

FREEDOM OF ASSOCIATION AND RIGHT TO COLLECTIVE BARGAINING IN ILO REGULATIONS

Assistant PhD **Alina Paula LARION**
"Ștefan cel Mare" University, Suceava, Romania
Faculty of Economics and Public Administration
lariona@seap.usv.ro

Abstract:

The international labour standards are the cornerstone of the ILO's activities, and the freedom of association is undoubtedly the cornerstone of labour law at national and international level. Political, economic, and social transformations, which remain as influential even though we are in 2016, did not diminish the importance, significance, functions or purposes of collective bargaining, nor their role in industrial relations, although, in recent years, has advocated for the abandoning of labour law and replacing it with civil and commercial rules.

Since 1947, the International Labour Organisation was concerned with the issue of freedom of association and the exercise of trade union rights. As a result of this concern, the organization has developed legal instruments governing freedom of association and right to collective bargaining, thus developing Convention no.87 / 1948 and the Convention No.98 / 1949.

Key words: right to work, International Labour Organisation, freedom of association, international convention, collective bargaining.

JEL classification: J52, J71, J83

INTRODUCTION

While international labour standards are the cornerstone of the ILO's activities, freedom of association is undoubtedly the cornerstone of labour law at national and international level [1]. In 1948, two events took place in early impressive international human rights law. The first time was the adoption of the *ILO Convention no. 87 concerning Freedom of Association and Protection of the Right to Organise* [2], and the second - the adoption by the UN *Universal Declaration of Human Rights* (UDHR) a few months later.

A close relationship between some aspects of the two was maintained by the ILO supervisory process until now. Universal Declaration of Human Rights is, of course, of great importance for the ILO in its work to promote and protect human rights. As noted by the Committee of Experts of the ILO regarding the application of conventions and recommendations in the report of its Session from 1997, the "Universal Declaration" is generally accepted as the benchmark for human rights around the world and as a basis for most of the standards developed under the United Nations and in other organizations. "ILO standards and practical activities on human rights, with the instruments adopted in other organizations, are implementing general expressions of human aspirations in the Universal Declaration formulated and translated into binding rules the noble principles of this document [3]."

It is of particular interest to the ILO that the UDHR proclaims in art. 23, par. 4 that: "Everyone has the right to form and to join a trade unions for the protection of his interests". This is a more specific manifestation of the right provided in art. 20 of UDHR "the freedom of peaceful assembly and association".

The inclusion of this principle in the Universal Declaration was preceded by its inclusion in three important ILO instruments. The first is the ILO Constitution, which, in its original version as Part XIII of the Treaty of Versailles proclaimed that the High Contracting Parties consider that the right of association "for all lawful purposes" is "particularly important and urgent" both for workers and for employers [4].

The preamble to the Constitution explicitly cites the trade union rights among the measures that could improve working conditions and thus ensure peace. When in 1944 the ILO adopted the

Declaration of Philadelphia and in 1946 incorporated it in the Constitution, it was reaffirmed the freedom of association as one of the fundamental principles on which the Organization was based and characterized it as “essential for sustaining progress”. It also refers to “the effective recognition of the right to collective bargaining, the cooperation of employers and workers to improve production efficiency and continue their collaboration in the preparation and implementation of social and economic measures”.

ILO CONVENTION NO. 87/1948

The third of these fundamental texts was the *Convention no. 87 concerning Freedom of Association and Protection of the Right to Organise*. Convention no. 87 is concise and unambiguous. It seeks simply to transpose the principle of freedom of association contained in the ILO constitutional instruments in law rules applicable in practice. It contains four parts: the first concerns the freedom of association (ten articles), the second - protection of the right to organise (one article), the third - several measures related to the implementation of the Convention on the non-metropolitan territories and the fourth contains final provisions (entry into force, etc.).

The right of association is understood in the art. 2 of the Treaty as the right to form organizations and to join them. Convention no. 87 clarifies the field of application of *ratione materiae* of this law broadly. Thus, the association aims to promote and defend the interests of workers and employers (art. 10). Moreover, the field of application of *ratione personae* is also extended, the right of association is quasi-universal: it is owned by all workers and employers (Article 2), whatever their nationality, position and sector in which they work and whatever their working relationship. No discrimination is permitted, and therefore the art. 2 was preferable to the phrase “without any discrimination” to a list of prohibited grounds of discrimination, to avoid a restrictive interpretation [5].

