

CHAPTER IX

FINAL OBSERVATIONS

482. In this last chapter, the system of protection of wages as enshrined in Conventions Nos. 95 and 173 with the corresponding Recommendations is reviewed from the standpoint of problems or difficulties which their implementation in national laws and their practical application pose to some countries and which therefore inhibit or impede their ratification. The chapter follows this up with some concluding remarks highlighting more specifically and directly the importance of the system of protection, the extent of the obligations created by the instruments, the continued relevance of the system, its inadequacies and shortcomings.

Difficulties of application

483. The Committee notes that most governments have stated that no difficulties are encountered in the implementation of the instruments under review in national law and practice. Among the few reports received in which mention was made of specific problems related to the application of the Convention, the Government of Australia reported that for certain states and territories, such as Western Australia and Tasmania, the impediments to ratifying the Convention arise because there are few legislative provisions dealing explicitly with the subject covered by the Convention. More specifically, the Government of Australia has stated that in these two states there is no legislation ensuring that works stores operated by the employer are not operated for profit, requiring the payment of wages on working days at or near the workplace or providing for the payment of wages in hard currency only. Moreover, the Government of Australia has reported that, in the case of the Northern Territory, the payment of wages by electronic fund transfer (EFT) and by cheque, which does not appear to be consistent with Article 3 of the Convention, is common practice and therefore represents a further obstacle to ratification.

484. The Government of Japan has stated that, while the provisions of the Convention are for the most part given effect to by national labour laws, certain differences exist, particularly as regards the requirements of the Convention concerning the partial payment of wages in kind, the prohibition of payment in the form of alcoholic drinks and the prohibition of payment in certain places. For

the Government of Namibia, the requirement of the Convention that wages be paid only in legal tender and not in promissory notes, vouchers or coupons is not reflected in the national legislation and therefore constitutes an obstacle to ratification.

485. A certain number of workers' and employers' organizations made comments concerning the difficulties experienced in the practical application of the Convention. Some of these comments relate to persistent problems of the deferred payment of wages. For instance, the Federation of Trade Unions of Belarus stated that over the period from September 2001 to May 2002, wage arrears amounted to 7.5 per cent of the country's total wage bill in September 2001, 13.9 per cent in April 2002 and 11.5 per cent in May 2002. Similarly, according to information supplied by the Federation of Trade Unions of Ukraine, some 2.7 million workers are still affected by arrears, with 32.9 per cent of them experiencing delays in the payment of wages in excess of six months. The Confederation of Employers of Ukraine noted that the wage arrears decreased in 2001-02 by 42 per cent in state-owned enterprises and by 54 per cent in the private sector, and has requested the Office to consider the possibility of providing technical assistance and advice on experience of other countries in this matter.

486. The Viet Nam Chamber of Commerce and Industry (VCCI) observed that, although the national legislation is relatively consistent with the requirements of the Convention, there is a lack of information and the penalties prescribed by law for those who violate salary regulations are not being applied. At another level, the Austrian Federal Chamber of Labour (BAK) reported that, despite the existence of appropriate judicial machinery, significant difficulties regularly arise under the prevailing rules concerning the burden of proof in connection with claims such as remuneration for overtime and additional hours worked, which are often very difficult to assert.

487. Two organizations referred to the wage conditions of workers employed in export processing zones (EPZs). The Confederation of Free Trade Unions of Cape Verde (CCSL) expressed the view that the ratification of Convention No. 95 would be advisable since the wage protection situation in Cape Verde urgently requires the adoption of legal and judicial measures better adapted to current realities. By way of example, the CCSL reported that since May 1994 workers employed in enterprises in EPZs have been excluded from the scope of all legal instruments pertaining to the protection of wages. The precarious conditions of employment of workers in EPZs are also alluded to in the observations of the Federation of Progressive Unions of Mauritius. According to the latter organization, workers employed in the EPZ sector can be dismissed without any notification, as the relevant section of the Labour Act on the "reduction of the workforce" is not applicable to workers in EPZs.

Moreover, in the event of dismissal, such workers are frequently not even paid the wages due.

488. Finally, one organization referred to the deterioration of national conditions relating to the protection of wages as a result of structural economic reforms. Indeed, the New Zealand Council of Trade Unions (NZCTU) stated that the collapse of the award system, the development of sweatshops and other labour market practices during the period of structural economic reform have had a definite impact on national practice in respect of wage protection.

