

The ILO law and the freedom to strike

Jean-Michel Servais¹

Strike certainly constitutes one of the most complex phenomena regulated by labour law, one of the most difficult to grasp in all its dimensions. Infrequently rational arguments are so much mixed with others of an ideological or psychological nature. Strike can have a revolutionary flavour and work against social and production relations; this is anathema to the authorities, even if they are not totalitarian.

Trade union leaders and democratic lawmakers have sought, with uneven success, to master and to incorporate, the former into their strategy, the latter into their policies and into their laws, the form of direct action known as a strike, which more often than not expresses an irritation, a refusal to work, a spontaneous revolt against what are deemed to be unacceptable employment conditions. The laws governing industrial disputes depend on the political system and vary considerably throughout the world². Quite often, collective conflict between employers and wage earners is seriously restricted and even unlawful.

Strikes come in many forms, depending on the country and the times. They are a freedom in some instances (in that this type of work stoppage does not result in criminal penalties, a fine or prison, but leaves the question of contractual responsibility intact). More often than not they are now a right (and therefore, except in certain circumstances, the employer cannot invoke a fault to break off the labour relationship nor take other punitive measures). Strikes may be a means of action only trade unions are authorized to take (Sweden) or recognized for individual workers (France). In some cases they are an exceptional measure the workers can invoke when the employer does not fulfil its obligations. They may be allowed only in the classic form or extended to cover work slowdowns, rotating strikes, work-to-rule, boycotts and other kinds of direct action.

Contrary to other universal or regional instruments, Conventions No. 87 on freedom of association and protection of the right to organize, 1948 and No.98 on the right to organize and collective bargaining, 1949 of the International Labour Organization (ILO) contain no provisions on strikes³. Some other ILO instruments refer to labour conflicts as the

1 Visiting Professor at Liège (Belgium) and Gerona (Spain) Universities, Former Director at the International Labour Organisation (ILO), Honorary President of the International Society for Labour Law and Social Security.

² O. Kahn-Freund and B. Hepple, *Laws against strikes*, London, Fabian Society (Fabian research series 305), 1972; R. Blanpain and R. Ben-Israel (eds.), « Strikes and Lock-out in Industrialized Market Economies », *Bulletin of Comparative Labour Relations*, no 29, 1994.

³ Canada has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). It has not ratified the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Labour Relations (Public Service) Convention, 1978 (No. 151), nor the Collective Bargaining Convention, 1981 (No. 154).

Unemployment Provision Convention, 1934 (No. 44), Article 10; the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), paragraphs 4, 6 and 7; the Social Security (Minimum Standards) Convention, 1952 (No. 102), Article 69; the Abolition of Forced Labour Convention, 1957 (No. 105), Article 1.

Fear that, in one way or another, the freedom of relations between employers' and workers' organizations and the possibilities for direct action would be restricted seems to be one of the main reasons why so few ILO standards have been adopted on the settlement of industrial disputes⁴. The same may be said of national law, in countries like Belgium or Germany, where the legitimate use of collective action is based on precedents, not on legislation.

The ILO organs of control have had numerous occasions to take a position on the subject. They have built up a body of principles⁵, recognizing that the right to strike constitutes an intrinsic corollary to the right to organize and a fundamental right of the workers and of their organizations. They have allowed some restrictions that also figure in a variety of ways in many national law and regulations. Employers have contested the extension given to the right to strike⁶, but not its very existence.

This paper focus on the interpretation and developments of the general recognition of the right collectively to stop work as it has been made by the ILO supervisory bodies for individual countries or in particular cases. The first part reviews their decisions on the right to strike, especially the ones adopted by the Governing Body Freedom of Association Committee (CFA)⁷. The second part examines the few ILO standards dealing with alternative ways of settling collective labour disputes.

I. The ILO principles on direct action, including strike

A. The General Recognition of the right to strike

The CFA has pointed out that Convention No. 87 recognizes the right of trade unions, as organizations of workers set up to further and defend their occupational interests (Article 10), to formulate their programmes and organize their activities (Article 3); this means that unions have the right to negotiate with employers and to express their views on economic and social issues affecting the occupational interests of their members. This constitutes the basis for the

⁴ See also R. Ben Israel, *International Labour Standards. The case of strike*, Deventer, Kluwer, 1988, p.46.