However, this field of application is not unlimited, implementation of ILO Convention no. 87 to members of the armed forces and police (art. 9.1) is left to the states [6]. Furthermore, while the Convention refers to both employers and workers, for obvious reasons, its application to workers presents the biggest problems in practice, confirmed by the violations of freedom of association of workers, unfortunately amply demonstrated [7].

ILO Convention no. 87 specifies the conditions for establishing organizations. Thus, the establishment of organizations and affiliation to the latter will be “without prior authorization” (art. 2). Several national legislation, without giving permissions as such, provide more formalities for the constitution and membership of these organizations. These formalities are still legal under the Convention No. 87, as long as it does not amount to an authorization and are not left to authority’s discretion [8]. For example, the regulations that require a minimum membership for a union to be created, is compatible with the Convention no. 87 just in case the number is reasonable [9]. This reasonable number is estimated from case to case. On the contrary, the strict deadlines for registration, accompanied by disproportionate penalties, is equivalent in practice to a system of prior authorization [10].

ILO Convention No. 87 emphasizes the freedom of choice of employers and workers of the organization they wish to join or they want to create (art. 2). This clarification has generated many interpretations of control bodies; this implies in particular that the number of trade unions cannot be limited by businesses and prohibit the union monopoly imposed by law [11].

In the application of the Convention, the Article 11 thereof does not provide additional clues in this regard. With its broad wording, leaves a much leeway to states parties: the most important thing is not how to apply freedom of association. Convention no. 87 contains, also, the performance requirements.

The Convention no. 87 is drawn up at present indicative time and each article contains clear obligations to do or not to do. As such, it is interesting to note that many of Convention rights are contained in a negative form: public authorities *must refrain* from any intervention, unions *cannot be* subject to suspension or dissolution, and legislation *should not* undermine the Convention no. 87,

etc. The Convention has a deeply compelling character: there is no question here of a convention establishing the objectives to be achieved, but an agreement establishing a minimum basis to be observed and applied as such [12].

It is clear that ILO Convention no. 87 exposes the basic elements of freedom of association, the right to organize, the trade union independence and state's non-interference in the affairs of the union. However, several questions arise when examining its provisions, for example, regarding the right to strike, the right of unions to engage in political activities, and practices of union security, the clear principles of freedom of association being problematic when applied in practice the Convention no. 87 is therefore essential, but insufficient in expressing the freedom of effective association.

The right to freedom of association, expressed especially in the Convention no. 87, art. 3, also involves the right to strike, and, even this right is not expressly stated in the text of the Convention, it has been internationally recognized as a fundamental right of workers [13] in order to protect their interests related to labour relations.

There is also a "general consensus that the respect for civil and political rights is necessary for the exercise of trade union rights" [14], therefore, the protection of these rights is so important to promote freedom of association, due to their interdependence.

The right to freedom of association, it is important to bring a balance of power in labour relations, to the fact that, as researcher L. Betten emphasizes, "the individual workers can be controlled stronger by the employer, but once they join forces, they can become a powerful force" [15], or at least there can be a kind of equality between the parties in negotiating working conditions.

Therefore, these organizations must be free from interference or discrimination. ILO experts advisors also drew attention to the fact that "without the principle and the right to freedom of association and the effective recognition of the right to collective bargaining there can be no progress in relation to other categories of principles" [16] promoted by ILO Declaration on the fundamental principles and rights to work.

ILO CONVENTION NO. 87/1948

Regarding the right to collective bargaining, it is enshrined in the *Convention no. 98/1949 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively* [17] which guarantees to workers adequate protection against acts of anti-union discrimination in employment. Convention no. 98 provides that such protection should apply particularly in respect of acts which aim to: a) employment of a worker condition not to join a union or to cease to be part of a union; or b) to dismiss a worker or to be detrimental by any other means because of his union membership or participation in union activities outside working hours or consent of the employer during working hours (Article 1).