Prospects for ratification

489. In their replies, governments expressed different views as to whether they intend to take any steps for the ratification of the Convention in the immediate future. The Government of Finland, for instance, reported that the ratification of Convention No. 95 is under consideration as part of an overall examination of the prerequisites for the ratification of all the ILO Conventions that the country has not yet ratified. The Government of Kuwait stated that it is currently giving careful consideration to the possibility of formally accepting the Convention, without however indicating a time frame. The Government of Seychelles reported that it may consider ratifying the Convention in the future as it believes that it would not encounter any practical difficulties in applying its provisions, while the Government of Viet Nam stated that ratification required consideration by the competent authorities and might occur at an appropriate time.

490. On the other hand, the Governments of Denmark and Sweden reported that Convention No. 95 and Recommendation No. 85 are considered as partly addressing phenomena which are irrelevant to the present-day conditions in the Danish and Swedish labour markets and that Convention No. 95 should not therefore be ratified. Several Swedish employers' and workers' organizations have concurred with the Government's view, stating that there is no reason to ratify Convention No. 95, which would amount to abandoning the long-standing tradition of regulating matters such as the form and manner of the payment of wages and the conditions and limits of wage deductions, exclusively through collective agreements or individual contracts.¹ Similarly, the Governments of Kenya, Luxembourg, Singapore and Thailand reported that they are not considering ratifying the Convention for the time being.

¹ Swedish Agency for Government Employers; Confederation of Swedish Enterprise; Swedish Association of Local Authorities; Swedish Confederation of Professional Associations (SACO); Swedish Federation of County Councils; Swedish Confederation of Trade Unions.

491. As regards the reasons invoked for not considering ratification, the Government of Germany stated that it is not possible to ratify the Convention in view of Article 7, paragraph 2, of the Convention since there is no legal basis in German law which could force or even encourage employers to operate services for the benefit of the workers on a non-profit basis. The Government of the United Arab Emirates reported that the main obstacle to ratification is the inadequate administrative infrastructure, as a possible ratification would risk overstressing the limited capacity of the existing labour administration services. The Government of China indicated that there is still some gap between national law and practice and the provisions of the Convention. Furthermore, the Government of Indonesia stated that ratification has not so far been possible as focus has primarily been placed on the application of the ILO core Conventions that have been ratified, while the Government of New Zealand indicated that the ratification of the Convention is not among its current priorities.

492. The Committee notes that some governments provided information on the possibility in the near future of ratifying Convention No. 173, which revises partially Convention No. 95 and contains improved standards on the protection of workers' wage claims in the event of the employer's insolvency. The Government of *Bulgaria* reported that it is currently working on preparing the ratification of Convention No. 173 and the elaboration of implementing legislation, with the assistance of the ILO Office in Budapest. The Government of the *Syrian Arab Republic* reported that, by decision of June 2001, the Council of Ministers decided to submit Convention No. 173 to the National Assembly for ratification. The Government of Zimbabwe announced its intention of ratifying Convention No. 173 in light of the recent amendment introduced to the Insolvency Act. The Government of *Belgium* stated that it anticipates no difficulties in ratifying Convention No. 173. Similarly, the Government of Lithuania reported that, as the national legislation is in the process of being aligned with European Union law, taking into account ILO Conventions and Recommendations, no difficulties are foreseen in ratifying this Convention. In addition, the Government of Luxembourg indicated that Convention No. 173 could be ratified in the context of the measures taken for the implementation of the new Directive 2002/74/EC of the European Parliament and the Council relating to the protection of employees in the event of the insolvency of their employer.

493. A number of governments acknowledged the importance of the provisions of Convention No. 173, but refrained from stating clearly their intentions as to the formal acceptance of that instrument. For example, the Government of Croatia reported that it is currently planning the adoption of special regulations governing the issue of the protection of workers' claims in the event of the employer's insolvency, without specifying whether the ratification of Convention No. 173 is also envisaged. Similarly, the Government of *Honduras* stated that it attaches great importance to the ratification of

Convention No. 173, while the Government of Jordan indicated that the provisions of the Convention will be taken into consideration in any modifications that might be introduced to the relevant legislation in the future. The Government of Seychelles indicated that, after consultation with the social partners and other stakeholders, it may consider ratification of the Convention.

494. On the other hand, the Governments of *Benin*, *Ecuador*, Estonia, *Malaysia*, Namibia, Rwanda and the United Kingdom informed the Committee that the ratification of Convention No. 173 is not envisaged at the present time. Similarly, the Government of *Brazil* reported that no steps are being taken for the ratification of that Convention, while the Government of *Nicaragua* stated that no decision has yet been taken in this respect.