⁵ In accordance to Article 27 of the ILO Constitution any question or dispute relating to the interpretation of a Convention shall be referred for decision to the International Court of Justice. The conclusions of the experts or representative bodies have been accepted worldwide, but do not have the legal authority of a court judgement. There is no decision of the International Court of Justice regarding the right to strike.

⁶ A. Wisskirchen and C. Hess, *op. cit.*, pp. 35–36; see also J.-M. Verdier, 'Débat sur le droit de grève à la Conférence internationale du Travail', *Droit social*, No. 12, Dec. 1994, pp. 968–971.

⁷ When there is no other indication, the principles mentioned below result from the decisions of the CFA. They are recorded in ILO, *Freedom of Association. Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th (revised) edition, Geneva, 2006, §§ 520 *et seq.*

Committee's position that the right to strike is one of the legitimate and indeed essential means available to workers for furthering and defending their occupational interests⁸.

Nevertheless it is regarded as such only in so far as it is utilized as a means of defending and promoting those interests. Purely political direct action and strikes decided systematically long before negotiations take place do not fall within the scope of the protection.

Trade unions should however be able to have recourse to protest strikes, in particular where aimed at criticizing a government's economic and social policy. Their objective may go beyond a concern for better working conditions or collective claim of an occupational nature, and seek solutions to problems posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and standards of living. In other terms, the right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement: workers and their organizations should be authorized to express in a broader context their dissatisfaction as regards economic and social matters affecting their members' interests, even if it is often difficult to distinguish between the political and occupational aspects of a strike. Strikes at the national level, even general ones, are within the normal fields of activity of trade unions organizations.

Making the right to call a stoppage of work the sole preserve of trade unions organizations is compatible with the standards of the Convention. The fact that collective action is called for recognition of a union is nevertheless a legitimate interest. Workers and their organizations should also be allowed to call for industrial action in support of multi-employers contracts.

Employees should be able to launch a sympathy action provided that the initial strike they are supporting is itself lawful. The ILO Committee of Experts for the application of Conventions and Recommendations (Committee of Experts) has confirmed that they are becoming increasingly frequent because of the move towards the concentration of enterprises, the globalization of the economy and the delocalization of work centres. While pointing out that a number of distinctions need to be drawn here (such as an exact definition of the concept of a sympathy strike; a relationship justifying recourse to this type of strike, etc.), it has considered that a general prohibition on this kind of collective action could lead to abuse⁹

The CFA considers that the denial of various forms of collective action (demonstration, wild-cat strikes, tools-down, go-slow, working to rule and sit-down strikes) may be justified only if the action ceases to be peaceful. Taking part in picketing and firmly, inciting other workers to keep away from their workplace cannot be considered unlawful, except when it disturbs public order or is accompanied by violence or coercion of non-strikers whose freedom to work should be respected. In the same manner, the management should be able to enter the premises of the firm, with the help of the police, if necessary¹⁰. The requirement that the pickets can only be set up near an enterprise has been accepted.

⁸ J.-M. Servais, "ILO standards on freedom of association and their implementation", *International Labour Review*, Vol. 123(6), Nov.-Dec. 1984, pp. 765-781.

⁹ B. Gernigon, A. Otero, H. Guido, *ILO Principles concerning the right to strike*, Geneva, ILO, 1998, p.16.

¹⁰ *Ibid.* p.49.

The occupation of the workplace or its immediate surroundings by workers has also been accepted as long as it has been peaceful¹¹.

B. Conditions and restrictions

A general prohibition of collective action can only be justified in the event of an acute, in particular economic, national emergency and for a limited period of time. Responsibility for suspending a strike on the grounds of national security or public health should not lie with the Government, but with an independent body which has the confidence of all parties concerned.

