercise of the freedom of association, in particular the right of assembly and expression, and the right to demonstrate.

The imperative for organizations to be independent from government authorities was also solemnly recalled four years later (1952) by the International Labour Conference with the adoption of the resolution on the independence of the trade union movement, which retains such relevance that the ILO supervisory bodies still very frequently cite it.

Yet Convention No. 87 did not cover all aspects of trade union independence. Indispensable as it is with respect to public authorities and political parties, the independence of workers' organizations must be no less ensured and safeguarded in their relations with employers. After all, the genuine defence of workers' interests would hardly be conceivable if the organization responsible for promoting their claims were created by the employer or owed its existence wholly to the latter's support. By the same token, fixing working conditions through collective bargaining implies not only the independence of labour and management from each other, but also the possibility of reaching collective agreements without undue intervention by public authorities.

This set of issues not covered under Convention No. 87 was therefore addressed a year later by Convention No. 98, whose title "Right to Organise and Collective Bargaining" gives a good indication of its goals.

Like Convention No. 87, Convention No. 98 simultaneously recognizes and protects an individual right vested in the worker (protection against anti-union discrimination) and collective rights attaching to employers' and workers' organizations (protection against acts of interference and promotion of collective bargaining).

Protection against anti-union discrimination

In general terms, Article 1 of Convention No. 98 provides that "workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment". Paragraph 2 spells out the scope of such protection: "Such protection shall apply more particularly in respect of acts calculated to: (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities

outside working hours or, with the consent of the employer, within working hours".

This form of workers' protection is a key aspect of freedom of association, as acts of anti-union discrimination can in practice lead to a denial of the guarantees provided in Convention No. 87. Clearly, it is of special importance in the case of trade union leaders and representatives, who must be guaranteed not to suffer prejudice by reason of their trade union office.

The full importance of the protection afforded under Convention No. 98 is appreciated when it is observed that acts of anti-union discrimination, more specifically dismissals on account of trade union membership and activities, together with violations of civil liberties indispensable to the exercise of freedom of association, constitute the most frequent source of the complaints filed with the ILO Committee on Freedom of Association and that the proportion of these cases is increasing steadily with time.

One of the major obstacles facing workers victim of such acts is the difficulty of providing proof of the anti-union nature of the measures taken with regard to them. They happen to face a range of problems in determining in practical terms the real nature of their dismissal or of the refusal to hire them, above all when there are blacklists, a practice whose strength lies precisely in the secrecy shrouding it. While it is undoubtedly important for employers to obtain information concerning job applicants, it is no less important, as underlined by the ILO Committee on Freedom of Association, that employees who have been trade union members or activists should be able to become privy to and challenge information held about them, especially if it is inexact and of unreliable origin. Considering this difficulty if not impossibility on the part of the worker to prove that he or she has been the victim of an act of anti-union discrimination, the obligation incumbent on the employer to prove that the alleged anti-union measure has to do with issues other than trade-union-related ones is undoubtedly the most developed form of protection in this regard.

A special and increasingly frequent problem is posed by dismissals dictated by the economic situation which may entail disastrous consequences for unionized workers and their leaders if they are misused to perpetrate acts of anti-union discrimination against them.

The effectiveness of the protection accorded under the law depends not only on the content of the provisions concerned, but also on the way in which they are applied in practice and, in particular, on the efficacy and rapidity of measures designed to ensure their application. It is this context that brings out the full meaning of Article 3 of Convention No. 98, which states that "Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise…"

In other words, governments should put in place machinery designed to ward off acts of anti-union discrimination or, where they cannot be avoided, to ensure the granting of sufficiently dissuasive compensation. Whether preventive in nature (for example, obtaining authorization from a government or independent agency prior to dismissing trade union leaders) or compensatory, the procedures instituted should be speedy, low-cost and impartial so as to forestall such acts or remedy them as rapidly as possible. An important element to be taken into account in this connection is a sense of proportion between the damages suffered by the worker – particularly serious in the event of dismissal, above all in a situation of general economic crisis – and the compensation the said worker may expect. As any act of anti-union discrimination is a violation of a fundamental workers' right, any compensation awarded should be full and comprehensive. This notion underlies the position of the ILO supervisory bodies which consider as insufficient, within the meaning of Article 1 of Convention No. 98, laws which in practice allow the employer to terminate a worker's job simply by according the statutory compensation payable in cases of unjustified dismissal, when the real motive is the worker's trade union membership or activities. The reinstatement of the dismissed worker with retroactive compensation is in this context clearly the most appropriate means of redressing acts of anti-union discrimination. This shortcoming motivated the Committee on Freedom of Association to adopt the practice, in cases of duly proven anti-union dismissals, of requesting the governments concerned to take action to reinstate the workers concerned. The applications made by the Committee in this regard have borne fruit, as the reinstatement of the workers dismissed on account of trade union activities is among the more frequent positive outcomes of its recommendations.

Once the protection of trade union rights was ensured, the next step was to guarantee the independence of trade union organizations vis-à-vis employers and their protection against acts of interference. That was the goal being pursued by the International Labour Conference with the adoption of Article 2 of Convention No. 98.

Protection against acts of interference

Article 2.1 of Convention No. 98 states that "Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration." Paragraph 2 of the same article then describes the examples of certain specific acts of interference "designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations…" Convention No. 98 thus covers a particularly important aspect of freedom of association: the protection of the free exercise of the rights conferred upon employers' or workers' organisations.

The most obvious types of interference as envisaged under Convention No. 98 are the creation of workers' organizations that have been described as "house unions" or "yellow unions" or the establishment of corporatist systems in which employers and workers are represented by one and the same body under public law. Naturally, these are forms of organization unreservedly condemned by the ILO.

Without going to such extremes, there are more insidious instances of acts of interference that can undermine the guarantees provided in Convention No. 98. The numerous complaints the ILO has had to examine in this connection are a good illustration of this phenomenon in practice. We may cite the example of two steering committees existing side by side in a single union, one of them allegedly being manipulated by the employer; the presence of a parallel union that is understood to have been created under pressure from the management; the dismissal of trade union leaders in a manner prejudicial to the existing union and favouring the formation of another trade union organization; and the dual function of a member of the government who also heads an organization of civil servants.

The ILO supervisory bodies have also had to address the specific problem of solidarist associations set up in some Central American countries. These are workers' associations set up dependent on a contribution from the employer and which are financed in keeping with the principles of mutual benefit societies by workers and employers for the social and economic purposes of material welfare (savings, credit, housing and educational programmes, etc.) and unity and cooperation between workers and employers. The organs of these associations must be composed of workers, but an employer representative may participate in them without the right to vote.

In the view of the ILO supervisory bodies, the fact that these associations are partially funded by employers while their membership is comprised of workers, senior managers and staff members taken into confidence by the employer and are often created at the initiative of employers means that they cannot function as independent organizations and therefore pose problems for the application of Convention No. 98. The governments concerned should therefore take steps to eliminate any inequality of treatment between solidarist associations and trade unions and to ensure that the former do not engage in trade union activities in particular, and do not participate in collective bargaining.

As it happens, observance of the principle of the independence of the parties and the voluntary nature of negotiations is indispensable to a genuine process of collective bargaining. If this condition were no longer met, the agreements reached at the end of the process would not regulate working conditions in any valid or objective way, contrary to Article 4 of Convention No. 98.

Promotion of collective bargaining

Article 4 provides that "Measures appropriate to national conditions shall be taken, where necessary, 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." This provision therefore carries two components: the action needed on the part of the public authorities to promote collective bargaining, and the voluntary nature of bargaining, which in turn presupposes the independence of the parties with respect to one another as well as with respect to the public authorities.

The promotion of collective bargaining obviously presupposes the presence of the parties at the bargaining table and therefore the designation of the organization(s) that will represent the workers. The main problem arising in this connection is that of trade union representativity. In discussing Convention No. 98, the International

Labour Conference examined this matter and agreed that preferential rights could be accorded to the most representative organizations for the purposes of collective bargaining. Furthermore, the designation of trade unions for this purpose should be based on objective and pre-established criteria so as to avoid any possibility of bias or abuse. The ILO supervisory bodies have established some guarantees that should be respected in deciding on the organization acting as bargaining agent: (a) the granting of this status by an independent body; (b) the choice of a representative organization by a vote among workers in the units considered; (c) the right of an organization that failed to obtain sufficient votes at previous trade union elections to request a new election after a stated period; (d) the right of a new organization other than the certified one to request the holding of new elections after a reasonable period.

The institution of specialized bodies or procedures often usefully supplements the panoply of provisions and mechanisms designed to promote collective bargaining. These methods may take a wide variety of forms ranging from conciliation to the prohibition of unfair labour practices that hamper the collective bargaining process. These systems should be set up in such a way as to facilitate bargaining, possibly even creating an ad hoc legislative framework, though without going as far as interventionism which would jeopardize the voluntary nature of the bargaining.

In the cases submitted to the ILO Committee on Freedom of Association, one of the problems encountered in recent years has been the established trend in certain countries towards reverting to a certain individualization of labour relations which, should it become entrenched, could of course seriously endanger the promotion of collective bargaining and beyond that the very development of workers' or even employers' organizations.

Another relatively recent phenomenon that prompted the Committee of Experts on the Application of Conventions and Recommendations to express its concern is the fragmentation of bargaining units and the consequent fragmentation of the collective bargaining exercise often concomitant with structural changes in the economy, especially in cases of privatizations. From the ILO standpoint, it is obviously desirable to ensure that these developments are not used to weaken trade union organizations. To safeguard the independence of the parties to collective bargaining, it would even be better for them to decide by common agreement on the level at which the negotiations should take place or at least to entrust a truly independent body with settling the issue.

So the issue of intervention by the public authorities in collective bargaining has at this stage been mooted. And the issue is raised less often in regard to procedures than to the actual content of the collective agreements. This is indeed a domain in which the public authorities are very often inclined to take steps to limit the autonomy of the parties. They may do so by requiring the approval of agreements prior to their entry into force or through more targeted interventions designed to limit or curtail the free determination of working conditions and of salaries specifically by collective bargaining. This latter type of restriction has been used by a growing number of governments in recent years as part of economic stabilization or structural adjustment policy packages. The ILO supervisory bodies believe that such restrictions should be applied only in exceptional circumstances as a strict necessity, should not exceed a reasonable time frame and should be accompanied by appropriate guarantees of protection of the standard of living of the workers concerned, especially those at greatest risk. Failing this, governments would be denying workers and management what is undoubtedly the most flexible and suitable means of adapting to the circumstances of time and place. It is owing to this very virtue that collective bargaining has retained its character of being the most appropriate means of determining working conditions.

By guaranteeing protection against acts of anti-union discrimination and acts of interference and by promoting collective bargaining, Convention No. 98 had fortunately completed the work started one year earlier with the adoption of Convention No. 87.

Admittedly, some grey areas still persisted even after the entry into force of the two Conventions: no special protection was given to workers' representatives, nothing was envisaged to facilitate the accomplishment of their mission and public servants in government departments excluded from Convention No.98 were not protected against acts of anti-union discrimination, nor were the provisions on bargaining applicable to them. It was only much later that these shortcomings were remedied by the Workers' Representatives Convention, 1971 (No. 135), and the Labour Relations Convention, 1978 (No. 151).

In spite of these lacunae, Convention No.98 remains a major instrument in the body of inter-

national labour standards. It is a major instrument because it protects a fundamental right, that of freedom of association, and because it provides what is still a satisfactory and present-day response to the problems besetting workers and their organizations. So it is hardly surprising that Convention No. 98 came to be the preferred instrument in the ratification campaign launched by the Director-General of the ILO in 1995 and that the recognition of collective bargaining figures in the Declaration on Fundamental Principles and Rights at Work adopted by the International Labour Conference in 1998.

The large number of ratifications of Convention No. 98 – 140 to date, currently the second-largest number for any ILO Convention – is proof, if needed, of the importance attached to it by all the parties involved – governments, employers and workers. Thirty-four member States are still to be convinced of the interest and urgency of ratifying this Convention: to convince them is one of the priority tasks which the International Labour Office and its Freedom of Association Branch particularly wish to address in the early years of the next millennium.

Collective bargaining: A comparative analysis

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The following article takes the form of a comparative presentation of collective bargaining in Latin America. The ILO's treatment of this topic is not new: almost 40 years ago it was addressed in an Inter-American Study Conference on Labour-Management Relations (Montevideo, 1960).[2] *In Caracas in 1977, the ILO convened a Latin American seminar on the promotion of collective bargaining which gave rise to a review of collective bargaining in the region.*[3] *Then in 1986 the topic appeared on the agenda of the Twelfth Conference of American States Members of the International Labour Organisation, within the broader framework of the function of industrial relations in economic and social development.*[4] *Since that time, it has not been selected for consideration at the regional level, but subregional studies have been conducted in the Common Market of the Southern Cone (MERCOSUR) countries and Chile,*[5] *and in the Andean countries,*[6] *respectively. This article has drawn on the studies referred to and other available information; it seeks to provide the most current portrayal of the main features and trends in collective bargaining in Latin America.*

Definition

Collective bargaining refers to the process of negotiations between a group of workers, usually represented by one or more trade unions, in exceptional cases by ad hoc delegates, on the one hand, and one or more employers or employers' organizations, on the other, with the set purpose of determining the working conditions and terms of employment applicable to an enterprise or industry. It may also aim at regulating relations between the parties involved in collective bargaining. The anticipated outcome of bargaining is the conclusion of a collective labour agreement to govern working conditions. Throughout Latin America the instrument as defined is known by various Spanish terms, including: *convención colectiva de trabajo* in Argentina, Costa Rica, Nicaragua, Panama, Peru and Venezuela; *contrato colectivo de trabajo* in Bolivia, Chile, Ecuador and Paraguay, and *convenio colectivo de trabajo* in Cuba, Uruguay and the Dominican Republic.[7]

Importance of collective bargaining in the industrial relations system

In the early 1980s, an ILO publication highlighted the fact that collective bargaining in Latin America played a role whose significance could neither be ignored nor exaggerated.[8] That assessment was made at a time when a large part of the continent was governed by authoritarian political regimes, or was just barely emerging from such regimes. One would have hoped that almost 20 years later – in a democratic environment more open to freedom of association – collective bargaining would be in full bloom. However, that expectation has not been met. Collective bargaining has definitely made some headway, but it has also experienced setbacks to the point where, at present, its importance in the industrial relations system of most countries must at least be qualified.

On one hand, it cannot be denied that the return of a number of Latin American countries to a democratic system of government and a climate fostering greater respect for human, civil and political rights has created more room for freedom of association which, in theory, might have permitted the exercise of collective autonomy under conditions unthinkable a short while before. Nevertheless, while Latin America was shedding its authoritarian regimes it was also suffering the onslaught of the external debt crisis and its economy went into decline. The 1980s are called the *lost decade* in terms of its economic development (but not its political

maturity). That period was followed by one of neo-liberal economic programmes whose effects on the composition and structure of the workforce were dramatic. The workforce shrank significantly in the sectors with a strong trade union presence, particularly in the public, industrial and commercial sectors of the State and the manufacturing industries of the private sector. At the same time it grew in the informal sector in terms of non-wage work, and in emerging industries such as in-bond assembly industries where organized labour encountered serious obstacles. Simultaneously, unemployment rates tended to rise and even the more formal economic sectors proved rather inclined to favour precarious forms of employment by resorting increasingly to *atypical* employment contracts.

Those factors had a demobilizing effect on workers, reflected in the weakening of trade unions which lost their bargaining capacity. In most countries, after a phase of expansion which came in the wake of the democratization of society, collective bargaining came to a standstill due to the impact of the economic crisis and structural adjustment programmes. In several countries, without exception, it lost ground, sometimes considerably. Within this general scenario we can note that collective bargaining has greater relative importance in Argentina, Brazil, Mexico, Uruguay and Venezuela and substantially less in the other countries. In places such as Costa Rica, its presence could almost be considered symbolic. Cuba is a case apart because trade union membership is almost total, and practically all *labour organizations* have collective agreements. Nevertheless, both Cuba's economic model and the role of its trade unions and collective bargaining differ significantly from the rest of the continent: neither can be compared.

Origin and development

In its broadest sense, collective bargaining has been practised in Latin America for almost a century and its history goes even further back in time. Around 1895 in Uruguay, negotiations were held to limit the working day in the construction, marblework and printing industries.[9] Although such negotiations were not concluded in the form of documents grouping the formal requirements of a collective agreement in the legal sense of the term, they nevertheless reflected a new approach to regulating conditions of employment through self-appointed commitments on the part of employers and groups of workers, in as much as their features were distinct from individual contracts and heteronomous regulation. In Argentina a collective sectoral agreement was concluded in the Buenos Aires printing industry in 1906. The first collective agreement in Mexico – in the textile industry – dates from 1913; in 1918 Bolivia and Colombia each engaged in collective bargaining in mining centres and the port of Barranquilla respectively. The first collective agreement in Venezuela dates from 1919 and covered labourers and workers on the Gran Ferrocarril Central.[10]

The common denominator of those negotiations was their close relationship with conflict, which historically has been the main feature of relations between capital and organized labour in Latin America. In fact, conflict also predates trade unions since in general the main reason for dispute is trade union recognition. Collective bargaining was therefore originally considered a conflictual relationship, and the first collective agreements on record acquired the form of dispute settlement protocols. Such a perception of collective bargaining has been gradually changing, to the extent that labour legislation has been shaped to recognize the proper role of collective bargaining as a medium for regulating working conditions. In this sense the pioneer laws were probably the Chilean Labour Code and the Mexican Federal Labour Law, both of which were passed in 1931 and represent the first attempts at codification of labour legislation in Latin America. Shortly thereafter, similar legislation was adopted in almost all the other countries.[11] However, the perception of collective bargaining as a conflictual process has not yet been altogether banished, as is evidenced by the fact that in the majority of countries the procedure for collective bargaining follows the same course as conflict resolution. It has been only through a painstaking process that there has emerged an acceptance of the notion that the purpose of collective bargaining is to resolve conflicts, not create them.

Current practice: Full of contrasts

Available statistical information shows the rather uneven development of collective bargaining. For Central America, a Costa Rican Labour Ministry report for 1994-97 made no mention of the signing of new collective labour agreements, in contrast to the 42 and 55 collective agreements registered in 1975 and 1976 respectively.[12] In El Salvador, the Ministry of Labour registered 308 collective agreements in

force in 1995, of which 229 applied to the construction industry and 49 to manufacturing. In 1993, 1994 and 1995, the Guatemalan Ministry of Labour registered 21, 34 and 31 collective agreements on working conditions ("pactos colectivos"), respectively. In Honduras, 60 collective agreements were registered in 1994 and 28 in 1995, but the actual number of collective agreements in force was far greater, namely 279, covering a total of 79,715 workers. During the period 1993-95 Panama concluded 206 collective agreements, covering slightly fewer than 70,000 workers. Between February 1990 and June 1993, the "Dirección de Negociación Colectiva" (Office of Collective Bargaining) in the Nicaraguan Ministry of Labour registered 339 collective agreements. Of that figure, 275 resulted from innovative and unprecedented negotiation, 48 were revisions of earlier agreements and 13 were attached as addenda to existing agreements;[13] almost three-fifths of the 275 agreements had been signed in the public sector, and only 30 per cent in the private sector. In comparison with a study conducted some years previously, the importance of collective bargaining had greatly diminished, probably as a consequence of the change in the political environment in 1989.[14]

Drastic decline in the Andean countries

With regard to the Andean countries, the information available shows that in Colombia in 1996, 607 collective agreements were concluded, 206 in Ecuador, 623 in Peru and 594 in Venezuela. In some of these countries the actual number of agreements in force is probably higher, since more than a year has elapsed. Furthermore, the agreements remain in effect even when the duration of their terms has expired, as long as the parties have not revoked or replaced them.

Nevertheless, as described in the study from which these data have been taken, in all these countries the decline of collective bargaining has been drastic.[15] This opinion is corroborated by a comparison of data published 20 years earlier: in 1976 there were 1,123 collective agreements in Colombia, 222 in Ecuador, 1,596 in Peru and 1,446 in Venezuela.[16]

Extensive industrial coverage in Argentina

In contrast to the situation described above, collective bargaining enjoys a healthier status in the Southern Cone. Undoubtedly, it is in Argentina that collective bargaining is most prevalent, due to the extremely ample coverage of its industry-level domestic collective agreements. After a period of near freeze during the military regime (1976-83), collective bargaining regained impetus upon the restoration of democracy. It received further stimulus at the beginning of the 1990s with the adoption of standards such as the National Employment Act which enhanced labour flexibility in so far as it was possible to do so through collective bargaining. In addition, a 1995 law was passed stipulating collective bargaining in determining specific working conditions in small and medium-sized enterprises, thus encouraging bargaining at that level. Collective bargaining also gained ground in public administration and education through the passage of laws on collective bargaining in those sectors, adopted in implementation of the ILO Collective Bargaining Convention, 1981 (No. 154), ratified by Argentina in 1993.

Brazil: More autonomy with regard to the State

There has also been notable progress in Brazil where collective bargaining was practically non-existent for much of the rule of the military government (1964-85), largely as a consequence of legal provisions which prohibited the negotiation of salary increases which were incompatible with the economic thrust of the Government. Another restriction stemmed from the *dissidio colétivo* procedure, which allowed any of the parties to a negotiation to request a labour court to set salaries and working conditions through a *sentencia normativa* (legal ruling), similar in effect to an enforceable arbitration award. However, towards the end of the 1970s the situation began to change as a result of the appearance of the "new trade unionism" (*novo sindicalismo*) which provided greater autonomy from the State, and by 1988 a total of 75 per cent of urban trade unions were engaged in collective bargaining.[17] At present, although the *dissidios colétivos* have not entirely disappeared, they have lost much of their earlier dominance to the benefit of bilateral collective bargaining.

Uruguay: Bilateral negotiation has displaced tripartite wage boards

Collective bargaining in Uruguay has made giant strides after many years of virtual paralysis during the military regime (1973-85). Upon the restoration of democracy, the new govern-

ment reopened wage negotiations in tripartite wage boards which had existed since 1944 but which had not met since 1968. That practice remained in force for several years while at the same time bipartite collective bargaining between workers' and employers' organizations began to gain strength. Around 1991, 86 per cent of the workers in enterprises employing more than 50 workers were covered by some form of collective labour agreement and 79 per cent of the enterprises were covered by an industrial agreement.[18] In other words, bipartite collective bargaining has ousted tripartite wage boards, which the Government has stopped convening.

Progress only with the restoration of democracy

Collective bargaining in Chile has not reached levels comparable to those of its neighbours in the Southern Cone, but it cannot be denied that it has grown since the restoration of democracy in 1990. Consequently, in 1993, 9.7 per cent of contractual workers and 15.5 per cent of the total number of salaried employees were covered by a collective agreement; this proportion rose to 36.1 per cent in enterprises employing more than 50 workers, but stood at a mere 1.3 per cent in smaller enterprises.[19] A more recent survey has shown that collective bargaining had reached 75.7 per cent of the large enterprises (200 or more workers), but only 5.4 per cent of micro-enterprises (one to nine workers).[20]

Similarly, collective bargaining in Paraguay, which nonetheless is the MERCOSUR member with the least relative development, may be said to have picked up some momentum. The most significant leap occurred between 1989, the date of the fall of the dictatorship, and 1994, a period in which 250 collective agreements covering 31,494 workers were concluded, a figure representing a 400 per cent increase over the previous period.[21]

Main features

In Latin America, as in the rest of the world, collective bargaining is one of the means which binds the actors in industrial relations: the employers and their organizations on one hand, and one or several groups of workers on the other, usually, but not always, represented by a trade union. As shown earlier, there are very few countries, if any, in which collective bargaining is the main mechanism for interaction between the actors in the industrial relations system. Nevertheless, it applies in those enterprises or industries in which workers have been able to form solid trade unions.

A well-defined framework for legislation

The central feature of collective bargaining, with the sole exception of Uruguay, is that it takes place within a framework which is strictly demarcated by legislation. This in principle offers the advantage that in almost all countries legislation, and often the Constitution itself, enshrines the right to collective bargaining in emphatic terms. Besides, the existence of a legal framework allows for the formulation of clear and precise "rules of the game" which, at least in theory, makes the bargaining exercise easier.

State interest or control mechanism?

It might then be surmised that the existence of such a detailed legal framework reflects the interest of the State to promote collective bargaining, a requirement of some international instruments such as the Collective Bargaining Convention, 1981 (No. 154).[22] Yet legislation has also in day-to-day practice functioned as a device to control the bargaining autonomy of the parties to collective bargaining, due to the inquisitorial way in which the public authorities interpret and apply its rules. The matter deserves very special attention because if the subject is approached from a historical perspective it would have to reflect rather accurately the traditional mistrust that Latin American governments have displayed towards the workers' movement, which they often severely repressed when they could not win it over for their own purposes. That was why the State at one and the same time restricted freedom of association and enacted generous legislation in favour of the individual worker, perhaps in an attempt to *send workers a message* that their welfare depended on the State rather than on trade unions; those governments had no confidence in the political submission of the unions.

In spite of all impediments

Perhaps the most surprising aspect of it all is not so much the relatively low prevalence of collective bargaining, but rather the fact that it has survived in spite of all the obstacles the State has erected. An eloquent testimony to

these impediments is the remarkable number of complaints, handled by the Committee onFreedom of Association, which relate to collective bargaining restrictions imposed by most countries on the continent at one time or another.

Trend towards legislating through restrictions

In contrast with the rest of the countries, Uruguay offers, as said earlier, the unique example of a country lacking legislation on collective labour relations, to the point where its main sources of regulation are ILO Conventions Nos. 87 and 98, both of which it ratified in 1954, and a 1968 Act, which is now partially obsolete.[23] If the truth were to be told, this absence of a legal framework has not hampered the development of collective bargaining. In fact, *self-regulation* of collective labour relations has been the position traditionally defended by Uruguayan trade unions, which often interpret the term *regulation* as a synonym for restriction of freedom of association. The experience in Latin American countries, with their tendency to legislate through restriction, including the experience of Uruguay whose only regulation of collective bargaining (and trade unions) was adopted during the military regime (1973-85) and quickly annulled after the restoration of democracy, tends, at least to a certain extent, to prove the trade unions right. However, as an ILO mission observed during a 1986 visit to study the country's industrial relations, the absence of a legal framework could also prove harmful because it translates into a lack of clear rules of the game which would facilitate and promote negotiation.[24]

Goal to promote consensus and stimulate social dialogue

The main issue is not so much establishing whether collective bargaining should be subject to rules or not, but rather, knowing their content and, particularly, whether they will promote collective bargaining or restrict it *de facto*. Sometimes collective bargaining is conceived as a conflictual process, when in reality its aim should be to promote agreement, through conciliation and reciprocal concessions, and not conflict. The promotion of collective bargaining – and this should be the goal of regulation – means promoting consensus and stimulating social dialogue, which can only be beneficial for industrial relations, and more generally for the economic development of the countries in question and strengthening of their democratic and pluralist governments.

Structure of collective bargaining and its actors

Trade unions and coalitions

Legislation invariably designates trade unions as the representative of workers, but such representation is often not exclusive. In fact in several countries, a coalition of non-unionized workers is also a possible participant in bargaining, but is almost always subject to safeguards established to prevent anti-trade union discrimination. Therefore, as a general rule, the coalition may engage in negotiations only when there is no trade union in the enterprise in question. Furthermore, it will always negotiate as an agent, and not as a collective actor, because agreements signed with a coalition may apply only to those workers who have specifically given the coalition the mandate to represent them. This differs from the case of the trade union whose representational power is extended normally (but not always, as we shall see later) to the whole bargaining unit. In addition, in several countries such as Argentina, Mexico and Venezuela, the law purely and simply does not recognize collective bargaining with coalitions of non-unionized workers.

Chile is an exception: coalitions and trade unions enjoy the same rights, either of them may engage in negotiations, and in both cases they represent only their respective members. It would perhaps be more appropriate in this instance to speak of *pluri-individual* rather than *collective* bargaining.

Separate mention should be made of the conflict which has arisen in countries such as Costa Rica, where workers have often preferentially negotiated *direct agreements* with solidarity associations instead of collective agreements with trade unions. Such associations, created to provide benefit and enhance material welfare, are financed by employers' contributions, and do not have the features of independence typical of trade unions. As ILO supervisory bodies have pointed out, the negotiation of *direct agreements* with "asociaciones solidaristas" is likely to create discrimination against trade unions, rendering the practice incompatible with freedom of association.[25] Reforms of the 1993 Labour Code prohibited the negotiation of *direct agreements* in the event that workers were represented by a trade union.

Structure of trade unions and collective bargaining

The structure of trade unions greatly influences their representational power and capacity to operate within the scope of specific bargaining units. For example, the trade union in an enterprise would rarely have an opportunity to bargain at the industry level or at the level of small enterprises employing fewer than the minimum number of workers required in order to register a trade union (between 12 in Costa Rica[26] and 40 in Panama). Nor is bargaining made any easier when the trade union structure

workforce be unionized for there to be an obligation to negotiate. In Mexico and Paraguay there is no specific membership requirement for the negotiation of an enterprise-level collective agreement, but there must be membership of at least two-thirds for a *contrato-ley* (law governing the contract). Likewise, there is no minimum membership requirement in Honduras, Panama or Chile where, in any event, the collective agreement applies only to trade union members.

Employer as bargaining partner

The employer is a party to enterprise-level negotiations, whereas the employers' organization carries out that function during industry-level negotiations. As shown earlier, negotiation at this highest level is prevalent only in Argentina, Brazil and Uruguay while in the other countries it rarely occurs, if at all. In short, apart from these exceptions, employers' organizations do not usually have a direct leadership role in collective bargaining, even though they may provide indirect leadership by giving technical advice to their members.

Centralized bargaining: a form of negotiation not covered by law

One outstanding aspect of collective bargaining in Latin America has been the conclusion of centralized national agreements, usually tripartite, between the government and employers' and workers' organizations. This form of negotiation has not been covered by any of the Labour Codes of the region, but paradoxically, it becomes increasingly prevalent when bilateral collective bargaining falters. It is closer to the realm of social consultation and social (and political) dialogue than to collective bargaining proper. Centralized bargaining was scarcely practised until the 1980s, even though its precursors have been studied by the ILO.[29] However, once democracy was restored, collective bargaining became the object of growing interest and favour, a trend that was perhaps influenced by Spain's experience.

Transition without excessive social upheaval

The extremely positive results of Spain's *Framework Agreements* during the transition to democracy following the dissolution of the Franco regime, and their quite favourable impact on the strengthening of democracy, would suggest that the negotiation of centralized agreements in Latin America could have similar effects, fostering an orderly transition from dictatorship to democracy without excessive social upheavals. Centralized bargaining was therefore practised in one form or another in the various countries, leading to agreements which combined firm commitments with political statements in support of democracy and social dialogue.

Practically no strike action in Chile

Perhaps the best-known example of this practice is the tripartite agreement called *Chile: an historic opportunity,* which was concluded between the new democratic Government and central employers' and workers' organizations just after the end of the regime led by General Pinochet. That document not only set some minimum social commitments (among others, the raising of the minimum wage), but it also reaffirmed political commitment to democracy. This episode of centralized bargaining and negotiations in the following two years were, without a doubt, instrumental in ensuring that the transition to democracy in Chile would take place without industrial action. By contrast, in many other countries the passage from dictatorship to democracy was accompanied by violent social conflict, and that was largely due to the release of social frustrations in reaction to a protracted period when the ruling authorities virtually equated strikes with subversion.

Important agreements concluded in other countries

Examples of centralized bargaining can also be found elsewhere, such as in Paraguay and Colombia, where centralized bargaining indisputably played a key political role, but it also occurs in Argentina, where in 1994 an important Framework Agreement for Employment Productivity and Social Justice was signed, and in Mexico, where the conclusion of the 1987 Economic Solidarity Pact was followed by a long cycle of tripartite negotiations aimed at price and wage stabilization.[30] It is also worth mentioning the experience of Venezuela, where President Caldera succeeded in securing the 1997 "Acuerdo tripartito sobre seguridad social integral y política salarial" (tripartite agreement on social security and wage policy) with the Confederation of Venezuelan Workers and the employer organization, the Venezuelan Federation of Chambers of Commerce and Manufacturers' Associations (FEDECAMARAS).

Consensus was thereby reached on the introduction of important reforms in labour legislation (in the areas of wages and severance pay) and in social security. Those areas had been politically frozen for many years and could be unblocked only through social dialogue and tripartite negotiation.

An atypical form of negotiation: The State as beneficiary

We could conclude that while traditional collective bargaining experienced a period of relative decline, another form of negotiation, centralized and tripartite bargaining, emerged and evolved. This form of bargaining could be placed midway between the industrial relations system and the general political system, drawing on the objectives of both systems. It does not deal with what is strictly understood as *conditions of work*, and its direct beneficiary is not the employer, but the State and the social partners in abstract. It is a difficult concept to define because it does not fall within the everyday dynamics of working relations. Nevertheless, it requires the full participation of trade unions and employers' organizations, and a willingness on the part of the actors to negotiate. It also has an impact – at least indirect, but often very direct – on the living and working conditions of workers; therefore even though it is a form of atypical negotiation, it also has its proper place within the practice of collective bargaining in Latin America.

Content of collective bargaining

The degree to which collective bargaining is substantive is influenced by the general context of the industrial relations system, and in particular by factors such as the nature and structure of the bargaining unit; the trade union's competence to negotiate and its interest in negotiating specific issues; the economic and general political climate; economic capacity on the employer's side and the room for manoeuvre the law grants to the social partners. All these factors may come into play favourably in collective bargaining, and this renders the collective agreement a highly dynamic and reciprocally useful instrument for employers and workers. On the contrary, they may limit collective bargaining to a few points which almost always relate to wages, unless they are limited – as is done in some collective agreements – to reproducing already existing legal provisions or confirming that the employer is obliged to observe the law.

A list of bargaining topics

While wages and pay systems are ever-present topics in collective bargaining, the other main issues which are likely to be negotiated appear with much less frequency. However, they are not totally unheard of and a short list of them deserves mention at this point.

Work organization and job classification

The second main bargaining item is general conditions of work, in particular working hours, public holidays and leave even if these subjects may already be elaborately covered in detail by legislation. In addition, there are provisions related to work organization, such as shift work or work teams, which also arise frequently in collective bargaining. It should also be pointed out that in certain countries, such as Argentina, job classification is given much emphasis in collective bargaining.

Social benefits, medical attention, facilities

Another topic covered by bargaining is *social benefits,* a topic of great interest to workers due to the generally unsatisfactory social security coverage, in both quantitative and qualitative terms, and the scarcity or insufficiency of social welfare distribution networks in Latin America. Therefore in a country such as the Dominican Republic, the coverage of personnel by regular medical fees appears almost invariably on the collective bargaining agenda involving a medium-sized enterprise. In all the other countries, whenever possible, bargaining is held on issues such as medical and dental care, childcare facilities, canteens, cultural and sports recreation, and so on. It is nonetheless obvious that very few or none of these subjects will be negotiated in small enterprises, or in enterprises which are not on a sound financial footing. Once again we are faced with the inadequacy of enterprise-level collective bargaining to meet the needs of the majority of workers.

Relations between the trade union and employer

Finally, it would be fitting to mention the provisions referring more specifically to relations between the trade union and the employer or employers' organization signing the collective

agreement. This topic is of prime importance, since the first step would be the recognition of the trade union as a legitimate bargaining partner in the enterprise, thereby eliminating the main cause for conflict. Next in line are trade union facilities, which could include union licences, meeting rooms, space for trade union announcements, and most importantly, payroll deductions for union dues, to which is added in some countries, especially in Argentina, the *cuota de solidaridad* (social contribution) or agency shop fee.