495. The Committee hopes, in view of the fundamental nature of the principles and rights set out in the Protection of Wages Convention, 1949 (No. 95), that governments which are not as yet bound by its terms will give due consideration to the possibility of formally accepting this instrument. It also hopes that a growing number of States will consider favourably the ratification of the Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173), in the coming years and recalls that member States may request the Office's technical and advisory services in this regard.

Concluding remarks

496. Labour legislation is in general developed around the question of wages. Wages are in the epicentre of labour relations, whether individual or collective; the principal aim of collective bargaining is to fix mutually acceptable wage rates, while remuneration is one of the two constitutive elements of the bilateral relationship which is established by the employment contract. Even matters that appear somewhat unrelated at first sight, such as social security regimes or the regulation of working time, are ultimately connected in one way or another to the question of wages. The right to decent remuneration is a corollary to the right to work as enshrined in Article 23 of the Universal Declaration of Human Rights, which provides that "everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection".

497. The Committee welcomes the opportunity to examine for the first time the Protection of Wages Convention and Recommendation, and incidentally also the Protection of Workers' Claims (Employer's Insolvency) Convention, with a view to contributing to a better understanding of the issues and problems which arise under those instruments. It would be difficult to overestimate the importance of the Protection of Wages Convention. Apart from the eight Conventions on fundamental rights at work and two of the four priority

Conventions,² Convention No. 95 is one of the most widely ratified ILO instruments, with a total number of 95 ratifications. This high number of ratifications is a clear reflection of the general level of acceptance of the principles embodied in the Convention. However, nearly half of the member States have not yet ratified it. The Governing Body confirmed in March 1998 that the Convention is up to date and that its ratification should be encouraged. Following this decision, the Committee has undertaken the present survey in order to comment on the precise extent of the obligations arising out of the Convention, assess its continued relevance and shed some light on certain aspects which may have so far impeded ratification.

498. Self-evidently, the Protection of Wages Convention does not focus on the determination of wage levels, the reduction of wage differentials or the promotion of equality of treatment. It does not regulate the systems of wage payment nor does it address other aspects of wages policy. Convention No. 95 offers an anthology of long-standing principles and fair practices which should govern the process of labour remuneration in the course of the employment relationship. It could be said that the Convention states the obvious and that its relevance may therefore be diminishing in a context of economic development and social progress. Yet, unfortunately everyday life proves that the most elementary of the principles codified in the Convention are violated to varying degrees and in different forms in certain countries. It is distressing that the phenomena of deferred payment of wages and illegal practices of wage payment in the form of vouchers or coupons have persisted in recent years in various parts of the world and have in many cases attained alarming proportions.

499. Turning to the application of the protection of wages instruments as a whole, the Committee is in a position to affirm that practically the totality of their provisions are given effect in the law and practice of the overwhelming majority of States. Whether it is the obligation to pay wages in legal tender, the requirement for the direct and regular payment of wages or the need to keep workers informed of their wage conditions, the principles set out in the Convention and the corresponding Recommendation appear to have attained almost universal acceptance.

² The eight Conventions on fundamental rights at work are: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182).

The four priority Conventions are: Employment Policy Convention, 1964 (No. 122); Labour Inspection Convention, 1947 (No. 81); Labour Inspection (Agriculture) Convention, 1969 (No. 129); Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144).

500. *Legal tender: Paying wages in money, not worthless IOUs.* The legal obligation to pay remuneration in lawful money and the corresponding prohibition of the use of coupons, vouchers or similar surrogates for money is the quintessence of wage protection. Yet phenomena such as the use of promissory notes to settle wage debts, and even the use of local government bonds in place of national currency still occur, which proves that the principle enunciated in Article 3, paragraph 1, of the Convention retains all its relevance at both the legal and practical levels.

501. *Cashless methods of the payment of wages: Are bank transfers permissible?* As discussed in paragraph 84, payment of wages by electronic bank transfer is compatible with the letter and spirit of the Convention so long as there is compliance with Articles 5 and 10. The Office has given a number of informal opinions to similar effect which have been sufficiently publicized, and the Committee has never raised the question in its comments of the payment of wages by bank transfer being inconsistent with the Convention. When the issue arose recently in the context of discussions of the Working Party on Policy regarding the Revision of Standards, the same overall conclusion was reached. Therefore, no problem of incompatibility may be feared by reason of such form of payment alone.