A number of recent cases before the ILO supervisory bodies relating to Canadian provinces concern the denial or restrictions of collective bargaining and of the corollary right to strike in the public sector and other services¹². While a detailed analysis of each of them would go beyond the purpose of this paper, the general principles formulated on those occasions are included in the present review.

Limitations of collective action are accepted in three hypotheses.

Firstly, the recognition of the public servants' trade union freedom does not necessarily imply the right to any collective action. It may be restricted or prohibited when public servants exercise authority in the name of the State, as the custom offices or officials in the administration of justice and the judiciary. On the contrary, public servants in state-owned commercial or industrial enterprises should have the possibility to negotiate collective agreements and enjoy the right to strike, provided that they do not fall within the second hypothesis.

Secondly, the same limitations may apply to employees working in public or private services that are considered as essential, the term being interpreted in a strict sense. The criteria consists in the existence of a clear and imminent threat to the life, personal safety or health of the whole "or part of the population". The highly controversial question at issue here is the extension of the right to strike. No need to add that it has been eagerly discussed within the ILO representative bodies like the Conference Committee on the application of standards. The employers' and the workers' groups have come most of the time with totally different views. Solutions have been found on a case by case basis. It means in practice that the ILO definition of the essential services depends to a large extent on the particular circumstances prevailing in the country. Moreover, its concept is not absolute, in the sense that a non-essential service may become essential if the freezing of operations lasts beyond a certain

¹¹ *Ibid.*, p.12 ; ILC, 98th session (Geneva, 2009), *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), ILO, Geneva, 2009, p.162.

¹² Case no 2467 (Canada/Quebec), report no 344, ILO Official Bulletin, vol. XC, 2007, Series B, no1, §§ 461-587; cases no 2314 and no 2333 (Canada/Quebec), report no340, *ibid.*, vol. LXXXIX, 2006, Series B, no1, §§ 373- 432; case no 2405 (Canada/British Columbia), report no340, *ibid.*, §§ 318- 338 and report no343, *ibid.*, no3, §§ 433-457; case no 2430 (Canada/Ontario), report no343, *ibid.*, §§ 339- 363; case no 2324 (Canada/British Columbia), report no 336, vol. LXXXVIII, 2005, Series B, no1, §§ 233- 284; case no 2277 (Canada/Alberta), report no 333, vol. LXXXVII, 2004, Series B, no1, §§ 240- 277; report no 337, no2, vol. LXXXVIII, 2005, Series B, no2, §§ 343- 360; case no 2349 (Canada/ New Foundland and Labrador), report no 337, *ibid.*, §§ 361- 407; cases no 2343, no 2401, no 2403 (Canada/Quebec), report no 338, *ibid.*, no3, §§ 536-603; case no2257, report no 335, vol. LXXXVII, 2004, Series B, no3, §§ 412- 470; case no 2305 (Canada/Ontario), report no 335, *ibid.*, §§ 471- 512. See B. Langille, "Can We Rely on the ILO?" *Canadian Journal of Labour and Employment Law*, 2007, vol. no 13; " B. Etherington, " The B.C. Health Services and Support-Decision – The Constitutionalization of a Right to bargain collectively in Canada:where did it come from and where it lead?", *Comparative Labour Law and Policy Journal*, vol.30(4), summer 2009, pp.740-741.

time or extends beyond a certain scope: whenever a total and prolonged strike in a vital sector of the economy might cause a situation in which the life, health or personal safety of the population might be endangered, and only in that case, a back-to-work order might be lawful, if applied to a specific category of staff in the event of a strike whose scope and duration could cause such a situation¹³.

The following has been considered to be essential services: the police and the armed forces; the hospital and health sectors; the fire-fighting services; public or private prison services; water supply and electricity services; the telephone service; the provision of food to pupils of school age and the cleaning of schools; air traffic control. Even in essential services, certain classes of personnel, such as the labourers and gardeners, should not be deprived of that right because the possible interruption of their functions does not, in practice, have any bearing on people's life, personal safety or health¹⁴.