Administration of the agreement, recruitment and duration

There are other issues related to the administration of the collective agreement often handled by a joint commission. For example, dispute settlement may be put before an internal complaints committee, and even involve highly sophisticated complaints mechanisms inspired by "grievance procedures" as practised in the United States. Trade union intervention in the recruitment of workers is another related topic. In Venezuela some collective agreements include provisions which grant privileges or at least priority to trade unions in the area of labour supply. In Mexico, collective agreements specify the groups of workers embraced within the scope of application and whose trade union affiliation will be less than automatic, because of the possibility that the union could demand "union shop" dismissal. The final issues negotiated are the provisions specifically related to the duration of the collective agreement and the formalities for its possible renewal.

Final considerations

At the beginning of the 1980s, the outlook for collective bargaining in Latin America augured well for the future.[31] Almost 20 years later it has become inevitable to check the tone of optimism expressed earlier since the scene has indeed changed. Although collective bargaining has gained in importance in some countries, in others, perhaps in most cases, it has declined perceptibly, even though there is no reason to presume that its survival is threatened. The question is not so much whether it will disappear, but rather, how much it will count in the world of organized labour.

However, on a brighter note, we must recall that 20 years ago, collective bargaining was still questioned ideologically, sometimes because it was considered as a prelude to strike action or an expression of the class struggle, and at other times because it supposedly had a negative impact on the behaviour of prices and wages whose stability was a goal constantly pursued and rarely achieved by previous governments. In contrast to that period, today such ideological questioning has vanished. Although labour legislation – called "regulation of the labour market" nowadays – is the focus of many neo-liberal attacks, most of these concentrate more on the individual than on the collective aspects of industrial relations. Furthermore, attempts are even being made to empower collective bargaining as a means of introducing greater flexibility into labour legislation, which is expected to prove useful in improving the international competitiveness of enterprises now facing the challenge of globalization. Perhaps the best example of this focus is the 1998 Brazilian labour law reform[32] which allows enterprises to streamline the distribution of working hours between the high and low periods of the business cycle, and to recruit part of their manpower under fixed-term employment contracts, provided that such measures to create greater flexibility are established through collective bargaining. This may offer a new dimension to collective bargaining, and thereby open up its possibilities and enhance its usefulness.

A new form of collective bargaining has appeared and its future at present seems quite promising: national tripartite bargaining, or consultation, as mentioned earlier. Through this form of bargaining, economic, social and political commitments may be adopted and at the same time legitimize the social and political rights of representation of the partners in the industrial relations system.

A less disheartening conclusion may therefore be drawn than that which would emerge from a mere study of the quantitative evolution of collective bargaining. It is no longer being perceived as a form of conflictual relationship between capital and labour, and increasing emphasis is being placed on its potential instead of its limitations. This is not sufficient to conclude that its relative decline is simply transitory, but it can encourage the formulation of a more optimistic forecast, based on the recognition that the potential of collective bargaining has so far been underutilized and the time has come to use it to better advantage.

Notes

[1] Director, ILO Multidisciplinary Technical Advisory Team for Central America, Cuba, Haiti, Mexico, Panama and the Dominican Republic.

[2] The documents and discussion of this symposium were published in *Some aspects of labour-management relations in the American region*, Labour-Management Relations Series, ILO, Geneva, No. 11 (1961) and No. 11a (1962).

[3] Documentation for this seminar was published in *La negociación colectiva en América Latina*, ILO, Geneva, 1978.

[4] See *Labour relations and development in the Americas*, Report III to the Twelfth Conference of American States Members of the International Labour Organisation, Montreal, March 1986.

[5] *Labour relations in the Southern Cone: Comparative study*, RELASUR Reports, 1995.

[6] M. L. Vega Ruiz, et al.: *Tendencias y contenidos de la negociación colectiva: fortalecimiento de las organizaciones sindicales de los países andinos*, Working document, No. 88, Field Office and ILO Multidisciplinary Technical Advisory Team for the Andean countries, Lima, 1998.

[7] It is also called *convenio colectivo* in Spain. In the other countries: *convención colectiva* in Brazil when its scope includes industry or branch of activity and *acuerdo colectivo* when it covers the enterprise; *contrato colectivo* in Mexico at the enterprise level, and *contrato ley* at the level of industry. In El Salvador it is called *contrato colectivo* when it is negotiated with an employer, and *convención colectiva* when the negotiation is conducted with an employers' organization. In Guatemala the expression *pactos colectivos de condiciones de trabajo* is used. Colombia in turn says *convención colectiva* when negotiations are held with a workers' organization and *pacto colectivo* when it is concluded with a group of non-unionized workers. In Honduras, the Labour Code apparently uses the terms *contrato, convención and convenio colectivo de trabajo* interchangeably.

[8] A. Bronstein: "La negociación colectiva", in *Las relaciones colectivas de trabajo en América Latina* (E. Córdova, ed.), ILO, Geneva, 1981.

[9] For the evolution of collective bargaining in Uruguay, see ILO: *Relaciones de trabajoen el Uruguay: informe de una misión de la Oficina Internacional de Trabajo*, Labour-Management Relations Series, No. 66, Geneva, 1987.

[10] ILO: *La negociación colectiva en América Latina*, op. cit.

[11] For information on the evolution of labour legislation in Latin America, see A. Bronstein: "Societal change and industrial relations in Latin America: Trends and prospects", *International Labour Review*, Vol. 134,No. 2, 1995/2, pp. 163-186, and "Labour law reform in Latin America: Between state protection and flexibility", *International Labour Review*, Vol.136, No. 1, spring, 1997, pp. 5-26.

[12] Since then the practice of concluding collective agreements in state enterprises has ceased and trade unions in the private sector have almost disappeared.

[13] Pablo Aznar, Mercedes Fonseca; Auxiliadora Leal: *La convención colectiva*, Ministry of Labour, Centre of Labour Studies, Managua, 1996.

[14] Aznar, Fonseca and Leal, ibid.

[15] Vega Ruiz, op cit., p. 25.

[16] ILO: *La negociación colectiva en América Latina*, op. cit.

[17] *Labour relations in the Southern Cone*, op. cit.

[18] Ibid, p. 83.

[19] Ibid, p. 83.

[20] Data taken from *Encuesta laboral* (1998) of the Dirección Nacional de Trabajo (National Labour Office) The survey is based on a sample of 1,241 enterprises which cover a total of 151,251 workers.

[21] Ibid, p. 84.

[22] To date, this Convention has been ratified by Argentina, Brazil, Guatemala and Uruguay.

[23] Act 13720, promoted by the Comisión de Productividad, Precios e Ingresos (COPRIN). At present its provisions remaining in effect are chiefly those relating to the maintenance of minimum services during strikes which affect an essential service.

[24] ILO: *Relaciones de trabajo en el Uruguay*, op. cit.

[25] See *Freedom of association. Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, fourth edition (revised), Geneva, 1996.

[26] In Chile a trade union may be formed with a minimum of eight workers if the enterprise has fewer than 50 workers, but it must include 50 per cent of the staff.

[27] Vega Ruiz, op. cit., p. 29.

[28] The minimum number of workers required to form a trade union is 12 in Costa Rica, 20 in Bolivia, Dominican Republic, Guatemala, Mexico, Nicaragua, Paraguay, Peru, and Venezuela, 25 in Chile and Colombia, 30 in Ecuador and Honduras, 35 in El Salvador, and 40 in Panama.

[29] See ILO: *Labour relations and development in the Americas*, op. cit.

[30] See Basilio González: "La experiencia reciente del diálogo social en México", in *Diálogo y Concertación Social*, documents for a tripartite symposium, ILO/Ministry of Labour and Social Security of Colombia, Bogotá, 17 and 18 October 1995.

[31] See A. Bronstein: "La negociación colectiva", in E. Córdova (ed.), op. cit.

[32] Act No. 9601 of 21 January 1998 and its regulatory decree No. 2460 of 4 February 1998.

Strong state presence to control conflict pervades labour law

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The aim of this article is to provide a summary of collective bargaining in Central America, and to show the direction it has taken as well as the course we expect it to take in its development as a component of freedom of association. To achieve this goal, we shall make a brief reference to the concept of collective bargaining and some of its implications; and study its function in society, as ascribed by labour law.

1. Concept

According to the principles laid down by international law, collective bargaining in general 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" (Collective Bargaining Convention, 1981 (No.154)).

The following conceptual points could be made:

- Although collective bargaining is an essential manifestation of collective autonomy, and consequently an integral part of freedom of association, it is not an activity (or domain) exclusive to trade union organizations; non-unionized workers may also engage in or be entitled to participate in collective bargaining.
- Secondly, the above definition refers to procedures ("negotiations") which may be set out in a record or an agreement between the parties. However, specific legislation will further define – where appropriate – the precise mechanisms to be applied, and the hierarchical position of the instruments in each domestic legal system.
- Thirdly, collective bargaining may take place within the framework of *formal procedures* established by labour law, or through *informal mechanisms or procedures* defined by the parties themselves. Both cases represent authentic collective bargaining governed by common principles.

Since collective bargaining is a fundamental aspect of freedom of association, it would be worth summarizing the basic principles which the ILO Committee on Freedom of Association has established with regard to collective bargaining:[1]

- Collective bargaining is an essential element in freedom of association.
- Trade union organizations authorized to engage in collective bargaining must be selected on the basis of their representativity, free from employer or government interference.
- Collective bargaining must be applicable in both the public and private sectors.
- Collective bargaining with the representatives of non-unionized workers may take place in the absence of trade unions.

- Collective bargaining must always be voluntary for both workers and employers and free from governmental intervention or interference.
- The dispute-settlement bodies arising from collective bargaining must be independent and their intervention on behalf of the parties voluntary, except in the case of essential public services where arbitration is the prescribed mechanism for the resolution of differences.

2. Function

A less traditional variable concerns the analysis of the role or function ascribed to collective bargaining under labour law. As a starting point we can therefore formulate the hypothesis that in Central America collective bargaining is carried out with a dual purpose:

- To establish a set of procedures (collective bargaining) aimed at maintaining state control over disputes between the actors in collective labour relations. It seeks to *regulate* conflicts, keeping them within the realm of legitimacy predetermined by the State and containing them within the context of the enterprise or sphere of employment in which they occur.
- Secondly, collective bargaining by/or with the participation of trade unions is determined by the specific function of trade unions within a given socio-economic model of society. In that connection, trade union participation in collective bargaining is defined and exercised in ways that are specifically restricted to the enterprise and to the substance of labour relations, without any reference to class issues. This aspect is undoubtedly related to the limited role which Central American laws ascribe to trade unions, and according to which trade union activity must be based on the support of a particular socio-economic model.

In view of the significance of this subject in countries experiencing rapid socio-economic developments which could lead to changes in the regulation of collective bargaining in the short and medium term, we shall make a brief study of each of the national laws. In so doing, it would be useful to identify the distinct modalities and instruments at the core of collective bargaining, and to include special reference to the main trade union instrument: the *Collective Labour Agreement*.

Constitutional regulations

The primary framework of reference which defines the functional nature of the socio-economic model of collective bargaining and its goal of controlling labour disputes may be found in constitutional norms. Such provisions governing collective bargaining are quite common throughout the region. As will be seen, in most cases, it is included in references to freedom of association and, from time to time, incorporates the third basic component of that freedom: the right to strike.

We can therefore make two observations at this point. Firstly, reference to or express mention of collective bargaining is often avoided, possibly because it is regarded as being already subsumed under the concept of freedom of association (Panama, Political Constitution, hereinafter referred to as PC, article 64) but not the right to strike (PC, article 65). In other cases (Nicaragua and Costa Rica), freedom of association (PC, article 60), collective bargaining (PC, article 62) and the right to strike (PC, article 61) are specifically cited in the Constitution. In El Salvador, for example, the Political Constitution relegates both the conditions under which collective bargaining (collective agreements and contracts) develops and the impossibility of establishing exclusionary clauses pertaining to trade unions to the competence of ordinary law (PC, article 39).

The framers of Constitutions (for example in Costa Rica) often confuse “class” with “subgroup”. Reference is made only to the Collective Labour Agreement, which is one instrument, but not the only, falling within the purview of collective bargaining, as defined by international standards. This theoretical inaccuracy, which is also reiterated in the Political Constitution of El Salvador, tends to cause controversy in practice, especially when considering collective bargaining in relation to the sectors which are inclined to restrict this component of freedom of association, as in the case of public servants.

The inclusion of formulations on labour law in Central American Constitutions dates back to the Mexican Constitution of 1917 and its well-known article 123. It is due to this recognition that labour principles, which did not exclude rules on collective labour law, appear in the Constitutions of the entire region. Yet, regardless of origin, what is certain is that the incorporation of labour law principles also reflects the functions ascribed to collective bargaining in the first instance. It is indeed in the Political

Constitution of each country that the dominant social groups define the economic model they promote under specific economic conditions.

Provisions of ordinary law

In spite of the provisions established in the international legal order, even in the case of countries which have ratified many such instruments, and despite the existence of constitutional regulations, what is certain is that – correspondingly – it will be ordinary labour legislation which definitively establishes the mechanisms and the specific guidelines for the development and implementation of collective bargaining.

These concrete provisions governing the function of labour law allow us to make the initial distinction between statutory collective bargaining (directly established by the State through labour law), and negotiations which are not generated directly by state intervention but stem from the will of the parties in the collective relation and which we might call non-state bargaining. Although both types belong to the domain of collective bargaining, for the purpose of this study we shall refer only to the content of ordinary labour law, dispensing for the moment with non-state bargaining and its various manifestations.

In addition, it should be stressed at the outset that labour law is extensively regulated in the region. Likewise, it is clear that many of these ordinary law regulations again have a common historical origin, given the strong influence in the whole region of the 1931 Federal Labour Act of Mexico, a body of rules which served as a point of reference for many of the Labour Codes of Central America adopted at the beginning of the 1940s and later.

An examination of statutory collective bargaining should be carried out through a comparison of various national laws in order to: (1) differentiate between the various procedures based on whether or not a third party is involved; and (2) establish and clearly identify the various instruments and their corresponding nomenclature, in accordance with the authorized collective entity. In both cases we are attempting to illustrate the features which support the stated hypothesis.

Distinction based on procedures

In Central America statutory collective bargaining is subject to extensive and sometimes detailed statutory regulation; it is precisely this situation which helps us to draw this distinction based on the various procedures laid down by statute: (a) negotiations which are required by statute to take place directly between the parties to the collective labour relation; and (b) collective bargaining which occurs in accordance with procedures prescribed for the settlement of collective disputes and in which the intervention of legal or administrative bodies that facilitate the autonomous composition of the dispute is relevant.

(a) Direct negotiations

When the legislator determines that collective bargaining will take place directly between the parties to the collective relation, this is direct negotiation or direct collective bargaining. It is characterized by two complementary elements:

- The requirement that no third parties who direct or guide the proceedings, thereby providing assistance to the parties to the negotiation, be present. In exceptional cases, mediators participate at the request of the parties, but their presence is not essential to the validity of the final result.
- The absence at this stage of real conflict between the parties in the collective labour relation. Consequently, the dispute, if it exists, is merely latent and has not yet evolved beyond the basic collective bargaining framework. In short, this is not an overt, but rather, a "latent" dispute.

In most instances, statute imposes an obligation to register or deposit the resulting instruments as a means of maintaining *adequate control over the collective bargaining agenda*. Similarly, statutory collective bargaining (established by labour law) often contains regulations on its content, its basic rules, the elaboration of which the parties must attend to, and even, as will become clear when the various instruments are studied, on requirements for its registration with the administrative labour authority, where so provided.

We should also add that in most bodies of legislation pertaining to direct negotiation, workers may be represented by both trade union organizations and directly elected workers' representatives. It is in this context that the settlement procedures or direct negotiation of the laws under consideration come into play. For our purposes, it is important to point out that in Central America there is very little development of direct mechanisms and especially of

those pertaining to trade union participation. Apart from the exceptions, this is attributable to minimal trade union presence in the enterprise and to a widespread tendency for lawmakers to focus on conflict and its settlement mechanisms or procedures.

(b) Collective conciliation

- In collective conciliation, negotiation takes place under the supervision of the legal or administrative bodies specifically established to monitor labour disputes; the final result, if the outcome of the proceedings is positive, is still an agreement forged between the interested parties, and in this sense, constitutes an autonomous solution to collective disputes.
- Collective claims are addressed in a procedure prescribed by labour law devised in such a way that the interested parties, with the mandatory presence of a third party, acting as conciliator and/or mediator, may resolve the collective labour dispute submitted for settlement outside the enterprise. In this case, unlike in direct negotiation, a higher level of conflict is presupposed, and the procedures which are being pursued in an attempt to resolve the dispute precede measures of open conflict or outward expression of the conflict, such as strikes or lockouts.
- As stated in the distinction made earlier, it would be worth pointing out that representational rights in the procedures mentioned may well be assumed by the trade union organizations or by a temporary and ad hoc coalition of the workers concerned, defined in each case by labour law. Mindful of the fact that direct collective bargaining does not always produce a collective instrument, and that, on the contrary, the claims of workers and/or their organizations, if not met by the employer, may lead to a formal collective labour dispute and are likely to assume external manifestations (strikes), labour law has established collective dispute-settlement systems of a quasi-compulsory nature.
- Similarly, there are mechanisms or procedures for autonomous collective dispute settlement, as well as procedures, such as labour arbitration, in which a third party sets forth a solution which is binding on the parties (heteronomous). In any event, it must be borne in mind that these are procedures established by the State with the basic aim of preventing (collective) labour disputes from surpassing the levels of "normalcy", or conflicts from being regarded as acceptable by the legislator, and that the implementation and development of the economic model are not jeopardized or endangered in any way. This consideration justifies the presence of third-party bodies or public officials in practically all Central American legislation.

Since we are discussing collective bargaining, reference will be made only to the procedures which the parties *agree to* within the legally established settlement procedures. For the time being, we shall set aside the comparative study of those procedures which are imposed by a third party (arbitration) since they are also collective instruments and are also envisaged in the various Labour Codes of Central America.

It would therefore be useful to refer briefly to the procedures for the settlement of collective labour disputes prescribed in various laws in order to identify the instruments which might emerge.

In general terms, as far as the amendment or formulation of new labour standards is concerned, the main procedure for the settlement of collective labour disputes is the *conciliation* procedure. It should be noted that this procedure is ordinarily anticipated when direct negotiation fails, and therefore it is usually only those parties who have held direct negotiations who may resort to conciliation.

In *El Salvador*, conciliation is regarded as a stage following direct negotiation. Consequently, not only are disputes contained (Labour Code (LC), article 49) but also the party enjoying representational rights is restricted, since direct negotiation and conciliation are conducted only if trade unions are involved in bargaining for a collective labour contract ("contrato colectivo de trabajo") or collective labour agreement ("convención colectiva de trabajo"). Nevertheless, statute provides for conciliation procedure for the protection of the socio-economic interests common to non-unionized workers (LC, articles 516 and 528). When agreement is reached, the resulting instrument, called the *conciliatory settlement* (arreglo conciliatorio, LC, article 521), is approved and registered by the administrative labour authority.

In brief, in El Salvador workers may be represented by trade unions at the conciliation stage when a collective labour agreement is concluded or reviewed (LC, article 481); but workers temporarily associated for such pur-

poses may also represent their colleagues when the protection of collective material interests of an economic or social nature is at issue. The procedure is referred to the administrative labour authorities, namely the Director-General of the National Department of Labour, who in turn appoints an official conciliator (LC, article 492).

A different situation prevails in *Nicaragua* where the trade union is the only body authorized to commence any collective dispute of a social and economic character, although the petition which emerges might not attempt to secure the conclusion of a collective labour agreement (LC, article 373). In this case the procedure is referred to the General Labour Inspectorate in the Ministry of Labour and there is no particular or separate collective instrument other than the one resulting from the negotiations held outside the conciliation procedure, except in the case of disputes which may arise from acts or specific undertakings with trade union involvement.

Panamanian law expressly states that it is not necessary for the parties to have recourse to direct negotiation in order to initiate the conciliation proceedings (LC, article 425). Since collective bargaining is possible through works councils or delegates appointed for the purpose in the absence of a trade union, it is also possible to initiate conciliation proceedings without trade union involvement. However, non-unionized workers must make up 30 per cent of employees in the enterprise, establishment or business concerned (LC, article 429) for the claim to be valid. In *Panama*, but for the exceptions mentioned, there are two options with regard to the validity of the procedure, which must be submitted to the administrative authority, in this case the regional director of labour or the Director-General of Labour. With reference to the content or statement of claims to be resolved in the proceedings, these may be petitions concerning interests of a social and economic nature or a draft collective agreement. Once there is an agreement, conciliation will emerge as the collective instrument, collective agreement ("convención colectiva") or *conciliatory agreement* ("convenio conciliatorio"), depending on which parties have bargaining powers.

In *Honduras* the Labour Code provides for collective bargaining both with and without trade union participation. Therefore conciliation proceedings are initiated after direct negotiation, and if it is not possible to reach agreement through direct settlement, the workers involved or the trade union may submit the dispute for conciliation (LC, article 794). Regardless of the approach to worker representation, an instrument called a *collective labour agreement* ("conve

basically under the auspices of the administrative labour authorities. The statutes of Guatemala and Costa Rica are the exception to this rule.

- The documents which result from these proceedings, when they are not collective labour agreements, may be authentic conciliatory agreements ("convenios conciliatorios") or collective agreements ("convenios, pactos colectivos").

Classification of the instrument according to representativity

As an extension of the above, if we were to concentrate on the final result of the various procedures of collective bargaining, a distinction could be made based on the entitlement conveyed by the instrument produced, regardless of what it is called. It would therefore be useful to distinguish between: (a) instruments negotiated through trade union participation, and (b) others which involve workers' representatives which are not trade unions.

(a) The collective labour agreement

On the basis of the previous description and the definitions of the region's labour laws, we can deduce that the "collective labour agreement" is an instrument in which one or more trade unions representing workers come to an agreement with one or more employers, or employers' organizations, on the conditions under which work is rendered in one or more workplaces. These conditions must be incorporated into existing and future contracts of employment to be concluded in that work environment, as well as into the rules applicable to the relationship between the parties to the collective labour relation.

Various terms are used in Central American labour laws to describe the above concept. We should therefore specify that the instrument to which the laws of El Salvador refer is called the *contrato colectivo* when it is negotiated with an employer (LC, article 269 and onwards) and *convención colectiva de trabajo* when it is negotiated with an employers' organization (LC, article 288); in Honduras it is called *contrato colectivo* (LC, article 53) but the term *convención colectiva de trabajo* is also used and includes – as we shall see later – the option that workers may be represented by non-trade union coalitions. In Guatemala this document is called *pacto colectivo de condiciones de trabajo* (LC, article 49), and Nicaragua (LC, article 235), Costa Rica (LC, article 54) and Panama (LC, articles 398) use the term *convención colectiva de trabajo.*[2]

In spite of the variety of terms, they all refer theoretically to one and the same instrument, with some distinct and legally significant features. We may therefore describe what we call the "collective labour agreement" as *an instrument conveying legal entitlement, the representation of workers, in principle only to trade unions.*

According to the dictates of Convention No. 154 (1981), the concept of collective bargaining includes all negotiations involving a workers' organization and employers and/or their organizations. Even if the participation of non-trade union entities (temporary coalitions) is not provided for in collective bargaining, it is to be hoped that there would be domestic standards, relating to the right to organize, to encourage and promote collective bargaining between permanent organizations (Convention No. 98, article 4). In that connection, the laws of each country should provide for at least one instrument in which trade unions hold exclusive responsibility for representing workers.

This principle is respected by practically all bodies of legislation in Central America, since the exclusive powers of entitlement of the aforementioned instrument, promoting the interests of the workers, must be granted to a trade union. The exception to this general rule can be found in the Labour Code of Honduras, wherein the representation of workers in the collective contract ("contrato colectivo") or agreement ("convención colectiva") may be taken on by one or more workers' organizations or by the representatives of workers of one or more enterprises or groups of temporarily associated workers (LC, article 53). In this case, we would have to admit that there are two distinct instruments denoted by a single legal term: there is one instrument for the participation of the permanent workers' organization; and another which provides for the authorization of a temporary coalition of equal legal standing.

However, the laws guarantee trade union participation in this type of collective instrument, establishing that under certain circumstances, which usually take the extent of trade union membership into account, the employer is obliged to engage in bargaining.

In such cases, the legislative formula varies between countries: in Guatemala the obligation of the employer arises when one-quarter of the workers in an enterprise is unionized (LC, article 51); in Costa Rica, the required proportion of unionized workers is one-third (LC, article 56); in El Salvador there must be no less than 51

per cent trade union membership (LC, articles 270 and 289). On the other hand, in Nicaragua, (LC, article 238), Honduras (LC, article 54) and Panama (LC, article 401), as long as there are unionized workers, the employer is obliged to negotiate the conclusion of an agreement.

The subject is handled differently when there is more than one trade union representing the workers for the purpose of negotiating the agreement. In such instances, legislative references to representativity are few, and in general majority membership is the criterion. Priority is thereby granted to the organization with the largest number of members. In the laws of Costa Rica (LC, article 56), Guatemala (LC, article 51), Panama (LC, article 402) and Honduras (LC, article 54), contrary to Salvadorean legislation, which requires a minimum membership of 51 per cent of the total number of workers, a stated majority is required. With regard to this 51 per cent requirement, it would be worth pointing out that the criterion established by the ILO Committee on Freedom of Association states 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" (ILO, 1996).

Several of the bodies of legislation studied allow bargaining by a coalition of two or more organizations, mainly in the cases in which exclusivity of the agreement is established, that is to say, when the existence of several instruments at the same time is prohibited (El Salvador, Costa Rica, Honduras), unless the trade or industrial union is allowed to negotiate conventions on behalf of its members, without prejudice to the fact that a general or industrial workers' union might negotiate the general conditions applicable in the establishment (Panama, LC, article 402; Costa Rica, LC, article 56).

• *The employer may be a physical person ("patrono") or a legal entity, in which case it can also take the form of one or more employers' organizations or unions.*

All the laws of the region have uniform provisions to the effect that the employer may be an individual or one or more employers' organizations. The distinctions may be made on the basis of requirement that is established in some countries with regard to the unionized nature of the employer organization.

In general terms, as far as the nature of the employer entity is concerned, Panamanian law refers to an employer, group of employers or one or more employers' organizations (LC, article 398); similar latitude is given in the laws of Honduras (LC, article 53) and Nicaragua (LC, article 235) which state no specific requirements regarding the type of employer.

A more narrow concept appears in Costa Rican law (LC, article 54) which allows for the participation of several employers. The employer organization is required to have the status or nature of a union (LC, article 54), as is also the case in El Salvador where, as has already been shown, the document concluded between a trade union of workers and an employer is called a collective contract ("contrato colectivo"), or a collective labour agreement ("convención colectiva de trabajo") in the case of an instrument signed by the workers' union and the employers' organization, disregarding any other employers' organizations which are not syndicated. In these cases, the employers obtain greater security by being excluded from the negotiation, grouping themselves in civil (rather than union) entities, protected under the general right of association.

• *The content of the instrument is geared towards the determination of general working conditions, but this does not imply that rules of conduct or obligations cannot be established between the parties themselves (workers'and employers' organizations or unions).*

The subject-matter of the collective instrument is the setting of general conditions in which work should be rendered, and according to statute, the regulation of the conditions which govern individual contracts of employment in the enterprises or establishments in question, and the rights and obligations of the contracting parties (El Salvador, LC, article 268).

This and similar legislative formulations in the remaining countries allow us to clearly state that the determination of working conditions is the main objective of bargaining. In addition, collective bargaining seeks to establish the theoretical bases for the classification of the rules of the instrument, under which a distinction between operative and mandatory provisions must be drawn. Operative clauses are the provisions which are incorporated into individual contracts of employment to replace the rules of individual contracts of employment which may be less favourable than the terms of the collective agreement. Mandatory provisions establish direct obligations between the parties to a collective agreement, that is, between the employer(s) and the trade union.

Some additional comments could be made regarding operative clauses. Most Central

American statutes stipulate that they should be applicable to all workers, thereby preventing the instrument from being applied exclusively to unionized workers. The exception to this rule, as seen upon examination of the so-called exclusionary clauses with respect to trade unions, appears in Honduran legislation (article 61) which regulates recruitment of personnel to the enterprise, limiting it to the status of its union membership. In Honduras the collective instrument may establish privileges in favour of unionized workers; however, application of this rule shall not be exercised to the detriment of non-unionized employees who already work in the enterprise when the instrument is signed.

The remainder of countries are inclined to avoid discrimination against non-unionized workers, expressly forbidding exclusionary clauses in all their terms of reference. They usually adopt a strict formula, along the lines that the provisions of the collective agreement shall be applicable to all employees in an enterprise, even if they do not belong to unions (Nicaragua, LC, article 237). Otherwise, they give the instrument broader scope – Guatemala (LC, article 50), Costa Rica (article 55), El Salvador (article 277) and Panama (article 405) – and prohibit distinctions in the conditions granted to unionized and non-unionized workers.

Secondly, labour legislation guarantees that the instrument may modify individual contracts only to the extent that their terms are not more favourable than those set under the collective agreement. This provision is aimed at protecting workers by preventing collective bargaining from lowering working conditions. In whatever form it is stated, the provision is inspired by the traditional notion that the instrument can only improve working conditions, linked to which is the typical labour law notion that no instrument – neither individual nor collective – may reduce the minimum conditions prescribed under ordinary law. It is a principle that clearly applies to the collective labour agreement, although in this case – at least in Panama – recent amendment approved the replacement of one benefit to workers with another envisaged in the collective agreement (Panama, LC, article 406).

This rule relates to the legal features of the provisions of the instrument and specifically stresses that the collective agreement shall not set conditions which are less favourable to workers than the contents of existing contracts (Honduras, LC, article 60), and furthermore, that the rules shall also apply to future contracts (Guatemala, LC, article 50). It is understood that the application of the operative clauses is binding on both current individual contracts and similar contracts to be concluded in the future (Costa Rica, LC, article 55).

• *The main subject is the general regulation of working conditions, but the parties are bound by a set of formal rules laid down by the State.*

Out of respect for the principles of non-interference and, in particular, of collective autonomy, the State does not impose the insertion of any specific element into the collective agreement, but it does identify the topics the agreement should cover and insists on some basic formalities. Statute usually lays down certain formal requirements, such as the identification of the parties; the number of copies of the instrument; the scope of its application and the category of workers concerned; the date of signature and the duration of the agreement.

In that respect, all the laws of the region coincide, with some variations in form: El Salvador (LC, article 275), Costa Rica (LC, article 58) and Panama (LC, article 403). In the other countries, labour law tends merely to suggest the subjects which the parties may wish to include, such as working hours, vacations and wages, without setting any other restriction beyond the observance of statutory minimums and the content of individual contracts which may not be reduced. The important point is that a specific content is never imposed, and the parties are free to conclude an agreement in the manner they see fit.

Although voluntary, the duration of the agreement is subject to more specific legislative regulation. In that connection, the general rule almost always establishes minimum and maximum terms within which the parties may set the period for which the instrument will remain in force. The laws of Costa Rica (LC, article 58), El Salvador (LC, article 276) and Guatemala (LC, article 53) have set this term at a minimum of one year and a maximum of three years. On the other hand, in Panama the minimum term is two years and the maximum is four years (LC, article 410); and Nicaraguan law specifies only a maximum period of two years (LC, article 239). Honduras (LC, article 68) presents an exception to this type of regulation: a presumptive term of a year is stated unless the parties to the agreement explicitly state otherwise. This seemingly gives the parties greater latitude in which to negotiate.

Finally, and despite a few differences, all countries allow for the automatic extension of

the term of the instrument: in some instances by a year (El Salvador), in others for successive periods of a year (Honduras), or for a period equal to the original duration (Nicaragua and Costa Rica) or even until a new instrument is negotiated (Panama and El Salvador).

• *The instrument is usually required to be registered and approved by the administrative labour authority*.

Although there is no compulsory requirement on substance, observance of formally prescribed rules is monitored by the State through the process of registration and approval of the instrument by the administrative labour authorities. On exceptional occasions, the law may ask that the instrument be deposited for safe-keeping (Nicaragua, LC, article 235), or simply that it should be presented to the labour authority (Panama, LC, article 399). On the contrary, a procedure for both the registration and official ratification of the instrument is laid down in the laws of Costa Rica (LC, article 57), El Salvador (LC, article 277), Honduras (LC, articles 58, 78 and onwards) and Guatemala (LC, article 52) where the administrative labour authority may order either the registration or deposit of the instrument, or, on the other hand, request that the parties amend the agreement if it is not in line with existing labour legislation.

Furthermore, it is worth mentioning that in some countries, *ex officio* or at the request of the parties, the State reserves the right to extend or broaden the scope of the collective instrument. This may embrace an entire region, industry or branch of economic activity. In El Salvador, the extension applies to enterprises with the same economic activity (LC, 295) while in Costa Rica (LC, article 63) and Guatemala it covers a branch of industry, economic activity or region. Extensions are made in Honduras according to territory or occupational categories, by arrangement with the labour authorities (LC, article 73).

Obviously, this rather rare practice in Central America represents state interventions in the labour market, which was typical of the previous economic model. The low level of development of collective bargaining in the private sector, and with limited trade union presence, has resulted in few extensions of this type.

(b) Direct settlement

Direct settlement is also a formal collective instrument for the determination of working conditions when, instead of a trade union, a representative of the workers acts as the authorized bargaining partner. This representative is usually appointed for the purposes of the instrument and protection of common interests.

Various expressions may be used in legal literature to denote this type of collective bargaining which, as mentioned, is characterized by the non-participation of trade unions, and is distinct from what we have described earlier as a collective labour agreement.

As for the content of international conventions, it must be stressed that these instruments are also envisaged within the broader concept of collective bargaining, and that an important – albeit indirect – reference can be found in the text of the Workers' Representatives Convention, 1971 (No. 135) and Recommendation (No. 143):

> For the purpose of this Convention the term "workers' representatives" means persons who are recognised as such under national law or practice, whether they are -
>
> (a) trade union representatives, namely, representatives designated or elected by trade unions or by the members of such unions; or
>
> (b) *elected representatives, namely, representatives who are freely elected by the workers of the undertaking* in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned. (Article 3, Convention No. 135)

Under Honduran law, the collective labour agreement ("contrato colectivo de trabajo", "convención colectiva") is the sole instrument, and it may be negotiated equally with a workers' trade union or with a group of workers who are temporarily associated (LC, article 53). In this unique case, the instruments concluded by the temporary coalition and trade union, respectively, are encompassed in a single legislative entity and would have equal authority. Therefore the statutory stipulation of Direct Settlement (LC, article 790) is intended to cover failed trade union negotiations, out of which would emerge a collective agreement. In the case of non-unionized workers – if an agreement is reached – the instrument would take the form of a collective pact on working conditions ("pacto colectivo de condiciones de trabajo"), which would fall within the scope of direct settlement as discussed earlier (LC, article 793).

On the contrary, in Nicaragua and El Salvador there is no such instrument. The only possibility arises through trade union intervention (collective labour agreement), and in the absence of a workers' organization, the workers cannot resort to direct collective bargaining. Although direct settlement is provided under Nicaraguan law (LC, articles 371 and 372), it is intended for direct discussions between the employer and the trade union as well as for the conclusion of collective labour agreements, but not for the exercise of collective bargaining by workers who have temporarily associated themselves.