Convention No. 98 is short, with only six major items. As Convention No. 87, it is the almost universal application and also excludes from its scope the armed, police forces and public officials (art. 5 and Article 6).

Despite its title, Convention No. 98 does not define the collective agreement or collective bargaining, but only their object: set the terms of employment (art. 4) - "conditions of employment" have been interpreted broadly by the control bodies, including topics such as "exclusion of promotions, transfers, recruitment". Convention No. 98 essentially gives additional protection to workers who face discrimination trade union and workers' organizations and employers experiencing interference with one another.

Convention no. 98, as the Convention no. 87, leaves to the discretion of member states the means of achieving the obligations enshrined therein. It proposes two ways of implementing its provisions, if necessary. First, it indicates that *appropriate bodies* should be set up to ensure implementation of its provisions (Article 3), without specifying their nature. However, according to the regulatory body, the mere presence of a provision in the legislation that prohibits anti-union

discrimination is insufficient if not accompanied by “fast and effective” procedures of its enforcement in practice [19].

Secondly, if necessary, *appropriate measures* must be taken to “encourage and promote the full development and use of procedures by negotiating voluntary the collective agreements between employers and organizations of employers, on the one hand, and organizations of workers, on the other hand, in order to solve this way the conditions of employment (Article 4).” The purpose of these measures are specified, but again, determining their nature is left to the states. Latest clearly cannot, in accordance with article 4, to impose collective bargaining with some determined because this would violate the principle of free and voluntary nature of negotiations [20]. Therefore, we cannot be in the presence of an obligation imposed by law to negotiate or reach an agreement. In addition, this article establishes the primacy of the collective work contract over the individual contract, because otherwise it would not promote negotiations, as direct negotiations between employers and non-union groups, while there is a union [21].

Of course, the state is the sole owner of the collective bargaining obligations. Much depends also on the parties who, for example, an obligation to negotiate in good faith. However, it is for the state to fit properly the relationship between employers and unions through clear laws in order to prevent the escalation of relations, often “stormy”, between them. As noted B. Gernigon, A. Otero and H. Guido, “rules that collective bargaining must meet in order to be viable and effective are inspired by the following principles: independence and autonomy of the negotiating parties and the free and voluntary negotiations, minimum of interference of public authorities in bipartite agreements and the priority given to employers and their organizations, as well as trade unions as negotiating topics” [22]. The states must, therefore, ensure that these conditions are met.

Noted that in the second half of the XX Century and, in particular, the last 35 years have seen a series of events that affected collective bargaining in different ways, with different implications for social justice in the world. Without attempting to be exhaustive, we refer in this respect to general acceptance of the market economy after the fall of the Berlin Wall, which affected the processes of rationalization and restructuring and which, in turn, led to drastic cuts in public sector and a greater flexibility / deregulation of the economy and the world of work.

The more comprehensive process of economic globalization, based on trade policy of World Trade Organisation, has led to tougher competition in a context of constant technological innovation, the repeated merger of enterprises, creation of industrial conglomerates and relocation of production.

Simultaneously, it may be mentioned very important processes of regional integration. The monetarism has been reaffirmed as an effective means of combating the inflation, and went hand in hand with budgetary reduction policies and the influence of the International Monetary Fund and World Bank over the national economic and financial policies.

The dichotomy persists between the European model of employment and working system from North America, with their differ attitudes about layoffs, the purpose of social protection and difficulties in connection with the reduction at reasonable levels the very high levels of unemployment prevailing in many parts of the world. It has developed the informal sector and the atypical forms of employment, with the proliferation of short-term employment contracts, often through temporary employment agencies, and industrial expansion of export, which often discourages trade unionism.

The above phenomena have a very significant impact and indicate the development of a new approach in the line of work, leading to new directions for collective bargaining. Collective bargaining has become more dynamic, as has consolidated a more flexibility and a deregulation of the labour market. They have gained prestige as new economic policies have begun to stop inflation without limits supported by many countries until now.

Simultaneously, the field of application of collective bargaining in the matter of categories covered has changed in various ways. Although it fell safely in scope, due among other factors, high unemployment and growth of the informal sector, subcontracting and different forms of non-

standard labour relations (which make unionization more difficult), and this deficit was attenuated by a certain tendency of development of collective bargaining in the public service.