502. *Payment of wages in kind: From spirits to stock options.* Some 50 years after the adoption of the Convention, its carefully worded provisions on the payment of wages in kind remain of unflinching relevance. The application of Article 4 of the Convention has over the years occasioned by far the highest number of comments by the Committee. Laws still exist in many countries which tolerate the payment of wages in their entirety in kind, practices consisting of the payment of wages in the form of spirits occasionally come to light, safeguards are not always in place to ensure that goods and services offered in lieu of money wage are appropriate for the worker's household and fairly valued, and arrangements for the payment of wages in kind continue at times to be the subject of individual agreements and not the result of collective bargaining. Moreover, the extensive use of "barter" in cases of liquidity problems and wage arrears has revealed an even more worrying dimension to the risks involved in the payment of wages in kind when this issue is left unregulated. The Committee considers that the payment of wages in kind still represents a potential source of abuse of the wage rights of workers and that the Convention affords a very satisfactory level of protection in this respect.

503. One of the aspects that the Committee has not had the opportunity to examine in any length, as it is not directly addressed in the Convention or specifically referred to in the report form, is the question of "wage packaging", and in particular the modern forms of remuneration, such as profit-sharing and stock options. Recent experience has shown that these new forms of remuneration may benefit employees but may also carry great risks, sometimes

with extremely serious consequences. The Committee is of the view that this is an area in which further study is needed, since the legal framework provided by the Convention is clearly not suited to the regulation of such practices. The Office may wish to propose a number of initiatives to the Governing Body in this regard, as the basis for studying whether a new regulatory approach with a view to achieving a viable balance between income security and speculative forms of remuneration should be developed.

504. *Deductions from wages and the attachment and assignment of wages: The need for clear rules and reasonable limits.* As a framework instrument, the Convention does not seek to regulate the specific conditions under which employers may retain part of the wages owed to employees. It only requires that such conditions be clearly prescribed in national laws and regulations or fixed by collective agreement and, in any event, not left to the free will of the parties. Deductions also have to be kept within limits which permit the worker and his/her family to live decently with the remaining resources. It may be regretted that the Convention refrains from prohibiting certain forms of deductions, such as disciplinary fines, which are in any case relatively uncommon in member States. However, deductions in the form of fines are not explicitly provided for in either the Convention or the Recommendation. The emerging trend in member States to eliminate wage deductions in the form of disciplinary fines is therefore not in conflict with the content of the Convention since the Convention is silent on the point.

505. *Wage protection and insolvency regime: Solid standards, interesting innovations.* Analysis of national law and practice shows that the preferential treatment of workers' claims in bankruptcy proceedings forms an integral part of the bankruptcy legislation in almost every country. The Committee also notes that in many cases national laws have been amended, or are in the process of being amended, to grant workers' wage claims a higher ranking than all other privileged debts, particularly taxes and other claims by the State. In a globalized economy, phenomena such as corporate bankruptcies, company closures and cessation of payments are bound to rise. At the same time, there are those who argue in favour of the elimination of most statutory priorities in bankruptcy or insolvency laws. Under these conditions, the Committee considers it essential to reaffirm the principle of the privileged protection of workers' wage claims in the event of the insolvency of their employer. The process of making insolvency laws more effective should in no event result in such laws becoming socially insensitive. The designation of employees' wages and entitlements as a preferential debt is a keystone of labour legislation in practically every nation and the Committee would firmly advise against any attempt to question such a principle without proposing in its place an equally protective arrangement, such as a wage guarantee fund or an insurance scheme providing a separate source of assets to ensure the settlement of employees' claims.

506. While noting that over the past two years the Office has been requested by certain member States to offer technical advice and assistance in relation to Convention No. 173, and that as a result a number of member States may now be prepared to formally accept that instrument, the Committee requests the Office to maintain its efforts to actively promote Convention No. 173. The Committee has reason to believe that member States are not fully aware of the wide range of options for ratification offered by that instrument, possibly because of its atypical structure, and that a proper information campaign would certainly enhance the prospects of its ratification in the near future.