An explicit admission of direct settlement can be found in the laws of the Republic of Panama, which state that in the absence of such organizations (trade unions), workers may present grievances and petitions through works' committees or delegates specially designated for that purpose (article 423), and that the result of such measures shall be stated in a record of settlement which must be submitted to the administrative labour authorities (LC, article 424). Since this approach specifies a works' committee or delegates, the resulting instrument will be an instrument of collective bargaining in the terms stated. The importance of this regulation stems from the fact that in order to avoid the anti-union nature which this arrangement can sometimes take on, the regulation is contingent upon the non-participation of trade unions. Employers can thus avoid conduct which is incompatible with freedom of association.

Similarly, in Costa Rican (article 504) and Guatemalan (LC, articles 374 and 375) legislation, an ad hoc committee may engage in direct negotiations, and subsequent agreements must be set out in a record which is deposited with the administrative labour authorities. It is the duty of those authorities to ensure that these agreements do not contravene the labour laws, and to enforce strict compliance. The substantive difference is that because they are instruments which exclude trade unions, they could serve to circumvent trade union presence. Recent Costa Rican legal reform (Act No. 7360 of 12 November 1993) prevents the employer from engaging in collective bargaining without a trade union or if the union has a membership of at least one-half of the number of workers, plus one (Costa Rica, LC, article 370). It can therefore be hoped that direct settlement may be taken up as an authentic instrument of collective bargaining, without any trace of anti-trade union discrimination.

In general terms, in the three countries which accommodate this type of instrument the regulations are quite basic and elementary, precisely because the main feature is that the instrument itself is secondary to the instruments involving trade union participation. The only exception to that rule can be found in Honduran regulations.

The content of trade union bargaining

An initial examination of the content of collective bargaining, restricted for purely practical reasons to trade union instruments (the collective labour agreement), confirms the theory that collective bargaining in the countries under discussion is developed in conformity with labour law. That is to say, it takes place within the enterprise and its content is limited to (individual and collective) labour relations, and devoid of class discrimination.

In addition, it must be borne in mind that the subjects and the regulations incorporated into the instruments are often based on the legal rules themselves. In such cases, the rules governing the collective instrument tend to surpass the minimums established by statute, and/or complement the legal provisions without deviating from the basic path set by the State for each of the subjects.

The same feature can be detected in some of the main topics, as in the case of individual contracts of employment and working hours, and generally in all areas defined by legal literature, such as the operative clauses of the collective instrument. With individual contracts of employment, for example, the parties tend to make the distinction in the instrument between fixed-term contracts (based on time period or job) and open-ended contracts, as already defined by labour law, stating and/or specifying the contents, but without regulating or imposing new terms or conditions for hiring. The same phenomenon can be observed with the issue of working hours. Collective instruments confine themselves to reiterating the traditional legal distinction between a regular working day and overtime hours worked on a weekly or daily basis, setting the regular working hours at fewer than or the same as those set by statute. For overtime, these instruments set remuneration at levels equal to or higher than those prescribed under ordinary law. A similar conclusion might be drawn from reviewing rest days, wages and employment stability.[3] In all these cases, the parties reiterate the legal regu-

lations, with variations in favour of the workers, thereby transforming the instrument into a special, "miniature" Labour Code of limited scope. It would therefore seem that collective bargaining in Central America and Panama is closely linked to the contents of labour law, is improved for the benefit of workers, and plays a supporting role to the model of labour relations established by labour law.

Furthermore, and almost as a consequence, we should emphasize that collective bargaining is also lagging considerably behind the changes taking place within the current socio-economic context. It is thus clear that the content of collective bargaining does not reflect the so-called emerging themes in the world of labour, and the few exceptions to this statement confirm the rule mentioned.[4] This is most evident in countries – most of the ones under discussion – whose labour laws have not undergone changes in the sphere of individual labour rights as a result of the new socio-economic model and its requirements.

It could also be said that in those countries the emerging themes are neither regulated by legislation, nor are they components of collective bargaining. This would explain the absence in the instruments of provisions on new forms of labour contracting and pay, irregular working hours, productivity and so on. This situation of genuine dependence between the law and the bargaining agenda clearly demonstrates the limits – although not thoroughly explored – of the stated functions of trade unionism in respect of the economic context and, in particular, the inadequacy and maladjustment in the development of the collective bargaining agenda which might even touch upon the very model of labour relations established by labour law.

We can therefore draw some general conclusions.

As is the case throughout labour law, there is a strong state presence both in the mechanisms for the autonomous resolution of conflicts and in direct negotiation. This presence is manifest, among other aspects, in the abundance of legal regulation of the procedures, the instrument, its subjects and the contents of collective bargaining, aimed at controlling and ensuring a content that will not be incompatible with the model of labour relations implemented by state regulations.

- Trade union participation in collective bargaining is expressly and formally accepted, both in ordinary law and in constitutional provisions. The absence of collective bargaining that is repeatedly described by workers' organizations in Central America is not due to the absence of legal provisions, but rather to other factors. These include the increasing and recognized difficulty in obtaining real trade union participation in the enterprise and/or the practical inadequacy of existing rules.
- In spite of the recognition of trade union participation in collective bargaining, it is also worth stressing that the various bodies of law provide for the simultaneous participation of ad hoc entities or permanent committees of workers which also engage in collective bargaining. In such cases, not all laws include the principle of the protection of trade unions as a means of avoiding anti-trade union discrimination resulting from collective bargaining without trade unions.
- Taking into account the purely formal level of legal rules, and allowing for mandatory provisions, where appropriate, the basic content of collective bargaining is geared almost exclusively towards the amendment or improvement of the rules of the Labour Codes or employment contracts (operative clauses) in favour of workers, without specific reference to the current topics relating to the implementation of a new socio-economic model. The absence of explicit legal reference to the emerging themes in the world of labour, such as productivity and flexibility, is conspicuous.

Reference

ILO. 1996. *Freedom of association*, Digest of Decisions of the Committee on Freedom of Association, para. 854, fourth (revised) edition, p. 172.

Notes

[1] One of the most important international regulations in this field may be found in ILO Right to Organise and Collective Bargaining Convention, 1949 (No. 98). Article 4 of this Convention provides that "Measures appropriate to national conditions shall be taken, where necessary, 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."

[2] It should be noted that this instrument, which legal scholars call *contrato de equipo*, has been erroneously termed "contrato colectivo" in some bodies of legislation (Costa Rica,

LC, article 49 and Guatemala, LC, article 38), but is really an instrument between an employer and a union aimed at forging an agreement for a specific job (and not conditions of work), and in which the union points out, within the scope of its responsibility and fulfilling its role as a true intermediary in labour relations, which of its members will render a specific service in exchange for an overall sum to be paid by the employer, employers or employers' organization which are parties to the contract.

[3] The general rule in employment stability is to award compensation which is higher than that paid under ordinary labour law, and only as an exception are regulations established which impede unjustified dismissal.

[4] The Republic of Panama may be the exception, taking into account the changes brought about by Act No. 44 of 12 August 1995 and its effects on the content of collective bargaining.

Many social sectors are today demanding that trade unions work out a common position in the framework of the social dialogue

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The legal framework

In the Andean countries, where the legal systems are based on Roman law, the system of labour regulation is structured around the law. Nevertheless, with the forward march of industrialization and development and where the political situation has permitted, collective bargaining has been opening up its own spheres of autonomy, at times even ahead of legal developments. In general, however, the over-regulation existing in the region has diminished the importance of collective bargaining, not only hampering (even intentionally sometimes) the development of freedom of association, but also bringing about a marked discrepancy between the written and the applied standard.

Despite their overall similarities, the five countries – Bolivia, Colombia, Ecuador, Peru and Venezuela – have developed models of collective relations that differ considerably and which undoubtedly constitute a framework that varies according to economic, social and historical divergences.

Without prejudice to one or other orientation, legislative trends in the five countries would seem to be moving slowly towards greater participation by labour and management in working out the regulatory framework. Hence, consultative committees (*mesas de concertación*) on labour relations are being created (Ecuador), tripartite agreements are being signed to encourage the reform of the labour code (Venezuela) and core projects are being worked out and developed to improve the culture of labour relations (Colombia). In contrast, countries such as Peru are pioneers in legal flexibility in the Andean region.

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General features of the legislation

Although the sources of labour legislation in Latin America lie in the national Constitutions (the Constitutions of the five countries contain provisions on collective bargaining[1]) – in fact Colombia, Ecuador and Peru expressly guarantee the right of collective bargaining – it is the various **labour laws** that regulate collective bargaining and its procedures. Hence, in Bolivia, collective agreements are given effect by Regulatory Decree (*Decreto Reglamentario*) No. 224 of 22 August 1943 (in turn given effect by the General Labour Act (*Ley General de Trabajo)* (LGT) and by Supreme Decree (*Decreto Supremo*) No. 05051 of 1 October 1958. In Colombia, collective agreements (*convenciones colectivas*), collective covenants (*pactos colectivos*) and trade union contracts (*contratos sindicales*) are regulated by the Substantive Labour Code (*Código sustantivo de trabajo*) (Article467), while in Ecuador, the collective contract (*contrato*) or covenant (*pacto*) is regulated by the Labour Code (*Código de trabajo*) (Article 226). Finally, in Peru (the only instance of a non-codified body of rules), these are regulated by the Collective Labour Relations Act (*Ley de relaciones colectivas de trabajo*) No. 25593 of July 1992,[2] and in Venezuela, collective agreements are regulated by the Labour Organization Act (*Ley orgánica de trabajo*).

Although an entire regulatory framework for trade union activity[3] was developed early

on, the evolution of ordinary law has varied considerably in time among the five countries, as borne out by the effective dates of the laws in force: Bolivia has the region's oldest regulatory framework, which has seen no major changes in recent years, even though this is a country hard hit by structural adjustment programmes. In Ecuador, although the most recent reform dates back to 1991, the codifications of 1961, 1971 and 1978 had the effect of partial reforms in lieu of a revision of the original 1938 text as a whole, with the result that in practical terms the text now contains discrepancies and discontinuities. The laws in Colombia, Peru and Venezuela have been substantially revised in recent years from very different standpoints (to make for greater flexibility in the first two cases and provide stronger guarantees in the last).

As regards the ILO Conventions on freedom of association, in particular No. 87 (Freedom of Association and the Protection of the Right to Organise) and No. 98 (The Right to Organise and Collective Bargaining),[4] all the laws still have fundamental flaws that were pinpointed a long time ago by the Committee of Experts on the Application of Standards and Recommendations.

Types of bargaining and instruments

Although there would seem to be no limits in any of the five countries to the scope of collective bargaining (enterprise, industry, profession) – only Peru[5] and Venezuela[6] have more or less detailed standards on the conclusion and application of industry-wide and/or professional agreements – in practice, barring Venezuela, bargaining is still restricted to the enterprise level.

There are differing types of "collective agreements" (*acuerdos colectivos*) and this not only by reason of terminology (see above). In Bolivia, Peru and Venezuela the law provides for only one type of collective labour agreement (called a contract (*contrato*) in Bolivia and a collective agreement (*convención colectiva*) in the other two countries) and which is that concluded between one or more employers or an association or union of employers and a union, federation or confederation of worker unions (in Peru, should these latter bodies not exist, such an agreement may be concluded by representatives of the workers concerned) in order to lay down and regulate working conditions (Bolivia), fix wages, working conditions and productivity and other aspects of labour relations (Peru) or to lay down terms and conditions of work and the rights and obligations of the parties (Venezuela).

In Colombia, collective agreements (*convenciones colectivas)* (concluded between one or several employers or employers' associations and one or several workers' unions or confederations of unions to lay down working conditions), collective covenants (*pactos colectivos*) (agreements reached between employers and non-unionized workers) and trade union contracts (*contratos sindicales*) (one or several worker unions with one or several employers or employer unions for the provision of services or the execution of a particular project by their members) are regulated. In Ecuador, together with the collective contract (*contrato*) or covenant (*pacto*) (concluded between one or more employers or employers' associations and one or more worker associations in order to determine working conditions or the bases for the conclusion of individual work contracts), there is the binding collective contract (*contrato colectivo obligatorio*), that is, one which by virtue of an executive decree issued pursuant to the law applies to all employers in one and the same branch of industry and in a particular province, provided that it is concluded originally by two-thirds of the employers and organized workers concerned.

The authorized parties

In the five countries, worker unions are the parties authorized to negotiate on behalf of workers, this recognition being extended expressly to the federations in Bolivia, Colombia, Peru and Venezuela and to the confederations in Bolivia and Venezuela. As seen above, non-unionized workers may nevertheless conclude agreements in Colombia and Peru. In Venezuela,[7] if there is no union, enterprise agreements may be bargained collectively by representatives expressly elected by a majority of workers.

In Ecuador, where there is a works committee, as is normally the case, it is the body that enjoys the preferential right to bargain, other workers' associations being obliged to abstain.

In Bolivia, should there be more than one union in the enterprise, all the organizations must form a single representation to negotiate a collective contract (*contrato colectivo*), while in Colombia and Peru[8] the rules of the most representative trade union apply. A similar rule applies in Ecuador in the absence of a works committee.

On the employer side, the very definition of the collective agreement (*convenio colectivo*) in all the countries legitimizes one or several

employers or employers' associations or unions or several employers' organizations,[9] while there are no specific rules on representation. This is because individual employers may engage in bargaining, which obviates the need to designate any employer union as the most representative.

Procedure

The launch of the collective bargaining procedure is similar in all the countries: it requires the submission of a list of claims (in Colombia the list is also necessary to start an industrial dispute). The minimum content of this list is expressly laid down in the law in Bolivia and Peru, whereas in Colombia, the law states that this list must contain claims concerning working conditions.

The list of claims is submitted directly to the employer in Colombia and Peru, whereas in Bolivia, Ecuador and Venezuela it must be submitted to the works inspector for onward transmission.

Once the bargaining team has been designated, the stage of direct talks (*arreglo directo*) begins and could last up to five days in Colombia or indefinitely in Peru or Venezuela. Should direct talks fail, the labour authority is informed as a prelude to the conciliation stage, except in Colombia, where there are standards in that regard as conciliation is not envisaged under the collective bargaining procedure. Arbitration is envisaged in the five countries as a form of dispute settlement if conciliation fails. In Bolivia and Ecuador it is obligatory and in certain instances (essential public services) in Colombia, Peru and Venezuela, though in these latter three countries it is otherwise usually optional.

Government involvement in the collective bargaining process can be observed concretely in all the countries, even where the trend towards deregulation and greater independence of mind in collective relations would seem to be the new approach. Hence, in Venezuela for example, the constant presence of government is obvious specifically in regard to time frames and in the highly regulated bargaining procedure for working out industry-wide agreements (meeting for setting labour standards (*reunión normativa laboral*)), being excessively protracted and complex and lasting up to a year, even though the law provides that bargaining should not exceed 60 days. In Peru, the role of the government has diminished but not entirely disappeared[10] as the Executive has retained sufficient instruments to ensure that it does not lose ultimate control. In fact, the new standard perpetuates heteronomous government regulation, the static time frames of the agreements and their decentralization (the law furthermore prescribing the need and form of articulation of the different levels, assuming that collective bargaining is coordinated).

There is no doubt that legalism and intervention do influence the real development of bargaining in the five countries. The strength and presence of the dialogue partners in the collective arena are unquestionably also a barometer of the actual evolution of the agreements. In regard to participants, there is evidence in the five countries of growing ignorance of the practical requirements for preparing the agreement, failure to consult with the rank and file and a distinct trend towards confrontation[11] – historically very pronounced in Bolivia – especially on the part of trade union organizations. Besides, trade union federations do not seem to believe that mutual trust among the bargaining partners has improved, although some progress has been observed in the communication and transmission of unmanipulated information and towards an approach favouring the search for mutually acceptable solutions (a trend also becoming apparent in Venezuela and Ecuador).

Efficacy of the agreements

In Bolivia and Colombia (when membership does not exceed one-third of the total workforce in the enterprise) the collective contract (*contrato colectivo*) binds not only those who conclude it, but also those subsequently acceding to it in writing and those joining the union at a later date,[12] while in Ecuador[13] it binds only those represented by the union or professional association. Under Peruvian law the agreement is binding on the parties adopting it, those on whose behalf it was concluded and to whom it is applicable and on workers joining the enterprise after its conclusion, except for those in confidential positions. In Venezuela, provisions benefit all workers in the enterprise (*erga omnes* effect), save where the parties expressly exclude managers, inspectors or persons in confidential positions.

Legal content and time frames

The provisions of the agreements become part of individual contracts in the five countries and are applicable to collective and individual work relations among the parties coming under such agreements. In Colombia, Ecuador and

Peru, minimum contents are stipulated, while in Bolivia it is established in general terms that agreements must regulate working conditions without setting conditions contrary to the law, good practices and the public interest.

As regards the time-frames of agreements, in Bolivia and Peru, the minimum period is one year, though in Peru the parties may establish longer time-frames for the agreement as a whole or for parts thereof. In Venezuela for its part, the duration of the agreement lies between a minimum of two and a maximum of three years. In Colombia, the parties establish this in the agreement, failing which a six-month duration is presumed. In Ecuador, collective contracts (*contratos colectivos*) may be concluded indefinitely, for set periods or for the duration of a specific project or service. In the absence of a set timeframe, it is presumed that they can be revised every two years at the proposal of any of the parties.

The practice of collective bargaining

As has been seen, while there is a profusion of rules, the practice of collective bargaining itself raises many questions. With the exception of Venezuela, labour relations in the Andean countries would seem to have a common denominator: collective bargaining has suffered major reverses in recent years. This is reflected in the dwindling number of agreements concluded and workers covered, the impoverishment of their content and the growing importance of enterprise-level or individual bargaining at the expense of industry-wide bargaining.

The reasons for this are closely bound up with the waning bargaining strength of unions. The aforementioned amendments of labour laws in the Andean countries have had a telling impact on workers' organizations. In Venezuela, in contrast, it is precisely the Government that has encouraged the signing of collective agreements.

Number of agreements signed

Table 1 clearly shows the scale of the setback suffered by collective bargaining. In Ecuador

focused more on reaching industry-wide agreements than on strengthening bargaining at the enterprise level.

In the case of Bolivia, there are obstacles to the development of genuine collective bargaining. The chief hindrance is its own labour law. By dealing with collective contracts and collective bargaining under the standards for individual labour relations, the law fails to assign the unions and employers' associations a pre-eminent role in concluding employment contracts. What it does in effect is to clear the way for market forces to determine labour relations based on individual labour productivity. In addition, both the General Labour Act and the rules governing employers curtail the latter's leeway for representing their members in labour-management questions.

In Bolivia, on the other hand, having opted during several decades for confrontation as a means of settling industrial disputes, the trade union movement has not allowed the concepts of bargaining to thrive. What is more, as trade union leaders come to believe that democracy and neo-liberalism are two mutually supportive elements, they have begun to construct a whole "body of theory" hostile to dialogue. The size of enterprises and the capacity to create unions in them also partly explain this negative turn of events: the stipulated minimum membership for the creation of worker organizations in enterprises is a considerable constraint on the capacity of workers to negotiate, especially in the light of the small size of industry in some countries.

Moreover, the heterogeneity of employers stemming from the varying financial and technological capacities among producers in specific branches of industry is hampering the signing of industry-wide agreements in some countries.

The scope of collective bargaining

Collective bargaining in the Andean countries takes place essentially at the enterprise level. Industry-wide agreements are practically unheard of in Peru, Bolivia and Ecuador and are the exception to the rule in Colombia.

A variety of factors account for this, though labour laws have been the chief among them, having complicated and in some cases prevented industry-wide bargaining. Hence, in Colombia the law does not exclude industry-wide bargaining, but recognizes as valid only contracts negotiated and ratified at enterprise level. In that country there are currently no more than two agreements concluded at a level higher than the enterprise level (banana and electricity industries). Besides, industry-wide agreements are registered only after they are ratified within the enterprise, with the result that official statistics often do not reflect them.

The law also creates major obstacles to the progress of sectoral or industry-wide bargaining in Peru, added to which are the pressures exerted by employer organizations, with their long-standing preference for enterprise-level bargaining. The result has been the virtual demise of industry-wide agreements[17] in only five years. In Ecuador, there is practically no industry-wide bargaining as most contracts are concluded between the employer and a workers' association.

In Venezuela in contrast, the pre-eminent role of the labour authorities has given rise to a series of industry-wide agreements in key sectors of the economy: a number of major sectoral agreements have been concluded in that country, including those covering workers in the petroleum, construction, woodworking, plastics and derivatives or hides and skins industries.

Table 2. Coverage of collective bargaining

Country	Labour force		Wage earners		No. of workers covered		Percentage of workers covered*	
	1991	1996	1991	1996	1991	1996	1991	1996
Bolivia	nd	nd	nd	nd	nd	nd	0	0
Colombia	nd	nd	10 357 000	11 994 000	141 403	169 505	1.36	1.41
Ecuador	3 359 767	3 790 300	1 427 759		189 528	182 903	5.6**	4.8**
Peru***	1 006 409	1 212 318	1 006 409	1 212 318	279 293	89 428	27.75	7.38
Venezuela	nd	nd	nd	nd	nd	1 067 835	nd	nd

* As the vast majority of collective contracts last two years, the actual number of workers covered by collective bargaining would be approximately twice that shown in the columns. ** The percentage refers to the economically active population covered by collective bargaining. *** The data apply to the Lima metropolitan area.
nd = no data

Coverage

A study of the coverage of collective agreements is complicated by both the difficulty of securing reliable data and the varying nature of the agreements signed. Despite these problems, coverage is known to be limited and it is in Venezuela that the greatest percentage of workers is covered. What is worrying is not only the limited coverage, but also its steady contraction over recent years. In Peru, for example, workers covered by collective bargaining declined by 68 per cent between 1991 and 1994, this reduction being 4 per cent in Ecuador (see Table 2).

The increase of coverage in Colombia reflects a recovery from the spectacular drop triggered in 1991 by the economic crisis. This notwithstanding, the overall long-term trend is a declining one, though it is more pronounced in some sectors than in others.[18]

It is worthy of note that despite this downward trend, a series of parallel bargaining processes are taking place in some Andean countries giving rise to another type of informal agreement or arrangement, with the result that in Colombia, for instance, coverage is 17 per cent of the workforce.

The low coverage is related to the waning importance of collective bargaining in the Andean countries, itself in turn partly explained by the falling levels of trade union membership within enterprises, economic restructuring and liberalization, privatization processes, subcontracting and corporate downsizing, the emergence of economic sectors devoid of trade union experience or the growth of the informal sector,[19] where remuneration, working conditions and job and income opportunities cannot be negotiated with an employer, but instead depend on quite different players.

In Venezuela, the signing of two labour standards covering civil servants and the 1996 industry-wide agreements in the agriculture, hunting, forestry and fisheries industries and in the commercial, restaurant and hotel sectors caused a surge in the number of workers covered that year.[20] Nevertheless, enterprise-level bargaining – predominant in Venezuela – would not seem to be following the same trend as industry-wide bargaining.

Content of collective agreements

The content of collective agreements in the Andean countries is rather meagre and in many instances shows a trend towards a narrowing of the bargaining agenda. In some countries, the content is limited to that set as a compulsory minimum by the labour law.

Period of validity

The most frequent time-frame in most of the collective agreements reached in the Andean countries is two years (by operation of the law), except in Peru, where the period of validity is one year.[21] But even in this latter country some employers are lobbying for the extension of the period of validity of agreements. This is being favoured by a stable economic environment that means less risk of the sharp drops in real wages that were frequent during the period of inflation.[22]

At the same time, there is a tendency on the part of many trade union organizations to seek a shorter period of validity, given the high historical rates of inflation in the Andean region, and this creates much uncertainty over wage increases for the second contractual period. In recent years this problem has been solved by negotiating the second period on the basis of the expected increase in the Consumer Price Index (CPI) and adding one or more points to that indicator.

In Venezuela it is frequent to find agreements with a three-year duration, especially since article523 of the Labour Organization Act (LOT) establishes a maximum of three and a minimum of two years, though some clauses may be revised within shorter time-frames.

Subjects of bargaining

Wages

Wage increases are the main, sometimes the only subject of collective agreements in the Andean countries. No other factor is of comparable weight and importance. Between 82 and 100 per cent of labour agreements contain wage provisions. Nevertheless, some studies show the gradual decline in the importance of wage-related issues vis-à-vis other items on the collective bargaining agenda.

Wage increases are granted directly through across-the-board increments and safeguard clauses, or indirectly through some additional allowances. The benchmark most frequently used for wage negotiations and other financial aspects of labour agreements has been the CPI. The topic of productivity for its part is all but absent from the bargaining table.

As regards wage negotiations, it is worth underlining the case of Bolivia where, as already mentioned, bargaining focuses only on wages.

Other subjects of bargaining

As for the remaining issues dealt with, studies show an extreme paucity of content andinnovation. For a variety of reasons, including evolving production methods, the few changes have not enriched the agreements, but have even further impoverished them. On occasion, this process has taken the form of a new legal framework that introduces substantive changes in this regard. In Peru for instance, the employer has been empowered to participate in setting the bargaining agenda and may introduce new or substitute clauses. Furthermore, the enactment of the Labour Relations Act (*Ley de Relaciones Colectivas* (LRTC)) No. 25593 entailed a comprehensive review of the collective agreements, which obliged trade union organizations to renegotiate each and every item that had already become part of their permanent benefits.

A look at the agreements in force reveals that in practice the prescribed minimum of bargaining topics becomes a maximum. Besides, in most cases, what is agreed concerning union leave does no more than echo the provisions of the labour law in force, sometimes even falling short of them, or the matter is left to the discretion of the enterprise. Apart from the lack of innovation mentioned above, we should underline the high percentage of agreements with job security clauses that have made their appearance among collective contracts from 1976 onwards. There has been a steadily increasing demand for this and it is now the main worker demand. This illustrates just how crucial it has become in the present context of crisis and labour market deregulation, which is jeopardizing employment.

Content would seem to be more substantial in Colombia and Venezuela than in the other Andean countries, though as pointed out in the national studies, since the beginning of the past decade there have been no major new gains. It has been just about possible at great pains to safeguard real wages and already existing provisions. The principal changes have been the amalgamation rather than elimination of some joint committees, the spiralling cost of the layoffs made possible by the new law, education programmes and a measure of agreement on worker training, and the commitment to productivity and quality and in regard to the right to information.

It is noteworthy that the content of collective covenants (*pactos colectivos*) in Colombia, most of which have been imposed, is appreciably less favourable to workers and unions than the collective agreements (*convenciones*). The overall number of regulatory provisions is declining, as are the joint committees that mean participation in the work process. The wage levels and increments under the collective covenants (*pactos*) are also clearly lower.

Flexible working hours: Only a handful

In the Andean countries, as in the rest of the region, flexibility remains a central topic of discussion and is inspiring radical stances based on a legalistic conception of labour law and industrial relations underpinned by both state interference and the curtailment of collective autonomy.

Flexibility has basically been introduced by law and, except for the case of Peru, its regulatory framework may be considered as still embryonic by comparison with other countries in the region (e.g. Argentina) and other parts of the world. As we have seen, Bolivia is a special case, for in 1939 (when the current labour law was passed), there was no question of discussing flexibility as currently understood.

Generally speaking, companies at the subregional level have in practice construed flexibility as the possibility to cut back the permanent staff by providing them with incentives to resign or take early retirement (Peru), and this has in many cases led to the hiring of new workers on a temporary basis with less coverage and insufficient protection.

In another approach designed to avoid this type of flexibility, some labour contracts in Colombia set limits on the hiring of temporary staff and introduce clauses to protect indefinite engagement. In this same connection, a (very) few contracts in that country even provide for increases in statutory compensation payments.

The limitation of wage indexation is one flexibility proposal commonly contained in collective agreements (e.g. in Ecuador). In Colombia, reducing wage costs is regarded as one of the main subjects along with the modernization of production. In that regard, enterprises introduce bargaining proposals designed to limit previous trade union gains such as a cafeteria service within the enterprise at token prices, the purchase of products made by the enterprise at sharply reduced prices, and so on. In this same connection, there are provisions in some enterprises making wages contingent upon output (Colombia,[23] Venezuela). Nevertheless, it is invariably the enterprise that introduces finan-

cial incentives (related to skill and professional aptitude), though this covers a mere 20 per cent of enterprises at the most.

Only a handful of enterprises in the five countries negotiate annualized or flexible working days, though in practice there are "adaptations" to working hours decided individually by the employer on the basis of demand patterns.[24] In Peru for instance, some agreements are based on the flexitime system laid down in the law (e.g. in the agreement with *Cervecería Backus y Johnston S.A.*), and sometimes shorter working days (CODIEX), grant paid leave of absence and introduce round-the-clock production systems based on shifts (*Compañía Nacional de Cervezas* or *Sudamericana de Fibras*).

Subcontracting could mean an erosion of rights

Subcontracting is also a visible element of bargaining at enterprise level and is in fact recognized in many collective agreements in Ecuador and Colombia. In Ecuador, paradoxically, to avoid or compensate for lay-offs, the union itself demands either higher compensation or the rehiring of staff through subcontractors (which in principle could mean an erosion of rights, as subcontracting arrangements in practice entail fewer legal guarantees for workers than those that the main enterprise is statutorily required to provide). Conversely, in Colombia there are contractual provisions that totally prohibit subcontracting (25 per cent of all agreements, according to the sampling done in the national study).

Very few agreements take account of technological and organizational changes and these are generally concentrated in multinational companies and in a few enterprises in the traditional sector that are radically overhauling their processes and equipment. The service industries (e.g. energy or telecommunications) have launched a process of technological renewal in Bolivia, Peru and Venezuela that is affecting the organization of work on the shop floor though having no real impact on enterprise or group agreements, at least in Colombia or Venezuela. The assignment of multiple functions or polyvalence has mostly been undertaken unilaterally by employers as can be observed in some 25 per cent of enterprises (Colombian study).

The trade union strategy and response with respect to flexibility is difficult to assess, as it is dictated by a range of considerations and a variety of pressures. Indeed, while in countries such as Peru, where there is a high degree of flexibility, some trade union leaders have attempted to include new bargaining subjects from a novel organizational perspective[25] and even though the enterprises have for all practical purposes ignored them, most trade union organizations are extremely diffident about introducing new topics to their lists of claims, whether for fear of seeing their overall rights diminished (Colombian study), or owing to the growing belief that bargaining has now become more difficult and the bargaining partners more intransigent.

No strategy on flexibility

Generally speaking, trade union leaders are failing to work out a response to the changes introduced by the enterprise, on account of the speed at which they come onstream, their novelty and the lack of preparedness to put forward the new types of claims involved. Nor would the Colombian practice of obstruction by means of counter-proposals used on different occasions seem to yield any new answers. The problems facing trade unions in placing new topics on the bargaining agenda may be classified at different levels ranging from the unreceptiveness of employers to the lack of information and knowledge of new technologies. The effect is nevertheless the same: the absence of new subjects in collective agreements designed to regulate and attenuate the impacts of flexibility.

No trade union strategy on flexibility may therefore be said to exist. The fact is that barring some very specific sectors such as the petroleum industry in Peru, the current labour flexibility has been construed as something sectoral rather than general or national and demands have focused on wages. Nevertheless, in most of the countries, the trade union proposal takes the form of the submission of a list of claims per sector, although this approach has certain practical difficulties engendered by the heterogeneity and weakness of trade unions.

Undoubtedly, greater bargaining power of unions is a *sine qua non* for a substantive alteration of their present posture regarding flexibility. The not unfounded fear that new organizational methods may herald a heavier work load and could even become instruments of trade union repression must be met with a well-defined organizational policy and with an adequate legal framework for monitoring abuses.

No major demands met since 1980

As mentioned above, trade unions are the parties authorized to bargain on behalf of workers in the five Andean countries. Nevertheless, recent developments in the various spheres in which the unions are active have brought them face to face with a range of questions, dilemmas and challenges.

Hence the amendments to labour laws, which are closely bound up with greater economic openness and the globalization process – with the resulting advances in the area of flexible working hours and the reduced role of government as a regulator and supplier of goods and services – have undoubtedly had a telling impact on the way trade unions operate. In turn, political, social and economic changes have also complicated their function and role in the various spheres of activity. At the same time, companies have adopted austere savings and cost-cutting policies (including the ever-present sword of Damocles of lay-offs) that make it very difficult for workers to operate on an equal footing.

At the internal level, changes in the composition of the workforce (the large-scale incorporation of women, the emergence of a burgeoning urban informal sector) and changes in workers' attitudes and behaviour patterns (individualism, new cultural and educational challenges) are shifting the traditional operating paradigms of trade union organizations.

In practice, the consequences of these changes have made themselves felt and fear of enforcing labour claims in a world of high joblessness has become generalized; the fear of losing their livelihood has in fact prevented workers from protesting against low salaries and poor working conditions. Indeed, it is frequently asserted that no major worker demands have been met since 1980, essentially owing to these fears and the lack of dynamism on the part of trade union organizations in the prevailing adverse and crisis-ridden environment.

This situation is directly affecting collective bargaining, which is changing in accordance with the strength or weakness of the union within the enterprise or industry and this is reflected in reduced coverage and the impoverishment of content (see above). In enterprises where the union is strong, autonomous, and capable of rallying support and displaying initiative, collective bargaining is the primary vehiclefor the submission of new subjects and proposals. In enterprises where the union is weak, the threat of dismissal is used as a form of pressure to dissuade workers from making demands and collective bargaining becomes a rudimentary exercise. In enterprises where workers have been coopted, collective bargaining is non-existent or is at best no more than an automatic and bureaucratic procedure.

Furthermore, trade union federations and/or confederations are out of step with local unions especially in the industrial sector. Strong unions do not always turn to trade union confederations and/or federations for support in the collective bargaining process; they are self-sufficient and are sometimes better endowed with resources than the confederations themselves. It is the weaker unions that have major difficulties and need the trade union confederations and/or federations. Nevertheless, the success of the umbrella trade union bodies in attracting local unions, regardless of their strength, will depend on their capacity to articulate and interpret demands and to offer unions legitimacy, efficiency and self-reliance.

Trade union organizations are also grappling with changes within their own ranks.

New sectors with no trade union traditions

Indeed, the trade union movement has always claimed to represent all workers and not just its members. There are huge swathes of workers making up new sectors that either have no trade union tradition or are unorganized, such as the informal sector and others with precarious or atypical wage relations. How can the interests and values of the workers in these sectors be effectively represented? What are the forms of organization best suited to dealing with these situations?

The more heterogeneous nature of the trade union rank and file resulting from the large-scale influx of women into the workforce (upsetting the traditional concept of the market), the increasingly wide variety of qualifications and new forms of hiring constitute a challenge to the ability of trade unions to dovetail the different demands of each of these sectors of the labour force into one common trade union project.

Apart from its new make-up, the current atomization of the labour force is throwing up new challenges. The problem is even further compounded by the extreme fragmentation of the trade union movement in the Andean countries, where there are still some 25 trade union confederations altogether. The four trade union confederations existing in Peru in 1990, for

example, have now increased to 13, a fact that complicates any attempt to coordinate the trade union movement. In Ecuador, there are five trade union confederations, in Venezuela four and in Colombia three. In addition to this, there are independent trade unions not affiliated to any confederation, which are often strong and on average comprise 30 per cent of all trade union organizations.

Poor training leads to further poverty

Ideological wrangling has undermined the unity of the trade union movement, above all bargaining at the highest levels, for the large number of often rival participants and the resulting pressures often make bargaining highly difficult if not impossible. The result is a web of trade union bodies that not only have more limited coverage but are also politically weak. It is this weakness that has ultimately thwarted the capability of workers to negotiate redistribution policies and thus prevent the progressive concentration of income and the spread and deepening of poverty. At the same time, trade union leaders and members lack familiarity and training in matters of technological change, new systems of work organization and new corporate management models, a shortcoming that is limiting and restricting the coverage of collective agreements and hence endeavours to regulate and cushion the impacts of these changes.