On the contrary, the following were not considered as such: radio and television; the education sector (except principals and vice-principals); the petroleum sector; airlines pilots, ports, railway, metropolitan transport and transport generally; refuse collection services (except if it exceeds a certain duration or extend); production, transport and distribution of fuel; postal services; computer services for the collection of excise duties and taxes; banking; refrigeration enterprises; department stores; hotel services; agricultural activities, the supply and distribution of foodstuffs or alcohols; pleasure parks and casinos. The possible long-term consequences of a strike in the teaching sector did not justify a prohibition¹⁵.

Employees deprived of the right to take direct action must have appropriate guarantees to safeguard their interests: a corresponding denial of the right of lockout, provision of joint conciliation or mediation proceedings and, only where it fails, the provision of joint arbitration machinery. The proceedings should respect certain requirements as will be examined later on.

Thirdly, in order to avoid damages which are irreversible or out of all proportion to the occupational interests of the parties to the dispute, as well as damages to third parties, the authorities could establish a system of minimum service in services which are of public utility rather than impose an outright ban on strikes, which should be limited as just explained¹⁶. It may be put in place in essential services, in fundamental public services or in an acute national crisis endangering the normal living conditions of the population (and confined to operations that are strictly necessary to avoid the danger).

Again, the lack of consensus on a precise definition of those services and circumstances within the ILO representatives bodies have led to conclusions on a case by case basis. Minimum operational services have been accepted in ferry services (in view of the difficulties and inconveniences for the population living on islands along the coast¹⁷); ports; underground railway's activities; railways services; underground transport enterprises; transportation of passengers and commercial goods; postal service; refuse collection service; the Mint;

¹³ Case no 2467, *op. cit.*

¹⁴ Cases no 2343, no 2401, no2403 and case no 2277, *op. cit.*

¹⁵ Case no 2305, *op. cit.*

¹⁶ See ILC, 98th session (Geneva, 2009), *op. cit.*, p.53.

¹⁷ Case no 2324, *op. cit.*

education sector (for regular basic education¹⁸ and in cases of strikes of long duration¹⁹); the Animal Health Division (in the face of an outbreak of a highly contagious disease).

In those cases, the trade unions should be in a position to participate, along with the employers and the public authorities, in defining the minimum service. The measures should be established clearly, applied strictly and made known to those concerned in due time. Any disagreement as to the number and duties of the workers concerned should be settled by an independent body and not by the ministry involved. A definitive ruling on whether the level of minimum services is indispensable or not, made in full knowledge of the facts, can be pronounced only by the judicial authorities, in so far as it depends, in particular, upon a thorough understanding of the structure and functioning of the establishments concerned and of the real impact of the strike action.

The ILO's supervisory bodies have also allowed restrictions to collective labour stoppages for reasons of security in companies. The necessary staff for the safety of machinery and equipment and the prevention of accidents may be obliged to work.

Finally, they have agreed with a decision to suspend collective action for a reasonable ("cooling off") period so as to allow the parties to seek a negotiated solution through mediation and conciliation efforts. It is possible to require the exhaustion of that procedure before a strike is called on condition that the proceedings are not so complex or slow that a lawful strike becomes impossible or loses its effectiveness²⁰. Strikes may also be prohibited while a collective agreement is in force²¹.

Not always does national law restricts or prohibits the use of strike, it also imposes conditions to be fulfilled in order to render a strike lawful. Those requirements should be reasonable, and in any event not be so complicated as to make practically impossible to declare a legal one.

The obligation to give prior notice to the employer before calling a strike does not undermine the principles of freedom of association. National law should not impose that the notice mentions the duration of the strike, as workers and their organizations should be able, if they so wish, to call an indefinite action²².

The requirement of a majority vote of all workers involved in order to declare a strike is excessive and could hinder the possibility of carrying it out, particularly in large enterprises. Nevertheless, the obligation to observe a certain quorum and to take the decision by secret ballot may be considered acceptable. The same can be said of the requirement to hold a second vote if a strike has not taken place within the three months of the first vote. Legislation may make the exercise of the right to strike subject to the agreement of a certain percentage of the workers, regardless of their union membership²³. In one case where the government had consulted the workers in order to determine whether they wished the strike to continue or be called off, the organization of the (secret) ballot had been entrusted to a permanent, independent body; the CFA has nevertheless emphasized the desirability of

¹⁸ See ILC, 98th session (Geneva, 2009), *op. cit.*, p.149.

