

TRADE UNIONS AND COLLECTIVE BARGAINING IN INTERNATIONAL LAW: REGULATION IS NOT THE PROBLEM

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INTRODUCTION

- New labour scenarios (emergence of new forms of employment, appearance of new business models, disruptive impact of new technologies, etc.) seem to have created a hostile environment for the action of trade unions and their main means of action: collective bargaining:
 - Constant trend towards the decrease in the rate of union membership worldwide and a general fall in citizens' trust in this figure.
 - Developing of alternative formulas for dialogue with workers such as direct negotiation with the entire workforce or with provisional commissions specifically chosen for the occasion.
- Can we find in international law answers to these challenges?

INTERNACIONAL BILL OF HUMAN RIGHTS

- **Universal Declaration of Human Rights:** “Everyone has the right to form and to join trade unions for the protection of his interests (art. 23.4)”
- **Characteristics:**
 - Connected with other human rights related with labour relations: right to work, right to favourable work conditions, favourable remuneration, etc.
 - Specific right for labour relations, different from general right to freedom of association (art. 20.1). Specific term: “trade union”.
 - Two dimensions: a) associative (form and join trade unions), b) purpose oriented (for the protection of his interest)

INTERNACIONAL BILL OF HUMAN RIGHTS

- “Purpose oriented” is the key concept: trade unions need instruments to protect the interest of his members. Without that instruments, create or join a trade union has no sense.
- Trade union action is a main component of freedom to form and join trade unions.
- Does that include collective bargaining?
- ILO has not doubts about that.

INTERNACIONAL LABOUR ORGANIZATION

- **Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)**
 - Art. 2: “Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation” (associative dimension)
 - Art. 3. “Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to **formulate their programmes**. (trade union action dimension)

INTERNACIONAL LABOUR ORGANIZATION

- **Right to Organise and Collective Bargaining Convention, 1949 (nº. 98).** Clear connection between both concepts is expressed in the title itself.
 - Art. 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' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements”: collective bargaining is recognized as part of freedom of association and as one of the most important instruments of action that organizations of workers (and employers) can use.

INTERNACIONAL LABOUR ORGANIZATION

- **Collective Bargaining Convention, 1981 (No. 154)**
 - Art. 2: “For the purpose of this Convention the term collective bargaining extends to all negotiations which take place between an employer, a group of employers or one or more **employers' organisations**, on the one hand, and one or more **workers' organisations**”. Trade unions have a leading role to play in collective bargaining.
 - “Leading role” doesn't mean “exclusive”. Other workers representatives can participate in collective bargaining. Art. 3 allows to extent it to “elected representatives” as defined in the Workers' Representatives Convention, 1971 (No. 135). In that case, “appropriate measures shall be taken, wherever necessary, to ensure that the existence of these representatives is not used to undermine the position of the workers' organisations concerned”.

INTERNACIONAL LABOUR ORGANIZATION

- **Committee of Freedom Association:**
 - “The right to bargain freely with employers with respect to conditions of work **constitutes an essential element in freedom of association**, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent” (Comp. §1232). Actually, “one of the **main objects** of the guarantee of freedom of association is to enable employers and workers to combine to form organizations independent of the public authorities and capable of determining wages and other conditions of employment by means of freely concluded collective agreements” (Comp. §1233).
 - ILO standards “**stress the role of workers organizations as one of the parties in collective bargaining.**” (Comp. §1344).”Where there exist in the same undertaking both trade union representatives and elected representatives, appropriate measures are to be taken to **ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned**” (Comp. §1345).

COUNCIL OF EUROPE

- **European Convention on Human Rights:**

- Everyone has the right to peaceful assembly and the right to freedom of association including the right to form and to join trade unions for the protection of its interests (art. 11.1)
- Characteristics:
 - The right is formulated as part of the general right to freedom of association (“including”) not as a specific right for labour relations
 - There is a “purpose oriented” dimension (“for the protection of its interests”) but weaker than in the International Declaration on Human Rights (there is not connection with other “social rights”)

COUNCIL OF EUROPE

- **Judgments of the ECHR (evolution influenced by ESC and ECSR):**
 - **Case of Swedish Engine Drivers' Union (1976):** The phrase “for the protection of his interest” is not redundant. “These words, **clearly denoting purpose**, show that the **convention safeguards freedom to protect the occupational interest of trade union members by trade union action**, the conduct and development of which the Contracting States must both permit and make possible”. Article 11 **does not guarantee any particular treatment of trade unions or their members**, by the State, such as the right that the State should conclude any given collective agreement with them”.
 - **Case of Demir and Baykara (Grand Chamber, 2008):** “having regard to the developments in labor law, both international and national, and to the practice of Contracting States in such matters, the **right to bargain collectively with the employer has, in principle, become one of the essential elements of the right**”

ABOUT WORKERS COVERED BY RIGHT TO FREEDOM OF ASSOCIATION (CFA)

- “Adverse impact of **insecure forms** of employment on trade union rights and the protection of workers rights, especially in the case of repeatedly **renewed short-term temporary contracts; outsourcing**, (...). Some of these modalities often deprive workers of access to freedom of association and collective bargaining, **especially when they conceal a genuine and ongoing labour relationship**. Some forms of job insecurity can also deter workers from joining trade unions” (Comp §326)
- “The criterion for determining the persons covered by that right, therefore, is **not based on the existence of an employment relationship**, which is often non-existent, for example in the case of agricultural workers, **self-employed** workers in general or those who practice liberal professions, who should nevertheless enjoy the right to organize (Comp. §387).

CONCLUSIONS

- Trade union freedom is a human right that goes far beyond simple association and includes all necessary means for the defense of the professional interests of workers and employers, among them notably collective bargaining.
- Trade union is for international regulations, a priority actor for the defense of professional interests. The use of other mechanisms for representation and negotiation of workers and employers is not prohibited, but always with the guarantee that these are not used to the detriment of the position of the unions.
- The formulation of the right is, in addition, very open and allows its extension to other forms of employment not formally considered as dependent work, but which are de facto dependent.
- That gives it a remarkable potential of adaptation.

CONCLUSSIONS

- Problem is not in the regulation. Where it is then?
 - Behind the apparently common trend characterizing OECD countries, there appears to be a collection of country-specific stories. Within countries, trade union density decline is likely to be the cumulative product of a variety of smaller episodes of decline at particular points in time, driven by particular causes. (OECD, 2019, *Negotiating our way out*)
 - Support to democratic values is declining all around the world
 - Do we believe in social dialogue and in industrial democracy? If affirmative, role of trade unions and employers organizations must be vindicated

NEGOCIA2 Project: “Collective bargaining and social dialogue for a sustainable work management”
(PID2022-137853NB-I00), financed by
MCIN/AEI/10.13039/501100011033/ FEDER, EU

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