In the Andean countries, only a minority of trade union bodies have a training and education system. Only in a few exceptional cases do organizations have a clear-cut educational strategy for improving the qualifications of their members in such a way as to enhance their prospects of procuring their demands for better wages. In addition, the financial situation of trade union bodies has worsened in recent years as a result of sharp fluctuations in the numbers of paying members (lay-offs, resignations, retirements, and so on) and the limited funds available are being allocated to ensure the very survival of the organizations.

The quest for a new trade union strategy

As has been indicated thus far, we are witnessing a process of change that is ushering in a new historical era. Trade union organizations find themselves in an environment in flux and where the philosophy of confrontation is not warranted. Labour relations cannot be settled by conflict if any headway is to be made in adverse circumstances. A system of industrial relations based on bilateralism and consensus at the workplace is an element of stability in labour relations and makes for an atmosphere of thriving civil liberties, respect for the rule of law and optimum levels of investment, growth and development.

Cooperation is therefore the only wise approach to bargaining and requires a number of solid underpinnings that will make it possible not only to procure greater advantages, but also to foster the appropriate climate of labour relations for the production process. In general, maintaining traditional demands and defending key issues such as the purchasing power of wages today call for a high degree of professionalism, meticulous study and adequate and reasoned proposals.

The fact is that at the national level employers no longer make up one homogeneous bloc with uniform values. The existence of small enterprises separate and apart from the major corporate centres and of *de facto* groups with different policies and strategies is changing employers' attitudes to collective bargaining. Alongside the traditional core that maintains a conflictual view of industrial relations, a new generation of managers is emerging with a more cooperative vision based on restructuring, and the desire to build bridges of communication based on information and fluid relations with trade union representatives. Trade unions therefore need to rethink their stances and meet the challenges in a coherent manner. It is not merely a matter of procuring material advantages, but also of acquiring different attitudes that will enable the enterprise to operate in a forward-looking perspective. Trade unions must look at themselves and take stock of their role as active players, as an element central to bargaining, and must help foster coherent industrial relations through collective bargaining.

For the purposes of bargaining therefore, trade unions must:

- *Be more professional*, by improving their knowledge of and approach to all aspects of bargaining. They must therefore acquire the technical expertise required for tackling the subjects of bargaining.
- *Be better informed*,

reluctance, it is possible through dialogue to change their attitudes and make them more amenable to workers' demands. Furthermore, some trade union leaders are afraid of altering existing agreements lest new and more reactionary or restrictive attitudes are imposed on them. While caution is necessary, strengthening trade union organizations by meeting the foregoing prerequisites would not only make possible the gradual opening up of the bargaining process, but would also win employers' recognition of the capacity and strength of the unions.

To achieve these goals, one essential condition must be met: a trade union culture must be fostered that will help find new avenues of worker participation, cooperation and solidar-

[4] The five countries have ratified both Conventions.

[5] In Peru, Article 46 of the law prescribes that a majority of workers and enterprises is necessary in order to conclude a collective agreement by branch of activity or profession (contrary to ILO Convention No. 98).

[6] Expressly laid down in Article 528 of the Organic Labour Law.

[7] As a result of the recent amendment of the Labour Organization Act, in enterprises with no unionized workers, agreement may be reached directly with the workers that up to 20 per cent of wages will be excluded from the computing basis for social security benefits (Article 133).

[8] In Colombia, when there is simultaneously a basic union together with a professional union and an industry-wide union in one and the same enterprise, representation is awarded to the union with the majority. If none has a majority, representation will be shared. If there are several unions in one and the same sphere they may undertake joint representation (on a pro rata basis) or they may award it to one of their number. At the level of industry or profession, authorization is effected by the corresponding organization or jointly if there are more than one.

[9] In Bolivia, this is limited to one or several employers, while in Peru the phrase "several employers' organizations" is used.

[10] Since the 1992 enactment of Decree Law 25593, there has been no further need either for administrative approval of agreements reached in direct talks or conciliation or for an administrative resolution to be issued covering the agreements reached by direct talks or conciliation, nor for the passing of an administrative resolution concluding the bargaining. Yet in opting either for discretionary arbitration (whereby if there is disagreement as to the designation of the chairman of the tribunal, the administrative authority would undertake this) or strike action (in case the strike becomes protracted and therefore seriously prejudicial to the enterprise or sector, the Executive Power could decree the end of the strike and impose a settlement of the dispute), intervention is clearly maintained.

[11] Though confrontation often results from justified distrust and *in pejus* modification of working conditions both in law and in practice.

[12] In Colombia, this rule applies when membership does not exceed one-third of the total workforce in the enterprise, but if it does the agreement covers all workers in the enterprise, whether unionized or not.

[13] This has nonetheless been construed in legal practice to mean all workers in the enterprise, as it is not acceptable to establish differences in working conditions among workers in one and the same production unit.

[14] In Bolivia, unlike other countries in Latin America, collective bargaining and collective contracts cannot be placed on the same footing. In practice, as pointed out above, collective bargaining and the signing of agreements are not possible as the regulations governing employers prevent them from negotiating labour questions.

[15] The table includes only data concerning collective agreements as the other agreements, the so-called collective covenants, cannot be considered as genuine bargaining between workers and employers.

[16] There is a distortion in this year's figures as the Labour Regions of the Ministry of Labour and Social Promotion (*Regiones de Trabajo del Ministerio de Trabajo y Promoción Social*) submitted no information.

[17] Federal-level collective bargaining is no longer being conducted by the Banking Federation of Peru (*Federación Bancaria del Perú*), the Civil Construction Federation (*Federación de Construcción Civil*), the Textile Federation (*Federación Textil*), nor by the unions in the electricity industry. Only the bakers' federation still conducts industry-wide bargaining.

[18] Please refer to the national study for detailed information concerning patterns of coverage in the various sectors.

[19] Between 1990 and 1994, 15.7 million jobs were created in Latin America, 8.5 of every 10 being in the informal sector. In Peru in particular, the informal sector accounts for about 60 per cent of the economically active population.

[20] In Venezuela, as a result of the three-year duration of collective agreements, coverage skyrockets in those years when the signing of two or three major industry-wide agreements coincide, such as those in the petroleum, chemical or textile industries.

[21] The laws throughout the Andean countries prescribe different periods of validity for collective agreements. Thus, in Peru and Bolivia the labour code establishes minimum periods that may be extended by the parties; in Venezuela it sets a maximum and a minimum time frame; and in Ecuador and Colombia the duration is set by the parties, though in the latter country an agreement is presumed to be applicable for successive six-month periods if it does not specify a time-frame. Even where the labour code is not adhered to, the periods of validity would seem to follow normal usage in each country.

[22] In Peru there are prominent cases of extension of the period of validity of agreements by two, three and even five years, such as those of Magma Tintaya and Southern Peru.

[23] The report by the Centre for the Processing of Collective Agreement Data *(Centro de Información Sistematizada de Convenciones Colectivas)* (CISCON), which is analysing 200 agreements, states that 6.97 per cent of those agreements contain clauses on output and productivity, while only one includes profit-sharing.

[24] Incidentally, the Colombia study contains a single instance of *flexitime* in an arrangement separate from the collective agreement at an automobile assembly plant. On account of the problem of terrorism and in an attempt to circumvent it, apart from other insurance benefits, protection for trade union leaders and so on, provision was made for the possibility of varying working hours pending notification to the plant supervisor.

[25] Two noteworthy examples are the company Backus y Johnston S.A., whose list of demands includes proposals concerning the organization of production and technical training, and the National Federation of Health Sector Workers (FENUSTA), which successfully tabled a package of proposals for comprehensive health sector restructuring, including new job categories.

Collective bargaining: A fresh spurt of social and sectoral dialogue and some interesting findings

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It is well known that the collective labour agreement, as an agreement concluded between workers' and employers' representatives in order to lay down the conditions for provision of services in an enterprise, is undoubtedly a fundamental institution of labour law. Viewed as a paradigm for action of organized labour, it is one of the most important achievements of trade unionism and the fundamental instrument of the trade union in the Mexican system for the safeguard and promotion of workers' interests.

It is difficult to lay down rules

It is nevertheless important to remember that any collective labour agreement – whether known as a collective agreement, rates agreement, team agreement, etc., according to the country and the legislation in question – is preceded by a process of discussion known as collective bargaining during which the specific conditions are fixed for the provision of services in one or more companies or enterprises. Collective bargaining is a dynamic and complex process in itself which brings together dissimilar persons with differing interests in a discussion for which the rules are difficult to define and in which economic and legal aspects mingle, with a touch of psychology, philosophy, human relations and ideology. Conceived initially as a demand and expression of workers' groups against their exploitation and social vulnerability, today collective bargaining has ceased to be a totally conflictual process and become a normal form of worker-employer communication and relations.

A single union device imposed by the labour movement

Our Political Federal Constitution of 1917 does not expressly mention collective labour agreements and, consequently, does not refer to collective bargaining, but the dogma prevailing since then acknowledges the existence of both merely by recognizing trade unions and strike action. In this regard, it may be added that by enshrining respect for freedom of association in Article 123, section A, part XVI, of the Constitution, there is implicit recognition of the right to freedom of action for workers, which includes the possibility of demanding collective bargaining on labour conditions and its formalization in a collective labour agreement. Hence, since their origin, these instruments appear as a single, all-embracing trade union instrument imposed by the labour movement to assume the character of a right for workers' organizations to defend and promote better living and working levels, beyond and despite the bias which liberal individualism has attempted recurrently to establish.

Absence of major obstacles since 1931

At the outset, collective bargaining in Mexico developed under the provisions of the Federal Labour Act of 1931 and operated without major obstacles given its own complexity and the changing conditions of the Mexican situation in each period. In terms of its characteristics with regard to the form and substance of collective bargaining, they picked up momentum when the new Federal Labour Act of 1970 came into force, and furthermore when in 1974 two provisions on labour standards were included concerning the compulsory annual revision of collective agreements and daily wages paid in cash. These provisions – 399 bis and 419 bis – began to exert an effect in May 1975 just when the government of Luis Echeverría Alvarez was in power, a period during which, despite the ups and downs of inflation

and devaluation, collective agreements improved notably and many of the rights enshrined in Article 123 of the Constitution were laid down in laws and institutions such as the *Instituto y Ley Infonavit* (Infonavit Institute and Act), Fovissste, Fonacot, etc.

Troubled times in the era of the Pacts

Under José López Portillo's government, the labour aspects linked to collective bargaining followed a satisfactory trend: bargaining was carried out freely and the parties obtained significant improvements in regard to wages and benefits with up to 1,000 jobs a day being created during the six-year presidential term. Unfortunately, the world oil price crisis and the complications of the Mexican external debt led to severe disturbances, reversing the progress made and in response to which the administration of Miguel de la Madrid Hurtado was to resort to a long-lasting economic and labour policy hinged to Pacts directed in the first stage at controlling prices and salaries.

A series of cooperation pledges

The Pact on Economic Solidarity, concluded on 16 December 1987, marked the beginning of a long series of cooperation agreements made with official intervention which, willy-nilly, have had a considerable impact on the social effectiveness of collective bargaining and have significantly and disturbingly reduced the purchasing power and well-being of Mexican workers and their families in the past 11 years. The value of the economic and social pacts cannot be denied. They can be justified and be of enormous use in a particular social and economic situation, but such cooperation mechanisms must be temporary and require that all the sectors involved make proportional and equitable sacrifices. The virtues of these democratic consensual tools can either turn to naught or become corrupt when their successful application relies on sacrifices by only one of the parties, in this case the most unprotected and vulnerable in a national and international context of aggressive economics and a process of globalization making headway by leaps and bounds.

Striking a balance among the various production factors

As aforementioned, trade union rights in Mexico are upheld constitutionally by Article 123, section A, part XVI, which lays down that "both workers and employers have the right to join together in the defence of their respective interests, forming trade unions, occupational associations, etc.", a provision which must be read in association with part XVIII, which stipulates that "strikes shall be lawful when their purpose is to achieve a balance between the various production factors, harmonizing labour rights with those of capital" [free translation from the Spanish original].

Section Seven of the Mexican Federal Labour Act regulates the content of parts XVI and XVIII of the foregoing provision under the heading of Collective Labour Relations and, specifically in chapters I and II, covers the occupational associations in regard to coalitions, trade unions, federations and confederations. Chapters III and IV deal with collective labour agreements and the *contrato-ley* (legal agreement), while chapter VIII of the regulatory act relates to strikes.

The constitutional aspects referred to above are closely connected with trade union law, the essential concerns of which largely find expression in collective bargaining, collective agreements constituting concrete achievements.

One of the most comprehensive definitions

Currently, our Federal Labour Act, in defining a collective agreement as "an agreement concluded between one or more workers' unions and one or more employers or one or more employers' unions, for the purpose of establishing the conditions under which work should be carried out in one or more companies or establishments" (Article 386), provides one of the most comprehensive definitions on the subject so that, in accordance with its content, the negotiation leads primarily to fixing hours worked per day, the amount of wages, rest days for each category and speciality, workers' training and skills development, the bases for the membership and operation of the joint committees which must function in each enterprise according to the law, and other provisions as decided by the parties.

Three types of collective bargaining

Viewed essentially from the legal angle, we may say that Mexican legislation today gives rise to three types of collective bargaining: *ordinary bargaining*, in which no authorities participate, except for the judicial authorities to endorse the agreements reached by the parties

when so specified by the law; *administrative* or *conciliatory bargaining*, under the responsibility of the Directorate-General of the Corps of Conciliators dependent on the Secretariat of Labour and Social Welfare; and *negotiation relating to the "contrato-ley"* in the charge of the Directorate-General for Agreements of the above-mentioned body of the Federal Executive. Work completed during previous presidential terms by the National Tripartite Commission could not be followed up because of the Commission's essentially political rather than legal nature.

Ordinary bargaining: Joint committees

In the first type of bargaining, as a general rule joint committees are constituted consisting of an equal number of workers' and employers' representatives who intervene in the proceedings. The law provides for the presence of these committees in some specific cases: safety and health; education and training and internal regulations; and allows others to function if so agreed by the production factors – capital and labour; so all in all they enjoy a very wide range of functions: conciliation; tabulators; recruitment and promotion; standardization of specific posts, etc. For each collective agreement the parties themselves agree on its establishment and lay down the bases for any negotiation.

Administrative bargaining: Officials responsible for conciliation

In regard to the second type, for some decades now there has been a body of conciliation officials in the Secretariat of Labour and Social Welfare of our country to provide a public bargaining service in respect of working conditions, avoiding any worker-employer conflicts by official intervention, especially when the parties themselves cannot reach a satisfactory settlement.

A simple procedure governs this type of bargaining without any other direct intervention, providing an authorized record of the collective agreement both parties conclude: the conciliator only testifies publicly to the contents of the agreement for any subsequent legal action which may arise.

The contrato-ley: Obligatory in an industrial branch

In respect of the third category, article 406 of the Mexican Federal Labour Act provides that trade unions which represent at least two-thirds of the unionized workers in a branch of industry in one or several federal entities or in one or more economic branches can conclude a *contrato-ley* (legal agreement). The definition which Mexican legislation provides of this legal institution restricts it to an agreement concluded between one or more workers' unions and one or more employers' unions for the purpose of laying down the conditions under which the work in a specified branch of the industry must be carried out, in order to declare it obligatory in one or more federal entities, in one or more economic zones or throughout the national territory (article 404 of the Federal Labour Act).

Labour authorities step in

On the basis of the provisions referred to, collective agreements are held by the labour authorities to determine the general working conditions in the industry or branch as well as fix the rules under which plans and programmes are drawn up for introducing education and training or any other agreed provisions.

The main feature of this type of bargaining is the involvement of the labour authorities both in preparing and ensuring the application of these labour-employer agreements and their involvement in the consensual process and in the revision of the collective agreements by offering administrative solutions and regulating the functioning of the joint enterprise committees which are set up.

Similarly, the labour authorities must be aware of the objections raised by employers and workers to the compulsory application of the *contrato-ley* and issue an opinion on the matter (Articles 415 et seq. of the Federal Labour Act). In this way, bargaining guarantees application of the agreement and forestalls any disputes which could arise between the trade unions involved, with the aim of settling the greatest number of labour demands.

A defence for the most vulnerable groups

Viewed in a different perspective – and relying on the experience amassed by the trade union affiliates of the Confederation of Mexican Workers (CTM) – we can affirm that collective bargaining is currently satisfactory and constitutes an important defence against the harsh effects of a complicated economy which places a heavy burden on workers and their families, especially those who are not trade union members and are therefore more vulnerable.

Tripartite bodies do not always take economic realities into account

There is no doubt that conditions of remuneration and security in employment, granting of social benefits, working hours and other similar guarantees are achieved more effectively and yield better social gains when they are discussed, agreed on and laid down in agreements which are the outcome of collective bargaining – the prerogative of the trade unions – than when they are concluded by tripartite bodies. The latter do not always take into account the real economic situation in which the workers provide their services, but obey macroeconomic imperatives whose considerations are far distant from the material needs which the wage should cover under constitutional provisions.

The recent approval in Mexico of a 13 per cent rise in the minimum general wage – lower than the 17 per cent recorded inflation – confirms the foregoing assertions and underlines the need for an in-depth review of the establishment and functioning of the tripartite National Minimum Wages Commission, which is the source of the agreements concluded by vote of the workers' representatives.

A new labour culture gives pride of place to dialogue

Against this background and the volley of criticism that the measure has provoked in almost all sectors of Mexican society, 1999 has been ushered in as a particularly important year for an appraisal of Mexican collective bargaining with workers and employers engaged in the contractual wage review, making it possible to gauge whether the new jointly sponsored climate for resolving the labour question affords the possibility to overcome the complications caused by the low minimum wage increases and head towards a new labour culture inspired by dialogue and consensus in the conclusion of collective agreements.

So what are the prospects for collective bargaining in Mexico?

The CTM is both spectator and actor at a time which is historic for the nation, but from several stances, all closely linked with the imperatives of globalization and the role and consideration that must be given today to the working classes if they are to be part and parcel of scenarios involving industrial and commercial competence of the highest order.

Challenges imposed by regional commitments

In this ongoing climate of globalization, we Mexicans must respond to the immediate challenges imposed by regional commitments with the United States of America and Canada, in addition to those that would surface should a system of free trade with the European Union be introduced in our country, and still others that would be the result of short-term agreements with countries and blocs in the Central and South American regions.

Trade unions with the same flexibility as companies

In a scenario with these characteristics, it is essential to recognize that in present-day world economies, the only workers and unions that flourish are those which develop the same skills and acquire the same flexibility as companies. But, in order to be successful, companies must be able to exploit market niches, adapt practically and instantly to changes in demand and endeavour to offer a perfect product.

If Mexican workers have to adapt to changing production conditions, investment must be made so as to improve their skills commensurate with changing market conditions. Their access to the tools and resources required for periodic "modernization" must be facilitated and they must be given the necessary time.

Unskilled workers

According to data from the Secretariat of Labour and Social Welfare, at the end of the second half of 1996, the National Employment Survey showed that 73.8 per cent of the Mexican population working at that date lacked full basic education while 11 per cent had no schooling, 21.2 per cent had not completed primary school, only 20.6 per cent had completed primary school and 20.9 per cent had embarked on but not completed secondary education.

We must therefore admit that the Mexican labour force consists mostly of people with enormous individual potential but who lack proper education.

Mexican companies, for their part, have to consider productivity and competitiveness as an overall strategy within which the workers' efforts are clearly and precisely geared to the company's changes and objectives, with the result that only a re-evaluation of the employ-

ees' and workers' role will make it possible to enter the new national and international markets advantageously.

A programme which breaks new ground

The managerial challenge means that development programmes must be ongoing, and be geared to the following considerations: systems for measuring the individual and collective progress made and economic incentives; systems allowing workers to participate both in reviewing the work process and in the search for solutions to the problems posed by the new objectives (e.g. quality circles, productive process analysis groups, etc.); proper identification of needs for human resources qualification and training; technology transfer and/or adaptation processes; priority to improved business management and strategic planning; improving the work environment with modern techniques such as biomechanics and ergonomics; and promoting social activities among workers and their families in order to raise their individual and collective self-esteem, as well as other matters on a broad agenda which breaks new ground for the new era of the collective bargaining process in Mexico.

Why is it perfectly feasible to include these and other similar topics in an advanced view of collective bargaining?

Two requirements for a new labour culture

First, enterprises worldwide have begun to realize that their main assets are not material – machinery, equipment, factories – but human resources; and it is from the workers' capacity for innovation and their acquired knowledge that the managerial potential for competitiveness and productivity can take form; and secondly, unless the worker-employer relationship includes employment stability and prosperity for the workers, it will be difficult to produce a new labour culture striving towards consensus in sectoral agreements thereby enabling the various interests to attain their specific goals.

No abdicating: Another brand of trade unionism

In the search for a fresh course for collective bargaining, two powerful tools are at work in Mexico: a new conception of the trade union struggle in keeping with the new conditions and demands of the labour market, and the virtues of the new labour culture which we have been formulating and constructing jointly as workers, employers and government.

The new form of trade unionism we are spearheading in Mexico has abandoned neither its historical roots nor its social role. It has not abdicated from its position as intransigent defender of the fundamental rights of workers nor from the never-ending struggle to obtain a fair and fitting reward for the product of their work enabling them and their families to lead a decent life. But the new brand of trade unionism we bring to collective bargaining and social dialogue is to be of a forward-looking and participatory character, to be modern and supportive of the other production factors but not desert the inalienable right to freedom of association and the true representation of a key component of society – the workers. The new trade unionism in which we place our trust is turning to cooperation, dialogue and consensus to find the appropriate formulas which global complexity brings to the Mexican worker-employer relationship; and it is in education and training that it expects to find the new tools for fashioning workers' well-being and happiness.

Closer bonds reveal the national climate

This trade union renewal which we as CTM workers are bringing has already yielded concrete evidence of its new social philosophy by contributing decisively to the thrust of the new labour culture. In 1995, amid the worst crisis in our history, an event occurred that was unusual but highly revealing of what could, in the near future, be the national climate for collective bargaining, a fresh fount for social and sectoral cooperation: a major breakthrough occurred in the country in the relations between the CTM and the Mexican Employers' Confederation (COPARMEX) leading to agreements based on dialogue and consensus. The debate about the Federal Labour Act has been shelved and in its stead has come to the fore the will to analyse labour problems and seek solutions of mutual benefit, but above all, of benefit to society and the future of the country.

An agreement signed by the top organizations

As it happened, in July 1995 the CTM and COPARMEX signed an agreement entitled "For a new labour culture". Subsequently, in August 1995, the *Congreso del Trabajo* (Labour Congress)

and the *Consejo Coordinador Empresarial* (Employers' Coordination Council) – the leading workers' and employers' organizations respectively – ratified and initiated the joint action proposals in nine months of work which resulted, in August 1996, in the signing of the Principles of the New Labour Culture, witnessed in person by the President of the Republic, Dr. Ernesto Zedillo Ponce de León.

The purpose of the new labour culture is to launch a re-evaluation of human labour; strive towards just and equitable levels of remuneration; actively promote training of workers and employers as a systematic and ongoing process; stimulate job creation and save existing jobs; foster care for the environment and the full application of safety and health rules in the workplace; and consolidate cooperation and dialogue as appropriate means to enhance worker-employer relationships. Around these objectives, basic principles have been formulated: on ethics, labour rights, obtaining and instructing in labour justice; and principles of economics, education and training, and productivity which, as aforementioned, open up infinite possibilities for collective bargaining and sectoral consensus.

The regulatory labour instruments referred to earlier enable us to spot very interesting leads for exploring collective bargaining in Mexico which will take us along the route indicated in the Declaration of Viña del Mar adopted by the Eleventh Inter-American Conference of Ministers of Labour of the Organization of American States held in Viña del Mar, Chile, on 20 and 21 October 1998.

Promising indicators

Indeed, extending the coverage of collective bargaining to the greatest number of sectors in the economy; paying special attention to negotiating appropriate conditions for forms of work other than permanent contracts: seasonal, contract labour, fixed-term, and part-time; establishing or strengthening the scope of the tripartite or bilateral social dialogue; endeavouring to obtain respect for freedom of association and rights of representation and autonomy enshrined in national legislation; and, in general, observing the indications which are laid down in the Constitution and ILO Conventions on freedom of association and collective bargaining, as provided in the Declaration of Viña del Mar, are all promising indicators of how the New Labour Culture, which is gradually being consolidated, could take shape in Mexico.

Collective bargaining and international obligations

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A paradox

Collective bargaining has pride of place in the Canadian labour relations system. A solid framework exists to promote collective bargaining, helping to make it one of the key means of determining the terms and conditions of employment.[2] Despite such a framework, 50 years after its adoption, Canada remains among the minority of countries that have not yet ratified the international labour Convention on collective bargaining.[3] Added to this paradox is the fact that Canada is called to account regularly by the ILO Committee on Freedom of Association because of complaints concerning violations of collective bargaining rights.

A pivotal role

Canada holds a significant place in the history of the International Labour Organization, not only as one of its founding members, but also for having hosted the International Labour Office when Europe found itself at the eye of the storm during the Second World War.[4] Canada's role in the Organization has not diminished: the Government as well as workers' and employers' representatives sit on its Governing Body,[5] and Canadian delegates often have a strong voice in many of the Organization's discussions and on many of its Committees. Canada played a pivotal role in securing the adoption of the most recent affirmation of fundamental rights (including the right to bargain collectively), namely the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up.[6]

Domestic to international commitment

Given its role on the international stage and the domestic commitment to collective bargaining, why has Canada been unable, or perhaps unwilling, to ratify the Convention on collective bargaining? And what are the prospects for the future? These questions will be looked at from two perspectives. First, an examination of the general framework of collective bargaining that has been established: when held up to the model for promoting collective bargaining that the ILO supervisory bodies[7] have pieced together over the years, Canada's general collective bargaining framework looks exemplary. However, there are also cracks in the system, leaving some workers without the same rights and protections enjoyed by others. There have also been intervals when the system has been suspended for certain employees (mainly those in the public sector) for economic reasons. The lapses in the system that have been brought to the attention of the ILO supervisory bodies is the second perspective from which Canada's record will be examined.

Obligations by virtue of membership

Although it has not ratified the principal Convention concerning collective bargaining, namely the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), Canada still has international obligations in this area. By virtue of membership in the International Labour Organization, all member States are bound by the basic principles of freedom of association, including the right of collective bargaining, since these are included in the Organization's Constitution.[8] As a result, the Freedom of Association Committee of the Governing Body of the ILO has authority to hear complaints of violations of freedom of association whether or not the country at issue has ratified the particular Conventions. Since Canada has not yet ratified Convention No. 98, it is through this special complaints procedure that Canada's collective bargaining record has been

scrutinized. Of the 70 complaints that have been filed against Canada with the Committee on Freedom of Association since 1951, 60 involve collective bargaining issues.

Divided jurisdiction

Before turning to the promotion of collective bargaining in Canada, when discussing ratification prospects, the complex constitutional structure of the country cannot be overlooked. Authority over labour matters falls under both federal and provincial jurisdiction. While Canada is the international entity authorized to ratify a Convention, jurisdiction for implementation is divided between the federal jurisdiction and the provinces. Consequently, the practice has been to ratify only if all 13 jurisdictions concur and undertake to implement the requirements of the Convention.[9]

Canada's collective bargaining framework

The Right to Organise and Collective Bargaining Convention (No. 98) calls on States to take measures to encourage and promote voluntary collective bargaining.[10] It refers specifically to "the full development and utilization of machinery for voluntary negotiation". Importance is placed on the voluntary nature of collective bargaining, thus limiting the State's direct role in the process. However, this is balanced with the concept of "promotion": a State is not entitled to remain indifferent with respect to collective bargaining.

While the ILO supervisory bodies have not determined an "ideal" collective bargaining system, they have identified practices and procedures that promote collective bargaining. The recognition of representative trade unions for the purpose of collective bargaining, good faith bargaining, the prohibition of unfair labour practices, and mediation and conciliation procedures have been identified in this context,[11] all of which are provided for in all Canadian jurisdictions.[12]

Union recognition or formal certification

Once a group of employees decides to organize for the purpose of bargaining collectively, either an employer voluntarily recognizes the union or a formal certification procedure is set in motion. Certification has been described as "the linchpin of modern North American labour law".[13] Through this process, exclusive bargaining rights are granted to trade unions that have secured a certain level of employee support. Normally, a union must show that it has the support of a majority of the employees in a bargaining unit[14] in order to obtain certification.

Safeguards built in

For recognizing unions as exclusive bargaining agents, the ILO supervisory bodies have insisted on certain safeguards: the certification should be made by an independent body; the representative organization should be chosen by a majority vote of the employees in the unit concerned; a trade union that previously failed to secure a sufficient number of votes in an election should be able to request a new election after a stipulated period; and any new organization should have the right to demand a new election after a reasonable period.[15] These safeguards have been built into the Canadian system. Independent labour boards across the country determine whether a union is entitled to certification. The federal and provincial legislation provides for a certification vote, but the level of support needed to trigger a vote and the means of proving sufficient support may vary.

Representation vote

In some of the jurisdictions, certification can be obtained without a vote. For example, in British Columbia, if the board is satisfied that the trade union has 55 per cent of the employees of the union as members "in good standing",[16] it must grant certification.[17] But where a union shows it has less than 55 per cent of members in good standing, but not less than 45 per cent, a representation vote is held.[18] All the employees of the bargaining unit vote in a representation vote, and if a majority of those casting ballots (as opposed to those entitled to vote) vote in favour of representation by the union, certification will be granted.[19] What is particularly interesting about the Canadian situation is that, generally, a union need not show it has a majority of employees as members, but rather that a majority of employees support the union as their bargaining agent.

In some cases, the labour board can certify a union as the exclusive bargaining agent without a vote if the employer has been guilty of an unfair labour practice which has prejudiced the union in its efforts to gain majority support.[20]

Duty of fair representation

The mere filing of an application for certification creates certain obligations on the part of the employer: terms and conditions of employment are not to be changed.[21] Once certified, a trade union becomes the bargaining agent for all the employees in the bargaining unit, even those who are not members of the union. As a corollary to this right of exclusive representation, the union has a duty to represent all the employees in the bargaining unit fairly.[22]

Good faith bargaining

Once certification is granted, either party can give notice to begin collective bargaining. When notice to bargain is given, the employer again must refrain from unilaterally changing terms and conditions of employment,[23] and both the union and the employer are obliged not only to bargain, but to bargain in good faith. Good faith bargaining is important in the view of the ILO supervisory bodies "for the maintenance of the harmonious development of labour relations".[24]

Although good faith bargaining does not require the parties to reach an agreement, it does require them to make every reasonable effort to enter into a collective agreement. In this context, the Committee on Freedom of Association has noted the importance of genuine and constructive negotiations and the avoidance of unjustified delays.[25] The Committee has also stated that agreements once reached should be binding on the parties,[26] which is the case of collective agreements under Canadian law. A collective agreement in Canada may also contain whatever subjects the parties agree to include.

Conciliation/mediation services

Since competing interests are at stake, the parties to collective bargaining are not always able to reach an agreement without the assistance of a neutral third party. The importance of conciliation and mediation as a means of helping the parties to come to an agreement voluntarily is recognized across Canada. Conciliation or mediation services are provided to help the parties re-establish dialogue and consider different possibilities, but in the end it is still the parties who decide what terms they will agree upon, if any. The importance of maintaining the autonomy of the parties with respect to dispute settlement machinery has been stressed by the supervisory bodies.[27]

Voluntary arbitration

Some Canadian jurisdictions also provide for voluntary arbitration. In Ontario, for example, once notice to bargain has been given, the parties can agree in writing to submit all matters remaining in dispute to final and binding arbitration.[28] Although arbitration results in a collective agreement being imposed, the autonomy of the bargaining parties is maintained, since the decision to submit to arbitration is the choice of each party.

Imposition of first collective agreement

A general exception to the voluntary nature of collective bargaining in some Canadian jurisdictions is the imposition of a first collective agreement. The ILO Committee of Experts on the Application of Conventions and Recommendations has accepted that, while arbitration imposed at the request of one party is generally contrary to the principle of voluntary collective bargaining, an exception might be made in order to conclude a first collective agreement: "As experience shows that first collective agreements are often one of the most difficult steps in establishing a sound bargaining relationship, these types of provisions may be said to be in the spirit of machinery and procedures which facilitate collective bargaining."[29] The difficulties in securing a first collective agreement are recognized in a number of Canadian jurisdictions. In Ontario, for example, when the parties are unable to reach a first collective agreement, either party may apply to the labour board for a direction that the agreement be settled by arbitration. In determining whether to order arbitration, the board looks at whether the employer has refused to recognize the bargaining authority of the union, the uncompromising nature of the bargaining position, if applicable, and any failure to make reasonable or expeditious efforts to conclude a collective agreement.[30]

Business transfers

Another noteworthy aspect of the Canadian collective bargaining system is the protection of bargaining rights and collective agreements where there is a sale or transfer of a business. At common law, if the parties to the collective agreement change, both the collective agreement and the union's bargaining rights come to an end.[31] Legislation across Canada attenuates this situation by providing in certain cases that

successor employers are bound by the terms of the pre-existing collective agreement and must recognize the bargaining rights of the union.[32]

Falling through the cracks

The standard Canadian collective bargaining framework described above is clearly aimed at encouraging and promoting collective bargaining. However, not all workers are entitled to take advantage of the system. There are two types of workers who fall through the cracks: those who are completely excluded by the general legislation and those whose rights are suspended from time to time by special legislation. The rights provided under Convention No. 98, however, are to apply to all workers, except a narrow category of public servants.[33]

Certain workers not covered

A Governmental Task Force on the revision of the Canada Labour Code acknowledged that "while there is substantial compliance in Canada with ILO Convention No. 98 on the Right to Organise and Collective Bargaining, it has not been ratified because in some jurisdictions either farm workers or members of certain professions are excluded from collective bargaining."[34] This has been a point raised by the Committee of Experts for a number of years in the context of Canada's reporting obligation under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87), which has been ratified. Most recently, the Committee noted that certain agricultural and horticultural workers in the Provinces of Alberta, Ontario and New Brunswick are excluded from the coverage of labour relations legislation; therefore they do not enjoy the protection provided with respect to the right to organize and to negotiate collectively.[35]

Ontario nullifies rights and agreements for certain categories

The ILO Committee on Freedom of Association has recently examined some of the legislative changes in Ontario, one of which was to limit further the categories of workers entitled to take advantage of the statutory collective bargaining framework. Excluded from these rights and protections are domestic workers, agricultural and horticultural workers, architects, land surveyors, lawyers and doctors.[36] The Ontario Labour Relations Act also terminates the bargaining rights of existing bargaining agents and nullifies existing collective agreements for these groups. The Committee on Freedom of Association adopted decisive recommendations: the Government was requested to take the necessary measures to guarantee the excluded groups access to machinery and procedures that facilitate collective bargaining, to recertify the organizations representing those workers, and to revalidate any collective agreements that they had entered into.[37] While the supervisory bodies are obliged to comment where groups of workers are denied access to collective bargaining machinery, they are likely to be more critical in cases where workers, having once been within the system, suddenly find themselves stripped of their pre-existing rights and protections. Interference with existing freely concluded collective agreements seems to have been a particularly aggravating factor in the Ontario case.