¹⁹ Case no 2305, *op. cit.*

²⁰ *Ibid.*, p.119.

²¹ See below.

²² *Ibid.*, p. 125.

²³ B. Gernigon, A. Otero, H.Guido, *op. cit.*, p.11.

consulting the representative organizations with a view to ensuring freedom from any influence or pressure by the authorities.

C. Interference by Public Authorities

Responsibility for declaring a strike illegal should not lie with the government, but with an independent body.

The use of military and requisitioning orders to break a strike over occupational claims is only acceptable when these actions aim at maintaining essential services in circumstances of the utmost gravity. Different is the situation where an essential public service such as the telephone service, is interrupted by an unlawful strike; the government may have then to assume the responsibility of ensuring its functioning in the interest of the community and, for this purpose, may consider it expedient to call in the armed force or other persons to perform the duties which have been suspended and to take the necessary steps to enable such persons to be installed in the premises where such duties are performed.

While workers and their trade unions have an obligation to respect the law of the land, the police intervention in the course of strike movements should be limited to the maintenance of law and order. The intervention should be in proportion to the threat to public order; governments should give adequate instructions so as to avoid the danger of excessive violence in trying to control demonstrations that might undermine public order. Measures taken to enforce the execution of a court decision affecting strikers should observe the elementary guarantees applicable in any system that respects fundamental public liberties.

The closure of the establishment in the event of a strike, as provided for in the law, is an infringement of the freedom of work of the non-strikers and of the management, and disregards the basic needs of the firm in terms of maintenance of equipment and prevention of accidents.

D. Sanctions

The principles of freedom of association do not protect abuses consisting of criminal acts while exercising the right to strike. Penal sanctions should only be imposed where there are violations of strike prohibitions which are themselves in conformity with those principles. All penalties in respect of illegitimate actions linked to strikes should be proportionate to the offence or fault committed.

Salary deductions for days of strike have given rise to no objection, except if they were higher than the amount corresponding to the period of stoppage. The payment should be neither required nor prohibited by statute, but left to the parties concerned. The obligation imposed by a government to do overtime to compensate for the strike may in itself unduly influence its course.

In the same manner, imposing sanctions (such as a closure, liability in damages for any losses incurred by the firm, withdrawal of the check-off facility, facilitating class actions against the trade union²⁴, arrest or deportation of leaders) on unions for leading a legitimate

²⁴ Case no 2467, *op. cit.*

strike is a serious violation of the principles of freedom of association. The non-compliance with a minimum service requirement should not lead to the suspension or the revocation of a trade union's legal status, even though the decision is made by an independent judicial body.

E. Anti – Strike Measures

The CFA has concluded that the hiring of workers to break a strike in a sector which cannot be regarded as essential in the sense defined above constitutes a serious violation of trade unions rights. It has also condemned the threat of dismissal of strikers, the recruitment of underpaid workers and a ban on joining of a trade union in order to break up lawful and peaceful strikes. Those practices may be analysed as an anti-union discrimination, in violation of Article 1 of the ILO Convention N° 98. The same may be said of measures applied to compensate non-strikers by bonuses.

In some countries with the common-law system, strikes are regarded as having the effect of terminating the employment contract, leaving employers free to replace strikers with new recruits; in other countries, when a strike takes place employers may dismiss strikers or replace them temporarily or for an indeterminate period; furthermore, sanctions or redress measures are frequently inadequate when strikers are singled out through some measures taken by the employer (disciplinary action, transfer, demotion, dismissal). In the Committee of Experts' view, legislation should provide for genuine protection in those cases; the issue is particularly serious in the case of dismissal, if workers may only obtain a sum in compensation for damages and not their reinstatement²⁵.