507. *Wage arrears: Difficulties and dilemmas.* As discussed at some length in Chapter VI above, the disturbing practice of the deferred payment of wages has for some years been affecting a number of countries, especially in Central and Eastern Europe, sub-Saharan Africa and Latin America, and consequently a considerable number of employees. The deleterious effect of this practice on the life of employees must be emphasized yet again, particularly as regards certain States who defer the payment of the remuneration of public servants even though their resources, which they direct towards other uses, would permit their payment: they thereby deliberately choose to place themselves in contradiction with their obligations under the Convention. Their attitude must be severely criticized, as the Committee has already had occasion to do. Moreover, as emphasized above, there are enterprises which take the decision to apply for other purposes funds which should have been used for the payment of their employees' wages. It is not admissible in such cases for States, through their supervisory services, to fail to take vigorous and effective action so as to comply with the Convention and put an end to such blatant abuse. In this respect, the Convention has been instrumental in drawing attention to the wage debt crises in various parts of the world and keeping them under the close scrutiny of the ILO's supervisory bodies. In case there should be any doubt as to the utility of ILO standards, the Committee wishes to recall that, had there be no instrument requiring the regular payment of wages, it would not have been possible for workers' organizations to lodge more than a dozen representations under article 24 of the ILO Constitution over the past 15 years thereby drawing attention at the international level to the serious problems of the deferred payment of wages. The Convention does not, of course, offer ready-made remedies to such systemic failures. It only serves as a reminder of the special nature of wages as the workers' principal, if not sole, means of subsistence, which implies that the regular payment of wages cannot be subjected to the logic of accounting practices and assumes a great significance in its own right. The discussion concerning the periodicity of wage payment also gives the Committee the opportunity to emphasize the crucial role of strict enforcement above and beyond mere legislative conformity, and the need for sustained government action and open social dialogue. Moreover, the Committee cautions against recourse to unrestrained payment in kind or the use of money surrogates, such as

bonds and vouchers, as a solution to problems of cash shortages and accumulated wage arrears.

508. *Keeping workers informed: The need for transparency and certainty.* Another of the long-standing principles laid down in the Convention is the obligation of employers to keep workers informed of the wage conditions applicable during the employment relationship. The rationale is of course that the worker should put his/her labour at the service of the employer in full cognizance of the exact conditions, form and amount of payment that he/she expects to receive in return. Workers must be given advance notice of pay intervals, the place and manner of payment, and the conditions and limits of any wage deductions at the time of recruitment, as well as when any change occurs. The Committee's review of national law and practice has clearly established that the provision of itemized wage statements and the maintenance of payroll records are today common practice in most countries.

509. *Requirements relating to the time and place of payment: Not as antiquated as they may appear.* At a time when the payment of wages by direct bank transfer is becoming increasingly common, some governments have expressed the view that the requirement for payment at or near the workplace and during working hours may seem somewhat arcane. However, it should not be forgotten that payment by bank transfer is unknown to millions of workers around the world, especially rural workers. Moreover, the prohibition of the payment of wages in places where alcohol is consumed or places of amusement could appear to some to reflect a completely outdated sense of social protection. Yet the management of alcohol-related issues remains extremely topical in most countries. It should be pointed out that the drafters of the Convention wisely provided for the possibility of other arrangements being made in collective agreements or agreed upon between the employer and the worker. The Committee therefore considers that, even though the provision of the Convention relating to the time and place of payment may appear to some to bear little relation with modern labour realities, it is worded in flexible terms and can hardly therefore be considered as diminishing the continued relevance of the Convention as a whole.

510. *Means of application: Practice or enactment of laws?* On several occasions, the question has been raised as to whether the application of the Convention through current practice or usage is sufficient, or whether precise legislative provisions are necessary. The Committee points out in this respect that the provisions of the Convention are worded in varying forms; some require specific practices to be prohibited, and thus appear to require legislative provisions to this effect, while others merely require certain practices to be followed, and thus seem to leave scope for implementation by various means, including custom or practice. In this latter case, the responsibility rests upon the public authorities to keep themselves informed of the situation and, if necessary,

to take further measures to secure the observance of the provisions in question. Yet other provisions permit certain matters to be regulated by collective agreement, arbitration award or even by agreement between the employer and the worker, or leave it to the discretion of the competent authorities to decide on the need for and the form of any action on their part. Notwithstanding the above, the Committee emphasizes that the mere fact that certain procedures or practices may have not given rise to complaints, or that certain practices which have to be controlled under the terms of the Convention do not exist or are unlikely to occur in some countries, does not absolve the governments of those countries from their obligation to give specific legislative expression to the standards set out in the Convention. In this regard, the role of the workers' and employers' organizations in applying in practice the principles and guidelines set out in the Convention, and thereby complementing and reinforcing the legislative provisions, needs to be emphasized.

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511. In the light of the above, the Committee views the Protection of Wages Convention as a “fundamental” Convention in the commonly accepted sense of the term, as it affords protection in an area that impinges closely on the rights set forth in the eight ILO Conventions that are officially designated as being “fundamental”. The Committee therefore urges those member States which have not yet ratified it to consider the possibility of formally accepting this instrument in the very near future.