Legislative imposition of wage levels

The Committee on Freedom of Association has also had a number of opportunities to consider cases of the second category of workers falling through the cracks – those who normally are within the system, but who find their rights suspended from time to time through the adoption of special legislation. From 1991 to 1994, 20 complaints were lodged against Canada concerning wage cuts or freezes or the postponement of wage increases in the public sector.[38] In these cases, collective bargaining had been suspended through the statutory extension of the duration of collective agreements or the legislative imposition of wage levels regardless of the terms of existing collective agreements. These cases have given rise to what is unofficially considered "the Canadian jurisprudence". They concern not only the Federal Government but also British Columbia, Manitoba, New Brunswick, Nova Scotia, Newfoundland, Ontario, Prince Edward Island, Quebec and the Yukon. While there was a flurry of cases of this nature in the early 1990s, similar cases also came before the Committee in the 1980s.[39]

ILO Committee expressed concern over large number of cases

The cases in question involved economic stabilization measures imposed by law which had the effect of suspending collective bargaining, at least with respect to wages. While showing some deference to the Government in its attempts to overcome difficult economic

problems, and acknowledging that the special character of the public service requires some flexibility with respect to the application of collective bargaining principles, the Committee on Freedom of Association was obliged to express its concern about the large number of cases that had been filed and the manner in which some of the measures had been imposed. In the view of the Committee, "this reflects serious and profound difficulties in reaching agreement on the determination of employment conditions in the public service in Canada both at the federal level and in the various provinces."[40] The Committee suggested that the Government make use of ILO assistance to find a solution to these problems; in particular, an advisory mission was recommended.[41]

Exceptional measure or violation

Taking into consideration the serious financial and budgetary difficulties facing governments, certain conditions must still be met before collective bargaining rights can be limited. First, the Government must assert that there are "urgent"[42] or "compelling"[43] reasons of national economic interest. Secondly, any restrictions must be imposed as "exceptional" measures, which by definition are temporary. Where the duration of the restriction is particularly long or is extended, the Committee is more likely to find that there has been a violation. The Federal Government was severely criticized in a case concerning the second extension of the Public Sector Compensation Act, resulting in a total of six years of wage restrictions in the public sector.[44] Having already examined the original Act and the first extension, and having recommended that there be a return to normal free collective bargaining,[45] the Committee "deplored" that the Government had not implemented its earlier recommendations and expressed profound regret that again collective bargaining had not been given preference.[46] It went on to express its concern at the danger of institutionalizing recourse to legislation to address wage concerns in the public sector.[47]

Committee sympathy for protection for lower-paid workers

The third condition before limiting collective bargaining is that there should be adequate safeguards to protect workers' living standards. In cases where an attempt was made to protect lower-paid workers or to maintain pay equity measures, the Committee has been more sympathetic to the Government.[48] On the other hand, legislation resulting in cancelling the retroactivity of pay equity agreements was seen as an exacerbating factor.[49]

Role for collective bargaining

A relevant question is whether or not a role, even limited, still remains for collective bargaining. For example, if all working conditions and benefits other than salary are still subject to negotiations, this will be a mitigating factor.[50] Another mitigating factor is where wage increases are merely postponed by the legislation rather than denied altogether.[51] Interference with the terms of existing collective agreements rather than waiting until the expiry of those agreements, however, is viewed with disapproval.[52]

Adequate consultation

Finally, an important factor influencing how public sector wage restraint measures are perceived is whether adequate consultation with all the parties concerned took place before the changes were imposed: "where a government seeks to alter a bargaining structure in which it acts actually or indirectly as employer, it is particularly important to follow an adequate consultation process, whereby all objectives perceived as being in the overall national interest can be discussed by all parties concerned." The consultations should be undertaken in good faith, with both parties having sufficient information to make an informed decision.[53] By consulting with the parties beforehand, the Government not only benefits from solutions that those with a different perspective may be able to propose, but may be able to convince the parties of the importance of certain measures: their implementation may be facilitated, and a harmonious industrial relations climate maintained. While consultation cannot be considered collective bargaining, it is a step in the direction of respecting the autonomy of the parties and the interests of those who will be significantly affected.

The central role of collective bargaining in Canadian labour relations cannot be denied. Nor can the role of the State in helping to nurture a system that has now developed strong roots. Will Canada be willing to give an international affirmation of its commitment to the right to bargain collectively by ratifying Convention No.98? Given that the economic stabi-

lization programmes have met their objectives, the painful process of streamlining the public service has been completed in most jurisdictions, and as the Federal Government has proudly announced a balanced budget, it can be hoped that the 20 public sector cases will be of historical interest only. As a result, the remaining obstacles to ratification seem relatively minor, though some adjustments would still be needed. If ratification of Convention No. 98 were a priority on Canada's political agenda, would it not be possible to take measures to convince the provinces to make the necessary adjustments? From a political point of view, it may be useful to wait to ratify until it can coincide with a significant event – a 50th anniversary perhaps?

Notes

[1] The views set out in this article are those of the author and do not necessarily reflect those of the Office. The author would like to thank Bernard Gernigon for comments on the draft.

[2] For example, approximately 50 per cent of all workers in the federal jurisdiction are covered by collective agreements: *Canada Labour Code Part 1 Review: Seeking a balance* (Canada, 1996), p.17.

[3] As of February 1999, the Right to Organise and Collective Bargaining Convention, 1949 (No.98), had been ratified by 140 countries (approximately 80 per cent of ILO member States). There are two other Conventions supplementing Convention No. 98 in the area of collective bargaining: the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154). Neither has been ratified by Canada.

[4] The International Labour Office was based in Montreal from 1940 to 1946.

[5] At present, the Government of Canada is a titular member of the ILO's Governing Body; the Workers' representative is also a titular member, and the Employers' representative is a deputy member.

[6] Ambassador Mark Moher, Government member of Canada, chaired the Conference Committee during the 86th Session of the International Labour Conference in June 1998. At the adoption of the Declaration by the Plenary of the Conference, Ambassador Moher's role was unanimously heralded.

[7] Namely, the Committee of Experts on the Application of Conventions and Recommendations – a Committee of independent experts that is concerned primarily with examining the periodic reports on ratified Conventions; and the Committee on Freedom of Association of the Governing Body of the ILO – a tripartite Committee examining complaints concerning violations of principles of freedom of association. An important distinction between the two Committees is that the Committee of Experts' jurisdiction generally arises from a country having ratified a Convention; however, ratification is not needed in order to bring a complaint before the Committee on Freedom of Association.

[8] See the Preamble to the Constitution of the International Labour Organization, and the Declaration of Philadelphia annexed to the Constitution. This obligation has recently been reaffirmed through the adoption in June 1998 of the Declaration on Fundamental Principles and Rights at Work. Article 2 declares that "all Members, even if they have not ratified the Conventions...have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith ...freedom of association and the effective recognition of the right to collective bargaining…"

[9] See *Freedom of association and collective bargaining*, General Survey of the Committee of Experts on the Application of Conventions and Recommendations (Geneva, ILO, 1994), para. 315; and *Canada Labour Code Part I Review: Seeking a balance*, op. cit., p. 29.

[10] Article 4.

[11] See *Freedom of association*, General Survey, op. cit., Chapter 10; and *Freedom of Association: Digest of Decisions of the Freedom of Association Committee of the Governing Body of the ILO*, 4th (revised) edition (Geneva, ILO, 1996), Chapter 14.

[12] The only exception is with respect to good faith bargaining which is not specifically referred to in the legislation in Saskatchewan; however, section 11 of the Saskatchewan Trade Union Act declares it an unfair labour practice for an employer to fail or refuse to bargain collectively with a representative union.

[13] W.B. Rayner: *The law of collective bargaining* (Ontario, Carswell, 1995), p. 12-1

[14] It is for the labour board to determine what is an "appropriate" bargaining unit. The board will look at a number of factors, most importantly whether the employees in the unit share a community of interest with respect to the nature of the work, working conditions, etc.

[15] See *Freedom of association*, General Survey, op. cit., para. 240. See also Case No.1743 (Quebec), 295th Report, para. 80.

[16] Proof of membership varies from jurisdiction to jurisdiction. For example, in British Columbia, this is determined on the basis of signed membership cards; in Alberta and at the federal level, the payment of an initiation fee is also required (see BC Labour Relations Regulations, section 3; Alberta Labour Relations Code, section 31; Canada Labour Relations Board Regulations, section 24).

[17] BC Labour Relations Code, section 23.

[18] Ibid., section 24. At the Federal level and in Quebec, the union must show that 35 to 50 per cent of the employees in the unit are members of the union: Canada Labour Code, section 29; Quebec Labour Code, section 28.

[19] BC Labour Relations Code, section 25.

[20] For example, see BC Labour Relations Code, section 14; the Manitoba Labour Relations Act, section 40.

[21] See for example Canada Labour Code, section 24.

[22] For example, section 37 of the Canada Labour Code states that the union "shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement…"

[23] For example, see Canada Labour Code, section 50.

[24] See *Freedom of association, Digest of decisions*, op. cit., para. 814. See also *Freedom of association*, General Survey, op. cit., para. 243.

[25] Ibid., paras. 815-818.

[26] Ibid., para. 818.

[27] Ibid., para. 859; and *Freedom of association*, General Survey, op. cit., paras. 246-247.

[28] Ontario Labour Relations Act, section 40.

[29] *Freedom of association*, General Survey, op. cit., para. 257.

[30] Ontario Labour Relations Act, section 43. See also Quebec Labour Code, section 93.1, and Manitoba Labour Relations Act, section 87.

[31] See Rayner, op. cit., p. 14-1.

[32] See for example Canada Labour Code, section 44; Alberta Labour Relations Code, section 44.

[33] Article 6 provides that "This Convention does not deal with the position of public servants engaged in the administration of the State…". Pursuant to Article 5, the police and armed forces can also be excluded.

[34] *Canada Labour Code Part I Review: Seeking a balance*, op. cit., p. 30. See also J. Mainwaring: *Canada as an ILO member: performance and potential* (Ontario, 1968), p. 19.

[35] Observation of the Committee of Experts on the Application of Conventions and Recommendations, December 1998.

[36] Ontario Labour Relations Act, sections 1(3)(a) and 3.

[37] Case No.1900 (Ontario), 308th Report, para.194.

[38] Cases Nos. 1603 (BC), 1604 (Manitoba), 1605 (New Brunswick), 1606 (Nova Scotia), 1607 (Newfoundland), 1616 (Federal), 1624 (Nova Scotia), 1715 (Manitoba), 1722 (Ontario), 1733 (Quebec), 1747 to 1750 (Quebec), 1758 (Federal), 1779 (PEI), 1800 (Federal), 1801 (PEI), 1802 (Nova Scotia), 1806 (Yukon).

[39] See Cases Nos. 1147 (Federal), 1171 (Quebec), 1172 (Ontario), 1329 (BC).

[40] See Cases Nos. 1733, 1747, 1748, 1749, 1750 (Quebec), 299th Report, para. 237.

[41] An ILO mission to Canada had in fact taken place earlier (in 1985): see report of the Information mission to Canada annexed to Cases Nos. 1172, 1234, 1247 and 1260, 241st Report.

[42] Case No.1733, etc., op. cit.,

[43] Case No.1616 (Federal), 284th Report, para. 635.

[44] Case No.1800 (Federal), 299th Report.

[45] Case No.1616, 284th Report, para. 641; Case No.1758, 297th Report, para. 230.

[46] Case No.1800, op. cit., paras. 178 and 183.

[47] Ibid., para. 182.

[48] See Case No. 1604 (Manitoba), 284th Report; Case No. 1605 (New Brunswick), 284th Report; Case No. 1606 (Nova Scotia), 284th Report; Case No. 1722 (Ontario), 292nd Report.

[49] Case No.1607 (Newfoundland), 284th Report.

[50] See Case No.1604 (Manitoba), 284th Report, para. 322.

[51] See Case No. 1605 (New Brunswick), 284th Report, para. 501; Case No.1606 (Nova Scotia), para. 543.

[52] See Cases Nos. 1779 and 1801 (Prince Edward Island), 297th Report, para. 266.

[53] See Case No. 1802 (Nova Scotia), 299th Report, para. 281; Case No. 1806 (Yukon), 300th Report, para. 126. In a slightly different context, see Case No. 1928 (Manitoba), 310th Report, para. 183; Case No. 1943 (Ontario), 310th Report, para. 230.

The rigours of the economic crisis are not the sole explanation for the refusal to tackle the issues raised by trade union organizations

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As far as trade unions and workers are concerned, the ILO Right to Organise and Collective Bargaining Convention, 1949 (No. 98), ratified in 1961 by the Government of Senegal shortly after independence, is still closely bound up with the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). Indeed, these two international labour standards are inextricably linked: the existence of workers' organizations would be inconceivable without freedom of association from which flows the right to organize and the protection generally afforded it by the national Constitution. When we compare the interaction of the two component principles of each of these conventions, it may also be asserted that without recognition of the right to organize, free and voluntary collective bargaining would be out of the question.

Post-independence loss of momentum

Although thanks to the dynamism and pugnacity of the trade union organizations in Senegal it had been possible some years before independence to draw up and implement a good many collective labour agreements that still govern all occupational areas of national economic life to this day, it must be admitted that collective bargaining soon lost momentum under the combined effect of a centripetal trend towards a worker representation monopoly, up to 1976 at any rate, and other structural adjustment programmes that have seriously depleted trade union ranks and curtailed the government's room for manoeuvre.

Review of the Labour Code

The result is that Senegal, like the other countries in the subregion, is experiencing what might be called a "delayed adjustment", a process compounded by highly draconian conditionalities and policies of unbridled liberalization, with the consequence that the social laws and specifically the Labour Code are being revised to grant workers even less protection. As the basis of industrial relations, collective bargaining in Senegal today is reduced to a minimum, giving rise to such an impoverishment of labour conditions that inevitably results in industrial disputes and setbacks, as illustrated in 1998 by the acrimonious dispute between the Government and the Single Union of Electricity Workers (*Syndicat Unique des travailleurs de l'électricité*), whose leaders were either imprisoned or persecuted and dismissed from their jobs for challenging the ill-judged privatization of the electricity subsector.

Restoring the primacy of the social dimension

Now that the economic crisis is universally recognized as a structural one with worldwide ramifications that are restricting the room for manoeuvre of the partners in the social dialogue (governments, employers, workers), it is necessary to recognize the imperative of restoring central importance to the social dimension as the aim of work and the resulting production of wealth and values. Besides, this is the sense that must be given to the application of international labour standards and in particular ILO Convention No. 98, which enshrines the free-

dom of association of workers and the need to promote social dialogue through collective bargaining.

Experience and practice of collective bargaining

After bitter struggles by the trade unions in African countries under French colonial domination, the passing of the Overseas Labour Code (*Code du travail d'outre-mer*) (on 15 December 1952) led to the negotiation of the major collective labour agreements, some of which still govern industrial relations to this day in the specific case of Senegal (see Table 1). Until then, the French decree of 20 March 1937 applicable to the overseas territories had instituted joint employer-worker committees and authorized the conclusion of collective agreements in the industrial, commercial and transport sectors, though excluding agricultural and mining workers. But reverting to the period following the implementation of the Overseas Labour Code, it can hardly be denied that the Senegalese Labour Code Act of 15 June 1961 (*loi portant code sénégalais du travail*) merely reproduced the bargaining forums established prior to independence. Thirty-six collective agreements and their supplementing regulations date from this period of prolific drafting of social protection and collective bargaining instruments.

An inappropriate legislative framework

It was the pluralism then prevailing and the strength of workers' organizations spurred by the independence struggles that lay at the root of this proliferation of regulatory instruments that for a long time constituted the framework of the laws and regulations governing industrial relations. As we shall see later, the inappropriateness of this regulatory framework seriously undermined the collective bargaining mechanisms, which were also affected by the tendency towards a representational monopoly inherited from the period of one-party rule, hence the astutely maintained obstruction of the instruments of social dialogue all too often seized upon by the employers and government as a prelude to anti-union repression and economic reverses.

Consultation forums

The fact is that even today, workers' organizations are able to score collective bargaining successes only at the cost of protracted struggles and social tensions.

The main consultation forums are the following:

- The Economic and Social Council (*Conseil économique et social)* set up in 1963. It must be consulted on all major economic and social questions and issues an opinion not binding on the Government. Trade union organizations are indeed represented on the Council but would derive greater benefit from it if the latter took up the matters being discussed in the society as a whole and examined the tragic social ramifications of the economic policies born of structural adjustment programmes. Should the Economic and Social Council perform a watchdog and early warning function in respect of economic and social matters, it could become a key player in policy determination and choices, but despite the presence of workers' representatives, this has not materialized.
- The National Advisory Council on Labour and Social Security (*Conseil consultatif national du travail et de la sécurité sociale)* (CCNTSS) instituted in Article L 205 of the Labour Code and organized by Decree-Law (*décret-loi*) No. 61.452 of 29 November 1961. Its purpose is to study labour and social security problems. In theory, its opinion must be sought on all draft labour and social security laws. The Advisory Council is a tripartite body and must also be consulted concerning the extension of collective agreements and on occupational health and safety. It also fulfils another important function. In the event of legislative or regulatory inadequacies, the CCNTSS may formulate and submit proposals to the minister responsible for labour questions. It may also conduct surveys as needed and enlist the services of the labour administration to obtain any information that it may deem useful for carrying out its work. The operating methods and efficacy of the CCNTSS are substandard, despite its potentially meaningful role in solving labour and social security problems.
- The National Technical Health and Safety Committee (*Comité technique national d'hygiène et de sécurité),* a tripartite body. This body was created by Article 210 of the Labour Code and organized by Decree-Law (*décret-loi*) No.69.137 of 12 February 1969. It must be consulted on all occupational health and safety matters. The enactment of Decree No. 94.244 on occupational health

and safety committees might have made the National Committee more efficient. The SONACOS accident (explosion of a tanker laden with ammonia inside an oil works) on 24 March 1992 that claimed 200 lives and left countless persons disabled for life could have brought safety issues back to the fore, but nothing came of that. To date, the victims and their claimants have neither seen a published report of inquiry nor managed to bring any criminal or civil action.

We have given an example of a collective bargaining structure that is inefficient and incapable of fulfilling its original purpose.

It would seem that enterprise-level collective bargaining ought to have taken on an increasingly important role. Indeed, the legitimacy of the shop steward (male or female) as a worker representative cannot be placed in doubt nor can his familiarity with the problems of the enterprise. Because Senegalese law has not yet recognized the existence of trade union sections in enterprises, the shop steward almost invariably appears on the list submitted by trade unions and acts as the representative of the workers who elected him and of the union of which he is a member. The shop steward may enlist the help of a representative of his union (this is only tolerated but not expressly prescribed by the law) and is legally entitled to engage in collective bargaining (working conditions, wages, health and safety, etc.), for his actions are binding on his colleagues and constituents, the workers. Shop stewards are instrumental in the conclusion of enterprise-level labour agreements mostly in big enterprises. This fundamental role of shop stewards could conceivably face the following very serious constraints:

- the degree of effectiveness of the collective agreements;
- the level of training of shop stewards (in trade unionism as well as in economics and management);
- those placed on the bargaining freedom and capacity of shop stewards by pressures that employers can exert in a field of action limited to the enterprise.

A safety valve

The National Committee for Dialogue (*Comité national de concertation)* (CNC) is not envisaged under the labour law. It plays a "political" role. Organized pursuant to Decree-Law (*décret-loi*) No. 75.114 of 23 January 1975, the CNC brings together government, employers and workers and aims to promote dialogue among the social partners on wage, price and employment policies. Created in 1975 at the very onset of the crisis of the groundnut industry – which was to spread to many other sectors of the national economy – the CNC was in fact a "talking shop" where neither decisions nor commitments were made. With respect to the collective bargaining agenda, this Committee is perceived by trade unions as a "safety valve", a means of defusing the social bomb and a place where trade unionists can give vent to their feelings.

The labour administration has a range of functions in industrial relations: hiring, conciliation, monitoring the observance of the labour law and regulations, drafting and determining the general labour and social security policy and dispute settlement. It lacks the material wherewithal for fulfilling its mission.

Worker representation in provident institutions

Social security pensioner

This representation takes place at the Board of Director level though most workers' organizations are dissatisfied with the proportion of that representation. Many of these bodies consider the representation of workers' organizations to be partial and arbitrary. Besides, it has made no significant impact in terms of improving retirement pensions or other social security benefits (e.g. family allowances or coverage of occupational accidents). Yet the decision-making bodies of these institutions might have played a pivotal role in putting in place a more equitable system of income redistribution.

Joint employer-worker committees

These are convened on a random basis in the private sector to sign wage increase agreements (under the auspices of the Ministry of Labour). However, these agreements can only be extended to general application by administrative orders issued by the labour administration. These committees are often convened under pressure from the trade unions, as for example following the devaluation of the CFA franc in January 1994. There is no legally prescribed frequency for their meetings.

The civil service: A special status

The principal collective bargaining mechanisms for civil servants are the following:

• *Joint administrative committees (Commissions administratives paritaires) (CAP)*

The committees are elected for three years and are responsible for the promotion and reclassification of the workers concerned. As things stand in the civil service, the CAPmandates have now expired and no new elections have been held. Instead, the Government has replaced them *de facto* with ad hoc committees, over the objections of the trade unions in the health and education sectors, which consider themselves to be prejudiced by the deficiencies of the administration.

• *Higher Civil Service Council (Conseil supérieur de la fonction publique) (CSFP)*

This Council was organized under Law 61.33 of 15 January 1969. Worker representation in it has not kept pace with changes in the trade union landscape as only one worker organization is represented, while the most representative public service confederation, the National Union of Autonomous Trade Unions of Senegal (*Union nationale des syndicats autonomes du Sénégal*) (UNSAS), and trade union, the All-Senegal Democratic Trade Union (*Syndicat unique et démocratique de Sénégal*) (SUDES), are absent. The CSFP is also an advisory body.

These bodies continue to meet and function on a random basis, as their make-up is still discretionary and out of step with the changed situation of trade union independence and autonomy.

A foothold in the education and health sectors

It is worth noting that public servants in the general administration, often non-unionized (except for some drivers whose demands are more corporatist in nature), have been given a special status under Decree-Law No. 77.880 of 10 October 1977. Subject as they are to considerable political pressures, their situation still does not favour unionization. To date, attempts to organize these workers have been fruitless. The Independent Trade Union of Workers in the Judiciary – *Syndicat autonome des travailleurs de la justice* (SATJUS) – and the Independent Trade Union of Administrative Workers of Senegal – *Syndicat autonome des travailleurs de l'administration du Sénégal* (SYNATAS) – have not withstood the pressures and these workers have been left without trade union representation, their plight being compounded by the failure of the Government of Senegal to ratify the ILO Labour Relations (Public Service) Convention, 1978 (No. 151), to date. It is mainly in the education and health sectors that workers' organizations have managed to gain a permanent foothold, after signal struggles for pluralism and collective bargaining.

Collective bargaining trends

Trends in collective bargaining in Senegal do not differ from those observed in other African countries undergoing structural adjustment. These include:

- the watering down of formal collective bargaining procedures under the constraints stemming from weak economic growth and from the conditionalities of international funding agencies;
- the weakening of the institutional structure, whose component elements (the laws/regulations) become dysfunctional if employers (including the Government) are unwilling to negotiate in good faith; and
- the shifting of the bargaining location to the enterprise when it comes to more specialized subjects in order to neutralize trade union action and pit the trade unions against unequal forces.

Dialogue for selective purposes

In Senegal, the phase of adjustment that started in 1978 and is continuing with even more stringent structural adjustment and unrestrained deregulation has meant less hiring and stagnating wages and a consequent sharp contraction in the spending power of workers. Persisting in their distrust of workers' organizations, the Government and employers have made selective use of the mechanisms of dialogue to push through amendments to the Labour Code (such as those affecting the time frames of indefinite contracts, economic redundancies, or tidying up the Labour Code) while giving their dialogue partners the impression of bargaining in good faith. The lack of concessions, however, often leads to deadlock.

The corpus of laws in doubt

There is undoubtedly a breakdown in the social dialogue and in collective bargaining in

Senegal and it is clear that however harsh they may be, the rigours of the economic crisis alone cannot explain the refusal of the Government and employers to contemplate an in-depth examination of the problems tabled by the trade union bodies to avert social conflict and reverses that could seriously jeopardize the commitments assumed by the country.

There are other trends that raise searching questions about the application and interpretation of the corpus of Senegal's labour laws and regulations: these are related to the process of adapting and ensuring the consistency of texts with the successive bodies of regulations adopted from the colonial era to the present day. Like other spheres of activity of workers' organizations, collective bargaining too is dependent on this.

Outlook

Like 50 years ago when ILO Convention No. 98 was adopted, the present-day economic and social climate underscores the relevance of collective bargaining and the right to organize.

Aside from the aspect of equity that is part and parcel of industrial relations in an environment so unfavourable to workers and their organizations, collective bargaining in a country such as Senegal should also be addressing another value, described by Professor Antoine Lyon-Caen[1] as social citizenship…alive to the demands of solidarity.

Therefore, Senegal's workers' organizations should continue their endeavours so that:

- collective bargaining can help to ensure the exercise of the fundamental rights of the person;
- collective bargaining can contribute to dealing with the problem of employment and the equal right of all to a decent standard of living;
- job access and security can be strengthened and employment safeguarded as an element of social status and cohesion;
- the legal capacity of collective bargaining agents will be strengthened adequately to reflect their power of representation and the legitimacy of their labour demands.

Table 1. Some examples of collective agreements in force in Senegal and their date of signing

Sector	Date of signing
Professions	Declaratory wage agreement (Accord déclaratif de salaire) of 5 July 1958
Textile	17 May 1958
Air transport	27 November 1965
Rail transport	19 May 1951
Highway transports	7 December 1959
Oils and fats	4 July 1959
Household helpers	Order 89 350 of 29 July 1959
Water	1 October 1959
Electricity	13 May 1959
Private education	22 November 1958
Hotel business	29 September 1960 (reviewed in May 1998 but contested by workers' organizations)
Various industries	12 December 1946
Printing trades	28 September 1960
Mechanical engineering	8 October 1957
Mines	14 April 1960
Advisory bodies/consultants	2 January 1964
Food	19 July 1958
Construction/public works	6 July 1956
Bakeries	28 March 1949
Businesses	16 November 1956
Garment industry	10 January 1963
Banks	24 April 1958 (reviewed in 1977)

This is the direction in which independent trade union bodies are channelling their efforts in Senegal today so that the different levels of collective bargaining – industry, inter-professional or enterprise – can become part of a national endeavour to bargain with the Government and employers for certain minimum benefits.

While the crisis of legitimacy and of representation is of concern both to workers' organizations and to other social players, there is no doubt that the brief of collective bargaining agents will depend on the effectiveness of ILO Convention No. 98.

Note

[1] See "La négociation collective: Nouveaux horizons? Nouveaux problèmes?" in *Droit social* (Paris), Special issue, No. 2,Dec. 1997.

Collective bargaining: Workers are less committed to any solidarity based on ideology and will readily shift their allegiance if unions do not deliver results

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The following article examines the legal framework and the practical issues relating to collective bargaining in India. It is structured in five parts: the legal framework; levels and duration; the distinctive aspects of collective bargaining in the public sector; emerging trends; and the implications of a shrinking core of organized workers amid growing numbers in the periphery.

Legal framework of collective bargaining

Article 19(c) of the Indian Constitution guarantees freedom of association as a fundamental right. It was recognized in the Trade Union Act, 1926, the Industrial Disputes Act, 1947, and the Industrial Employment (Standing Orders) Act, 1948. In 1923, India ratified the ILO Right of Association (Agriculture) Convention, 1921 (No. 11), during British rule. It has not, however, ratified ILO Conventions Nos. 87 (Freedom of Association and Protection of the Right to Organise) and 98 (Right to Organise and Collective Bargaining) due to "technical difficulties" involving trade union rights for civil servants. Such grounds constituted no valid reason for non-ratification: a ratifying country can exempt certain services. The real intention might have been (as Surendra Nath, former Chief Labour Commissioner of India, observed in 1997) "to restrict freedom of association to only manual workers (by defining them as workmen) and exclude supervisory and managerial workers…" (Surendra, 1997). The other interest of the Government is not to allow the right of collective bargaining even to industrial workers in certain Government departmental undertakings like the Railways, Post and Telecommunications, Central Public Works Department, etc. Pay and conditions of work of these categories are decided by the government on the basis of the Pay Commission's recommendations and not through collective bargaining. Nor do the labour laws at the national level mandate the employers to recognize unions or engage in collective bargaining. Some States (for instance, Andhra Pradesh, Bihar, Gujarat, Karnataka, Madhya Pradesh, Maharashtra, Orissa and West Bengal) provide for rules concerning the recognition of trade unions.

A moot issue?

Several conferences organized and co-sponsored by the trade unions and the Ministry of Labour, including the one held at Mussoorie in 1998, have addressed the question of the ratification of ILO Convention Nos. 87 and 98 and deferred the decision. The employers and the Government are one in this regard.

Since 1931 to date, the identification of collective bargaining agents remains a hotly debated issue. The Royal Commission on Labour (Government of India, 1931) did not favour the prevalent idea that recognition should depend on the strength of the union. It held that recognition should be based on reason and not force, and the fact that a union consists of only a minority of employees is no adequate reason for withholding recognition. The National Commission on Labour (1969) left the matter to be decided according to the local

circumstances. The 1947 Amendment Act to the Trade Unions Act of 1926 and the Trade Unions Bill of 1950 provided for the recognition of more than one union by an employer. The 1947 Amendment was never enforced and the 1950 Bill was not pursued. In 1956, the Second Five-Year Plan document highlighted the importance of "one union, one industry". In 1958, the Indian Labour Conference evolved a Code of Discipline in Industry, which did not and still does not have statutory force but which contained criteria for the recognition of unions. According to the Code, workers belonging to non-recognized unions should either operate through the representative union for the industry or seek to redress grievances directly.

Union recognition

There is no law at the national level for recognition of unions (Srivastava, 1989). In some States – Maharashtra and Madhya Pradesh, for instance – legal provisions on recognition of trade unions do exist. Thus, in India, considerable divergence is found in the requirements for determining the representative union for purposes of collective bargaining. They include: (a) a code of discipline, which is common in most public sector undertakings; (b) a secret ballot, which is made mandatory in three states: Andhra Pradesh (since 1975), Orissa (since 1994) and West Bengal (since 1998); (c) a check-off system, favoured by some unions; and (d) membership verification. In 1995, the Supreme Court of India asked a government corporation, the Food Corporation of India, to resolve the trade union recognition dispute through a secret ballot. The judgement also mandated the procedure for a secret ballot. In 1982, the Bombay High Court struck down the order of the Industrial Court ordering a secret ballot in the case of Maharashtra General Kamgar Union vs. Bayer India Ltd. The matter was taken to the Division Bench of the High Court which upheld the order of the single Judge. In the case referred to, what is required to be proved by the Maharashtra Union is that the membership of Hind Mazdoor Sabha has fallen to less than 30 per cent during the requisite six-month period. It was argued that, in a hypothetical case, if 25 per cent of the workers in an establishment were to vote for the recognized union, it would mean that the membership had fallen below the requisite percentage but, in the absence of the identity of the voters, it would not be possible to prove that the members of the union had voted against it.

Not binding on other unions unless a result of conciliation

Under Section 2(p) of the Industrial Disputes Act of 1947, collective agreements to settle disputes can be reached with or without the involvement of the conciliation machinery of the Government established under the legislation. If a settlement (a written agreement between the employer and the workers) is arrived at in the course of conciliation proceedings, it is binding under Section 18(3) of the Act, not only on the actual parties to the industrial dispute but also on the heirs, successors or assignees of the employer on the one hand and all the workers in the establishment, present or future, on the other. The conciliation officer is duty-bound to promote a proper settlement and to do everything he or she can to induce the parties to act in such a way as to arrive at a fair and amicable settlement of the dispute. A settlement / agreement with one trade union is not binding on members of another union or of other unions unless arrived at during conciliation proceedings; the other union(s) – including a minority union – can, therefore, start an industrial action. Section 36 (1) of the Industrial Disputes Act deals with workers' representation. Any collective agreement would be binding on the workers who negotiated and individually signed the settlement. It would not bind any worker who did not sign the settlement and who did not authorize any other worker to sign on his or her behalf.

A collective agreement presupposes the participation and consent of all the interested parties. When workers are members of different unions, every union, regardless of whether or not it represents a majority, cannot but be considered interested. A few workers may choose not to be members of any union, and one (or more unions), for reasons of its own, may not like to conclude negotiations by the proposed settlement. Sections 2(p)4 and 18(3) of the Industrial Disputes Act of 1947 deal with such practical difficulties by making collective agreements binding even on indifferent or unwilling workers as the conciliation officer's presence is supposed to ensure that the agreement is bona fide.

The unorganized sector

Collective bargaining rarely occurs in the unorganized sector. In several cases, bipartite collective agreements in the unorganized sector have provided for lower wages than the

applicable minimum wages. Where such agreements were entered into through conciliation and/or registered with the appropriate government authority, the labour commissioners concerned are expected to ensure that the wages, benefits and other conditions are not lower than the applicable minimum wages and other standards laid down in the labour laws.

Unfair labour practices

The Industrial Disputes Act of 1947 does not contain any provision to the effect that only a recognized union can raise an industrial dispute. The 1956 Code of Discipline is inconsistent with the Industrial Disputes Act of 1947. In 1982, the Industrial Disputes Act of 1947 was amended to include the following as unfair labour practices: (a) refusal by the employer to bargain collectively in good faith with the recognized trade unions; (b) refusal by a recognized union to bargain collectively in good faith with the employer; and (c) for workers and trade unions of workers to indulge in coercive activities against certification of a bargaining representative.

The collective bargaining rights of workers in the insurance sector, which has been a public sector monopoly, were restricted by Parliament when it was found that collusive arrangements between the unions and the employers (public sector) were undermining the interests of policy holders. Since then, insurance workers continue to engage in consultations, but their pay revisions are notified unilaterally by the relevant Government department.

Section 2(p) of the Industrial Disputes Act of 1947 defines "settlement", and section 29 of the Act makes breach of any term of the settlement punishable with imprisonment for a term of six months or with a fine or both. Refusal to bargain collectively, in good faith, with recognized trade unions is considered an "unfair labour practice" under Section 2(ra) / Schedule V of the Act and is punishable under section 25(u) with imprisonment for a term which may extend to six months or with a fine which may extend to Rs.1,000 or with both.

In fact several practices, which qualify to be called unfair labour practices, go unquestioned / unprosecuted. In one of the units of a multi-unit engineering industry in North India, the management unilaterally declared a wage revision package after negotiations with the trade union had reached deadlock and broken down. The workers were "happy" with the management's gesture. They also left it to management's discretion to determine the next round of wage revision. So to the extent that managements are willing to pay a price to keep the union out, the workers in India who are largely instrumental in their orientation would willingly aid management to make the trade union redundant for purposes of collective bargaining. A multinational corporation near Delhi lured the workers into accepting higher wages in return for not joining the trade union. Even in the public sector there have been occasions when supervisors received benefits such as interim relief pending wage revision only when they agreed in writing that they would not join the trade union. Several private sector companies, particularly pharmaceutical companies, have designated workers as officers and offered them additional benefits. However, since it entailed less job security, the workers protested and persuaded the courts to accept their position as workmen even if managements regarded them as officers.

Levels of bargaining

Sectoral bargaining at national level

Prior to the 1970s, wage boards appointed by government were given awards on wages and working conditions. The number of wage boards had declined from 19 in the late 1960s to one (for journalists) in the late 1990s. Since the early 1970s, sectoral bargaining has been occurring at national level mainly in industries where the Government is a dominant player. These include banks and coal (approximately 800,000 workers each), steel and ports and docks (250,000 workers each). Fifty-eight private / public / multinational banks are members of the Indian Banks' Association. They negotiate long-term settlements with the All-India Federation of Bank Employees. Over 200 coking and non-coking mines were nationalized in the early 1970s. Spread all over the country, some are owned by state Governments and many by the central Government. There is one national agreement for the entire coal industry. In steel, a permanent bipartite committee has been set up for the integrated steel mills in the public and the private sectors. Since 1969, this committee, called the National Joint Consultative Committee for Steel Industry (NJCS), has signed six long-term settlements. The 11 major ports in the country have formed the Indian Ports' Association. They hold negotiations with the industrial federations of major national trade union centres in the country.