II. ILO Standards on alternative means of settling labour disputes

A. Conciliation, Mediation and Arbitration

Convention No. 151 on labour relations in the public service, 1978 covers not only the right to organize in the public service but also the procedures for determining the terms and conditions of employment. It aims to adapt the general principles of freedom of association to the conditions inherent in the public service. The States are invited to establish institutions of protection and negotiation in accordance with a relatively detailed scheme. It allows exceptions for high-level employees, or employees whose duties are of a highly confidential nature.

Article 7 deals with the full development and utilization of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organizations; it nevertheless allows for the possibility of using other methods enabling representatives of public employees to participate in the determination of those conditions. Article 8 indicates that disputes should be settled through negotiation, or through

²⁵ B. Gernigon, A. Otero, H. Guido, *op. cit.*, p. 38.

independent and impartial machinery such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved.

The CFA has accepted that financial considerations may be taken into account in the public service, as long as it does not go too far, recognizing that its special characteristics justify some flexibility in applying the principle of autonomy of the parties to collective bargaining²⁶. The reservation of budgetary powers to the legislative authority, in the case of public services should not have the effect of preventing compliance with the terms of awards handed down by the compulsory arbitration tribunal.

Aside from those standards, there is basically at ILO just one (brief) recommendation (No. 92) on voluntary conciliation and arbitration, 1951 and it is limited to general principles. The matter is left to the discretion of the parties concerned. The final paragraph of the Recommendation underlines that none of its provisions may be interpreted as “limiting, in any way whatsoever, the right to strike”. In the view of the Committee of Experts, compulsory arbitration to end a collective dispute is only acceptable if this is at the request of both parties involved²⁷, or if the strike in question may be restricted, even banned. Provisions which allow for one of the parties to refer a dispute to compulsory arbitration where a work stoppage exceeded 60 days, seriously limit the means available to trade unions rights²⁸.

The Recommendation provides for the establishment of voluntary conciliation machinery to assist in the prevention and settlement of industrial disputes. It proposes that the procedure should be set in motion either by one of the parties or by the voluntary conciliation authority. If a dispute has been submitted to conciliation procedure with the consent of all the parties concerned, the latter should be encouraged to abstain from strikes and lockouts while conciliation is in progress. The same holds true if they have agreed to arbitration for final settlement; they should also be encouraged to accept its award. The proceedings should be expeditious and free of charge. When the procedure compensated legitimate restrictions to the right to strike, the CFA has agreed however on cost that are reasonable and do not inhibit the ability of the parties, in particular those with inadequate resources, to make use of the services²⁹.

In order to gain and retain the parties’ confidence, any arbitration system should be truly independent and the outcomes should not be predetermined by legislative criteria. When especially the right to strike is restricted or prohibited, adequate protection should be given to the workers to compensate for the limitation thereby placed on their freedom of action. It should take the form of impartial, rapid and effective conciliation, mediation and arbitration proceedings in which the parties concerned can take part at every stage and in which the award, once made, are fully and promptly implemented³⁰.

²⁶ Case no 2305, *op. cit.*

²⁷ ILC, 98th session (Geneva, 2009), *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), ILO, Geneva, 2009, p. 77.

²⁸ ILC, 97th session (Geneva, 2008), *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), ILO, Geneva, 2008, p. 88 (Convention no87/Canada).

²⁹ ILO: *Freedom of Association. Digest of Decisions...*, *op. cit.* § 602.

³⁰ Case no 2277, *op. cit.*; ILC, 81st session (Geneva, 1994), *Freedom of Association and Collective Bargaining*, Report III (Part 4B), ILO, Geneva, 1994, §§136–176; ILO, *Freedom of Association. Digest of Decisions*, *op. cit.*, §§ 569 and 595 *et seq.*; see also A.M. Trebilcock (ed.), *Remedies and sanctions in industrial action; preliminary relief*, Geneva, ILO, 1995.

It is essential that all the members of the conciliation, mediation and arbitration institutions should not only be impartial, but, if the confidence of both sides, on which the successful outcome even of compulsory arbitration really depends, is to be gained and maintained, they should also appear to be impartial both to the employers and to the workers concerned. The appointment by a minister of five members of an arbitration tribunal calls into question the independence and impartiality of such a body, as well as the confidence of the parties in such a system. The representative organizations of employers and workers should, respectively, be able to select members of the tribunal who represent them.