Collective bargaining lost, also, some leeway due to the economic successive crisis and obedience of national economic to the economic policies and processes of integration and agreements with the Bretton Woods institutions. From another point of view, the increasingly competition tougher brought by technological innovation and globalization has reduced the influence of sectoral agreements exercised in many countries and increased the importance of collective bargaining at the enterprise level (and at lower levels, as the unit of work, the factory or the workplace), strictly taking into account the criteria of productivity and efficiency.

The validity of ILO collective bargaining principles is confirmed by the large number of ratifications of Convention no. 98, totalling 164 states on 1st of August, 2015 [23], and which have not ceased to grow in recent years. Also, a consideration is that the law and practice in most Member States of the ILO are adapted to the principles of the ILO standards on collective bargaining.

Although the current radical thinking, in recent years, has advocated to abandoning labour law and replacing it with the civil and commercial rules, and some national practices have promoted systems under which individual contracts, agreements with workers that are non-members of unions and collective agreements coexist in areas separate and are on equal footing in the enterprise, these ideas and practices are supported by a minority, had a very limited impact and have not undermined the fundamental principles of collective bargaining globally.

It noted that Convention no. 87 and Convention no. 98 are completed each other. It can be observed, as did some theorists, that the first protects unions against state interference, while the second protects unions against employer interference.

CONCLUSIONS

International Labour Organization through its standards and technical cooperation activities in many countries, played an important role in promoting the collective bargaining and promoted also the development of certain types of negotiated procedures, particularly in a tripartite context.

Its standards and principles developed by its mechanisms of supervision contributed to strengthening universal frame in which collective bargaining should take place where it needs to be viable, efficient and keep their adaptability in times of economic, political and social changes, while ensuring a balance between the parties and opportunities for social progress.

Progressively, the collective bargaining, although intermittently, through bipartite or tripartite agreements managed to cover areas that go beyond determining working conditions and living standards in the sector or enterprise, and, at most, were previously considered to be the exclusive domain of consultations. Thus, in some cases, the collective bargaining has been extended to social and economic policy issues that have an impact on living conditions and reached topics such as employment, inflation, training, social security and provisions of social content.

ENDNOTES

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- (2) Convenția OIM nr. 87 privind libertatea sindicală și apărarea dreptului sindical
<http://www.mmuncii.ro/j33/images/Documente/Legislatie/DialogSocial/ConvnetiaOIM87.pdf>
- (3) ILO: Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries. Report III (Part 1A), International Labour Conference, 86th Session, Geneva, 1998, par. 56-58. p. 16-17.
- (4) Swepston L. Human rights law and freedom of association: Development through ILO supervision. International Labour Review, nr. 2, vol. 137, 1998. p. 170.
- (5) Compte rendu des travaux. CIT, 30^e session 1947, Genève: BIT, 1948, p. 553.
- (6) La liberté syndicale: recueil de décisions et de principes du Comité de la liberté syndicale du Conseil d'administration du BIT. Genève : BIT, 2006, par. 226 // http://www.ilo.org/public/english/standards/reln/info/translatns/pdf/digest-2006_fr.pdf

- (7) La Hovary C. *Les droits fondamentaux au travail*. Paris, 2009. p. 62.
- (8) Etude d'ensemble: liberté syndicale et négociation collective. BIT, 1994, p. 68 ; *La liberté syndicale: recueil de décisions*. BIT, 2006, par. 272//
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- (10) Rapport de la Commission d'experts pour l'application des conventions et recommandations. CIT, 92^e session, Partie IA. Genève, BIT, juin 2004, p. 51.
- (11) *La liberté syndicale: recueil de décisions*. BIT, 2006, par. 271. //
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- (14) Swepston L. *Human Rights Law and Freedom of Association: Development through ILO Supervision*. *International Law Revue* nr. 169, 1998. p. 177.
- (15) Betten L. *International Labour Law*. The Netherlands: Kluwer Law and Taxation Publisher, 1993. p. 67.
- (16) Review of the annual reports under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work. 2001 (19.04.2005) // http://www.ichrp.org/files/reports/31/120b_report_en.pdf
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