A peculiar feature of sectoral bargaining at the national level is the presence of a single employer body and the involvement of the relevant administrative ministry from the employers' side. In many sectors, two to five major national trade union centres with a major presence in their respective industrial federations of workers' organizations engage in negotiations. In banks, coal, and ports and docks, invariably all agreements have been preceded by strikes or strike threats. Only the steel industry has remained free of such unrest during the past 29 years. Even though industry-wide bargaining is not extended to the oil sector, nationalized in the late 1970s, the Oil Coordination Committees achieve a great deal of standardization in pay and service conditions even if collective bargaining occurs at firm and/or plant levels (for instance, Hindustan Petroleum Corporation Limited). The agreements in banking and coal covered 800,000 workers each, and in steel and ports and docks 250,000 workers each.

Industry-cum-regionwide agreements

Agreements of this nature are common in cotton/jute, textiles, engineering and tea, which are dominated by the private sector. But such agreements are not binding on enterprise managements in the respective industries/regions unless they authorize the respective employer associations in writing to bargain on their behalf. Employment figures in the four regional agreements in textile, jute and plantations stand at around 1,200,000, 300,000 and 250,000 respectively.

Decentralized agreements: Enterprise or plant-level

While in the rest of the private sector employers generally press for decentralized negotiations at plant level, unions insist on bargaining at least at company level where the employees are formed into federations (combining several plants/locations). In 1998, a 39-day strike was called on the issue of decentralized bargaining in Escorts, a private sector automobile and engineering conglomerate with over 14 factories and 35,000 workers in an industrial centre close to New Delhi. It does not mean, however, that employers in multi-unit private sector enterprises do not bargain with trade union federations at company level. One such example related to Brooke-Bond till it was merged with Lipton and became a part of Hindustan Lever in one of the recent mega mergers in the country.

Plant-level bargaining is believed to reduce the bargaining power of unions, particularly during periods of crisis. Admittedly, there is a general tendency on the part of the unions, in particular, as well as the Government, to think of the public sector as a whole, with the result that uniformity is sought at the highest level and the concept of capacity to pay is altogether ignored in public sector wage negotiations. If a public enterprise's coffers are empty, the exchequer raises the money. There is no corresponding tendency, however, even among the trade unions, to consider the private sector as a whole, where capacity to pay continues to be reckoned for the purpose of wage negotiations.

Duration

Till the 1970s, collective agreements were for a period of two to three years. During the 1970s and the1980s, the duration of agreements was extended to three to four years. During the 1990s, over four-fifths of the central public sector agreements have been signed for a duration of five years each. Most collective agreements in the private sector continue to be valid for a period of three, or in some rare cases, four years. Some private sector agreements, which deal exclusively with one aspect (e.g. incentives), are valid for a period of six years.

There has been a semblance of standardization in collective bargaining in the public sector since the 1970s. The fifth round of wage agreements in the public sector was signed during the early 1990s. Almost all of them expired on 31 December 1996. To date (31 December 1998), serious discussions on their renewal have not taken place. Initially, the unions were waiting for the report of the Fifth Central Commission to be out so that they could pitch their demands, as in the past, at 15 per cent higher than the emoluments of civil servants in comparable categories. Then they waited for the report of the Justice Mohan Committee. And now they are waiting for the decision of the Government on the recommendations of the Justice Mohan Committee.

Distinctive features of public sector bargaining

Since the 1970s, in the wake of the economic reforms of the 1990s, the collective bargaining scene in the public sector has also undergone significant change. In 1994, the Department of Public Enterprises, which seeks to exercise control over all the 240-odd central public sector

undertakings in the country, has issued guidelines providing for limited autonomy for decentralized bargaining, moving away from parity among the different central public sector undertakings. The Government allowed public enterprises to sign fresh wage agreements only if the latter were able to meet the extra financial commitment arising out of wage revisions from their own sources and if the unit labour costs and unit sale prices did not rise as a result of wage revision. About 100 public enterprises, which became financially unviable, even incurring losses, have had no wage revision since 1992 to date (December 1998).

The fifth round of wage agreements in the central public sector, which covered the period from 1992 to 1996, has already expired. It is likely, however, that those public enterprises which continue to be sick may remain unable to pursue wage revision in the sixth round as per the new guidelines, which are similar to the old guidelines issued in January 1989 by the Department of Public Enterprises attached to the Ministry of Industry.

The public sector or the State?

In India, civil servants' pay provides the benchmark for the public sector. In this sector, competitive bargaining is pitched against the best bargain and uses Article 12 of the Constitution of India where "public sector" has been interpreted by some Supreme Court judges as meaning the State, which, naturally, should not discriminate among its employees. In turn, public sector pay provides the benchmark for unionized workers in the private sector where collective bargaining has become coercive, with employers making the best of the worst economic conditions.

When the Fifth Pay Commission submitted its report in 1996, the central Government appointed another Committee to consider the pay and allowances of Board members below Board-level executives and non-unionized supervisors. The Committee, headed by Justice Mohan, submitted its report in October 1998, but its findings have confused public sector managements and displeased the officers' unions in the same sector. The Committee fixed the salaries of the chief executives of the public enterprises and recommended that the wage disparity between the lowest and the highest levels in public enterprises could be 1:10 as against the present 1:6. In the early 1970s it used to be 1:19. The unionized employees in the public sector have been demanding the revision of wages because the fifth round of agreements expired on 31 December 1996. Even without the revision, and should the 1:10 disparity be maintained, either the ceiling on chief executives would have to be increased or the current wages of the lowest-level employees reduced. Both options seem impossible. In any event, unionized workers resent any widening of wage disparities.

It seems, therefore, most likely that the current disparity of 1:6 will be maintained in the sixth round of negotiations, which are yet to commence on a meaningful note, even though the previous five-year agreements expired 25 months ago. The Government wants the period of sixth-round wage agreements, yet to be negotiated, to have the same duration as it does for officers. The Government seems to have accepted most of the recommendations of the Justice Mohan Committee, but since it has not announced its decision, unions and managements are unable to commence wage negotiations because of uncertainty about the period of agreement, which the Government wants to decide unilaterally.

Despite the avowed intentions of the Government to give autonomy to the public enterprise managements over the determination of the pay and allowances of their unionized staff, such regulations take away the autonomy. In fact, a new set of guidelines for negotiating collective agreements in the central public sector have apparently been approved by Cabinet and are expected to be issued by the Department of Public Enterprises shortly. The trade unions usually consider such guidelines with contempt since they are just baselines rather than benchmarks or upper limits.

Emerging trends

Till the 1970s, collective bargaining had been shaped along two main axes as far as possible, considering the adversarial relationship in most situations involving the social partners: the attitude on the part of both managements and trade unions has been to bar thegain to the other party. A second trend during the period was for the workers' unions to serve the charter of demands on the managements. Managements in bargaining used to claim that it was not possible to meet the unions' demands. After some negotiations, certain agreements would be reached and workers would gain some additional benefits. So managements would reluctantly give in and workers would be successful with some of their demands.

Productivity bargaining

In the 1980s, managements began to serve counter-proposals before or after they received the charter of demands from the trade unions, obeying the principles of "productivity bargaining". Trade unions were required to agree to abandon restrictive and wasteful practices in return for higher wages and benefits. In some cases there have been general promises which say something without meaning much or specific, actionable clauses. Then, since the late 1990s, the scope has been widened to cover the assertion of managerial rights to concession bargaining in crises.

In the public sector, however, the overall trend is, "*something* (to workers) *in return for nothing* (to management)", while in the private sector the usual pattern has been "*something* (to workers) in return *for anything* (for managements)". The emerging trend, particularly in the private sector, is somewhat akin to what Ian McGregor of British Steel averred during the Thatcher era in the United Kingdom: *something for something, nothing for nothing.*

Overall, the difficult conditions in product markets and the near recessionary and/or jobless growth situations in several crucial sectors of the economy are such that collective bargaining is barring any gains to the workers. Even in cases where they seem to gain significantly higher wage increases, and as Ramaswamy and Holmstrom observe, management's way of meeting unions is on complex issues linked to rights, career prospects and industrial relations involving a straight bargain between two corporate groups: the managements win control over work allocation, and unions get more money for their members. Managements emphasize that manning standards are not arbitrarily "scientifically" fixed but by Taylorist industrial engineers, an argument that middle-class union leaders can accept. The company and the union become mirror images of each other: "hierarchically structured, under hardheaded leaders who believe they are competent to take decisions on behalf of the less qualified people below them" (Holmstrom, 1990; Ramaswamy, 1990).

Managerial rights: a post-mid-1980s phenomenon

Very few empirical studies have looked at the trends in collective agreements over the past half-century. Two surveys undertaken by the Employers' Federation of India during the periods 1956-60 and 1961-69 revealed that: in the 1956-60 period, one-third to one-half of the industrial disputes in large firms were settled through collective bargaining. The second, covering 111 agreements over the period 1961-69, revealed that over 50 per cent of such agreements were valid for periods ranging from three to five years. Although wages were the dominant issue in almost all agreements, nearly 50 per cent of the agreements concluded during the 1960s also dealt with retirement benefits. There was no evidence at that time of any management proposals or managerial rights, which have emerged as a post-mid-1980s phenomenon, as shown in the studies of 60 and 200 firms respectively by Venkata Ratnam (1990, 1997b).

Assertion of managerial rights

Many collective agreements now unequivocally state that "the right to plan, direct and control operations of the plant, to introduce new or improved production methods…are solely and exclusively the responsibilities of the management. The management's authority to perform these and other duties will be respected in every case." Such agreements also state, usually and expressly, the mutual rights and responsibilities of managements and trade unions.

Changes in work norms/practices

Trade unions in India no longer resist outright changes in work practices relating to modernization, computerization, multiskilling, flexible deployment, working time / norms, etc. The major issue of dispute in this regard is over contract labour.[1] Recent court judgements have given trade unions leverage to press managements to regularize contract labour in certain areas. In January 1999, over 5,000 workers belonging to several unions in one public sector oil refinery went on a day's token strike because they held that the introduction of "Enterprise Resource Planning (ERP)" would adversely affect their jobs.

Flexible wage systems

In the organized sector, wages double every six to seven years. Wage sensitivity of firms varies because labour costs range from 2 per cent in process industries to over 100 per cent in sick units. In most cases, firms become sensitive when wage costs exceed 12 to 20 per cent.

Collective agreements found many innovative solutions to ward off a temporary crisis by

introducing flexible wage systems: (a) a two-tier wage system whereby newcomers get less pay for three years in the same / new grade. The difference usually tapers off in three years. This approach is justified on the ground that the newcomers take time to become fully productive; (b) linking, temporarily during times of financial crisis in the firm / plant, the dearness allowance to productivity instead of the cost of living; (c) a wage freeze /reduction when a firm / plant becomes financially unviable / non-competitive – wages are unfrozen and previous wage levels restored depending on productivity and/or profitability; (d) a wage-job trade-off, etc.

Concession bargaining in crises

Trade unions typically face a dilemma in decentralized bargaining at plant level where the plant / firm is facing a crisis due to market failure and/or financial sickness, whether such problems are a product of recession or not. In their anxiety to protect all or most jobs, they have, in several cases, agreed to workforce reductions and cutbacks or freezing of pay, benefits, and even the suspension of trade union rights. The following types of drastic measures were "mutually agreed" on as essential for survival in most of such situations:

- reduction in wages and allowances;
- freeze on the dearness allowance;
- changes in working patterns;
- stoppage of or modification to incentive schemes;
- early retirement;
- lay-off /retrenchment;
- retraining;
- redeployment.

Doubts have often been expressed as to whether such concessions on the part of trade unions alone would ensure the survival of the firm and the security of the jobs intended to be saved. The Board of Industrial and Financial Reconstruction (BIFR), set up in 1987 with quasi-judicial powers to dispose of cases of sick companies by deciding on their closure or rehabilitation, realizes that some sick units are potentially viable while others are not. The industry's characteristics and the firm's size, technology and corporate strategy are among the major determinants of the potential viability of a sick unit. The experiences of several companies like Jaipur Metals and Electricals Limited, Kamani Tubes, New Central Jute Mills, Walchandnagar Industries, etc., indicate that such concession bargaining has helped the companies to bounce back from the brink of liquidation and record impressive performances subsequently. As a result, in these and several other similar instances, employment, employee earnings and productivity have significantly increased.

Invariably, concession bargaining of the type described above occurs in companies after a crisis. Rarely, if ever, do parties see the writing on the wall and proactively respond and accommodate each other's interests for collective survival. Many private sector companies such as Ashok Leyland, Texmaco, Indian Aluminium and Kirloskar Cummins have recently provided for two to four days working with pro rata reduction in wages and/or relay lay-offs to ward off the existing / impending crisis due to recession, excessive piling up of finished goods, etc. Such agreements are in sharp contrast to the experiences of quite a few large companies which ask their employees to sit at home for extended periods and claim full or near full wages. In a few sick public sector units, workers have been getting wages for years with almost zero production.

Welfare to "moneyfare"

As Holmstrom (1990, p. 8) observes, most issues can be and indeed have been reduced to money. Working conditions, security, dignity and rights all have their price. An analysis of social security benefits in over 200 collective agreements revealed that most welfare benefits have been converted into "moneyfare" (Venkata Ratnam, 1997a).

Gender bias

Several agreements, which provide for employment to heirs/children of employees who die in service, consider dependants as males, not females. This particularly applies in organizations where the labour laws (underground mines, factories involving night-shift duties, etc.) carry restrictions on women's employment.

The banking industry computer agreement of 1987 provides an exception where there is a positive gender bias: pregnant women can refuse to work before computer terminals.

Crises of confidence

About 2 per cent of the total workforce or over 30 per cent of the workers in the organized sector participate in collective bargaining. The legal framework has a bias towards adjudication, with the Government specially empowered to influence the outcome of negotiations. In the case of political unions too, administering the laws is not bias free: not infrequently, in the collective bargaining process, do trade unions tend to get coopted by either government or management. Such a position then leads the unions to face a crisis of confidence, particularly when negotiations become difficult and they are unable to meet their members' expectations.

The portents are that workers feel less committed to any solidarity based on ideology and aim to be more instrumental in their orientation. If unions do not deliver results within certain intervals, workers will not hesitate much to shift their allegiance to some other leader / union who promises more in less time. All this is happening at a time when, increasingly, managements in the private sector want workers to do more with less. Labour is able to have its way when product and labour market conditions are not critical, but when they are, there can be trade-offs: jobs with wages; relay lay-offs; redundancy payments. If trade unions are still able to hold some influence, particularly in the public sector, it is largely because coalition Governments in India have been gasping for their own survival.

Shrinking core amid unorganized peripheries

In summing up, the accent should be placed on five essential areas of interest (a) workers can decide which union can represent them without ever belonging to a union; (b) workers can enjoy the benefits of collective bargaining as "free riders" without joining a union / paying union dues; (c) unions can enjoy collective bargaining rights without the support of the rank and file; (d) even where it is mandatory to bargain with management, it is possible to strike deals with minority unions; and (e) through collective bargaining, workers' interests can be further divided by offering more to the shrinking "core" workers who do less, leaving less to the growing numbers of workers in the unorganized "peripheries" who do more.

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Note

[1] See "Contract labour: Looking at issues", in *Labour Education*, Nos. 106 / 107, 1997 / 1- 2, ILO, Geneva.

The true challenge: To bring about equitable and meaningful income distribution in society

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A stable and effective industrial relations system is vital for the economic and social development of any country. It is on this foundation that sustained economic growth with equitable distribution of income, especially to labour, can be achieved. In turn, collective bargaining, which is an integral component of industrial relations, is essential if sustained economic growth is to be achieved with equitable distribution of income, but also constitutes a dynamic process between employers and workers for settling their disputes relating to wages and other terms and conditions of employment based on the bargaining strength available to each side.

A written guarantee

In other words, collective bargaining is a means to improve the terms and conditions under which workers are engaged, promote their socioeconomic interests and maintain industrial harmony. Its objective is to conclude a collective agreement in writing between an employer or employers' union on the one hand and a trade union on the other, fixing the terms and conditions of employment or the relations between such parties for a specific duration. It provides, therefore, a written guarantee for stable and harmonious industrial relations for the specified period.

First an informal process

Collective bargaining begins as an informal process whereby the workers in an establishment delegate a few representatives to submit their claims to their employer for the purpose of negotiating and concluding an agreement on their terms and conditions of employment. At a more advanced stage, a staff association or trade union is established and the employer agrees to meet, negotiate and conclude a collective agreement with the workers' representatives. The system becomes a formal process when the trade union is recognized by the employer as a representative body and it is agreed that meetings can be called at the request of either party on issues concerning the terms, conditions and grievances with regard to employment which, in turn, will be governed by mutually agreed grievance procedures. In Malaysia, collective bargaining may be confined to the employees of a single establishment or may cover all the establishments of a single employer. It may also be conducted locally in individual enterprises, nationally, or regionally in any one industry or occupation.

The process recognizes the need for a representative organization of workers or employees, i.e. a trade union; a formal system for recognition by employers of trade unions as legitimate representatives of workers; machinery for negotiating and concluding an agreement; and, in the event of disputes, conciliation and arbitration machinery to resolve such disputes.

The growth of trade unions

The evolution of collective bargaining in Malaysia is closely associated with the growth of trade unions in the country. During the British colonial period, especially the late nineteenth and early twentieth century, large numbers of immigrant workers from China and India came to Malaysia to work on the plantations and in the mines. They had been introduced on an indenture system whereby the worker bound himself or herself to an employer for fixed terms and conditions of employment. In reality the system was open to abuses. The influx of immigrant workers under

these conditions also altered the demographic pattern of the country and, by 1911, the native Malay population constituted only 51 per cent of the total population. The growth of wage-earning labour on the plantations, in tin mines and in the urban areas did not precipitate the formation of trade unions or associations for the protection of workers' interests as the great majority of workers were transient migrants: divided as they were by caste, clan, linguistic and cultural differences, solidarity among them was hardly possible. Though wages were low and the conditions of work appalling, it is from this same pool of workers that a permanent labour force was to emerge, fully conscious that they are part of the cosmopolitan society that has developed and that they have a stake in the country's development.

Collective action kept under control

The colonial Government's policy towards the working class was a combination of paternalism in politics and laissez-faire in economics. The Government ensured the smooth flow of workers into the country and left the owners of the industries a free hand to manage labour within the existing laws. Not only were trade unions not encouraged, but employers were opposed to the formal recognition of trade unions. However, some workers' organizations, e.g. the Selangor Engineering Mechanics Association and the Chinese Engineering Mechanics Association, existed and functioned as registered organizations under the Malayan Registration of Societies Ordinances of 1889 and 1895. Anyone acting in breach of these was fined, imprisoned, or deported and banished under the Banishment Ordinance. All forms of collective action by workers and industrial unrest were therefore kept under control. It was only in 1938, after the outbreak of strikes sponsored by the Malayan Communist Party (MCP), that the Government took a keen interest in trade unions and in 1940 introduced the Trade Union Bill to register and monitor trade unions. During the Second World War, migrant workers were subject to forced labour by the Japanese in the construction of the railway track between peninsular Malaysia and Thailand, popularly referred to as the Siam Death Railway.

Trade unions develop under governmental supervision

After the Second World War, there was a general awakening among the workers, fuelled by anti-colonial and nationalistic sentiments. The Government understood the threat faced by their economic interest and took appropriate steps to allow the development of trade unions under their supervision. Action was taken by the Government to implement the provisions of the Trade Union Enactment by the Department of the Registrar of Trade Unions. A Trade Union Adviser was appointed and an independent Trade Union Advisers' Department was set up in 1946. The role of the Trade Union Adviser was to assist trade unions in negotiating procedures and in the settlement of disputes. The objective of the colonial Government had been to ensure that trade unions were not infiltrated by agents of the MCP. The General Labour Union (GLU), led by leaders sympathetic to the MCP, posed a threat to the colonial Government: in 1947, half of the membership of 200,000 from 289 unions were under communist influence through the Pan Malayan Federation of Trade Unions (PMFTU), which had by then superseded the GLU. Aggressive strike action in 1948 brought about the deregistration of the PMFTU and the introduction of trade union registration confined to unions catering for workers in similar occupations and industries consistent with the "divide and rule" policy of the colonial Government. The declaration of the State of Emergency and the outlawing of the MCP in 1948 brought about an end to broad-based general labour unions in the country and marked the beginning of a trade union movement tailored to the colonial economic policies and security needs of the Government.

Trade unionists tended to be labelled

The period between the declaration of the State of Emergency and national independence (1948-57) saw the emergence of "cultured" democratic free trade unions consistent with colonial policies. All the same, the growth of trade union membership was slow: workers were suspicious that the Government might regard trade unionists who made active demands on employers as communist agents. In spite of such apprehension, trade union membership was to improve with the economic recovery which followed, especially during the rubber boom. Assistance from international trade union organizations also played a part in strengthening the trade union movement through amalgamation, organizational changes and leadership training.

Proliferation of small unions

The Government declared its policy of promoting the growth of a strong, free and democratic trade union movement after independence in 1957. Trade unions were acknowledged as equal social partners in the tripartite responsibility for the economic and social development of the nation. The Trade Union Advisers' Department was merged with the Labour Department to form a new Department of Labour and Industrial Relations and a new Trade Union Ordinance was introduced in 1959 after consultation with the trade unions. The new Ordinance retained the substantial role of the Government in determining the registration and administration of trade unions. Trade union membership came mainly from the rubber plantation industry and the tin mine industry. The characteristics of trade unions at the time indicate that, with the exception of a few large unions, there existed a large number of small unions with an average membership of less than 400, which reflected the fragmented nature of the trade union movement. Furthermore, this proliferation of small unions and haphazard growth of a mixture of local, craft and specialized departmental unions and a few national and industrial unions with inherent resource constraints had limitations with regard to their primary functions of industrial relations and collective bargaining.

Collective bargaining in the public sector

The public sector unions were always less influenced by the activities of the GLU and its successor the PMFTU. The largest number of trade unions were in the public services in the postwar period. These public sector unions were also organized on a departmental and class basis, e.g. clerical or technical workers, nurses and hospital assistants, or by sectors, e.g. telecommunications, postals services and railways. The British colonial Government was aware of the potential threat of communist infiltration into public sector unions and took the initiative to address the issues concerning terms and conditions of employment in the public sector through some form of collective bargaining. The first Postwar Salaries Commission was set up in 1947, followed by the Cowgill Commission in 1949 and the Benham Commission in 1950. Both Commissions reviewed the salaries and conditions of service of public sector employees. In 1952, the Whitley System was adopted in the United Kingdom for collective bargaining in the public services and two Councils were established under the system, viz.:

(a) the Whitley Council for Divisions I-IV;

(b) the Whitley Council for Daily Rate Employees.

There were five major staff organizations in the Whitley Council for Divisions I – IV, i.e.:

(i) the General Services Staff Council which represented the employees in Divisions II, III and IV;

(ii) the Senior Government Officers' Association which represented the Officers in Division 1;

(iii) the Expatriate Officers' Association which represented the European Expatriate Officers;

(iv) the Malayan Civil Service Association which represented the Malayan Civil Service; and

(v) the Malayan Administrative Service Association which represented the Officers of the Malayan Administrative Service.

The employees were represented by the Staff Side, who were accredited members from the various staff organizations. There were 22 Staff Side members appointed by the Staff Organizations and 19 Official Side members appointed by the High Commissioner. The Whitley Council for Daily Rate Employees was set up on the same lines except that, in the case of the Staff Side, the members were from the unions that organized the Industrial and Manual Group (IMG) workers, namely Telecoms, the Railway Union, etc. The Officers' Side included the Heads of Major Departments, Senior Civil Servants in the Public Services Department and representatives of State Governments. The first Preliminary Meeting of the Staff Side was held in March 1953 and both the Whitley Councils were formally established in April 1954.

The Whitley Council System was negotiating and conciliation machinery. A main feature of the system was that no circular was issued or implemented without the agreement of the Staff Side. In the event of disagreement, the machinery provided for arbitration by reference to the Prime Minister. The Tribunal which arbitrated was known as the Public Services Tribunal which consisted of an independent Chairman and one member, each drawn from a panel of persons representing the Staff Side and the Official Side.

The Council consisted of two main Committees:

(i) the General Purpose Committee which dealt with general provisions governing the public service; and

(ii) the Combined Grades Committee which dealt with claims of the various grades.

In 1960, the public sector trade unions, which were under the General Services Staff Council, formed the Congress of Unions Employed in the Public and Civil Services (CUEPACS) which was to become became the national centre for public sector trade unions. It was registered under the Trade Union Act and acted as coordinator and negotiated pay claims for all classes of employees in the public sector. From 1960 to 1964, CUEPACS negotiated and settled wage claims for more than half of the public services employees.

In 1964 the Official Side was unable to cope with the claims, and the Government appointed the Suffian Commission to settle the claims of the public sector unions. Its recommendations were not implemented, and separate Commissions were set up to review the pay and terms and conditions of employment of the other sectors, namely:

(i) the Aziz Commission for Teachers;

(ii) the Harun Commission for Statutory Bodies and the Local Authorities Committee on Pay for the Armed Forces; and

(iii) the Committee on Pay for the Armed Forces.

The Whitley System was replaced by the National Joint Council in 1973. The Council was established to strengthen the status of the Whitley Council so that agreements reached could be binding on both parties. The National Joint Councils (NJCs) were for:

(i) the general public service and teachers;

(ii) the statutory bodies and local authorities; and

(iii) the police service.

The Government appointed the Ibrahim Commission in 1973 to review the recommendations of the previous Commissions. Its report was not made available to the Staff Organizations and all the public sector unions threatened industrial action. The Cabinet established its own Cabinet Committee under the Chairmanship of Datuk Seri Dr. Mahathir Mohamed. This report was completed in 1976 and adopted in Parliament. The Cabinet Committee report also established the Public Services Tribunal to consider claims regarding anomalies with powers to rectify such anomalies. The decision of the Tribunal was final and binding.

In 1979 the Government reviewed the functions of the NJCs and established further ones as follows, for the:

(i) general public service;

(ii) education service;

(iii) subordinate and manual group;

(iv) statutory bodies; and

(v) local authorities.

Collective bargaining: A process of consultation

The functions of the National Council were confined to giving views and discussing principles affecting remuneration, allowances and facilities for employees in the public sector and other general terms and conditions of service. Discussions on the Cabinet Committee salary structures and on anomalies were restricted as such anomalies were dealt with by the Public Services Tribunal and the salary review was to be undertaken on a five-year periodic basis. CUEPACS considered such restrictions and constraints a violation of trade union rights. However, the system proved useful for resolving grievances about anomalies speedily. Collective bargaining, however, became a process of consultation between the Government and CUEPACS rather than bargaining in the real sense of the word. It is also important to note that the strike weapon of the unions has remained ineffective because of the provisions in the Industrial Relations Act to restrict strike action in the essential services of both the private and public sectors, which can be invoked by the Minister of Human Resources.

Collective bargaining in the private sector: Three prerequisites

The three Acts of Parliament which influence collective bargaining in the private sector today are the Trade Union Act (1959), the Industrial Relations Act (1967) and the Employment Act (1955).

Collective bargaining has moved through two main phases since the end of the Second World War:

- the pre-independence period which encouraged a self-regulation and voluntary dis-

pute resolution system based on the British model of industrial relations; and

- the post-independence period during which voluntary collective bargaining and compulsory dispute settlement were introduced.

The prerequisites to collective bargaining, universally, are threefold:

(i) freedom of association and the right to organize;

(ii) to be able to bargain collectively with the employer on terms of employment and conditions of work; and

(iii) freedom to strike to back up the process of collective bargaining.

Registration does not guarantee recognition

The Trade Union Act makes the registration of trade unions compulsory. However, the registration of a union does not guarantee recognition by the employer. Workers must register a union and then proceed to obtain recognition from the employer before collective bargaining can begin. They also need a simple majority before filing a claim for recognition. The Industrial Relations Act sets out the procedures which need to be complied with in the claim for recognition.

This process is the challenge that workers face in the establishment of trade unions.

Only a registered trade union can claim recognition from the employer. Once recognition is granted, the union is formally accorded a *locus standi* for the purpose of collective bargaining and other industrial relations matters involving the employer.

Conditions of eligibility

A union is eligible for recognition by an employer if its scope of membership is not in question. For example, the Electrical Industry Workers' Union cannot organize workers in the electronics industry. The union is also required to exclude workers in managerial, executive, confidential and security capacities, and to have a simple majority in membership from among the workers in the establishment. An employer must respond to a claim for recognition within 21 days. The employer may grant or reject recognition, giving the grounds in the event of a negative decision, in which case the union can seek the intervention of the Director General of Industrial Relations. He or she in turn may then bring the matter to the attention of the Director General of Trade Unions in an effort to resolve the dispute. The Trade Union Act also empowers the Minister to direct employers to accord recognition if the union fulfils the conditions of a simple majority. Some employers who choose to keep a "union-free environment" at the workplace are able to delay recognition of trade unions through delaying tactics, although the Act strictly forbids such actions. The case of Harris Solid State (M) Sdn. Bhd. v. Bruno Gentil & 21 Others (Civil Proceedings No. W-04-109-95 CA) is a good example of how establishment, recognition and functions of unions can be delayed and frustrated by some employers who choose to use the legal nuances to suppress the formation and functions of trade unions.

The Trade Union Act also guarantees trade unions immunity from employer-initiated criminal proceedings for conspiracy and civil proceedings for damages as a result of industrial action. A strike in common law might amount to criminal conspiracy as a way to coerce the employer in the conduct of his or her trade or business. However, immunity under the Industrial Relations Act does not affect the law relating to riot, unlawful assembly, breach of the peace, sedition or any offences against the King or any state authority.

Measures to protect the right to organize and join unions

The Employment Act and the Industrial Relations Act both prohibit an employer from including in the contract of service any conditions restricting a worker's right to organize or join a registered trade union and participate in its lawful activities. It is deemed unfair labour practice on the part of the employer to include in the employment contract any condition restraining this right. It explicitly prohibits an employer or an employer association from interfering with the establishment, functioning or administration of any trade union. It also prohibits an employer or his or her association from supporting any trade union financially or otherwise with a view to controlling or influencing the latter.

Measures against victimization, discrimination and intimidation

The Industrial Relations Act also lists the following labour practices as unfair, such as victimization of workers: refusing to employ any

person on grounds that he or she is a member or an officer of a trade union; discriminating against any person with regard to employment, promotion or working conditions on grounds that he or she is a member or an officer of a trade union; dismissing or threatening to dismiss a worker, or injuring or threatening to injure a worker in his or her employment; altering or threatening to alter his or her position on grounds that the worker proposes to belong to a trade union or seeks to persuade others to become a member or an office bearer of a trade union or to participate in the promotion, formation or activities of a trade union.

Since freedom of association also implies freedom not to join an association, the Industrial Relations Act deems it unfair labour practice for any worker or his or her union to intimidate or induce any person to join or cease to be a member or an officer of a trade union.

Access to information

The exchange of information is facilitated through the provisions of the Industrial Relations Act whereby employers may provide their workers with information on any matter pertaining to any collective bargaining matters or trade dispute involving them. Such provisions ensure healthy communication and provide information directly to workers on developments connected with collective bargaining or trade disputes.

A union can submit claims for collective bargaining

Once recognition is accorded, the union can submit its memorandum of claims for collective bargaining. Workers in "managerial, executive, confidential or security" categories of employment are not to be represented by a trade union where the majority of its members are not employed in similar capacities (see Fig. 1).

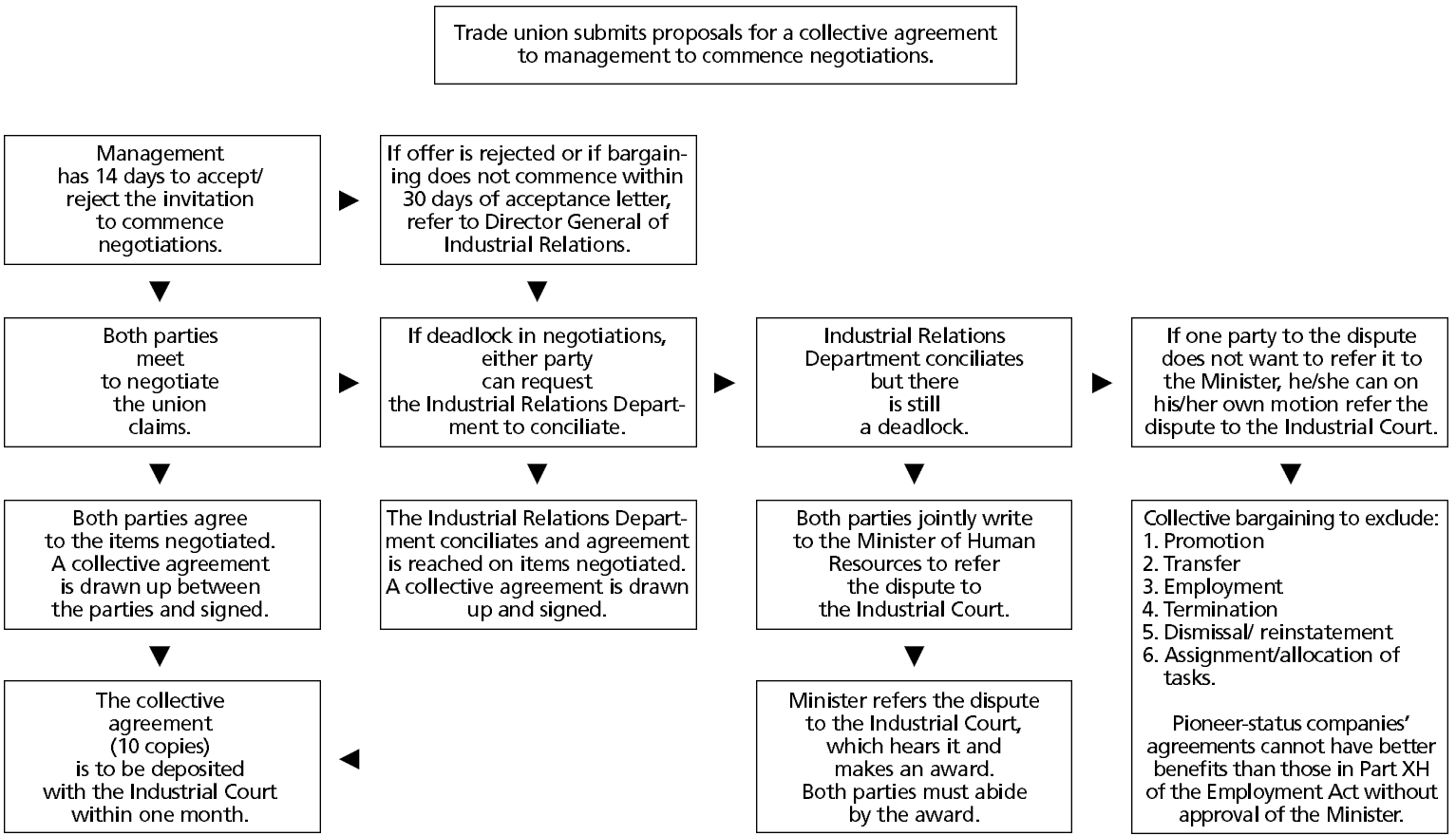
From voluntary to compulsory arbitration

Voluntary arbitration was encouraged between disputing parties through an agreed panel of arbitrators in the industrial relations system after the Second World War, pursuant to the Industrial Court Ordinance (1948) which empowered the Commissioner of Industrial Relations to refer industrial disputes for arbitration with the consent of the parties to the dispute. This system failed to prove effective and industrial unrest was widespread between 1948 and 1964. During this period, a total of 17 awards were made, including four major disputes with regard to wage claims in the mining and rubber industries and conditions of employment in the pineapple industry and the railways. During the Indonesian Confrontation Emergency in 1964 the step towards compulsory arbitration was taken when, under the Regulations of the Emergency Act (1964), the Minister of Labour was empowered to refer an industrial dispute to the Industrial Arbitration Tribunal which was empowered to hand down a binding, final and conclusive award which could not be challenged in any court. The Industrial Court Ordinance and the Arbitration Tribunal under the regulations of the Emergency Act (1964) were replaced by the current Industrial Court under the provisions of the Industrial Relations Act (1967), which provided for both voluntary and compulsory arbitration. The Minister of Human Resources is empowered to refer disputes to the Industrial Court on his or her own if he or she is satisfied that it is in the best interest to do so at the joint request of the parties to the dispute. The Industrial Court Panel comprises the President, a member representing workers, and a member representing employers who are selected from among a list of panel members appointed by the Minister of Human Resources. Although quick settlement of disputes is recommended, the backlog of cases in the Industrial Court delays the hearing of disputes especially with the limited resources available in the Industrial Court system. The decision of the Industrial Court can be appealed to the High Court on questions of law with leave to do so.