When the ILO supervisory bodies have accepted restrictions or a prohibition of the right to strike, they have taken no position as to the desirability of conciliation over mediation as both are means of assisting the parties in voluntarily reaching an agreement. Nor do they take a position as to the desirability of a separated conciliation and arbitration system over a combined mediation-arbitration one.

B. Grievances

Another ILO recommendation, adopted in 1967, deals specifically with consideration of grievances within the undertaking with a view to settling them. This recommendation, No. 130, provides that any worker, acting individually or jointly with other workers, should have the right to submit grievances without suffering any prejudice whatsoever as a result and to have such grievances examined pursuant to an appropriate procedure. The instrument specifies that its provisions are not applicable to collective claims aimed at the modification of terms and conditions of employment.

The Recommendation states that, as far as possible, grievances should be settled within the undertaking itself according to effective procedures which are adapted to the conditions of the country, branch of economic activity and undertaking concerned and which give the parties concerned every assurance of objectivity. Where all efforts to settle the grievance within the undertaking have failed, there should be a possibility for final settlement through i) procedures provided for by collective agreement, such as joint examination of the case by the employers' and workers' organizations concerned or voluntary arbitration by a person or persons designated with the agreement of the employer and worker concerned or their respective organizations; ii) conciliation or arbitration by the competent public authorities; iii) recourse to a labour court or other judicial authority; iv) any other procedure which may be appropriate under national conditions.

The instrument takes the precaution of adding that when procedures for the examination of grievances are established through collective agreements, the parties to the agreement should be encouraged to include in it a provision renouncing direct action: they should undertake, during the period of validity of the agreement, to promote settlement of grievances under the procedures provided and to abstain "from any action which might impede the effective functioning of these procedures". This enshrines the obligation of social peace provided for by the law or established by the case-law of many States. That obligation may, as we know, be relative or absolute.

The CFA has accepted that strikes be prohibited while a collective agreement is in force. It has asked the restriction be compensated for by the right to have recourse to impartial and rapid mechanisms, within which individual or collective complaints about the interpretation or application of collective agreements can be examined. This type of mechanism not only

allows the inevitable difficulties which may occur in this respect to be resolved while the agreements are in force, but also has the advantage of preparing the ground for future rounds of negotiations, given that it allows problems which have arisen during the period of validity of the document to be identified³¹.

No provision of the Recommendation restricts the worker's right to apply directly to the competent labour authority, to a labour court or to another judicial authority. The solution of a legal conflict as a result of a difference in interpretation of a legal text should be left to the competent courts. The CFA has considered that a prohibition of strikes in such a situation does not constitute a breach of freedom of association³².

Concluding remarks

A few concluding observations can be drawn from the ILO accumulated experience³³. The first concerns the importance of the interplay between freedom of association, the free collective bargaining and the proper functioning of a dispute resolution system. It implies in particular a real involvement of the social partners in preventing and resolving labour conflicts. A second and related issue relates to the limited capacity of any democratic government to prevent and resolve alone collective labour conflicts. Lastly, while it would be presumptuous to promote a best system of dispute resolution as countries deeply differ in their socio-economic, political and cultural environment, it may however be underlined that a sophisticated mechanism that secures and preserves peace and cooperation between the actors of the social scene and guarantees easy access, transparency and fair outcomes, matters as much, if not more, than a machinery to solving the actual conflict.

³¹ ILO: *Freedom of Association. Digest of Decisions...*, *op. cit* § 533.

³² *Ibid.* § 532.

³³ See still recently ILO, *Collective Dispute Resolution through Conciliation, Mediation and Arbitration: European and ILO Perspectives*, High-Level Tripartite Meeting on the Settlement of Labour Disputes through Mediation, Conciliation, Arbitration and Labour Courts, Nicosia, Cyprus, October 18th-19th, 2007, http://www.ilo.org/public/english/region/eurpro/geneva/download/events/cyprus_2007/cyprus_dialogue.pdf