Courts ratify collective agreements

The Industrial Court has another important function: to ratify collective agreements by taking cognizance of the collective agreements. This process is mandatory and it gives collective agreements a binding effect on both parties, since once taken cognizance of by the Industrial Court, they are deemed to be awards of the Industrial Court and bind the parties even in instances where a party is a trade union of employers; all members of the trade union to whom the agreement relates and their successors, assignees or transferees; and all workers who are employed or subsequently employed in the undertaking or part of the undertaking to which the agreement relates. A collective agreement which is not ratified by the Indus-

Figure 1. The collective bargaining process



Source: Ministry of Human Resources, Malaysia.

trial Court is neither binding on the parties nor legally enforceable in the Industrial Court or common law courts. The cognizance process also ensures that collective agreements are in compliance with the Industrial Relations Act and that the terms and conditions of employment are not less favourable than the minimum provided for in the Employment Act. The Industrial Relations Act ensures that any collective agreement must comply with the following minimum features:

(i) it must be in writing and signed by the parties to the agreement by an authorized person;

(ii) it must set out the terms of the agreement and, where appropriate, name the parties and specify the effective period which must not be less than three years from the date of commencement of the agreement, unless both parties agree to review the terms of the collective agreement within the period by mutual consent; and

(iii) it must prescribe the procedure for its modification and termination as well as grievance procedures for the settlement of disputes.

Binding on all workers, members or not

It is important to note that the collective agreement is binding on all workers in the undertaking, irrespective of whether they are members of the trade union representing them. It is therefore an implied term of the contract of employment with regard to wages and conditions of employment. In the event of disputes with regard to the interpretation of the collective agreement, both parties may apply to the Industrial Court for the decision on the question. The Minister of Human Resources is also empowered to refer such questions to the Industrial Court.

Strikes subject to compliance with certain requirements

An important weapon of trade unions to support their claims in a collective bargaining process is the right to strike. Any form of collective action such as "go slow", "work to rule" and "stoppage of work" is considered a strike in industrial relations. The statutes on employment, trade unions and industrial relations do not expressly give workers the right to strike. However, it may be inferred from several provisions that workers can strike subject to compliance with other provisions requiring appropriate resolutions and hold a secret ballot requiring a two-thirds majority in support of the resolutions before notice of strike can be given. Extensive powers are given to the Director General of Trade Unions to scrutinize the steps taken by a trade union to call for a strike; nor can strikes be called on issues concerning recognition, management prerogatives or matters which are referred to the Industrial Court or in the essential services which are defined in the Industrial Relations Act, e.g. banking, electricity, health, communications, etc. The Minister of Human Resources is also empowered to add any other sector to the list of essential services. The notice period of 42 days before commencement of a strike is mandatory. Any breach of the procedure for engaging in a strike can be fatal as the strike will be deemed illegal, the union risk de-registration and the membership involved cease to be members of the union. The existence of such restrictions makes it impossible for strike action to be invoked in the collective bargaining process.

Current status and forecast

Malaysia has ratified the Right to Organise and Collective Bargaining Convention, No. 98, 1949. This Convention provides the scope for the Trade Union Act and the Industrial Relations Act. An appraisal of these Acts indicates that, while workers are free to organize as trade unions and latitude for free collective bargaining is provided for, the procedure and control measures inherent in these Acts restrict the real potential for the growth of strong industry-based trade unions and limit the possibilities of use of the option to strike in the process of collective bargaining. It is no surprise, therefore, that one of the growing concerns in the economic development process of the country is the growing disparities in the distribution of incomes in society, especially among the working class, which can be attributed to the low level of trade union membership and the restrictions in the collective bargaining process. Public policy intervention to redistribute incomes is limited to poverty eradication programmes which do not reach out to the formal labour force. An analysis of income groups among workers who are contributors to the Employees' Provident Fund (EPF) and the Social Security Organization (SOCSO) indicate the monthly salary distributions of workers in 1996 as follows:

Wage band	Social Security Organization %	Employees' Provident Fund %
Under RM 100	0.7	1.9
RM 100-300	7	9.6
RM 300-500	16.7	19.2
RM 500-1000	38.1	34.2
RM 1000-2000	26.1	20.6
RM 2000-3000	11.4	7.1
RM 3000-4000		3.0
RM 4000-5000		1.5
Over RM 5000		3.0
Total	100.0	100.0

Informal sector not represented in unions

The above indicates that approximately 65 per cent of the workforce who contribute to the EPF earned below RM 1,000 per month. This information is based on workers in the formal sector of the labour force. The large number of workers who are in the informal sector and do not contribute to the EPF and SOCSO are perhaps in a worse position as they do not have active trade unions to represent their interests because of the casual nature of employment they are engaged in, i.e. self-employment, contract work and home-based work (see table 1).

Still a matter for small unions

The current provisions of the Trade Union Act and the policies of the Government encourage the proliferation of in-house unions (see tables 2 and 3). This strategy is designed to provide favourable conditions for investors who choose to operate in a weak trade union environment. A federation of trade unions can be formed, but such federations have limited scope in active collective bargaining, although they are useful for facilitating an exchange of information on industrial relations matters in the industry, especially with regard to wage rates, terms and conditions of employment in the various establishments. Collective bargaining is still confined to the individual unions and the inherent weaknesses of small unions are bound to surface.

Legal restrictions prohibit mergers

A liberal approach is necessary to facilitate the merger of in-house unions for the purpose of forming viable industry-based unions. How-

Table 1. Population, labour force and employment estimates 1970-95

Year	1970	1975	1980	1985	1990	1995	1998
Population (in millions)	10.77	12.24	14.26	15.86	18.01	20.26	22.18
Labour force (in millions)	3.60	4.22	5.38	6.03	7.04	8.14	9.00
Unemployment rate (%)	7.4	7.0	5.3	6.9	5.1	2.8	4.9

Sources: Third Malaysia Plan; Sixth Malaysia Plan; Seventh Malaysia Plan; Economic Report 1998/99, Ministry of Finance.

Table 2. Trade unions and membership according to size in Malaysia

No. of members	No. of trade unions				Total membership			
	1982	1986	1990	1997	1982	1986	1990	1997
Under 100	46	69	99	127	2 660	3 153	4 601	11 355
100-200	39	54	72	76	5 988	7 727	10 237	17 489
201-500	50	82	85	113	16 150	27 748	27 715	38 957
501-1000	42	65	76	82	28 856	46 509	52 325	65 132
1 001-2 000	39	47	50	67	53 917	65 131	72 622	95 727
2 001-5 000	30	37	35	36	92 260	117 149	109 045	125 180
5 001-10 000	20	16	19	11	136 693	112 889	130 437	82 472
Above 10 000	6	9	10	14	191 891	225 518	251 517	298 373
Employers' unions	13	19	17	–	631	670	621	–
Federations of trade unions	2	3	4	–	–	–	–	–
Total	287	401	467	526	529 046	606 494	659 120	734 685

Source: Ministry of Human Resources, Malaysia.

Table 3. Trade unions and membership according to sectors in Malaysia

Sector	1995		1996		1997	
	No. of unions	Membership	No. of unions	Membership	No. of unions	Membership
Private sector	281	396 663	292	407 303	303	405 674
Government	135	226 823	136	241 411	132	252 854
Statutory corporations and local government	88	82 767	88	79 532	91	76 157
Employers	13	572	13	528	11	475
Total	517	706 825	529	728 774	537	735 160

Source: Ministry of Human Resources, Malaysia.

ever, this challenge has been formidable for the trade union movement. Efforts to organize a National Union of Electronic Workers by the Malaysian Trades Union Congress met with stiff opposition from both employers and the Government. Instead, in-house unions in the electronics industry have been encouraged. In the textile industry, which preceded the electronics industry, regional or state-based unions have been registered. Furthermore, legal restrictions prohibit the merger of unions in Peninsular Malaysia, Sabah and Sarawak.

Any national solidarity among all Malaysian workers is impossible within the current framework of legislation governing trade unions. The number of employer trade union organizations is also small. In the circumstances, collective bargaining is a heavy responsibility for the workers since they have to negotiate within the scope of their union membership.

The trend to casualize employment through utilizing informal labour and distributing work to home-based workers wherever possible further weakens the scope for trade union membership and participation in the collective bargaining process. The expansion of small and medium-scale industries also poses difficulties for workers to organize into viable and effective trade unions.

Employers withhold necessary financial details

The National Labour Advisory Council has adopted the Productivity Linked Wage system which encourages productivity/gain-sharing models of a wage system compared to "fixed" and "payment by results" systems. This model, however, depends for its success on the willingness of employers to reveal the actual financial accounts of the enterprise. Employers do not reveal financial details of their enterprise other than what is strictly required to be revealed in their statutory accounts. Although this model can assist in improving the income levels of workers, the lack of trust between employers and unions in sharing information has not contributed to progress in implementing this model through the collective bargaining process.

Compulsory arbitration in collective bargaining disputes through the Industrial Court also contributes to delays in concluding collective agreements. The Industrial Court acts according to equity, good conscience and the substantial merits of the case without regard for technicalities and legal form and in the interest of the nation.

In these circumstances, workers' solidarity and strength have no place.

Minister can refer disputes to Industrial Court

The strike weapon of trade unions is possible in theory but has no effect in practice. Once a collective bargaining dispute is referred to the Industrial Court, the union is obliged to call off the strike. In the circumstances, the option to strike may not be useful since the Minister of Human Resources can defuse the situation by referring the dispute to the Industrial Court. The number of strikes, workers involved and working days lost is shown in table 4. The number of man-days lost is low with one exception in 1990 when the National Union of Plantation Workers went on a national strike to back up their claims for a basic monthly wage. The strike was, however, defused when the matter was referred to the Industrial Court.

Table 4. Number of strikes, workers involved and working days lost, 1974-97

Year	Number of strikes	Number of workers involved	Number of man-days lost
1974	85	21 830	103 884
1975	64	12 124	45 749
1976	70	20 040	108 562
1977	40	7 783	73 729
1978	36	6 792	35 032
1979	28	5 629	24 868
1980	28	3 402	19 554
1981	24	4 382	11 850
1982	26	3 330	9 621
1983	24	2 458	7 880
1984	17	2 437	9 267
1985	22	8 710	34 773
1986	23	3 957	14 333
1987	13	3 178	11 035
1988	9	2 192	5 784
1989	17	4 761	22 877
1990	17	98 510	301 978
1991	18	1 920	6 610
1992	11	2 401	5 388
1993	13	2 399	7 162
1994	7	2 289	5 675
1995	2	1 748	4 884
1996	9	995	2 553
1997	5	812	2 396

Table 5. Employment and number of collective agreements signed and workers covered, 1992-97

Year	Total	Agriculture, forestry and fishing	Mining and quarrying	Manu-facturing	Con-struc-tion	Finance, insurance, business, services, and real estates	Transport, storage and commu-nication	Other services
	No. (000)	No. (000)	No. (000)	No. (000)	No. (000)	No. (000)	No. (000)	No. (000)
1992	334 (109.8)	12 (6.5)	4 (1.8)	217 (129.2)	1	79 (74.7)	34 (7.7)	25 (10.5)
1993	332 (105.7)	15 (27.9)	3 (2.4)	191 (51.0)	–	46 (3.4)	40 (14.3)	41 (32.8)
1994	348 (112.8)	15 (1.5)	0	199 (54.9)	–	44 (6.7)	31 (3.6)	40 (10.0)
1995	257 (79.3)	8 (0.1)	0	196 (53.5)	– (0)	53 (10.1)	31 (3.1)	52 (44.5)
1996	398 (113.3)	32 (13)	6 (1.3)	210 (47.7)	1 (0.1)	42 (4.9)	55 (9.9)	53 (36.5)
1997	412 (121.1)	18 (36)	7 (0.3)	241 (64.4)	–	106 (18.8)	31 (0.7)	32 (6.5)
Employ-ment in 1997	8 805.1	1 494.5	38.8	2 390.5	874.2	405.8	436.2	2 291.9

Source: Economic Report 1998/99, Ministry of Finance, Malaysia.

In the case of the public sector unions, collective bargaining has been reduced to a mere consultation process and the determination of salaries assigned to special Commissions. However, the National Joint Council still plays an important role in representing the workers during discussions and meetings with the Public Services Department. The Government must reconsider the limited collective bargaining rights in the public sector and encourage greater involvement and participation of the workers in the determination of salaries and terms and conditions of work in the public sector.

Public policy not encouraging

No doubt collective bargaining in Malaysia has evolved in the "control culture" of the colonial Government, the Emergencies and the strategies of the New Economic Policy, industrialization and the Five-Year Economic Devel-

Towards industrial unionism: A grand experiment for the twenty-first century

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One hundred years: A summing up

Trade unions and the concept of collective bargaining in Korea emerged 100 years ago. However, collective bargaining had not been recognized as a legal institution for the earlier half of that period: collective bargaining was legally recognized only when the Constitution of the Republic of Korea of 1948 incorporated basic labour rights. It was not until the establishment of the Trade Union Law and Labour Dispute Adjustment Law in 1953 that collective bargaining was accepted as a real institution with its own procedures and effectiveness. Until then, collective bargaining had not been practised due to the repression by employers and the weakness of trade unions.

Cooperation and solidarity frustrated

The collective bargaining system had been restricted in the 1960s by the Government-led high economic growth policy. In 1961, the Park Jung-hee military regime made collective bargaining non-workable by prescribing a too strict dispute-resolution procedure. Then, from 1972 to 1980, the rights to collective bargaining and collective action were taken away by the Special Law concerning National Security of the Yushin (Renewal) dictatorship. This law provided a punishment of seven years or less imprisonment for any workers' involvement in acts of collective bargaining or collective action. In the 1980s, the Chun Doo-hwan military regime violated workers' rights to collective bargaining and collective action by totally reshaping the labour laws. The revised labour laws allowed trade unions to be organized only at enterprise level and extended the cooling-off period of industrial disputes. Then, the article on "Prohibition of Third Party Intervention" which was introduced in labour laws impeded cooperation and solidarity between trade unions and social organizations in organizing trade unions, collective bargaining and industrial disputes. Violation of this article was subject to punishment with a three-year term of imprisonment or a 500 won fine. These repressive labour laws were revised only in 1997 after a series of struggles and a course of events such as the Workers' Great Struggle of 1987, the nation-wide struggle for the ratification of ILO Conventions, and finally the admission of the Republic of Korea to the ILO as a member State in 1994.

Sectoral and regional levels

Since 1949, the dominant form of collective bargaining in the Republic of Korea has been enterprise-level bargaining reflecting the organizational form of its enterprise-based union system. Though the industrial union structure was built in 1961 on the instruction of the Park Jung-hee military regime, collective bargaining had still been conducted at enterprise level. There existed, however, several cases of collective bargaining beyond the level of the enterprise. In the late 1960s, sectoral bargaining in the cotton spinning and raw silk industries was implemented at national level between textile workers' unions and employers' organizations. Regional bargaining was also conducted between automobile workers' unions and employers' organizations which covered bus / taxi drivers and repair workers. This kind of bargaining practice is still in effect. In those days, the main contents of collective bargaining were focused on wage increase and the guarantee of trade union activities.

Calls for autonomy and democracy

From the 1970s to June 1987, collective bargaining had been undermined by the military governments and the repressive labour laws. From 1972 to the late 1980s, collective bargaining and collective action were prohibited. Working conditions were decided either by labour-management commissions or by the arbitration of government authority. By 1981, collective bargaining had merely become synonymous with legal restriction. Under such institutionalized suppressions on the part of the dictatorial regime, employers were enjoying a dominant position at the bargaining table. As a result, the gap between wages and the minimum cost of living had continuously widened and working conditions had not improved much. Under such strict conditions, however, some trade unions that were advocating autonomy and democracy demanded collective bargaining and waged collective actions, though prohibited by the law. A higher incidence of collective actions occurred in the 1970s than in the 1960s.

Democratization of the workplace

Even after the Workers' Great Struggle from July to September 1987, collective bargaining continued to be conducted mostly at enterprise level. But collective bargaining and strikes came to be so much the order of the day that the existing labour laws came to lose their binding grip. Union membership almost doubled from July 1987 to 1989. A total of 3,749 labour disputes took place in 1987, 1,873 in 1988 and 1,616 in 1989. Against the background of the retreat of the military dictatorship, the hegemony in collective bargaining was taken by trade unions, especially by the newly emerged democratic unions that rejected alliances with the Federation of Korean Trade Unions (FKTU). Although the issues negotiated within the framework of collective bargaining mainly focused on wage increase and the improvement of company-provided welfare, the democratization of the workplace had also emerged as an important issue. As a result, from 1987 to 1996, the nominal wage of workers in the Republic of Korea has increased by 3.8 per cent and democratization of the workplace was achieved to some extent.

Dismissal and imprisonment

During the period referred to, trade unions had faced many challenges. The Government did not stop efforts to destroy the democratic labour movement which had initiated the workers' struggle. Employers introduced a new management strategy and propelled strongly the restoration of workplace control and division among workers. The Kim Young-sam administration established in 1993 strengthened the attack against the labour movement through the so-called Segyehwa (globalization) policy, which was a kind of neo-liberalist policy. As a result, confrontation between employers and workers engaged in collective bargaining was aggravated. Many workers were dismissed, and 2,807 workers were imprisoned between 1987 and the end of 1996.

Shrinking membership

The internal conditions of the trade union movement have also changed significantly. The changes in the economic and industrial structure brought in its wake a decrease in blue-collar workers, who had been the main force of the collective bargaining drive. Due to the challenge of the management strategy in enterprise, the number of regular workers, who form the basis of enterprise-based unions, has also decreased while the number of irregular workers has rapidly increased. The number of rank and file union members shrank to a considerable extent as a result of the employers' control and attack. Since 1989, union density has steadily dropped and there have been fewer industrial disputes.

Broader bargaining agenda

As a response to this new situation, the trade unions, especially those espousing the democratic labour movement, have tried to adopt a new approach to bargaining and struggle. The democratic labour movement implemented tactics which concentrated its resources on bargaining and struggle within a specific period. When the Korean Confederation of Trade Unions (KCTU) was established in 1995, the democratic labour movement transformed its agenda from the demand for wage increase to a combination of wage increase and social reform. The demands of enterprise-level unions were eventually to cover various issues such as the reduction of working hours, job security, management participation, health and safety, etc. The new bargaining mode, "joint bargaining", has emerged to combine industrial-level federation and enterprise-level unions at the bargaining table.

Lay-off system delayed till 2001

From late 1996 to February 1997, the KCTU staged a general strike against the Kim Young-sam Government which tried to revise the labour laws in order to institutionalize labour market flexibility. The general strike mobilized 2 million workers, and was the first nation-wide general strike in the last 50 years. The FKTU also joined the strike. This struggle made the Kim Young-sam Government abandon the labour laws in force and make amendments. By the newly amended laws, the introduction of a lay-off system was delayed till 2001 and the collective bargaining system was partly modified.

Enough leeway to prejudice the outcome of negotiations

Collective bargaining in Korea at present is institutionalized in the Constitution, the Trade Union Law and the Labour Relations Adjustment Law. Article 33 of the Constitution provides that workers shall have the right to organize independently both collective bargaining and collective action to improve working conditions. The labour laws are so designed that they have no safeguards against unfair labour practice as in cases of acts of refusal or negligence of collective bargaining on the part of employers. The laws also provide for faithful negotiation between labour and management. Trade unions can mandate collective bargaining to industrial federations or a third party. They can also negotiate with employers' organizations. But none of these protects the rights of workers in a thorough manner. There is enough leeway for government and employers to steer the outcome of negotiations in their favour. The Constitution restricts the rights of public employees in terms of trade union organization and collective bargaining. Collective action within the defence industry, which belongs to the private sector, is also limited. As for the public sector, collective action as an extension of collective bargaining is prohibited by the mediation system. The labour laws allow the Minister of Labour to meddle in the contents of collective bargaining. However, the mediation system can be used to make collective bargaining ineffective. Although the notorious ban on third party intervention was eliminated, outside support for collective bargaining still required recognition by the Government. Furthermore, employers are allowed to nullify the collective agreement six months after the termination of collective bargaining. The Government in turn is supportive of employers by excluding from the scope of collective bargaining the issues of lay-off and workers' participation in management.

In December 1997, Kim Dae-jung was elected President. His new Government established a tripartite commission as an advisory body to the President for the purpose of overcoming the economic crisis after the "International Monetary Fund (IMF)-managed economic system". The new President firmly demanded that the tripartite commission should initiate the immediate introduction of the lay-off system. In the commission, agreement was arrived on 20 issues, including the introduction of the lay-off system and the labour dispatching (worker lease) system as of February 1998; but, of all these agreements, only the immediate introduction of the lay-off system has been implemented. The commission failed to adopt any significant measures concerning issues raised later such as the reform of the Chaebol system, restructuring or political reform, which aroused much resentment on the part of the trade unions against government and employers.

Recent trends in collective bargaining

Enterprise-level bargaining is still the dominant form of collective bargaining in Korea. There also exist other forms of bargaining such as joint bargaining, multi-employer bargaining and cross bargaining. *Joint bargaining* means a bargaining pattern that an enterprise-based union negotiates with an employer jointly with its affiliated industrial federation. *Multi-employerbargaining* is a pattern whereby several unions negotiate with employer-nominated representatives as in the case of bargaining in the cotton-spinning sector and bus/taxi drivers. *Cross bargaining* is a pattern whereby an industrial federation negotiates with the employer of an enterprise. However, they are all partial in scope or at the embryonic stage. Regardless of the different forms of collective bargaining which prevail, trade unions are facing serious challenges arising from the massive restructuring and job reduction drive on the part of government and employers in the context of the IMF-managed economic policy and the ensuing currency crisis.

Job security at the centre

Reflecting this change of situation, the most important issue shifted from wage increase as

in the past to job security. Trade unions have proposed a reduction of working hours to maintain the workforce, while government and employers prefer a reduction of the workforce. A typical case is the conflict in Hyundai Motor Co. where trade unions demanded the maintenance of the workforce through the reduction of working hours while management insisted on the lay-off of 12,000 workers.

No help from Constitutional Court

Job security agreements were reached in a

1999. In particular, if a full-scale restructuring in the financial and the public sectors is undertaken and the so-called big deal among Chaebol is implemented, massive unemployment will result. The social security system in the Republic of Korea, however, is too poor and the measures to redress unemployment are not fundamental therapy: they are too vague. Currently, finding solutions to all these problems falls within the ambit of the unions.

Doubt has set in

Considering the situation as described in the foregoing, the capacity of trade unions in the country to meet this challenge is too weak: union density as of 1997 has only stood at 11.6 per cent and is expected to decline even further. The organizational form of trade unions, still based on the enterprise-level system, suffers from weak mergers and a low level of concentration within the unions. It would be possible for enterprise-level unions to achieve wage increases with adequate organizational capacity in workplaces and to struggle for power in the period of "high growth and low unemployment". However, the enterprise-level union system has inherent limitations in terms of improving workers' living conditions and rights or in protecting workers' benefits beyond the "enterprise fence". The enterprise-level unions have so far failed to organize the masses of irregular workers; nor do they have the capacity to protect the unemployed. The current situation of low growth and high unemployment has brought fully to light the limits of enterprise-level unions. It became difficult to protect the rights of their members through bargaining and struggle. It became all the more clear that the isolated and scattered enterprise-based unions could not protect workers' rights in the face of the Government's neo-liberal policies and the rationalization strategy of employers. For this reason, some doubt has been expressed within the ranks of the trade unions as to the survival of the labour movement in the Republic of Korea.

Hope in industrial unionism

Trade unions in the Republic of Korea have explored many alternatives to try to cope with these new changes and challenges. These alternatives include the construction of industrial unionism, the creation of a political party within the ranks of the working class and organizational reform, including developing workplace activities. The construction of industrial unionism is considered the most important goal if the limitations of the existing enterprise unionism are to be overcome. Unions are promoting tactics of concentrating collective bargaining as a preliminary stage for constructing industrial unionism. This strategy delegates the collective bargaining right of enterprise unions to industrial (labour) federations and they demand that each employer engage in collective bargaining with such federations.

A history of battles won

The strategy of concentrated collective bargaining encounters many difficulties due to the employers' tendency to stick to the existing enterprise-level bargaining. However, unions in the country have accumulated considerable experience throughout their history in winning battles against severe repression by the state power and employers. This experience constitutes the basis for the historical belief that the unity and solidarity of the workers can protect the union movement. For example, the Medical Workers' Union Federation and the College Employees' Federation successfully transformed themselves from enterprise unions into industrial unions. On the basis of these experiences and beliefs, trade unions in the Republic of Korea will be pursuing the establishment of industrial unionism as a grand experiment for the twenty-first century even more passionately. In this process, the collective bargaining system in the country will undergo deep change in its structure and methods.

Trade unions must carry the burden of the reform policies without any new resources to meet the challenges

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In the following article, the author draws on his first-hand experience acquired as Senior Specialist on Workers' Activities attached to the ILO Budapest Office from 1992 to 1997 and later in the ILO Brussels Office.

- Collective agreements and bargaining to reach them should be a high priority for trade unions, employers' organizations and the State in the countries of Central and Eastern Europe (CEE). Currently they are not.
- All CEE countries have reformed their labour laws after the political changes of ten years ago. The laws recognize the rights guaranteed in ILO Conventions Nos. 87 and 98. Reality does not reflect the text of the laws.
- CEE countries are not a bloc: their development has been very diverse. The common starting point of Soviet industrial relations makes it relevant, however, to discuss collective bargaining in the region.
- Trade unions were not prepared for privatization and largely failed to use any opportunities offered in the process (should there have been any).
- Collective agreements are local; national branch agreements have been declining in number and coverage.
- Trade union representatives do not have access to full information for negotiations.
- Workers' commitment to their employers has collapsed.
- Membership of the European Union will have a marked positive impact on collective bargaining if unions are able to make the most of the opportunity.
- If collective bargaining does not gain genuine credibility with the support of representative, independent and democratic trade unions and employers' organizations, any development towards well-functioning market economies is at risk.

Political functions of collective bargaining

Collective bargaining is a political institution that regulates and defines several areas of interaction between employee and employer representatives. Its political purpose involves a process whereby an organized group of employees, in the form of trade unions, negotiate with employers, their representatives or their associations any aspect of employment or working conditions within the employer's organization. Such bargaining is "collective" because there is strength in numbers, which endows the institution with its political purpose: the balancing of power.

However, the balance of power becomes a reality only if the trade unions can present claims that are enforceable. "Enforceable" in turn means that they can back up their claims by threatening to withhold labour. If a single employee withholds his/her labour, the threat is usually not meaningful; but when the majority of a workforce in an organization threatens to strike or to take any other form of industrial action, such a threat carries heavier implications.

Once the collective agreement has been concluded, its provisions must also be enforceable. In the first place, the parties may resort to peaceful settlement mechanisms which are an

inherent part of the political institution of collective bargaining – internal dispute settlement procedures such as mediation, arbitration or conciliation as well as labour court procedures – but ultimately there remains the option of collective action.

If collective bargaining was a political institution in the communist era, it is still a political institution in all transition economies today but in a different sense: under the control of communist structures of industrial relations, collective "bargaining" and agreements were tools to express political objectives for production and the way in which people were expected to carry out production. Since 1991, labour laws have been revised in all transition economies. Basically, all rights guaranteed in ILO Conventions Nos. 87 and 98 are recognized in the texts of the new labour laws. Similarly, the right to strike is recognized in all CEE countries, either constitutionally or by law.

However, the political purpose of collective bargaining in terms of establishing a balance of power is not as evident as the political institution itself in the transition economies. This lack of political purpose is caused by a number of factors.

First, trade unions in many transition economies are still in the process of becoming independent, democratic and representative, and employers are still in the process of organizing themselves. When the trade unions have no employers' organization as a counterpart, the collective agreement has to be negotiated with individual employers. Consequently, branch-level agreements are few and far between, meaning poor "strength in numbers". Although there are many reasons why employers are not well organized, in the rare cases when they happen to be, the main purpose of their organization is not collective bargaining at the branch level but to qualify for legal counsel in the field of labour and social affairs.

Second, surplus of labour, overcapacity of production and no need for a modern "just-in-time" production system are common phenomena in many industries and workplaces in the transition economies. Consequently, strikes are less effective as a deterrent. The main reason for employers to keep a labour force which is not actually needed is the old tradition whereby state-owned enterprises take care of employees' social needs. After most of the state property was privatized, the responsibility for providing social services was relinquished by enterprises but not transferred to governments in a systematic way.

The main reason for overcapacity is the tradition of a centralized production system where only a few massive enterprises were producing goods and services for the entire country, for all Soviet Republics or for all CEE countries. One reason why there is no need for a "just-in-time" production system lies partly also in the communist tradition where production was not driven by the needs of the consumers. However, a more important reason is that individual production plants have not been integrated into any production chain or network nationally or internationally.

Third, a common problem for all the transition countries remains the inherent weakness of the rule of law. The judiciary, from the training of judges to procedural reforms, were more concerned with overcoming excessive delays in court cases. Labour courts are largely missing and mediation/arbitration/conciliation systems are not well established. Such weaknesses are detrimental to the implementation of collective agreements.

Economic purpose and the context of collective bargaining

Collective bargaining is primarily used for economic purposes. The result of the process is an agreement which provides for benefits and obligations for both parties – production which is not disturbed or interrupted by workers, compensation for work in the form of pay, leave, holidays, social services, etc., and working conditions. Such benefits or their costs can be expressed in terms of money. Naturally, collective agreements also have social consequences – intended or unintended – but the result is economic benefits for the interest groups concerned: employees and employers covered by the agreement.

Bend the circumstances

The economic context of the bargaining unit (i.e. company, sector, etc.) – and the macroeconomic circumstances of the country or region concerned – in which collective bargaining takes place varies considerably among the transition economies. Collective bargaining cannot change this context: the parties can only bend the circumstances in their own favour. Naturally the trade unions in the different transition economies negotiate in different circumstances. Consequently – besides the skills of individual negotiating teams and the position of the trade union they represent – the level of benefits

established in the collective agreements depends largely on the economic situation of the bargaining unit and the country concerned.

Take-off points are different

As for the macroeconomic background, the transition economies can be divided into two groups: the CEE countries and the former Soviet Republics (with the exception of the three Baltic States – Estonia, Latvia and Lithuania – that are economically closer to the circumstances of the CEE countries). The former Soviet Republics formed an integral part of the Soviet economic, political and security system. Before becoming independent they had but little control over their national economy, nor did they possess institutions to handle basic economic functions, with the result that the structure of production and trade served the interests of the former Soviet Union. Hence, the institutional and structural reforms in the national economy were much more entrenched in the former Soviet Republics than in the CEE countries, but the readiness and facilities for such transformation were different even within the former Soviet Republics. Even the Baltic group of countries are far from homogeneous: their past in international politics (i.e. dominance in the region or under the yoke of different foreign countries, etc.), industrial traditions, foreign exposure, etc. necessarily make them different. Much wider differences exist – and are widening – between the poorer regions of northern Russia and, for example, Moscow or the Caucasus. A further compounding feature among the CEE countries in the process is that the take-off points of the transformation process were different: for instance, the Czech Republic and Slovakia were already in the process of state and nation building alongside the economic transformation process.

Experience in the transition economies has not just shown that there is no single path to a market economy, nor just a single type of mature market economy, but also that there is no consensus about the desirable policies for effecting transition. Taking into account such reservations, CEE countries have been considered more successful in implementing reform packages than the former Soviet Republics. However, important differences also prevail: the southern countries (most of former Yugoslavia, Albania, Bulgaria and Romania) have had less success than the Visegrad four (Poland, the Czech Republic, Slovakia and Hungary).

Although the indicators (EBRD, 1990-98) show differences among the transition economies, some of the transition problems have been common to all of them: decline in statistically recorded production and GDP; collapse of productivity (production decline was not accompanied by open unemployment) and investment; difficulties in maintaining budget balance (low level of revenues); high inflation, deep cuts in public expenditure (social security); a large shadow economy; and poverty. Generally speaking, it has been far more complicated and time-consuming to carry out structural changes and privatization than to stabilize and liberalize the economy.

Trade unions not prepared

In general, trade unions were not prepared for privatization nor for any other profound changes the transition period brought with it, so they were not able to bend the circumstances in favour of their members in collective bargaining. Most of them did not negotiate with the state employer any provisions on job security, severance pay, training, maintenance of benefits, etc. in the case of a business transfer to private hands. If trade unions largely lost their moments of opportunity in the privatization process, it is partly owing to internal disunity within the trade union movement where "alternative" and "traditional" unions were fighting over dominance. Of far more consequence, however, is the fact that the traditional role of being involved in state politics channelled the activity of the traditional trade unions away from collective bargaining. They tried to influence the government's decision-making instead of bargaining with the state employer. Some trade unions set up investment funds which bought privatization vouchers, and tried in this way – as new owners – to guarantee the maintenance of benefits, especially social benefits.

However, trade unions in the CEE countries have in many cases managed to negotiate local agreements in privatized enterprises that include provisions on vocational training and job security. It seems, however, that the job security provisions negotiated are not always properly implemented, and that they frequently do not include any compensation or training possibilities for periods of temporary lay-offs. As it happens, it is often more convenient for the employer to lay off people temporarily than make them redundant: when workers are made redundant the employer has to pay them severance pay, but when they are

temporarily laid off, employers do not have to pay anything. Very often, the workers temporarily laid off are not eligible for unemployment benefits or any other social benefits either.

Traditional social benefits still won

Trade unions have all the same managed to include some of the traditional social benefits in collective agreements. In an ILO survey covering five CEE countries, we found that in the Czech Republic and Slovakia workplace childcare is still a common provision, and that in Hungary housing provisions are still very common in the collective agreement (Aro and Repo, 1997). In most enterprises, some health care is provided, although such services have generally been eroded. Significantly, over two-thirds reported that some vocational training is provided by the agreement.

National-level bargaining needed for shared responsibility

Local bargaining is the dominant level of industrial relations in the transition economies, as national agreements gradually decline in number and coverage. It has the obvious advantage of being close to the realities of the workplace where the agreement should be implemented, and where the specific conditions can be taken into account. However, from the point of view of solidarity and the broader interests at the level of the national economy, social protection and legislation, some national coordinated action is vital. Without national bargaining in some form, the enterprises are not drawn into shared responsibility for the country's problems.

According to an OECD study, economies with more centralized or coordinated bargaining systems have significantly less earnings inequality compared with more decentralized ones. An examination of changes in collective bargaining characteristics and changes in economic performance tentatively suggests that countries which moved towards decentralization or less coordination over the past decade have experienced larger declines in the employment rate than countries which did not (OECD, 1997). An ILO study on four small Western European countries suggests that well-developed social dialogue supports the positive development of the labour market (ILO, 1999).

One of the key shortcomings in local bargaining is that often the negotiators are not familiar with the prerequisites for successful local bargaining. They are also often unaware of the clauses which are necessary in the agreement in order to implement it. For instance, less than half of the respondents in our survey replied to the question about the annual turnover or budget of the bargaining unit. Between 9 and 20 per cent of the respondents said that no workers were informed about the financial situation of the bargaining unit. This means that trade union representatives negotiate basic wages and other conditions without any prior information about the economic situation or financial performance of the unit, which is all the more surprising since most countries have fairly extensive legislation on workers' and trade unions' right to obtain information from employers. On the other hand, most employers seem to accept collective agreements that do not have a peace clause (i.e. that is intended to prevent measures like strikes against the collective agreement). This supports the view that a new, genuine concept of bargaining and agreement as a set of mutual obligations and benefits based on confidence has not yet emerged in transition economies.

Social consequences

Collective bargaining has many social, political and economical consequences. In a social context, as mentioned earlier, the intended consequence of collective bargaining as a political institution is a system that regulates conflict, and brings stability to society. It helps to ensure that any industrial conflict is kept within limits. In most cases, the more militant elements are kept under control by virtue of the fact that the majority of the workers see an alternative manner of dealing with disputes.

However, in the transition economies, collective bargaining does not serve this function as well as it could. Strikes and other forms of collective action receive a lot of publicity but, as discussed earlier, withholding of labour seldom has the intended effect on production and, consequently, it does not bring the intended result for the workers. Quite often, strikes are not targeted against the employer but against government policy. In regions that are suffering from very severe economic conditions, the only way workers are able to show their protest is to go on strike. In many transition countries, an increasing number of strikes have a tendency to turn into political demonstrations. Miners' actions in Russia, Ukraine and Romania are examples of mining communities' conflict with

the centres of power and funding rather than industrial disputes in the traditional sense.

Another declared objective of collective bargaining is to improve the economic performance of the production units and the welfare of society. Collective bargaining provides man-

new private enterprises and foreign-owned enterprises earn much more than workers in domestically owned privatized enterprises or publicly owned enterprises. In many countries, budget-sector workers earn least.

Foreign anchors for collective bargaining

The clear aim of all CEE countries and some former Soviet Republics is to "return to Europe" and become an integral part of Western European regional institutions. Their first significant steps on this road were free trade agreements with the European Union (EU), and their final goal is full membership of the EU. Five countries are at the start of their affiliation process, expected to be completed early in the next millennium. Full membership means that the candidate countries have to adopt, among other things, the EU's social legislation and, more generally, the European social model. Systems of industrial relations form an essential part of this model.

Policy conditionality of international organizations

Like the EU, other international organizations also have an important effect on the transition economies. The World Bank and the IMF in particular impose policy conditionality when lending to these countries. As Berglöf points out in his working paper, such conditionality serves as an outside anchor which can relieve *ex ante* and *ex post* political constraints in these countries. From the *ex ante* point of view, reforms that would not be acceptable either to the domestic population or by vested interests enjoying veto power in the political process can be made acceptable when they are imposed by international organizations. This is because they come "attached" with funding or, in the case of the EU, also with benefits associated with their entry into the EU that help buffer the social consequences of reforms. Similarly, from the *ex post* point of view, reform reversal becomes more costly since breach of the conditionality entails a halt in funding or, in the case of the EU, in the integration process (Berglöf, 1997).

The transition economies expect EU membership to bring them a number of economic benefits: increased integration would create new opportunities for trade; improve investment conditions; lower risk levels; and make the transition economies more directly eligible for transfers through structural funds, the cohesion fund and the Common Agricultural Policy. It would also, with some delay, open Western European labour markets to their citizens.

Adopting the European social model: Implications and risks

Obviously, the Community would partly finance the restructuring of the social system. The history and development of social policy in the candidate countries have been quite different from those of the EU. According to the Commission report *The effects on the Union's policies of enlargement to the applicant countries of Central and Eastern Europe*, adoption by these countries of the EU's social legislation and, more generally, of the European social model will be affected by the large number of citizens having living standards far below the EU average, by their acute social problems, by the low efficiency of public administrations and by still underdeveloped systems of industrial relations (Aintila and Langewiesche, 1998).

On the other hand, many in EU countries are worried about the risks involved in this process. The process might endanger the integration of social policy in the EU. Enlargement carries a risk that support for a broad social policy would become weaker in the Union as a whole, especially if the adaptation of the acceding countries to the acquired rights were to prove inadequate. Further development of Community policies (equal opportunities for women, labour law, coordination of social security schemes) could be hampered, in particular when unanimity will be required for decisions.

Facing the workers every day

Adoption of the EU social legislation has required and will require considerable financial and administrative efforts from the candidate countries. The burden of trade union representatives in workplaces is much heavier than the burden of other "reformists", if only because they have to face the workers every day. They have to explain to the workers why they get fewer and fewer goods and services with their wages, why their health care and other services have deteriorated, etc. They are also the persons who have to "sell" to the workers the sacrifices that are needed for the reforms. And finally, from the point of view of an ordinary worker, they are responsible for any "compromises" they agree to in the collective bargaining process.

Supported structural adjustment

From the very beginning of the political changes ten years ago, trade unions faced the dilemma whether or not to support the process of structural adjustment in economic transformation. Almost everywhere the newly created as well as the reformed traditional unions declared their support, including their support for the most painful measures. Later, many trade unions were to point out that their power to influence the content of the policies and their responsibilities in the implementation of such policies – first of all through collective bargaining – are not on a par with each other. Trade unions have been made the beasts of burden of the reform policies without being given any new strengths to meet the challenges.

Krastyo Petkov, then President of the Confederation of Independent Trade Unions in Bulgaria (KNSB), summarized the situation in his foreword to our survey as follows: "…the international financial institutions use the national institutions for legitimization of the agreements and conditions for structural reforms, credits, investments, state budgets, etc. The rest of the national actors, among them the trade unions, play a secondary and complementary role in the policy that is supposed to open the way for the reforms and to maintain the social peace. But the responsibility for the results and consequences of this policy is transferred to these national actors" (Aro and Repo, 1997).

If collective bargaining does not gain genuine credibility with the support of representative, independent and democratic trade unions and employers' organizations, development towards well-functioning market economies is at risk. Liberalization has proved to be inadequate as the engine of the economic reform process, and a total failure in terms of social development.

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A twofold objective: Model their countries' labour relations systems on those of the most developed countries of the European Union, taking into account specific national contexts

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In the 1990s, the transformation in the countries of Central and Eastern Europe (CEE) lay at the centre of debate both in politics and in research. In the field of labour relations, the parallel tendencies of convergence and divergence came once more to the fore (Slomp, 1992; Cimbaliková-Mansfeldová, 1998; Delteil, 1998; Martin et al, 1998). Despite the similar political and economic history of this group of countries after the Second World War, both policy-makers and researchers were faced with the very different institutions and traditions which prevailed until 1989 in the labour relations systems of these countries. The seemingly unifying process of democratization and the shift to a market economy were also to lead eventually to different solutions in the different CEE countries. In the following article we are going to present the outcome of this transformation in both its aspects: as results obtained through collective bargaining based, on the one hand, on the converging process of democratization and, on the other, those dissimilar elements of the labour relations systems in the CEE countries that obtain due to diverging economic, social or political traditions or the different practices (economic, employment, privatization, etc.) applied in the transformation process.

A look at the past: The erosion of the Soviet model of collective bargaining

From the 1950s onward, the Soviet-type political and economic regime established its model of labour relations in the CEE countries as well. As this classic command economy was characterized by political, economic and ideological monopoly, its labour relations system was not only overcentralized and monolithic, but also dependent on this authoritarian party-State. Formally, negotiations did lead to collective agreements, but not as a result of autonomous collective action taken at the joint initiative of the independent social partners. Branch unions were centralized in monolithic structures of national confederations under the tutelage of the ruling parties. Union leaders were appointed and controlled by the central political organs. Obligatory union membership was one of the means of political control in society and in the firms. Nor were employers autonomous actors: they represented political power in organizing economic activities and carrying out central economic decisions at the workplaces. The function of the unions was to transmit and support the targets of centralized planning not only in the field of production, but also in the allocation of resources and in the

redistribution of incomes. Negotiations and agreements at enterprise and branch levels were derivations of the national and branch-level economic planning and political directives.

Labour conflicts become nationwide crises

From the foregoing, it is evident that the lack of autonomous actors, of institutions of labour relations, and the prevalence of dependent unions without an express interest in a representative role have so far been the main features of the uniform model of labour relations in the CEE countries. However, it should be noted that low political representation of employees and the dependent role of unions did not automatically mean that employees were in a totally subordinate position: stepped-up industrialization accompanied by a chronic manpower shortage ensured for certain employee groups relatively strong individual and collective positions in exercising pressure on enterprise management and sometimes even on party officials. Continuous absenteeism, disciplinary problems and restriction of output in the labour process were considered to be symptoms of diverging interests and indicated a certain autonomy among certain groups in the workforce. These scattered negative signs, cutting back economic production, often remained invisible, but already during the 1950s certain conflicts (as in Berlin in 1954, in Potsdam and Budapest in 1956) were transposed – together with other social and political conflicts – into a nationwide crisis of the whole political and economic system.

Direct workers' participation and broader scope

The first wave of divergence among the labour relations systems of the CEE region can be detected in the two types of political reactions to the succession of social, economic and political crises since the late 1950s. In some countries, the centralized character of collective bargaining has been reinforced (as in the former German Democratic Republic or in the former Czechoslovakia since 1968), while decentralization of political and economic decision-making enabled trade unions and enterprise managements to have a more independent role in collective bargaining (as in Poland, Hungary or Bulgaria during the 1970s). The first signs of articulation of different levels of collective bargaining can be traced to this period. Enterprise-level and branch-level negotiations began to have more and more impact on resource allocation and the redistribution process as the actors started winning important rights in the sphere of decision-making and as their degree of autonomy increased. Management at enterprise level became responsible for investments, technological development, organization, providing incentives and utilization of labour. At the same time Polish, Hungarian and Bulgarian enterprise-level unions were officially considered to be partners in enterprise-level decisions. In case of conflict they could even exercise the right of veto granted them since the 1970s. In this group of countries, scope for direct participation of employees in issues such as wage distribution within smaller groups, working time arrangements and the allocation of work loads, etc., has been introduced and extended.

Continuity of basic institutions

Reforms in certain countries like Poland and Hungary have further increased the autonomy of the business organizations by extending the social partners' sphere of action in the economic and human resources strategies of the enterprises. Such increased economic responsibility has led to the further enrichment of their labour relations systems. In Hungary and Poland, employees participated directly in different newly created enterprise-level bodies (enterprise councils and supervisory councils respectively) and in strategic decisions (including the election of company directors), significant investments and major employment cuts. Even in the production process various forms of organizational innovations were introduced such as the autonomous brigades in Bulgaria in the 1980s and economic working associations in the same period in Hungary. These institutions of collective bargaining and employee participation – similar to the self-management system of the former Yugoslavia – emerged after long decades of cumulative changes and they seemed to be the basis for further social developments towards a more autonomous system of labour relations at the end of the 1980s. In spite of these significant changes in some of the CEE countries up to the late 1980s, the core of the political and economic system remained intact. The one-party system (or the party-State) was not and could not have been questioned for ideological as well as for international or political reasons. Thus the public ownership structure of these economies has

prevailed together with the limited autonomy of the labour relations systems. Despite the erosion of the CEE regimes, the continuity in these basic institutions set limits to any radical transformation in the system of labour relations, including the autonomy of the social partners and the institutions and mechanisms of collective bargaining.

Institutional convergence and divergence of collective bargaining systems during the transition process

Since 1989, the pluralist and democratic political system and the market economy based on private ownership have opened the way for setting up an autonomous system of labour relations. This general tendency in the CEE region obeyed the universal standards laid down in ILO Conventions and Recommendations and these countries, setting in place mechanisms of collective bargaining, also tried to bring them into conformity with the social dimension of the European Union. Foreign direct investors and multinational companies also represent external resources for adapting to new ways of bargaining.

Much variety in functioning and coverage

In all countries of the region, the fundamental laws ensure the right of employees to freedom of association in independent unions, the right of trade unions to collective action, including strikes and the right to collective bargaining. On the other hand, such rights mean obligations for employers to negotiate at different levels with unions. The new labour relations systems in the CEE countries have brought about the pluralization of both unions and employer organizations. At the same time, the membership of unions has radically diminished (by between 20 and 50 per cent) though it has still remained at high levels compared with Western Europe. The different sectors of the economy according to branches, ownership and size, however, show great variety as to the functioning of collective bargaining and the coverage of collective agreements. Coverage is wider in those branches where only a few employers of mostly big enterprises dominate the sectors and where unions maintained or re-created their positions after the transformation and privatization (as in the energy, chemical, and mining industries or public administration).

No clear directives in legislation for having agreements respected

Although legislation is designed to promote collective bargaining, it is more precise in the description of its content and representativity of the actors rather than in laying down the means for stimulating the partners so as to ensure that all employers sign and respect the collective agreements. Sanctions are either very weak or non-existent as to non-compliance with labour legislation or collective agreements on the part of the employer, especially in the new private sector (Casale, 1997; Mouranche, 1998). Job security, minimum wage and health and safety regulations are fields where the standards agreed are not always and completely respected.

There is significant diversity in both the "substantive" and "procedural" dimensions of collective agreements: in the first, the primary targets of the bargaining process are wages and employment conditions; in the second they concentrate on regulating the relations between the social partners and the prevention and settlement of labour disputes. Using this two-dimensional approach, a few important attempts have been made to analyse the state and role of collective bargaining in the CEE region (Aro and Repo, 1997; Casale, 1997).

Validity may be extended to entire sector

In respect of legal regulations governing collective bargaining and collective agreements, it is possible to identify both differences and similarities among the CEE countries. For example, in Hungary and Poland, at the joint demand of the social partners signatories to the agreement, the Minister of Labour (or functional equivalent) can extend the validity of the collective agreement to the entire sector or sub-sector "on conditions that the contracting parties are considered to be representative in that sector or sub-sector" (Casale, 1997). In the Czech Republic, the extension of the national-level Economic and Social Agreement to the employers not participating in the negotiations is considerably weakened by their resistance.

As to the content of collective agreements, in one group of countries (Bulgaria, the Czech Republic and Hungary) legal regulation is very general; in another (Poland, Russia and Ukraine) the contents of the collective agreements carry more detailed regulations. In Poland and Russia, five or nine areas respectively are grouped and recommended, either in

a "negative" way (Poland) or in a "positive" way (Russia) as areas to be respected during the process of enterprise-level bargaining between the social partners.

National-level institutions of collective bargaining have been also set up in the form of tripartite councils between the social partners and the Governments to discuss and coordinate their stands concerning economic and social issues and to make joint proposals in the new democratic parliaments on wages, inflation or a wide range of social welfare issues (from pension and health funds to vocational training, from family support to taxation). At this level, the social partners, the unions and the employers are embodied by those considered to be representative. The principle of representativity and its assessment were very much discussed by the social actors and until now there has been no clear solution to this problem. For instance, in the case of Hungary, union representativity is measured by the results of the elections based on enterprise works councils. In Poland, union representativity is determined according to the level of collective bargaining: at national level, unions with at least 10 per cent of labour or 500,000 members, and at enterprise-level, unions with a membership of 50 per cent of the workforce, are considered to be representative. Bulgaria resembles the Polish model in terms of the two-level distinction, but criteria for determining representativity in terms of the changing number of grass-roots organizations and their membership is at the centre of fierce debates.

From minimum-wage fixing to gentlemen's agreements

The influence of the national-level collective bargaining systems, i.e. of the tripartite bodies, shows differences as to the topics selected for joint decisions and the issues for consultations. For example, in Hungary, the national-level tripartite body not only negotiates general economic and social issues but is also a forum for fixing the national minimum wage. In other countries, as in the case of the Czech Republic, the outcome of national-level tripartite negotiations is more like a "gentlemen`s agreement" and the function of this body is purely consultative.

Two consequences of centralized agreements

Certain views hold that centralized tripartite negotiations are not favourable to the development of branch-level action and agreements. Such centralized agreements automatically integrate the branches and leave open some margins for action at enterprise level. This approach carries two consequences within the labour relations system: (1) the government remains a main actor in national-level bargaining; and (2) enterprise-level agreements (either through "classical" bargaining between unions and employers or through the participatory models of works councils) assume a more and more important role giving a heterogeneous and fragmented character to the labour relations systems.

Mismatch between bargaining structure and human resource strategy

In this sense the reluctance of the new private sector and its employers to engage in higher-level collective bargaining cannot be simply dismissed as a negative approach but must be interpreted as a sign that the actual structure of bargaining is often ill matched with the economic and human resource strategy of the enterprises. In many cases, individual or even collective informal bargaining might also be more promising for important employee groups and not only more flexible but even more stable for their enterprises.

Alongside the differences in the characteristics of collective bargaining and collective agreements, similarities might also be registered. On the important issue of the recognition of the social partners, rather similar solutions can be found in these countries that are based on the dominance of quantitative methods in measuring the representativity of the partners. The rapidly changing social and economic environment of the CEE countries explains another similarity: the relatively short duration (one or two years) of the collective agreements.

Actors and dynamics

The above phenomenon of divergence and convergence can be better understood by an analysis of the actors in the field of labour relations, their past, their future prospects and the dynamics of their relationship. The relationship between the partners in collective bargaining shows certain rather similar problems in the CEE countries as follows:

On the trade union side:

- the question of representativity in the case of pluralistic trade union movements (i.e.

Poland, Hungary, etc.) has either not yet been properly answered or, if so, not in any acceptable way;

- certain unions had serious political legitimacy problems at the beginning of the 1990s;
- weakness at branch level due to the heterogeneous organizational structure of the economies or various ownership relations within the same branch that obstruct trade unions in their efforts to work out branch-level strategies;
- unions were and are also divided according to their former experiences. Some of them follow their former strategies as business partners coming from the traditions of the party-State. Others follow their confrontational model of bargaining based on their protest movements since the 1980s. (Mouranche, 1998).

On the employer side:

- heterogeneous dimensions, ownership structures and market strategies that do not create common interests among employers with regard to labour and employment issues;
- during the privatization process their relationship with political decision-makers and the government is a cardinal question for certain business groups; thus the interest groups within business do not show homogeneity with respect to the different sectoral levels. (On the contrary, employers within the same branches belong to very different interest groups that do not favour the participation of the former in joint organizations.);
- certain employer groups show mistrust of the labour and social legislation and of the measures taken by public institutions to control the agreed norms. Other business groups at the same time have very close relations with political decision-makers due to the special role played by the State in the privatization process and in the banking sector during the transformation.

The different issues in the area of labour relations and thus of collective bargaining during the radical transformation period find no easy parallel with those in the already well-functioning market economies since the dynamics of the processes are rather different. In the current transformation period, it has not yet become a question of the "routine" functioning of business but of setting up business itself: the creation of the partners is on the agenda of social and economic legislation. The partners of the trade unions cannot yet be unambiguously identified given the very wide range of problems and their complexity that lie well beyond the responsibility of employers. Even during the intensive codification process of the early 1990s during the social dialogue concerning the social and economic consequences of setting up the new market economies, when dealing with welfare issues, the main partners of trade unions were and remained the governments. This fact was reflected in the creation and functioning of the national-level tripartite bodies that correspond to the national-level collective bargaining institution in the CEE countries. There had been the express political intention to integrate unions in the transformation process and to neutralize them with regard to the controversial issues of economic austerity, mass lay-offs, etc., for the sake of social peace (Héthy, 1994, 1995). It should also be mentioned that agreements between employers and the government on business contributions, payroll taxes, health contributions, taxes, etc. were also negotiated and agreed upon in these tripartite councils. Meanwhile, the same tripartite forum was proposed to unions and employers as a "classical" collective bargaining institution in such business-related issues as wages or working-time arrangements between these two partners.

At the same time there is a distance between the national and the local level where the lack of branch-level bargaining is noticeable. As a general tendency in the CEE countries, and similar to the international trend, enterprise-level collective bargaining has been growing in importance. At first glance, this trend seems to be the result of similar processes rather than the transformation of labour relations. In the mature capitalist countries of the EU the same trend is attributed to the effects of globalization that requires more flexibility and higher performance from the individual enterprises or from the network of enterprises. Business reactions, including the articulation of the different levels of collective bargaining, are shaped by such forces as the characteristics of the political system, the labour market position of the workforce, the organizational comprehensiveness of the institutional bodies representing the interests of the State, their internal legitimacy, etc. The newly shaped labour relations system and the business world of the CEE countries are even more sensitive to the same

factors. The tendency towards the declining influence of national and branch-level collective bargaining corresponds to those CEE phenomena that show the relative lack of branch-level bargaining and agreements as well as the sometimes contested, sometimes weakened role of national-level bargaining. The following interrelated factors can explain this rather general situation prevailing in the CEE countries at the end of the 1990s:

- low organizational capacity of trade unions due to rivalry that results from the lack of organizational comprehensiveness among their confederations;
- overemphasis on external (national-level / political) legitimacy and less attention paid to the continuous search for internal legitimacy by members, on the part of both trade unions and employer organizations;
- difficulties in identifying the partners in collective bargaining, especially on the employers` side at national and branch levels;
- mistrust or "jealousy" of the new political forces in the emerging democracies in the region (with the exception of Poland) which aim at controlling all segments of the political arena (that can be motivated by a zero-sum game approach among the social actors that can be considered as one of the strongest legacies of the "monism" of the political regime of the socialist type);
- heterogeneous business structures in the making with diversified market and human resource strategies: small and micro enterprises becoming dominant employers in the CEE region where face-to-face relations favour informal bargaining instead of institutionalized collective negotiations; multinational enterprises carrying out direct investments representing a "union-unfriendly attitude" while combining organizational and labour-market flexibility based on individualized contracts;
- the "dual structure" of enterprise-level labour relations, as in Hungary and Croatia, may also in the short run challenge the role of trade unions and collective bargaining. (In Hungary, works councils are often used, especially in foreign-owned enterprises, as a substitute for trade unions.)

Social relations: Outcomes and fashioners of collective bargaining

Since the mid-1990s a few studies have already been conducted on the workplace influence of collective bargaining and agreements. The social relations between the partners show rather different patterns in the CEE countries (see table 1).

In the research cited, Hungary represents one end of the spectrum where "mutual understanding and cooperation" characterize the relationship between unions and management at enterprise level. Poland is located at the other end where "opposing and conflicting" interests – especially in the case of Solidarność – dominate the relations between the partners at the level of the enterprise. The Czech and Slovak Republics occupy the middle position between Hungary and Poland on the "cooperation-conflict scale" between management and unions.

Good relations, little open confrontation

Rather similar tendencies were experienced in another recent survey on management-union relations. Relations between trade

Table 1. Patterns of the relationship between trade unions and management: A survey in the machine industry (%)

Countries (sample of enterprises)	Mutual understanding	Mainly cooperating, but sometimes opposing	Mainly opposing, but sometimes cooperating	Opposing and conflicting	Difficult to answer
Czech Republic (n = 35)	13.0	53.0	28.0	3.0	3.0
Slovakia (n = 35)	4.0	73.0	19.0	4.0	0.0
Hungary (n = 379)	50.0	44.0	3.0	0.0	3.0
Poland (n = 379)					
Solidarność (n = 98)	14.3	38.1	19.0	28.6	0.0
OPZZ (n = 21)	16.7	50.0	22.2	11.1	0.0

Source: Ishikawa (1998), p. 16; Kasahara (1998), p. 59.

unions and the employers were for the most part good in all countries. Cooperation and partnership dominated the Bulgarian sample. In Hungary, units with "partnership and opposition" had almost as big a share as units with "cooperation and partnership". In the other countries (Czech Republic, Poland and Slovakia), according to the dominant opinion of employees, the relations of trade unions with employers were represented by "both partnership and opposition". It is true that only a tiny minority of respondents (from 2.8 to 6.3 per cent) used "open confrontation" to characterize the social relations between employers and trade unions. It is worth noting that among Polish, Slovak and Czech employees, the share of opinions of "open confrontation" is twice as high in comparison with Hungary and Bulgaria (Aro and Repo, 1997, p.41).

The gradual process of erosion of the former labour relations systems of the 1970s and the 1980s and the "traditions" created are reflected in table 2, which compares the communication channels between the social partners in four of the CEE countries.

Favours individualized employment relations

The exceptionally high proportion of those who utilize trade unions as a communication channel in Poland reflects the experiences accumulated during the recent history of the Polish trade union movement. In Hungary, on the other hand, the significant role of "informality" in the social relations between enterprises and the pluralistic structure of communication channels reflect other types of experiences. These features, together with "cooperative" patterns of union-management relations, are considered as facilitators of new human resource practices favouring individualized instead of collective employment relations in the Hungarian enterprises in comparison with other post-socialist enterprises in the CEE region.

Divergence of interests among employee groups

Certain CEE social and economic conditions are not favourable to collective actions by trade unions of the kind that may support their stand in collective bargaining. The circumstance of mass unemployment is creating a divergence of interests among employee groups. Employee groups in relatively stable jobs have strong interests in defending and improving the market positions of their enterprises. Others in less privileged situations or in weak labour market positions are afraid of losing their jobs. The phenomenon of "double loyalty" (Makó and Simonyi, 1997) can be explained not only in terms of the strong cultural patterns of former dependence and "inertia" (Mouranche, 1998, p.160) but also in terms of the considerable commitment of employees to keep their enterprises alive and support their transformation and/or privatization. On the other hand, certain employer groups too, especially in the new private enterprises, are fashioning obstacles to trade union presence to hinder the organization of collective actions.

Concentrate on securing internal legitimacy

There are several practical measures to be taken for increasing the social efficiency of collective bargaining in the CEE countries. To con-

Table 2. Bottom-up communication channels on wage-related issues: a survey in the machine industry (%)

Channels of communication	Poland	Czech Republic	Slovakia	Hungary
Trade union	77.6	46.7	47.8	28.6
Works council*	0.0	0.0	0.0	28.6
Foreman or shop-floor chiefs	23.3	30.0	30.4	5.7
Unofficial leaders	0.0	0.0	0.0	14.3
Directly or individually by workers	0.0	20.0	13.0	11.4
Other	0.0	3.3	8.7	11.4

* Among the so-called "Visegrad countries", only Hungary incorporated the institution of the "works council" for employee participation into their industrial relations system.

Source: Yamamura et al. 1996: *Business organisation in the transformation process in the post-socialist countries*, Sapporo, Hokkaido University, Slavic Research Centre, Preliminary Research Report, p. 18.

trol and support the visibility of negotiations, the requirements for the registration of collective agreements should be defined. Once they are registered, their applications can be monitored and they can be sanctioned. Representative organizations, both unions and employers, could then concentrate more on methods to secure their internal legitimacy among their members: more intensive cooperation among trade union federations where union pluralism prevails could enhance organizational comprehensiveness; and more transparency in national-level economic decisions (on matters related to privatization, taxes, credits, public investments, etc.) would also combat the mistrust of certain private groups with regard to labour and social legislation and could stimulate a common approach on the part of employer groups. Reinforcing labour standards and finding ways to extend the effects of collective bargaining among all employers require more intensive involvement on the part of the government. Unions, for their part, could further promote branch-level agreements through coordinated dialogue with employers.

Answers must fulfil two objectives

As we have seen, certain problems of collective bargaining – concerning the status and relations between the social partners, sanctions and obligations and coverage of agreements – are related to the transition from the monolithic and dependent system of labour relations to a pluralist and autonomous one. Others – like the drop in trade union membership, the legitimacy of representative organizations among their members, the growing importance of enterprise-level bargaining, the corporatist tendencies under attack, etc. – are connected with global tendencies in modern market economies. These problems together are urging governments and legislators as well as employers and trade unions to find answers that can fulfil a twofold objective: modelling their labour relations systems on those of the most developed countries of the European Union; and at the same time ensuring that they correspond to the specificities of their national, social, economic and political contexts.

Each context might be different, either on account of the new ownership relations following on from the transformation of the public sector according to the different patterns of privatization, the different share of small enterprises within business and the different weight of foreign direct investments, or just on account of differences in labour market situations. Unified unionism or union pluralism also differentiates the labour relations systems and the institutions and procedures of collective bargaining in the CEE region. The political approaches and ideologies of the political actors concerning their relations with the labour relations systems in general and with unions in particular also vary.

On the alert: Danger signals

The recent years of radical transformation have not yet enabled researchers to assess completely either the lasting effects of the earlier labour relations systems or the results of adapting the procedures and institutions of collective bargaining of the developed capitalist countries to these systems. More intensive and systematic comparative research in the coming years will show how imitation and "institutional transplants" mixed with "genuine solutions" and local traditions of the labour relations systems are integrated into the political and economic systems of the CEE countries. There remains the danger that mechanical copying and formal adaptation of collective bargaining models would merely serve once again to obscure the real processes and would fail to create transparency in labour relations. Thus inadequate or poor social control over labour and employment issues could again block the organic economic development of the countries in question.

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Annex

List of relevant ILO instruments on the right to organize and collectively bargain

Conventions

Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87)

Protection of Wages Convention, 1949 (No. 95)

Right to Organize and Collective Bargaining Convention, 1949 (No. 98)

Equal Remuneration Convention, 1951 (No. 100)

Minimum Wage Fixing Convention, 1970 (No. 131)

Workers' Representatives Convention, 1971 (No. 135)

Paid Educational Leave Convention, 1974 (No. 140)

Rural Workers' Organisations Convention, 1975 (No. 141)

Labour Relations (Public Service) Convention, 1978 (No. 151)

Collective Bargaining Convention, 1981 (No. 154)

Recommendations

Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113)

Communications within the Undertaking Recommendation, 1967 (No. 129)

Examination of Grievances Recommendation, 1967 (No. 130)

Minimum Wage Fixing Recommendation, 1970 (No. 135)

Workers' Representatives Recommendation, 1971 (No. 143)

Paid Educational Leave Recommendation, 1974 (No. 148)

Rural Workers' Organisations Recommendation, 1975 (No. 149)

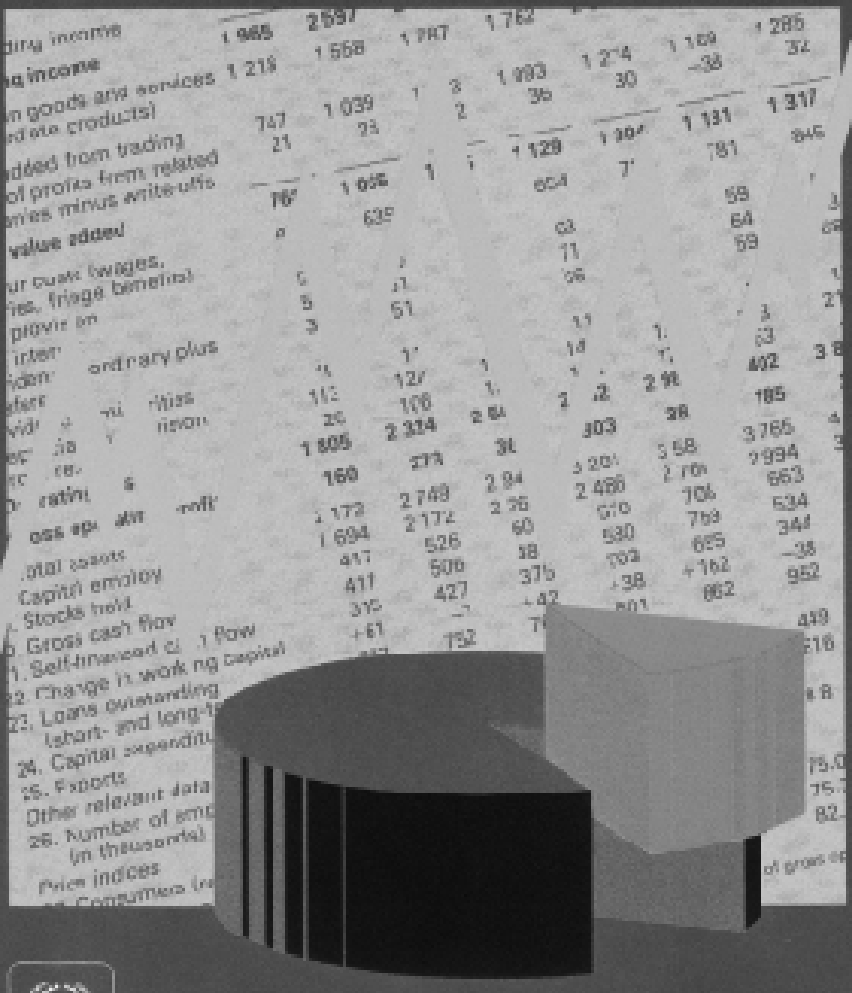
Labour Relations (Public Service) Recommendation, 1978 (No. 159)

Collective Bargaining Recommendation, 1981 (No. 163)

Financial and economic analysis of enterprises

Karl Hedderwick

A workers' education manual



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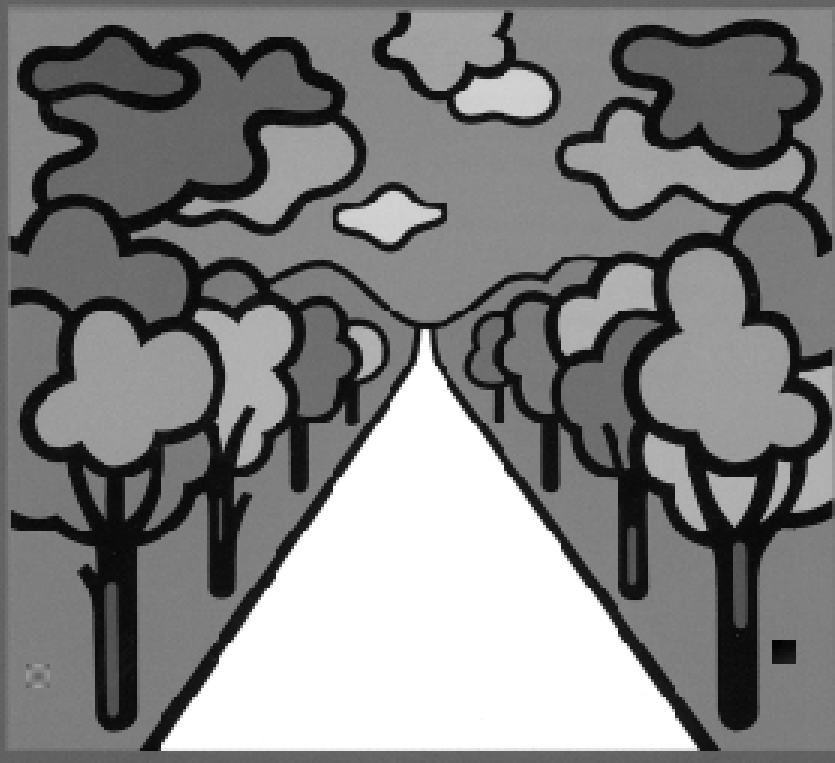

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